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Notes & Comments

The Proposed United States — Chile Free Trade Agreement: Reconciling Free Trade and Environmental Protection

Heather Corbin*

I. INTRODUCTION

On November 26, 2000, U.S. President Bill Clinton and Chilean President Ricardo Lagos announced the beginning of negotiations toward a United States–Chile Free Trade Agreement (US–CFTA).² Negotiations started on December 6, 2000 in Washington, D.C., and on April 16, 2001, current U.S. President George W. Bush and President Lagos of Chile announced their desire to complete the agreement by the end of 2001.³ As the first free trade agreement (FTA) negotiated by the new Bush administration, the US–CFTA will be an important marker in what is shaping up to be a long war between free trade advocates and environmentalists. How this agreement deals with environmental issues will have potential long-term implications, particularly for Trade Promotion Authority (TPA), the proposed Free Trade Area of the Americas (FTAA), and other bilateral free trade agreements.

This note will evaluate the general theories of free trade advocates and environmentalists regarding trade and the environment, and the arguments specific to the US–CFTA, and suggest the best plan for the agreement to implement. I start with an evaluation of the competing

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2. Office of the United States Trade Representative, *Draft Environmental Review of the Proposed U.S. – Chile Free Trade Agreement* 3 (2001), at <http://www.ustr.gov/-environment/draftchileer.pdf>.

3. *Id.* Since the events of September 11, 2002, however, it seems likely that this completion goal has been or will be postponed.

theories of free trade and environmental protection in general, followed by consideration of the various opinions of interested parties concerning the US-CFTA. I conclude with a solution that combines the methods suggested by both sides, along with new, innovative ideas. This solution should satisfy both sides and meet the goals of both free trade and environmental protection.

II. COMPETING THEORIES OF FREE TRADE AND ITS IMPACT ON THE ENVIRONMENT

Discussions about free trade, environmental protection and sustainable development have evolved into "multifaceted deadlock."⁴ There are two primary schools of thought: environmental protection groups argue that free trade causes environmental damage and is used to weaken environmental regulation, while economists and other free trade advocates argue that environmental regulation is being used as a thinly-veiled attempt at protectionism.⁵

A. The Environmentalist Prospective and the Free Trade Rebuttal

Environmentalists generally view free trade as a threat to the global environment, and thus demand inclusion of stringent environmental provisions in FTAs, with provision for trade sanctions as enforcement mechanisms. What follows is a basic outline of the environmentalist prospective on free trade, followed by the typical free trade advocate's rebuttal.

1. Free Trade as a Cause of Weakened Environmental Protection and Increased Environmental Damage

Environmentalists typically see free trade as a danger to the environment and as a direct assault on existing environmental regulations in developed nations. They argue that free trade works, but only at the expense of environmental protection, among other things.⁶ The primary

4. George William Mugwanya, *Global Free Trade Vis-à-vis Environmental Regulation and Sustainable Development: Reinvigorating Efforts Towards a More Integrated Approach*, 14 J. ENVTL. L. & LITIG. 401, 402 (1999).

5. *Id.* at 424.

6. Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT'L & COMP. L. 257, 273 (2000).

argument is that absolute free trade causes a “race to the bottom,” in which companies move their operations to the trading partner with the lowest environmental protection standards.⁷ With the lower costs that lower environmental standards impose, companies have a competitive advantage in producing goods in nations with lower environmental standards.⁸ This, in turn, causes downward pressure on environmental standards globally, as nations find it difficult to adopt optimal environmental regulations if they want to compete for industry and investment.⁹ Arguably, this results in nations desperate to achieve economic growth that even lower their environmental standards in order to attract industry investment.¹⁰ The maquiladora problem in the Mexican border zone following the North American Free Trade Agreement (NAFTA) is a commonly cited example of the race to the bottom.¹¹

Environmental groups also argue that FTAs are used to weaken environmental protection in a more direct manner. They argue that trade measures “remain the most viable and effective mechanisms available to nations to protect themselves against costs resulting from environmental degradation in other nations,” and that they are often “the only effective measures available to establish and enforce international conventions on the environment.”¹² It is argued that “disarming or curtailing states from imposing trade restrictions (in the name of free trade or trade liberalization) will *prima facie* have a debilitating impact on environmental protection.”¹³

Finally, environmentalists also argue that free trade deprives nations of basic sovereignty since they cannot utilize the basic tools of a free government—sanctions. Sovereignty, they argue, is threatened because under a free trade regime, nations cannot avoid environmentally dangerous products.¹⁴ Additionally, one of the most important arguments environmental groups make is that international law should

7. Jack I. Garvey, *A New Evolution for Fast-Tracking Trade Agreements: Managing Environmental and Labor Standards Through Extraterritorial Regulation*, 5 UCLA J. INT'L L. & FOREIGN AFF. 1, 7 (2000).

8. *Id.*

9. *Id.*

10. Mugwanya, *supra* note 4, at 426.

11. Garvey, *supra* note 7, at 5.

12. Mugwanya, *supra* note 4, at 403.

13. *Id.* at 405.

14. *Id.* at 403-404.

not allow corporations to do abroad what they cannot do at home.¹⁵ These arguments all support the basic argument outlined above that free trade is harmful to the global environment.

2. *The Free Trade Rebuttal*

Free trade advocates argue that the environmentalists' race to the bottom theory rests on the assumption that lower standards give less developed countries (LDCs) a significant advantage in attracting global capital and gaining markets. But the Organization for Economic Cooperation and Development (OECD) found that this plays no significant role.¹⁶ In fact, the OECD found strong evidence of a positive association over time between trade and improvements in environmental standards.¹⁷ Thus the true race may be to the top.¹⁸

In addition, multinational corporations (MNCs) tend to impose higher standards on their overseas plants than are required by the host nation's laws, thus raising average standards in host countries.¹⁹ High profile American companies have repeatedly and voluntarily established systems of self-regulation when it comes to environmental standards for their overseas plants.²⁰

Finally, opponents of free trade claim to seek to protect the people of LDCs, but these countries almost invariably seek trading opportunities, and they have "eloquently objected" to arguments against free trade.²¹ Former President Ernesto Zedillo of Mexico, for example, stated that, "a particular alliance has recently come to life. Forces from the extreme left, the extreme right, environmental groups, trade unions of developed countries and some self-appointed representatives of civil society are gathering around a common endeavor to save the people of developing countries from development."²² Zedillo's comment reveals a perspective shared by many free trade advocates: that the environmental protection argument in this arena is a thinly-veiled form of protectionism. They also argue that it is an excuse to protect domestic industries by locking out imports and thereby keeping the level of

15. *Id.* at 404.

16. Daniel T. Griswold, *The Blessings and Challenges of Globalization*, at <http://www.freetrade.org/pubs/articles/dg-9-1-00.html> (last visited May 22, 2002).

17. *Id.*

18. *Id.*

19. *Id.*

20. Garvey, *supra* note 7, at 52.

21. Tiefenbrun, *supra* note 6, at 276.

22. *Id.*

competition with domestic industries low.²³

B. The Free Trade Perspective and the Environmentalist Rebuttal

Free trade advocates argue essentially the opposite position of environmentalist theory. Essentially, they make the argument expressed by President Zedillo, as explained above: that the economic growth resulting from free trade is the best, and perhaps only way to improve environmental protections. In fact, free trade advocates argue that the environmentalist method could actually cause decreased environmental protection overall.²⁴ The following is an overview of the basic free trade theory regarding environmental protection, along with the environmentalist rebuttal.

1. Free Trade as a Solution to Environmental Problems

Free trade advocates argue that environmental protections improve under free trade regimes. Free trade, they argue, and the growth it creates, is “the best way to encourage higher standards.”²⁵ As per capita income rises in LDCs, so does the political demand for higher standards, along with the ability to pay for them.²⁶ According to this theory, the greatest beneficiaries of free trade are consumers in LDCs. Free trade expands the range and quality of available products, puts downward pressure on prices, and raises the real value of workers’ wages.²⁷ LDCs thus have the most to gain from engaging in free trade. For instance, they gain access to significantly larger markets. They also secure greater access to technology with so-called latecomers’ advantages, meaning that “rather than bearing the cost of expensive, up-front research and development, poor countries can import the technology off the shelf.”²⁸ Additionally, through free trade, LDCs gain access to greater capital to fuel future growth, infrastructure and incentives to follow more sensible economic policies as nations in order to attract capital.²⁹

Nations relatively open to trade tend to be more prosperous than those that are generally closed to trade, which tend to be the poorest

23. Mugwanya, *supra* note 4, at 403, 424.

24. *Id.*

25. Griswold, *supra* note 15.

26. *Id.*

27. *Id.*; Tiefenbrun, *supra* note 6, at 272.

28. Griswold, *supra* note 15.

29. *Id.*

regions in the world. For example, a 1998 OECD study found that freely trading nations grew on average twice as fast as those relatively closed to trade.³⁰ Nations that have moved decisively toward openness have reaped consequential gains in living standards, with free trade increasing the wealth of both consumers and producers.³¹ As the standard of living rises in a nation, its industries can more readily afford to control emissions, and citizens have more to spend on the "luxury good" of improved environmental quality.³²

By increasing standards of living, free trade also helps people reach higher levels of education and gain access to more diverse sources of information.³³ This helps create a larger, more independent-minded middle class that can provide a base for representative government.³⁴ The wealth created can also nurture and sustain civil institutions that can offer ideas and influence outside the confines of government.³⁵ In addition, citizens who enjoy freedom in trade are about four times more likely to be free from political and civil oppression than nations with closed trade.³⁶ These factors combine to create political demand for environmental protection from citizens, civil institutions, and even members of representative government. This demand grows out of the benefits LDCs reap from free trade: increased access to diverse information, increased ability to spend on the luxury good of improved environmental quality and growth of a large middle class that forms the base for non-governmental institutions and representative government.³⁷ Raising the income levels and the standards of living in LDCs can, therefore, result in the allocation of greater resources to environmental protection.³⁸

This argument is typically supported by Alan Krueger and Gene Grossman's Environmental Kuznets Curve, which argues that environmental quality in a LDC initially declines as industrialization begins, but then improves after its citizens reach a certain standard of living.³⁹ This change occurs at approximately \$5000 per capita,

30. *Id.*

31. *Id.*; Tiefenbrun, *supra* note 6, at 271.

32. Griswold, *supra* note 15; Mugwanya, *supra* note 4, at 403.

33. Griswold, *supra* note 15.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Tiefenbrun, *supra* note 6, at 276.

39. Griswold, *supra* note 15.

according to Krueger and Grossman.⁴⁰ They found “no evidence that environmental quality deteriorates steadily with economic growth,”⁴¹ rather it generally brings about improvements among almost all pollutants once per capita income rises above \$8000.⁴²

2. *The Environmentalists’ Rebuttal*

Environmentalists respond to the free trade approach with the widely accepted view that uncontrolled trade tends to undermine environmental protection.⁴³ While advances in technology inherent in economic development result in less wasteful use of resources, economic development may also cause depletion of natural resources overall. The industrialization and urbanization that generally accompanies economic growth may also increase the volume of hazardous wastes, air pollution and groundwater pollution, among other possibilities.⁴⁴

More specifically, environmentalists argue that there are substantial problems with the free trade advocates’ reliance on the Environmental Kuznets Curve.⁴⁵ Firstly, the hypothesis of the Environmental Kuznets Curve applies only to pollution, for which there are some counter-examples. For instance, the relationship does not hold true for pollutants like greenhouse gases or hazardous waste that are closely tied to economic growth.⁴⁶ They argue that this demonstrates that pollution, specifically greenhouse gases and hazardous wastes, increases with economic growth.⁴⁷ As economies grow, for instance, industries and products are created that invariably cause greater quantities of pollutants. Environmentalists also argue that the environmental impacts of economic growth are mixed at best. Growth seems to mitigate the effects of some kinds of pollution, and it provides the resources necessary to protect the environment, but it also causes significant environmental problems, most notably increases in the emission of greenhouse gases.⁴⁸ According to environmentalists, the effects of free trade are uncertain and mixed, and thus more protection is necessary than mere reliance on a theory that may

40. *Id.*

41. *Id.*

42. *Id.*

43. Mugwanya, *supra* note 4, at 405,406.

44. *Id.* at 426.

45. James Salzman, *Seattle’s Legacy and Environmental Reviews of Trade Agreements*, 31 ENVTL. L. 501, 518 (2001).

46. *Id.* at 519.

47. *Id.*

48. *Id.*

have mixed results at best.

III. ENVIRONMENTAL PROTECTION PROVISIONS AND THE PROPOSED US-CFTA

The competing theories discussed above are implicated every time we consider the creation of free trade relationships among nations. In fact, when the United States Trade Representative considers creating free trade relationships with other nations, he seeks public comment on the proposed relationship.⁴⁹ Among these responses, we see the conflict between the competing theories of free trade advocates and environmentalists as applied to specific facts and circumstances. This conflict is evident in the case of the proposed US-CFTA.

A. Background/History

Before evaluating the arguments on environmental protection provisions in the US-CFTA, it is helpful to first understand the background of the relationship between the United States and Chile as it relates to trade. At the same time, it is also important to examine the first U.S. FTA to impose environmental protection standards: the recently ratified agreement between the United States and Jordan. The United States-Jordan FTA is now looked upon by some, particularly environmentalist groups, as a model for future FTAs.⁵⁰ At the very least it presents the first framework for including environmental protection in trade agreements.

1. The History of Free Trade Discussions Between the United States and Chile

The decision of President Clinton in November 2000 to seek a FTA with Chile was not sudden or surprising. Chile has long received disproportionately large attention from the United States given its small stature as a nation of only approximately fifteen million people and a

49. Office of the United States Trade Representative, *supra* note 1, at 5-6.

50. J. L. Laws, *Trade: U.S. - Chile Free Trade Talks Continue This Week*, GREENWIRE, Jan. 8, 2001, LEXIS, Nexis Library, ENVNWS File [hereinafter *Trade*]; J. L. Laws, *Business Groups Blast Jordan Free Trade Agreement*, ENV'T & ENERGY DAILY, Mar. 30, 2001, LEXIS, Nexis Library, ENVNWS File.

gross domestic product (GDP) of only \$70 million.⁵¹ This attention seems to be premised on Chile's status as one of the strongest and most open economies in Latin America,⁵² and on its potential as a positive example to other Latin American nations as the United States continues to push for the Free Trade Area of the Americas.⁵³

In September 2001, Chile's Ambassador to the United States, Andres Bianchi, stated: "[s]ince the mid-1970s, Chile has embraced the principles of modern market economics, and is committed to an ongoing liberalization of its domestic economy and to building free and open markets internationally."⁵⁴ Chile has been at the forefront of Latin American nations in this respect.⁵⁵ Chile not only attempted liberalization, but was successful. From the mid-1980s to the late 1990s, Chile's GDP grew by seven percent per year.⁵⁶ With these successes, Chile is often cited as an economic policy model for other Latin American countries, and many Chileans are convinced that their success was due to their open economy.⁵⁷

Chile first began free trade talks with the administration of President George H.W. Bush.⁵⁸ When NAFTA went into effect in 1994, the United States told Chile they were next in line for a FTA.⁵⁹ No progress was made, however, and while the United States stalled in its efforts to expand free trade zones, Chile grew tired of waiting. It looked elsewhere for free trade, negotiating agreements with a number of nations, most notably Mexico and Canada.⁶⁰ As a result, it is estimated that U.S. firms are missing out on \$480 million in business per year in the absence of a

51. Sidney Weintraub, *The U.S. – Chile Connection*, at <http://csis.org/simonchair/issues200106.htm> (June 2001).

52. Office of the United States Trade Representative, *supra* note 2, at 3; Edward Gresser, *The U.S. – Chile Free Trade Agreement: Concrete Benefits, Strategic Value*, at <http://www.ppionline.org> (May 17, 2001).

53. Gresser, *supra* note 52.

54. *Chilean Leaders Gather in Washington to Underscore Need for Stronger Partnership with U.S.*, PR NEWSWIRE, Sept. 27, 2001, LEXIS, Nexis Library, ENVNWS File [hereinafter *Chilean Leaders*].

55. U.S. Trade Representative Robert Zoellick, Address to the Chilean – American Chamber of Commerce at http://www.ustr.gov/speech-test/zoellick/zoellick_1.html (Apr. 4, 2001); Gresser, *supra* note 52.

56. Weintraub, *supra* note 51.

57. *Id.*

58. *Id.*; Anthony Faiola, *Chile Takes Its Trade Elsewhere*, WASH. POST, Dec. 25, 1997, at A29, available at <http://washingtonpost.com/wp-srv/politics/special/trade/-stories/tr122597.htm>.

59. Weintraub, *supra* note 51; Faiola, *supra* note 58.

60. Faiola, *supra* note 58.

FTA with Chile. Although Chile's market is comparatively small and these losses are minimal compared to U.S. GDP overall, many say the situation is "an ominous lesson of the price of American protectionism."⁶¹ This experience, combined with the fact that the United States is still the most popular destination for Chilean goods, provided incentives for both nations to resume discussions.⁶²

In addition, the proposed FTA between the United States and Chile is a strategic step for the United States, aimed at strengthening U.S. credibility as a negotiating partner and strengthening commitment in South America to the FTAA.⁶³ Conclusion of the US-CFTA, particularly without presidential trade promotion authority (TPA),⁶⁴ would demonstrate to wary potential trading partners that the United States is a credible negotiating partner. If completed without TPA, the US-CFTA could help other nations overcome their concerns and begin negotiations with the United States, regardless of the President's TPA status. In addition, fulfilling a pledge made to Chile years ago is a show of good faith that will further strengthen U.S. credibility as a negotiating partner.⁶⁵ Furthermore, regardless of the President's TPA status, conclusion of the agreement between the United States and Chile can strengthen the commitment of other nations to the completion of the FTAA by showing skeptics what they will lose economically if they do not participate.⁶⁶

2. *The United States-Jordan FTA*

The United States-Jordan FTA, negotiated under President Clinton and finally signed and implemented by President Bush in October 2001, is the first U.S. trade agreement to contain environmental protection provisions in its main text, and the first to impose trade sanctions for

61. *Id.*

62. Last year, the United States imported \$3.2 billion worth of Chilean goods. Zoellick, *supra* note 55.

63. Gresser, *supra* note 52.

64. Trade promotion authority is a tool granted by the Congress to the President, allowing him to negotiate treaties with other nations that will be implemented in their entirety, without amendment. Without TPA, the Congress is allowed to amend legislation implementing trade agreements. This possibility of amendment strains the executive branch's ability to negotiate with all options on the table, and it indicates conflict between the President and Congress, as to trade liberalization. Trade Promotion Authority, *Questions and Answers on U.S. Trade Promotion Authority*, at <http://www.tpa.gov/qanda.htm> (last visited May 22, 2002).

65. Gresser, *supra* note 52.

66. *Id.*

violation of such provisions.⁶⁷ Democrats argue that the environmental provisions were needed primarily to keep other nations from holding down the costs of their products by requiring minimal environmental standards.⁶⁸ The agreement passed in the House and Senate despite arguments from Republicans that while environmental protection goals are worthy, including them in trade agreements would more likely inhibit trade than promote it.⁶⁹ Republicans also argued that many developing nations have resisted pressure to tighten their environmental protection laws, which, in light of this FTA, could eliminate their abilities to negotiate their own agreements with the United States, thus depriving them of the ability to trade and thereby increase their economic growth.⁷⁰ The agreement passed with some criticism from House Democrats, who charged the Bush administration with undermining the FTA's environmental provisions by coming to a separate agreement with the Jordanian government to resolve any trade disagreements without resorting to formal dispute settlement mechanisms, including trade sanctions.⁷¹

B. Arguments over Environmental Protection Provisions in the US–CFTA

On December 14, 2000, the Office of the U.S. Trade Representative (USTR) issued a federal register notice requesting public comment on the proposed US–CFTA.⁷² A wide representation of parties interested in free trade or environmental protection, among other groups, provided input, as the USTR received 130 responses, with over half in support of the agreement.⁷³ Thirty-nine of these groups expressed their positions concerning the use of environmental protection provisions in the US–CFTA.⁷⁴ In addition, both governments expressed their positions.⁷⁵ All

67. Edward Walsh, *House Approves Jordan Trade Pact*, WASH. POST, Aug. 1, 2001, at A4.

68. Richard W. Stevenson, *A Nation Challenged: Trade; Senate Approves Bill to Lift Barriers to Trade with Jordan*, N.Y. TIMES, Sept. 25, 2001, at C1.

69. *Id.*

70. *Id.*

71. Walsh, *supra* note 67.

72. Office of the U.S. Trade Representative, *supra* note 2, at 5-6.

73. *Id.* at 6; *Alvear in Washington Foreign Minister Pushes for Free Trade Deal*, SANTIAGO TIMES, Feb. 27, 2001, LEXIS, Nexis Library, ENVNWS File [hereinafter *Alvear*].

74. Office of the U.S. Trade Representative, *supra* note 2.

75. *Trade*, *supra* note 50.

of these statements are relevant and important, because they provide the base from which the parties will be and are now negotiating. They provide the range of alternatives from which the parties will chose in formulating the FTA, on a spectrum from the inclusion of environmental protection provisions in the main text with sanctions for enforcement to the complete exclusion of environmental protection provisions from the entire agreement.

1. The Governments' Positions

The governments of the United States and Chile generally agree that they do not desire inclusion of environmental protection provisions in the agreement.⁷⁶ This does not mean, however, that both sides are completely unwilling to address the environmental implications of the FTA. Both the governments of the United States and Chile seem willing to address these issues in a side agreement, provided trade sanctions are not utilized for enforcement, and both sides have conducted environmental reviews of the proposed FTA.⁷⁷ These acts indicate that neither the United States nor Chile wish to ignore the environmental implications of trade, they simply agree that trade sanctions are not the best way to address environmental concerns.

a. The Bush Administration's Position

In a December 1999 speech, then-presidential candidate George W. Bush declared: "I'm not going to allow labor and environmental codicils to scuttle free trade. I'm a free trader."⁷⁸ Once in office, President Bush's message remained the same. At the Summit of the Americas, President Bush's position was clear: he stated that, "when there's more trade, there's more commerce and there's more prosperity. . . . And a prosperous society is one more likely to have good environmental standards and be able to enforce those standards."⁷⁹ In support of this position, in May 2001, President Bush argued that "[b]y failing to make the case for trade, we've allowed a new kind of protectionism to appear

76. *Id.*; J. L. Laws, *Key Democrats Blast GOP Stance on Trade – Environment Linkages*, ENV'T & ENERGY DAILY, June 21, 2001, LEXIS, Nexis Library, ENVNWS File [hereinafter *Key Democrats*].

77. *Trade*, *supra* note 50; U.S. Trade Representative Robert Zoellick, Prepared Statement Before the Subcommittee on Ways & Means of the U.S. House of Representatives, at http://www.ustr.gov/speech-test/zoellick/zoellick_3.pdf (May 8, 2001); Office of the U.S. Trade Representative, *supra* note 2.

78. *Campaign 2000: Enviro Issues Should Not "Scuttle" Free Trade*, GREENWIRE, Dec. 8, 1999, LEXIS, Nexis Library, ENVNWS File [hereinafter *Campaign 2000*].

79. Zoellick, *supra* note 76.

in this country. It talks of the environment, while opposing the wealth creating policies that will pay for clean air and water in developing nations.”⁸⁰

This position is more thoroughly explained by U.S. Trade Representative Robert Zoellick, who has frequently explained the administration’s free trade advocacy. Zoellick argues that as LDCs grow wealthier, their private and public sectors are able to become more protective of the environment, and overall, economic growth is a better solution for these problems than government regulations.⁸¹ However articulated, it is clear that the Bush administration subscribes to the idea discussed above that free trade is a solution to environmental problems. The administration believes that creating greater prosperity through free trade is the best way to improve environmental protection. Nevertheless, the administration is still willing to address the potential that trade undermines environmental protection; it is just unwilling to use protectionist methods, such as trade sanctions, to address environmental protection goals in the US–CFTA.⁸²

b. The Chilean Government’s Position

While negotiating the US–CFTA in January 2001, Chilean officials stated that Chile would not accept environmental protection standards enforced by trade sanctions as part of the agreement.⁸³ A member of the negotiating team said “[w]e cannot accept the United States imposing its standards on us.”⁸⁴ Despite its unwillingness to agree to trade sanctions as an enforcement mechanism for environmental standards, Chile is not unwilling to address environmental protection in the FTA. Chile would agree to an agreement with the United States if environmental protection provisions were addressed in a side agreement and are not enforced by trade sanctions.⁸⁵ In lieu of trade sanctions, for example, Chile advocates use of a system of cash fines to enforce such environmental protection

80. *Bush: Opposition to Free Trade Blocks Cleaner Air, Water*, ENVTL. NEWS SERV., May 9, 2001, LEXIS, Nexis Library, ENVNWS File [hereinafter *Bush*].

81. Zoellick, *supra* note 54.

82. *Id.*; *Trade: Bush to Send Congress Principles for Fast Track This Week*, GREENWIRE, May 8, 2001, LEXIS, Nexis Library, ENVNWS File [hereinafter *Fast Track*].

83. *Trade*, *supra* note 49.

84. *Chile to Appoint Company to Lobby for Free Trade Accord*, GLOBAL NEWS WIRE, Feb. 20, 2001, LEXIS, Nexis Library, ENVNWS File [hereinafter *Chile to Appoint*].

85. *Trade*, *supra* note 49.

provisions, like the system adopted in Chile's FTA with Canada.⁸⁶ Under such an agreement, the violating nation would be subject to a fine, a one-time payment, rather than limits on certain types of trade, which would more severely impact economic growth in the violating nation. This is true because trade sanctions would be in place for a period of time and could impact the economy as a whole more directly and continually than a fine.⁸⁷

2. *The Industry Position*

Generally speaking, U.S. industries are opposed to the imposition of environmental standards through trade sanctions in the US-CFTA. The National Association of Manufacturers, in its letter to the USTR, stated its belief that, while environmental protection standards are important, they are "best achieved by positive cooperation without the threat of trade sanctions or the withdrawal of benefits, which only put U.S. companies at a disadvantage vis-à-vis their competitors overseas."⁸⁸ The National Electrical Manufacturers Association,⁸⁹ the California Farm Bureau Federation and the International Mass Retail Association,⁹⁰ among others, also oppose the use of trade sanctions to enforce environmental protection standards, generally taking the position that environmental protection provisions are inappropriate to trade agreements, are better served by international bodies and should not interfere with efforts to achieve free trade.⁹¹ The Grocery Manufacturers of America oppose the use of trade sanctions because "disparate levels of economic development and poverty, not trade agreements, are the root cause for deviation from fair and sound policies in [environmental protection]," advocating the traditional free trade argument.⁹²

86. *Id.*

87. *Id.*

88. Letter from Frank Vargo, Vice President for International Economic Affairs, the National Association of Manufacturers (NAM), to Gloria Blue, Executive Secretary, Office of the U.S. Trade Representative, at <http://www.nam.org/-tertiary.asp?TrackID=&DocumentID=22322> (last visited May 22, 2002) [hereinafter NAM Letter].

89. Letter from Timothy Feldman, the National Electrical Manufacturers Association (NEMA), to Acting Ambassador Rita Hays, Office of the U.S. Trade Representative (Jan. 25, 2001), at <http://www.nema.org> [hereinafter NEMA Letter].

90. International Mass Retail Association, *IMRA Urges New Administration to Negotiate a Free Trade Agreement with Chile*, at <http://www.imra.org/public/-pages/index.cfm?pageid=326> (Jan. 29, 2001).

91. *Id.*; NAM Letter, *supra* note 87; NEMA Letter, *supra* note 88.

92. Letter from Mary Sophos, Senior Vice President and Chief Government Affairs

3. *The Environmentalist Position*

Not surprisingly, environmental groups favor the use of environmental standards in the main text and their enforcement by way of trade sanctions. The Center for International Environmental Law, Defenders of Wildlife, Friends of the Earth, the Humane Society of the United States, the Natural Resources Defense Council, the Pacific Environment and Resources Center, Public Citizen and the Sierra Club, all advocate the use of environmental standards enforced by trade sanctions in the US–CFTA.⁹³ Fines are not sufficient, they argue, because they are unenforceable if the party chooses not to pay.⁹⁴ Environmentalists also advocate, among other things, market access based on environmental impacts of production, limits on investor-to-state dispute resolution, and, most controversially, continuing trade barriers where their elimination is “likely to encourage environmental harm.”⁹⁵ The Sierra Club in particular believes Chile’s environmental legislation and its enforcement are “weak,” and demands greater environmental protection, possibly seeking Chilean application of U.S. standards.⁹⁶

Labor groups also favor use of environmental standards and trade sanctions in the US–CFTA, apparently, at least from a pragmatic point of view, because labor standards are almost always mentioned in the same breath as environmental standards with regard to trade; a coalition can allow multiple groups to achieve their goals. This pragmatic approach helps explain the alliance between environmental and labor groups. A pessimistic, yet likely explanation of the labor groups’ motive in supporting environmental protection provisions in trade agreements is that their essential goal is to protect the jobs of their worker-members. One way to do that is to attempt to thwart efforts to achieve free trade through advocating for the inclusion of environmental protection standards, which many, including the current U.S. President, oppose.

Officer, the Grocery Manufacturers of America (GMA), to Gloria Blue, Executive Secretary, Office of the U.S. Trade Representative, at <http://www.gma-brands.com/news/docs/Comment.cfm?DocID=692> (Jan. 29, 2001) [hereinafter GMA Letter].

93. Letter from the Center for International Environmental Law, the Defenders of Wildlife, Friends of the Earth, the Humane Society of the United States, the Natural Resources Defense Council, the Pacific Environment and Resources Center, Public Citizen, and the Sierra Club to Gloria Blue, Executive Secretary, Office of the U.S. Trade Representative, at <http://www.ciel.org/Publications/USChileFRcommentsRevised.pdf> (Feb. 15, 2001) [hereinafter Environmental Letter].

94. *Id.*

95. *Id.*

96. *Pressure Groups Criticize Trade Treaty with Chile*, SANTIAGO TIMES, Jan. 10, 2001, LEXIS, Nexis Library, ENVNWS File [hereinafter *Pressure Groups*].

The American Federation of Labor – Congress of Industrial Organizations (AFL-CIO), the coalition of nearly all of America's unions, for example, argues that the inclusion of environmental standards (alongside labor standards) should be required in the main text of all new trade agreements.⁹⁷ Labor groups also argue that monetary fines are "inadequate and have proven an ineffective means of enforcement,"⁹⁸ and thus trade sanctions should be implemented for enforcement of environmental and labor provisions.

Like these environmental and labor groups in the United States, environmental and labor groups in Chile generally oppose a US-CFTA without environmental standards.

In May of 2001, Chilean environmental and labor groups, including the Institute of Ecological Policy, Southern Center for Environmental Law, the Mining Confederation of Chile, and the National Confederation of Small Fishing Operations, sent representatives to Washington, D.C. to "promote a vociferous rejection in the United States against the bilateral trade accord with Chile."⁹⁹

IV. PROPOSED SOLUTION – A BLENDED APPROACH

The groups involved in the US-CFTA discussions—the United States and Chilean governments, industrial organizations, environmental and labor groups in the United States and Chile—essentially suggest two schemes for use in the US-CFTA. As discussed above, those on the environmentalist side propose environmental protection standards in the main agreement with trade sanctions for enforcement,¹⁰⁰ while advocates of free trade propose exclusion of environmental protection standards from the main trade agreement, with at most their inclusion in side agreements with cash fines for enforcement, on the model of NAFTA.¹⁰¹ On their own, however, these schemes are each unsatisfactory. The best approach appears to be one that blends these two ideas, along with innovative concepts such as extra-territorial regulation, to provide both free trade and effective environmental protection standards.

97. AFL-CIO, *U.S. Trade Policy Going in Wrong Direction*, at http://www.aflcio.org/globaleconomy/ft_tradepolicy.htm (last visited May 22, 2002).

98. *Id.*

99. Gustavo Gonzalez, *Trade: Political Scheming Behind Chile-U.S. Deal*, *Say Activists*, at http://www.oneworld.org/ips2/june01/01_48_005.html (May 31, 2001).

100. *See supra* notes 93-99 and accompanying text.

101. *See supra* notes 77-92 and accompanying text.

A. Exploring the Two Extremes

The two schemes suggested by those involved in discussions on the proposed US–CFTA, as discussed above, are unsatisfactory in their individual capacities, if the goal is to achieve both free trade and environmental protection. This is at least partially due to the fact that those involved in the negotiations and discussions are essentially advocates of *either* free trade *or* environmental protection as their primary concern, but not both. Despite their respective futility, evaluation of the two schemes is essential, not just because one of the two is likely to be adopted, but because they shed light on what is needed to accomplish the goal of achieving both free trade and greater environmental protections in the FTA between the United States and Chile.

1. Environmental Standards and Trade Sanctions

One possible solution to the conflict between free trade and environmental protection would be to make environmental standards a part of the main text of the US–CFTA, enforceable by imposition of trade sanctions. This, however, has some serious problems, and there is credible evidence that such a solution may actually do more harm than good. Punishing LDCs with trade sanctions would only stifle their ability to raise environmental standards.¹⁰² Imposing environmental standards prematurely on LDCs could also exacerbate the division between the developing and the developed, lead to more closed trading regimes, and slow down growth in LDCs. Consequently, a net deterioration of environmental standards is a possible outcome.¹⁰³

Efforts to impose rich countries' standards on poor LDCs reduce LDCs' comparative advantage, which severely inhibits economic development, reduces LDCs' ability to create wealth, and thus makes less money available for environmental protection.¹⁰⁴ From an economic standpoint, environmental protection is a "luxury good" that LDCs cannot afford.¹⁰⁵ To deny LDCs with lower environmental standards the right to compete, through free trade, "is tantamount to denying them the opportunity to develop, to raise their standards of labor, environmental

102. Griswold, *supra* note 15.

103. Tiefenbrun, *supra* note 5, at 276; Mugwanya, *supra* note 3, at 403.

104. Tiefenbrun, *supra* note 5, at 275.

105. *Trade Twists: Alan Greenspan, Brief Article, AIR/WATER POLLUTION REP.*, Apr. 16, 2001, LEXIS, Nexis Library, ENVNWS File [hereinafter *Trade Twists*].

protection and living.”¹⁰⁶

A more practical problem with use of trade sanctions in FTAs is that LDCs will not accept them. As discussed above, the Chilean government has indicated that it will not accept trade sanctions to enforce environmental standards. It is unclear whether this is motivated by fears of the increased costs that would accompany compliance with heightened environmental protection standards or by fear of compromising Chilean sovereignty by allowing the United States to impose its standards on Chile. Either way, the Chilean government's refusal to accept trade sanctions leaves the United States with a choice. The United States must either abandon the idea of free trade with Chile because Chile is unwilling to accept its standards and enforcement mechanisms, or it must find other ways to promote environmental protection within an agreement acceptable to both parties. The latter option is superior because the goals of environmental protection and free trade need not be mutually exclusive, rather they can and should be coordinated to achieve economic growth while protecting the environment. LDCs, after all, should not be left to languish in poverty simply because some in the developed world are too stubborn to consider alternative viewpoints.

2. *Side Agreement with Fines*

Another option, suggested by Chile, is the incorporation of environmental protection standards in a side agreement, along the lines of NAFTA and the Chile-Canada FTA.¹⁰⁷ This option allows the Chilean economy to reap the benefits of free trade and thereby generate wealth that can support increased expenditure on higher levels of environmental protection. Additionally, this option will provide for enforcement of heightened environmental protection standards. This option, however, is not without its problems. Environmentalist and labor groups argue, for instance, that fines are inadequate remedies. This has proven true with NAFTA, under which, “in high profile cases, raised through the mechanisms of the Side Agreements, complainants have been left without remedy.”¹⁰⁸ The NAFTA side agreements were “wholly lacking in the mandatory character necessary to any substantially effective regulatory regime,”¹⁰⁹ and there is nothing to suggest that such a regime

106. Tiefenbrun, *supra* note 5, at 259.

107. *Trade*, *supra* note 49.

108. Garvey, *supra* note 6, at 12.

109. *Id.* at 18.

under the US–CFTA would have a meaningfully different outcome.

B. The Optimal Regime: Combining Strategies

The best solution seems to be a combination of multiple methods in order to achieve the goals of free trade and environmental protection. A free trade regime should provide just that: free trade. Sanctions impede the goal of free trade, and as explained above, probably impede the goal of environmental protection as well. This does not mean, however, that environmental protection cannot be substantially supported by FTAs. By combining side agreements with fines, incentive programs, cooperative programs, and extra-territorial regulation, true free trade can be accomplished while providing heightened protection for the environment.

1. Modified Side Agreements with a New Concept of Fines

As discussed above, environmental protection provisions in side agreements enforced by fines are ineffective independent of other measures. They can, however, be more effective in a broader program in which they are not the sole remedy and in which other provisions mitigate the problem of non-payment. In addition, there is the possibility that a solution can be reached that can solve the non-payment problem. The best method is to impose a tax on products from the offending party until the fine is paid. This could eliminate the problem of non-payment while only minimally impacting trade on a short-term basis. Such a program would operate in a manner similar to withholding requirements applicable to income tax, as a kind of integration of fines and sanctions. These modified fines could thereby simultaneously advance the goals of free trade and heightened environmental protection by eliminating the problems, as perceived by the opponent, of each side's respective enforcement mechanism.

2. Incentive Programs

In addition, incentives could and should be explored to encourage Chile to adopt higher environmental protection standards, rather than simply punishing low standards. USTR Robert Zoellick has suggested that such incentives could include increased U.S. foreign aid, financing through multinational development banks, and preferential trade, made available upon Chilean achievement of specific environmental protection

goals.¹¹⁰ The U.S. should also consider the fact that Chile's foreign debt is approximately fifty percent of its GDP, so any kind of debt relief incentive would likely be successful.¹¹¹ Other innovative incentive possibilities could be developed in addition to or in lieu of those suggested here. Whatever they entail, these incentives could be established on an incremental scale to encourage continued improvement in environmental standards.

3. Cooperative Programs

The US-CFTA should also provide for cooperative programs between U.S. and Chilean environmental regulatory agencies to provide technical and policy-formation assistance to Chile. As U.S. Trade Representative Zoellick stated, "[t]he Environmental Protection Agency and others can provide the kind of technical assistance that will improve the ability of our trading partners to improve both the adequacy of their environmental protection regimes and their ability to enforce their ability to enforce their environmental laws and regulations."¹¹² The increased technical knowledge that cooperation with groups like the Environmental Protection Agency can provide will help Chile achieve significant advancements in environmental protection.¹¹³

4. Extra-Territorial Regulation

Even with the above-mentioned components, it is likely that environmentalist groups would oppose this proposed program, on the basis that it would still allow the perceived race to the bottom problem to go unchecked. The innovative concept of extra-territorial regulation addresses this perceived problem, while still allowing unimpeded trade.¹¹⁴ The bulk of the proposed regime would be based on Jack Garvey's extra-territorial regulation proposal, as laid out in his article entitled *A New Evolution for Fast-Tracking Trade Agreements: Managing Environmental and Labor Standards Through Extraterritorial Regulation*.¹¹⁵ Under Garvey's theory, free trade should be "conditioned

110. Zoellick, *supra* note 76.

111. Asia-Pacific Economic Cooperation, *Economic Report - Chile*, at <http://www.apecsec.org.sg/loadall.htm?http://www.apecsec.org.sg/member/-memberecreport/chile.html> (last visited May 22, 2002).

112. Zoellick, *supra* note 76.

113. *Id.*

114. Garvey, *supra* note 7, at 34-35.

115. *Id.*

on reciprocal grants of authority for each trade partner to regulate extraterritorially, within the free trade regime, business entities controlled by its own nationals or business organizations. This would be in addition to the trading partners current corpus of domestic law and its enforcement.”¹¹⁶ Practically speaking, such a regime would allow the United States to enforce its own environmental protection standards on business entities in Chile controlled by U.S. citizens or corporations, and vice versa, with the host nation always able to enforce its own environmental standards on any business in its territory, and maintaining sole control over its own citizens.

The primary challenge to Garvey’s proposed regime concerns national sovereignty. He suggests, however, that the lure of trade benefits from the FTA would make it possible to “obtain the necessary concession of sovereignty and cooperation.”¹¹⁷ While this seems improbable at first blush, Garvey cites NAFTA’s regulatory regime, where significant concessions of sovereignty were required on matters such as intellectual property.¹¹⁸ Given Chile’s formerly stated desire to join NAFTA, and the inherent acceptance of limits on national sovereignty that desire implies, it is not a stretch to believe that the Garvey regime of extra-territorial regulation could be achieved in the US–CFTA. Besides, as Garvey proposes, “[i]t is not nearly so far to go, to provide only that U.S. norms will govern U.S. commercial corporations . . . and relations they may subcontract . . . within the territories of the signatory states.”¹¹⁹

Moreover, this would not be the first application of U.S. law extraterritorially. There is legal authority for extraterritorial impact of U.S. laws in other areas – it is basically an issue of congressional intent. The U.S. Supreme Court has said that, “Congress in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States,”¹²⁰ and this has occurred in the context of environmental regulation, albeit based primarily on territorial nexus (i.e. cross-border pollution).¹²¹

This proposal would not extend the full body of U.S. regulations, but would be limited to aspects that do not impact on issues sensitive to

116. *Id.* at 3.

117. *Id.* at 35.

118. *Id.* at 36.

119. *Id.* at 37.

120. *Id.*

121. *Id.* at 38-39.

the local politics or culture of Chile.¹²² Thus, national standards, as opposed to state standards, such as federal pollution control laws and other environmental standards motivated by a desire to avoid a race to the bottom among the states could be applied in Chile, since the same objective is sought.¹²³

There are many available methods for determining which corporations and other entities would be subject to the regulation. For example, the Restatement of the Foreign Relations law of the U.S. lists factors for determining the nationality of corporations. These include whether the shares of a corporation are substantially owned by nationals of a particular nation, whether the corporation is managed from an office within the country, or whether the corporation has a principal place of business in that country.¹²⁴ Similarly, jurisdictional regulations and statutes could define what constitutes control of an entity, particularly where ownership is not an applicable factor.¹²⁵ By applying extra-territorial regulation, incentives, and cooperative programs to side agreements containing environmental protection provisions enforceable by a modified fine system, both the goals of free trade and heightened environmental protection can be achieved in the US-CFTA.

V. CONCLUSION

It seems clear that the US-CFTA cannot adopt solely the free trade advocates' view or the environmentalists' view of the proper place for environmental standards in FTAs. First, such a result is nearly impossible from a political standpoint. Chile will refuse to accept any trade sanctions to enforce environmental protection standards, and the United States Congress, particularly with the current Democrat-controlled Senate, would likely refuse to accept any FTA devoid of environmental protection standards.

Additionally, application of either plan alone is unlikely to achieve both the goals of free trade and stronger environmental protection. Any application of trade sanctions would constitute trade that is not entirely free, while imposition of fines is unlikely to successfully enforce heightened environmental protection standards, since enforcement of a fines mechanism is often nearly impossible.

122. *Id.* at 41.

123. *Id.* at 44.

124. *Id.* at 47.

125. *Id.*

Instead, a blended approach is necessary to achieve both the goals of free trade and strengthened environmental protection. Such a regime requires a combination of the compulsory nature of enforcement found in sanctions, with the maintenance of a generally open trading atmosphere found in the fining approach. Such a combination is found in the idea of a modified fines scheme, in which a kind of tax is levied on the offending nation's goods until the fine is paid off, much like income tax withholding. Theoretically, this would be sufficient to advance both free trade and heightened environmental protection in Chile.

Although this would be enough in theory, more should be done to advance environmental protection goals, and more must be done to satisfy the worthy concerns of environmentalists. Only through a mixed and innovative approach can the US–CFTA achieve free trade while advancing a strong environmental protection plan. Thus, Garvey's innovative extra-territorial regulation regime should be implemented to address the race to the bottom concern, thereby closing the escape hatch that free trade with Chile would otherwise open for U.S. businesses. Requiring U.S. corporations and other U.S. business entities operating in Chile to comply with U.S. environmental standards, rather than taking advantage of lower Chilean standards, would prevent U.S. businesses from evading U.S. environmental protection standards in order to lower costs. In addition, this regulation of U.S. businesses in Chile could encourage Chilean businesses to similarly raise their standards, since they would likely suffer embarrassment and negative comparisons as a result of their utilization of lower environmental protection standards.¹²⁶

Cooperative programs and incentive schemes would also provide positive reasons for Chile to improve its environmental protection standards, while in no way interfering with the free trade established by the FTA. If the goal is to improve environmental standards in Chile, negative incentives will not be sufficient in the long-term. Use of negative incentives alone will only instill in Chileans the view that environmental protection is a price of free trade, something imposed upon them by the United States.¹²⁷ Such a situation is not likely to engender the widespread appeal of environmental protection to Chileans that is needed to cause the concept to take root in Chile. If the United States wants environmental protection to become Chilean goal, it must provide incentives for improvement, and advisory groups to emphasize how important environmental protection is, while at the same time teaching the Chileans *how* to achieve that goal.

126. Garvey, *supra* note 7.

127. Zoellick, *supra* note 76.

The stated goal of the US–CFTA is simple: to create a situation in which the United States and Chile trade freely. What that really means, however, is that the United States seeks to both improve its own economy and to improve the situation in Chile. Free trade would create faster economic growth, and increased wealth, thereby increasing Chilean demand for American goods as Chilean wealth grows. This would benefit both the United States and Chile. In addition, since Chile's economic development comes late, relative to other nations, free trade would allow Chile's economic development process to skip many steps taken long ago by now-developed nations. In other words, Chile could benefit from the latecomers' advantage: Chile could simply import the modern technology it needs, rather than suffering through the process of researching and creating what it needs to advance. But if the United States is truly concerned with bringing Chile into the developed world, it should also use the US–CFTA to advance environmental protection standards in Chile at a more advanced pace. The US–CFTA should strive to achieve both the goals of free trade and heightened environmental protection, and through the blended approach discussed in this note, it can achieve those goals.