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THE UNITED STATES ANTIDUMPING STATUTES: CAN A TRADE AGREEMENT WITH THE UNITED STATES BE BOTH "FREE" AND FAIR? A CASE STUDY OF CHILE

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On June 6, 2003, the U.S. Government and the Government of the Republic of Chile signed the United States-Chile FTA.[1] The purpose of the accord was to "[avoid] distortions in their reciprocal trade; . . . [enhance] the competitiveness of their firms in global markets; . . . [and contribute] to hemispheric integration and the fulfillment of the objectives of the *Free Trade Area of the Americas*."[2] Nevertheless, in light of U.S. antidumping laws which impose duties upon foreign imports sold for less than their home market price, these stated goals are arguably illusory.[3] Moreover, given the significant negative economic impact that U.S. antidumping investigations have on the economy of

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1. United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, § 101, 117 Stat. 909, 910 (2003). See generally OFFICE OF THE U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html (last visited Dec. 22, 2004), for the full text of the United States-Chile Free Trade Agreement (FTA).

2. *See* United States-Chile Free Trade Agreement, June 6, 2003, U.S.-Chile, pmbl., *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file535_3989.pdf. The FOREIGN TRADE INFO. SYS., http://www.sice.oas.org/tradee.asp (last visited Dec. 22, 2004), provides links to the full text version of many bilateral trade agreements, including the United States-Chile FTA. See generally OFFICE FOR TRADE, GROWTH & COMPETITIVENESS, PUBLICATIONS & STUDIES, http://www.sice.oas.org/tunit/pubinfoe.asp (last visited Dec. 22, 2004), for a collection of Organization of American States (OAS) trade unit studies, many of which are available (in pdf and Word format).

3. 19 U.S.C. § 1673 (2000). The statute, in relevant part, states that if

> the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value . . . there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.

Id. The U.S. Court of Appeals for the Federal Circuit defined "fair value" to be prices not "below [those which] the foreign manufacturers charge for the same products in their home markets." Torrington Co. v. United States, 68 F.3d 1347, 1352 (Fed. Cir. 1995).

developing countries and the United States' frequent use of antidumping measures, the question arises: can free trade with Chile be fair?[4] The importance of the response to that question is highlighted by the United States' present interest in the Free Trade of the Americas negotiations, the success of which will be affected by the Latin American perception of the United States in terms of their desirability as a co-member to a regional free trade agreement.[5]

The United States-Chile Free Trade Agreement (FTA) is scheduled to become effective in early 2004.[6] The FTA will represent the United States' first comprehensive trade agreement with a South American country.[7] The agreement liberalizes trade between the two countries by cutting tariffs and "reduc[ing] barriers for services."[8] Additionally, the FTA "protects leading-edge intellectual property, keeps pace with new technologies, ensures regulatory transparency and provides effective labor and environmental enforcement."[9] Chapter 8 of the agreement, Trade Remedies, addresses antidumping measures, and requires that both countries adhere to terms set forth by the World Trade

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4. J.F. HORNBECK, CONG. RESEARCH SERV., THE U.S.-CHILE FREE TRADE AGREEMENT: ECONOMIC AND TRADE POLICY ISSUES 11-12 (2003), *available at* http://www.uschamber.com/NR/rdonlyres/e3fq6svbb3yv5swkdhvc5shw5llpig6n67vsw4duul5zyyym3xbv4f2mrjvrvytoyl4xirpwz2xlqtin7wzq2zz22ec/crsfta030203.pdf. Hornbeck noted that "Chile maintained that its sensitivity to United States antidumping investigations was based on their 'frequent and at times unjustified use,' and argued that just the filing of dumping charges initiated a process with significant unrecoverable costs regardless of the investigation's outcome." *Id.* at 11 (footnote omitted).

5. JOSÉ TAVARES DE ARAUJO JR., LEGAL AND ECONOMIC INTERFACES BETWEEN ANTIDUMPING AND COMPETITION POLICY, http://www.netamericas.net/Researchpapers/Documents/Tavares/tavares6.doc (Dec. 2001).

> [W]hile the improvement of multilateral rules on antidumping will certainly facilitate regional negotiations, it will be insufficient for the FTAA process, wherein the parties will need additional disciplines for eliminating the use of antidumping as surrogate safeguards
>
> . . . [A]t the hemispheric level, antidumping is a serious threat . . . to the integration process itself.

Id. More broadly, the United States-Chile FTA has been praised for the political and economic advantages it can provide in a larger geographic context. *See* HORNBECK, *supra* note 4, at 2. Advocates responded to criticism of the FTA by groups generally concerned about the environmental and labor issues that arise in trade arrangements by pointing out that the FTA "offered both economic and political gains, with Chile seen as a potential strategic foothold in South America, a region historically linked closely with Europe and Asia." *Id.*; *see also* TAVARES DE ARAUJO JR., *supra*.

6. § 101, 117 Stat. at 910-11. *See infra* Part V.

7. Press Release, Office of the United States Trade Representative, U.S. and Chile Conclude Historic Free Agreement (Dec. 11, 2002), http://www.ustr.gov/Document_Library/Press_Releases/2002/December/U.S._Chile_Conclude_Historic_Free_Trade_Agreement.html.

8. *Id.*

9. *Id.*

Organization (WTO) Agreement.[10] Where a product is determined to have been dumped, the importing member's authorities decide whether to impose an antidumping duty upon the import; this duty would remain in force long enough to offset the injury-causing activity.[11] Thus, under the FTA, where Chilean exporters allegedly have sold products to the United States for less than their domestic price, the U.S. antidumping statutes serve as the operative law.[12]

The antidumping statutes are found within the Tariff Act of 1930.[13] The statutes lay out the numerous steps involved in the imposition of antidumping duties, from the procedures for initiating an investigation to payment of an antidumping duty.[14] Once the Department of Commerce, or an "interested party," initiates an antidumping investigation, the International Trade Commission (ITC) makes an initial determination as to whether the complainant has established a prima facie case for the imposition of an antidumping duty.[15] Provided no extensions occur, the

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10. United States-Chile Free Trade Agreement, *supra* note 2, ch. 8, § B, art. 8.8, ¶ 1, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file545_4002.pdf.

11. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, art. IX, para. 9.1, art. XI, para. 11.1, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, *available at* http://www.wto.org/english/docs_e/legal_e/19-adp.pdf.

12. *See* 19 U.S.C. § 1673 (2000).

13. Ch. 497, 46 Stat. 590 (codified as amended in scattered sections of 19 U.S.C.).

14. 19 U.S.C. §§ 1673a, 1673e-1673g (2000).

15. *Id.* §§ 1673a, 1677 (discussing procedures for initiating an antidumping duty investigation). The statute provides that

> [t]he term "interested party" means—
>
> (A) a foreign manufacturer, producer, or exporter, or the United States importer . . .
>
> (B) the government of a country in which such merchandise is produced or manufactured or from which such merchandise is exported,
>
> (C) a manufacturer, producer, or wholesaler in the United States of a domestic like product,
>
> (D) a certified union or recognized union or group of workers which is representative of an industry . . .
>
> (E) a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States,
>
> (F) an association, a majority of whose members is composed of interested parties described in subparagraph (C), (D), or (E) with respect to a domestic like product, and
>
> (G) in any investigation under this subtitle involving an industry engaged in producing a processed agricultural product, as defined in paragraph (4)(E), a coalition or trade association which is representative of either—
>
> (i) processors,
>
> (ii) processors and producers, or
>
> (iii) processors and growers . . . .

normal investigation process will conclude within 185 days.[16] However, according to the ITC, an antidumping investigation can last up to 420 days, not including administrative reviews.[17] For a developing country, even if the court finds favorably and does not impose a dumping duty, the litigation costs of a year-and-a-half long trial can prove economically devastating.[18] In light of the fact that antidumping measures do not exist in the Chile-Canada Free Trade Agreement,[19] one might question their necessity in the context of trade between the United States and Chile.[20]

Id. § 1677(9). As a general rule, the commission will find a prima facie case of dumping that warrants the imposition of a duty where "(A) an industry in the United States (i) is materially injured, or (ii) is threatened with material injury, or (B) the establishment of an industry in the United States is materially retarded, by reason of imports of the subject merchandise and that imports of the subject merchandise are not negligible." *Id.* § 1673b(a)(1).

16. *Id.* §§ 1673a-1673b. First, within twenty days of filing the petition, an initial determination is made as to whether all of the necessary elements are present for the imposition of an antidumping duty. *Id.* § 1673a(c)(1)(A). Provided the determination is affirmative, within forty-five days of filing the petition it must be determined whether there is reasonable indication of injury. *Id.* § 1673b(a)(2)(A)(i). If the finding is affirmative, the antidumping investigation must conclude within 140 days. *Id.* § 1673b(b)(1)(A).

17. U.S. INT'L TRADE COMM'N, STATUTORY TIMETABLES FOR ANTIDUMPING AND COUNTERVAILING DUTY INVESTIGATIONS, *available at* http://www.usitc.gov/trade_remedy/731_ad_701_cvd/TIMETABL.PDF (last visited Feb. 2, 2005) (providing a step-by-step explanation of how an antidumping investigation might last up to 420 days). According to the OAS, the maximum length of antidumping duty investigations in the United States is 407 days, and antidumping administrative reviews can last up to 545 days. FOREIGN TRADE INFORM. SYS., ORG. OF AM. STATES, COMPENDIUM OF ANTIDUMPING AND COUNTERVAILING DUTY LAWS IN THE WESTERN HEMISPHERE, http://www.sice.oas.org/cp_adcvd/english/041000up.asp (last visited Dec. 22, 2004).

18. *See* Sidney Weintraub, *The U.S.-Chile Connection*, ISSUES INT'L POL. ECON. (Ctr. for Strategic & Int'l Studies, Washington, D.C.), June 2001, *available at* http://www.csis.org/simonchair/issues200106.pdf. In reference to the antidumping case regarding Chilean table grapes initiated by the Growers League of Coachella Valley, California in March 2001, the Center for Strategic and International Studies pointed out that although

> [t]he U.S. International Trade Commission . . . dismissed the dumping allegation, . . . the Chileans had to bear the cost of a legal defense. It was another example that fortified the deep conviction in Latin America that competitive success in the U.S. market will almost inexorably lead to antidumping charges, justified or not.

Id.

19. Report on Trade Expansion Priorities Pursuant to Executive Order 13116 ("Super 301"), 66 Fed. Reg. 23,064, 23,065 (May 7, 2001).

20. Canada-Chile: Free Trade Agreement, Dec. 5, 1996, 36 I.L.M. 1067, ch. M, art. M-01. In relevant part, the Canada-Chile FTA states:

> [E]ach Party agrees not to apply its domestic anti-dumping law to goods of the other Party. Specifically:
>
> (a) neither Party shall initiate any anti-dumping investigations or reviews with respect to goods of the other Party;

Assuming that total elimination of antidumping measures is not feasible for trade between the United States and Chile, it is worth considering changes to the investigation process for developing countries, and particularly for Chile. This would reduce the hardship that developing countries face in antidumping cases—costs which the United States would ultimately end up bearing due to the loss in trade opportunities.[21] Ironically, this fact was confirmed by the ITC itself, in "the most complete study so far on the welfare impact of antidumping on the U.S. economy."[22] Specifically, "[t]he study showed that removing the antidumping and countervailing duties that were active in 1991 would have allowed a welfare gain of US$1.6 billion, i.e., about 0.03 percent of U.S. GDP in that year."[23] ITC Commissioners explained that the results of the study did not impact the ITC's subsequent practice because the antidumping and countervailing duty laws exist to protect producers, not consumers[24]—a response that has been challenged by the Office of the U.S. Trade Representative.[25]

This Comment examines the prospect of free and fair trade with Chile under the United States-Chile Free Trade Agreement in light of the Title 19 antidumping statutes. This Comment first discusses the definition and goals of free trade in general and then within the context of the U.S.-

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(b) each Party shall terminate any ongoing anti-dumping investigations or inquiries in respect of such goods;

(c) neither Party shall impose new anti-dumping duties or other measures in respect of such goods; and

(d) each Party shall revoke all existing orders levying anti-dumping duties in respect of such goods.

2. Each Party shall amend, and publish as appropriate, its relevant domestic anti-dumping law in relation to goods of the other Party to ensure that the objectives of this Article are achieved.

Id.

21. James Gathii, *Fairness as Fidelity to Making the WTO Fully Respond to all its Members*, 97 AM. SOC'Y INT'L L. PROC. 157, 163 (2003).

22. TAVARES DE ARAUJO JR., *supra* note 5.

23. *Id.*

24. *Id.*

25. *See* Report on Trade Expansion Priorities Pursuant to Executive Order 13166 ("Super 301"), 66 Fed. Reg. 23,064, 23,065 (May 7, 2001). The ITC expressed an arguably narrow view of "protecting producers" in that while antidumping and countervailing duty laws may protect producers in terms of "unfair competition," those producers are also consumers—a point that the Office of the U.S. Trade Representative made in stating that "restrictions on trade have victims: farmers, school teachers, factory and office workers, small business people, and many others who have to pay more for clothing or food or homes or equipment because of visible and invisible taxes on trade." *Id. Contra* Note, *Rethinking the 1916 Antidumping Act*, 110 HARV. L. REV. 1555, 1569 (1997) (arguing that "the assumption that consumer gains from dumping outweigh domestic producer losses depends on a narrow definition of producer losses that excludes any 'employee surplus' or rents that are eliminated when domestic producers lay off employees").

Chile FTA. This Comment then describes the United States' antidumping statutes, provides a brief consideration of their merits, and critiques the ways in which they conflict with the goals of free trade and particularly with the United States-Chile FTA. This Comment looks at the treatment of antidumping in the context of FTAs that the United States and Chile have with other countries, and notes inconsistencies in the treatment of antidumping under the United States-Chile FTA. Next, this Comment examines trends in the Department of Commerce and the ITC's treatment of antidumping cases, particularly those involving Chilean exports to the United States, in order to illustrate the force and application of the U.S. antidumping statutes. This Comment emphasizes the relative importance such changes will have in finalizing the Free Trade Area of the Americas. This Comment concludes that if the conflict between the U.S. antidumping statutes and free trade with Chile cannot be reconciled by an elimination of such laws, then perhaps various changes to the U.S. administrative review process, including improvements in the screening stage of antidumping actions brought against Chilean exporters, can mitigate this tension.

I. UNITED STATES TREATMENT OF DUMPING IN RELATION TO FREE TRADE WITH CHILE

A. Free Trade

Free trade has been defined as "trade based upon the unrestricted international exchange of goods with tariffs used only as a source of revenue *not* as instruments to influence the quantity, direction, or price of goods traded."[26] Similarly, the U.S. Department of Commerce has defined a free trade agreement as "an arrangement which establishes *unimpeded* exchange and flow of goods and services between trading partners regardless of national borders."[27] From such understandings of "free trade," it follows that restrictive measures such as the U.S. antidumping statutes go against the spirit of free trade and do not belong in free trade agreements.

The Office of the U.S. Trade Representative identified three principal ways in which trade liberalization benefits America.[28] First, the export opportunities that come with expanded global trade support employment

26. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 907 (1993) (emphasis added).

27. OFFICE OF ADMIN., DEP'T OF COMMERCE, COMPREHENSIVE GUIDE TO INTERNATIONAL TRADE TERMS, http://www.ntia.doc.gov/lexcon.text (Sept. 1, 1995) (emphasis added).

28. Report on Trade Expansion Priorities Pursuant to Executive Order, 66 Fed. Reg. at 23,065.

opportunities (an estimated twelve million jobs over the last decade).[29] These employment opportunities directly fuel the U.S. economy.[30] It is estimated that trade expansion from the Uruguay Round and the North American Free Trade Agreement (NAFTA) resulted in an increase from $1260 to $2040 for an average family of four.[31] Second, free trade has positive social effects.[32] It "reduces government barriers and encourages vibrant private and civic societies governed by the rule of law."[33] Additionally, "[it] opens societies to people, to ideas, to debate, to competition, and also to impartial transparent rules."[34] Third, the U.S. Trade Representative asserts that expanded trade strengthens homeland security by disarming the hostility that arises from a protectionist approach to trade.[35]

Opponents of free trade claim that it decreases job opportunities and the standard of living for people in developing countries who cannot compete with the low price of imports from developed countries.[36] According to the WTO, however, free trade actually helps reduce poverty by boosting the developing country's economy.[37] In his speech to the United Nations International Labour Organization of the WTO, former Director General Mike Moore said that workers directly benefit from free trade; it enables them to purchase goods at a lower cost while, for many, a higher demand exists for their goods and services.[38]

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29. *Id.* This report also noted that "[e]xports accounted for over one-quarter of U.S. economic growth over the last decade." *Id.*

30. *Id.* The report stated that "[t]he expanding global trade and the expanding economic growth in the United States are not coincidental; they are achieved in concert. One strengthens and reinforces the other." *Id.*

31. *Id.*

32. *See* Press Release, The White House, Office of the Press Secretary, Press Briefing by U.S. Trade Representative Robert Zoellick (Apr. 21, 2001), http://www.state.gov/p/wha/rls/rm/2001/2449.htm.

33. *Id.*

34. *Id.*

35. *Id.*

36. Chakravarthi Raghavan, *More Losers Than Winners from WTO's "Free Trade,"* TWN ONLINE (Feb. 16, 2001), *at* http://www.twnside.org.sg/title/losers.htm.

37. Press Release, World Trade Organization, Free Trade Helps Reduce Poverty, Says New WTO Secretariat Study (June 13, 2000), http://www.wto.org/english/news_e/pres00_e/pr181_e.htm.

38. Mike Moore, How Trade Liberalisation Impacts Employment, Speech to the International Labour Organization (Mar. 18, 2002), http://www.wto.org/english/news_e/spmm_e/spmm80_e.htm.

B. Free Trade with Chile

1. A Brief History of the United States-Chile FTA

Chile initiated the first campaign for a Free Trade agreement between Chile and the United States in 1990.[39] Negotiations began against the backdrop of President George H. W. Bush's "Americas Initiative," which was a "prelude to the creation of the North American Free Trade Agreement (NAFTA) . . . and . . . the proposed Free Trade Area of the Americas (FTAA)."[40] In 2002, President Bush "signed into law *fast track* . . . to negotiate future trade agreements, capping a lengthy and often contentious debate in the 107th Congress."[41] Some commentators attribute this difficulty to discrepancies regarding the incorporation of labor and environmental provisions into the FTA.[42] In addition, Chile's reservations about U.S. antidumping legislation likely added tension to the negotiations.[43] At a recent WTO Negotiating Group on Rules session, a Chilean official stated that with respect to the United States' use of trade-distortive practices, "'even for Chile, antidumping measures themselves are trade-distorting.'"[44] Despite such reservations, however,

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39. CHILE FOREIGN INV. COMM., CHILE AND THE UNITED STATES: A PARTNERSHIP FOR GROWTH 10 (2004), *available at* http://www.foreigninvestment.cl/publications/libro_chileusa/CHILEUS.pdf. The Foreign Investment Committee's website is available at http://www.foreigninvestment.cl. Negotiations were described as follows:

> "We were like annoying flies in a room," says Kathleen Barclay, former AmCham President and a key figure in the US-Chile Free Trade Coalition, formed with the American Chambers of Commerce in Latin America (AACCLA) and the US Chamber of Commerce. "We just wouldn't go away, no matter how often we were swatted."

Id.

40. *Id.*

41. CHARLES E. HANRAHAN ET AL., CONG. RESEARCH SERV., AGRICULTURAL TRADE ISSUES IN THE 107TH CONGRESS Summary (2003), *available at* http://www.ncseonline.org/NLE/CRSreports/03Feb/IB10077.pdf; *see infra* note 45.

42. J.F. HORNBECK, CRS ISSUE BRIEF: THE U.S.-CHILE FREE TRADE AGREEMENT, http://fpc.state.gov/fpc/6123.htm (last modified Mar. 5, 2001). A trade official commented that

> TPA, sometimes referred to as 'fast track,' is the legislative mechanism that gives U.S. trade representatives essential credibility at the international negotiating table. Absent TPA—an authority enjoyed by every president from Nixon to Clinton until it expired in 1994—there will be few negotiations and no major trade agreements.

Bill Center, *Future Depends on Fast-Track Authority*, SEATTLE POST-INTELLIGENCER, Sept. 7, 2001, http://www.wcit.org/topics/tpa/Center_ed.htm.

43. HORNBECK, *supra* note 42.

44. *WTO Rules Negotiations: Deep Divides Prevail on Harmfulness of Fisheries Subsidies*, BRIDGES WKLY. TRADE NEWS DIG., Oct. 24, 2002, at 1, 2, *available at* http://www.ictsd.org/weekly/02-10-24/2002BRIDGESWeekly36.pdf. The article also noted that "Chile and Japan are both members of an informal coalition favouring tougher rules

FTA negotiations continued and on June 6, 2003, Chile's Minister of Foreign Affairs, Soledad Alvear, and the U.S. Trade Representative, Robert Zoellick, signed the agreement.[45] The finalization of the FTA "emphasizes the Bush administration's intention to negotiate and conclude trade pacts in Latin America."[46]

2. What the United States Stands to Gain Through Free Trade with Chile

Support for the U.S.-Chile FTA is widespread.[47] This is largely because the estimated financial gains for both countries are great: a $700 million increase in Chile's annual GDP and a $400.2 billion jump for the United States.[48] Specific provisions of the agreement that support such projections include (1) the immediate removal of tariffs for over eighty-five percent of consumer and industrial products traded bilaterally, and

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constraining the use of antidumping measures dubbed the 'Friends of Antidumping,' which further comprises Brazil, Colombia, Costa Rica, Hong Kong, Israel, Mexico, Norway, Singapore, Korea, Switzerland, Thailand, and Turkey." *Id.*

45. *See* COUNTDOWN TO FTA IMPLEMENTATION, EXPORT.GOV, *at* http://www.mac.doc.gov/chileFTA/timeline.html (last visited Dec. 22, 2004). December 11, 2002 marked the conclusion of the United States-Chile FTA—the result of two years and fourteen rounds of talks. *Id.*

46. Dinah McDougall, *U.S.-Chile Free Trade Agreement*, EXPORT AM., Feb. 2003, at 19, 20, *available at* http://www.export.gov/exportamerica/NewOpportunities/no_us_chile_fta_0203.pdf.

47. On January 29, 2003, the U.S. Chamber of Commerce joined with the United States-Chile Free Trade Coalition, a "broad-based group of U.S. companies and business organizations." Press Release, The United States Chamber of Commerce, U.S. Chamber Joins in Launch of United States-Chile Free Trade Coalition (Jan 29, 2003), *available at* http://www.uschamber.com/press/releases/2003/january/03-11.htm. The U.S. Chamber of Commerce grounded their approval of the liberalization of trade between Chile and the United States in the facts that, in 2002, Chile was the "6th largest market for United States exports in Latin America," and trade between the two countries reached $6.6 billion in 2001. Press Release, U.S. Chamber of Commerce, U.S. Chamber Welcomes U.S.-Chile Trade Announcement—Support Pending Final Details, (Dec. 11, 2002), *available at* http://www.uschamber.com/press/releases/2002/december/02-214.htm; *see also* Press Release, Office of the United States Trade Representative, Trade Advisory Groups Report on Singapore and Chile FTAs (Feb. 28, 2003), http://www.ustr.gov/Document_Library/Press_Releases/2003/February/Trade_Advisory_Groups_Report_on_Singapore_Chile_FTAs.html (noting that reports from thirty-one trade advisory committees, "comprising over 700 practitioners representing diverse interests and views," indicated wide support for the FTA).

48. *See* CHILE-U.S. FREE TRADE AGREEMENT, RESEARCH, FACTS, http://www.chileusafta.com/rsrch_facts.html (citing a University of Michigan study) (last visited Oct. 9, 2003) (on file with the author); Press Release, HPG Worldwide, LLC, HPG Signs Exclusive Distribution Agreement in Singapore (Oct. 4, 2004), http://www.hpgroup.com/news.shtml (citing Rep. Philip Crane).

(2) a phasing-out of most of the remaining tariffs within four years.[49] The security the agreement offers investors, such as a strong legal framework and anti-corruption measures in government contracting, will enhance these direct economic gains.[50]

In addition to economic gains, the FTA promotes and enforces a bilateral commitment to upholding domestic labor and environmental laws.[51] For example, "[c]ooperative projects will help protect wildlife, reduce environmental hazards and promote internationally recognized labor rights."[52] Additionally, the FTA will enforce labor and environmental obligations by utilizing "[a]n innovative enforcement mechanism" that involves monetary assessments.[53]

The political benefits expected to result from the FTA are also significant. In general terms, the FTA will provide an example for future trade agreements.[54] Specifically, "[i]t allows the United States and a highly sophisticated trading partner to explore new issues and set precedents that will be valuable in a wider arena."[55] More importantly, the FTA may increase the likelihood that the Free Trade Area of the Americas (FTAA) will actualize—a common goal for both the United States and Chile.[56]

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49. Press Release, *supra* note 7. Approximately seventy-five percent of farm goods for both countries will be free of tariffs within four years, and all such tariffs will be removed within twelve years, thus allowing the United States to gain new access to Chile's fast-growing services market. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *See* Edward Gresser, *The U.S.-Chile Free Trade Agreement: Concrete Benefits, Strategic Value*, PROGRESSIVE POL'Y INST., May 17, 2001, http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=108&subsecID=127&contentID=3369.

55. *Id.*

56. *Id.* Andrés Bianchi, Ambassador of Chile stated that "in our view, an FTA between Chile and the United States would benefit not only our two countries but would also strengthen the process of establishing a Free Trade Area in the Americas." ANDRÉS BIANCHI, GLOBAL BUS. DIALOGUE & NAT'L ASS'N OF MFRS., TOWARDS A CHILE-UNITED STATES FREE TRADE AGREEMENT 2 (2002).

C. The U.S. Antidumping Statutes in Theory and Effect

1. U.S. Antidumping Law

a. Early Origins

Antidumping law in the United States began with the The Anti-Dumping Act of 1916,[57] which "allows . . . civil actions and criminal proceedings to be brought against importers who have sold foreign-produced goods in the United States at prices that are substantially less than the prices at which the same products are sold in a relevant foreign market," provided that the importer did so with malice.[58] The Act came about as a reaction to the "fear that after the end of World War I European—especially German—firms would try to regain their position on the American market through predatory selling practices, thus threatening the newly established preeminence of American

57. 15 U.S.C. §§ 71-77 (2000). Section 72 states:

> It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.
>
> Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court. Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefore in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.
>
> The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder.

Id. § 72.

58. PHILIP DE KEYSER, EXPLORING WTO DISPUTE SETTLEMENT IN US ANTI-DUMPING ACT 1916: AN EASY CASE? 1 (2001), *available at* http://www.jeanmonnetprogram.org/papers/01/013101.rtf; *see also* CRAIG K. ELWELL, CONG. RESEARCH SERV., DUMPING OF EXPORTS AND ANTIDUMPING DUTIES: IMPLICATIONS FOR THE UNITED STATES ECONOMY 1 (2002).

industries."[59] The 1916 Act remains on the books, but it rarely has been used to punish the antitrust acts of importers.[60] In application, the administrative approach set forth in the Anti-Dumping Act of 1921 superceded the 1916 Act.[61] Like the 1916 Act, the 1921 Act "was enacted 'to prevent actual or threatened injury to a domestic industry resulting from the sale in the U.S. market of merchandise at prices lower than in the home market (country of origin).'"[62] The 1930 Act, as amended, maintained the 1921 Act's administrative structure whereby the Department of Commerce and the ITC were charged with the evaluation of the "interested party['s]" (which includes industry participants) petition for an antidumping investigation, or the Department of Commerce's initiation of the same, and ultimately decided whether an antidumping duty is in order.[63]

b. Support and Criticism for U.S. Antidumping Law

Those who support the use of antidumping measures are primarily concerned with protecting U.S. producers.[64] Additionally, they claim that "[t]he U.S.' antidumping law . . . ensures 'fair trade' by offsetting market distortions caused by foreign governments."[65] In particular, these supporters of antidumping legislation fear that without such protection, predatory pricing—"the intentional selling of a good at a price below the cost of production with the intent of driving competitors out of business and increasing the market power of the predatory firm"—will occur to

59. DE KEYSER, *supra* note 58, at 2-3.

60. *Id.* De Keyser notes that

> [a]lthough the 1916 Act has been on the books for more than eighty years, it was rarely applied. There are no criminal cases under the 1916 Act reported. Before 1975 only one civil case was reported. Since 1975, the Act has known a little 'revival' and a modest jurisprudence emerged. However, none of the cases led to the imposition of sanctions. This lack of success is attributed to the fact that the required intent imposes a burden of proof on plaintiffs that is extremely difficult to meet. A number of cases brought in recent years regarding steel imports, have raised concerns that the Act is being used as a tool of intimidation to force foreign competitors.

Id. at 3.

61. 19 U.S.C. §§ 160-171 (1978) (repealed 1979).

62. Timken Co. v. Simon, 539 F.2d 221, 223 (D.C. Cir. 1976) (quoting J.C. Penney Co. v. Dep't of the Treasury, 319 F. Supp. 1023, 1024 (S.D.N.Y. 1970), *aff'd*, 439 F.2d 63 (2d Cir. 1971)).

63. DE KEYSER, *supra* note 58, at 4.

64. *See* TAVARES DE ARAUJO JR., *supra* note 5.

65. BRINK LINDSEY, CATO INST., THE U.S. ANTIDUMPING LAW RHETORIC VERSUS REALITY 1 (1999), *available at* http://www.freetrade.org/pubs/pas/tpa-007.pdf.

the detriment of our economy.[66] Those against these laws focus their criticism largely on the associated cost to consumers and the overall negative effect on the U.S. economy—two aspects that arguably conflict with the goals of free trade.[67] An additional criticism of the United States' antidumping law, one which goes to the heart of the supporters' argument, is that the laws actually harm domestic producers because they merely draw attention away from the important topic of why U.S. industries are less competitive in the local industry.[68]

2. *The United States' Use of Antidumping Measures with Respect to Latin America*

Between 1987 and 2000, the United States initiated 782 antidumping measures, 105 of which were directed against sixteen Latin American

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66. CONG. BUDGET OFFICE, ANTIDUMPING ACTION IN THE UNITED STATES AND AROUND THE WORLD: AN ANALYSIS OF INTERNATIONAL DATA, at xi (1998), *available at* ftp://ftp.cbo.gov/4xx/doc439/antidump.pdf.

67. TAVARES DE ARAUJO JR., *supra* note 5. ITC Commissioners Janet Nuzum and David Rohr stated that

> it must be remembered that the purpose of the antidumping . . . laws is not to protect consumers, but rather to protect producers. Inevitably, some cost is associated with this purpose . . . [s]o it should not come as a surprise that the economic benefits of the remedies accrue to producers, and the economic costs accrue to consumers.

Id.; *see supra* Part I. A recent report for Congress "looked at data from 30 U.S. antidumping actions between 1987 and 1992 and found that those duties reduced U.S. economic welfare by $275 million annually. Further, for each $1.00 protected producers gained from the trade barrier, U.S. consumers lost $3.20." ELWELL, *supra* note 58, at 11 (footnote omitted); *see also* JOSÉ TAVARES DE ARAUJO JR. ET AL., UNITED NATIONS, ANTIDUMPING IN THE AMERICAS 8 (2001), *available at* http://www.sice.oas.org/geograph/antidumping/karsten.pdf. The authors argue that "[a]s practiced today . . . antidumping . . . entails heavy costs, for the foreign firms targeted by this policy, certainly, but also for consumers in the country applying antidumping legislation." *Id.*; *see also* Letter from George Green, Vice President, General Counsel, Food Marketing Institute, to Donald Evans, Secretary of Commerce, U.S. Department of Commerce (May 3, 2001), http://www.fmi.org/gr/comments/report.cfm?issueID=350 (regarding the Spring Table Grapes investigation). The letter stated that

> [m]any FMI [Food Marketing Institute—a non-profit association that conducts programs in research, education, industry relations, and public affairs] members believe that the presence of Chilean . . . grapes in the United States marketplace has not harmed United States interest but, instead has created a *win-win situation for both United States businesses and United States consumers.* Given the United States climate, domestic producers simply cannot supply grapes for United States supermarket shelves year-round.
>
> [I]f Chilean . . . grapes are effectively removed form the United States marketplace by the application of future dumping duties, United States consumers will pay a heavy price.

Id.

68. TAVARES DE ARAUJO JR. ET AL., *supra* note 67, at 27.

Free Trade Area of the Americas countries.[69] Only five of these were against Chile.[70] As of August 2003, the United States had forty-three antidumping duty orders in place against Latin American FTAA countries.[71] Only two of these orders were against Chile, one for imported mushrooms and the other for frozen raspberries.[72]

D. Another Perspective: Antidumping in Chile and the United States' Other Trade Agreements

While a majority of the regional agreements in the Western Hemisphere permit antidumping measures, Chile is involved in a number of trade agreements in which the member countries have agreed to eliminate antidumping.[73] The United States, however, consistently adheres to the bilateral allowance of this protectionist measure in its free trade agreements.[74] In the Chile-U.S. FTA, the standard United States approach prevails.[75]

1. Chile Abolishes Antidumping Measures in Its Trade Agreements

a. The Canada-Chile Free Trade Agreement

The bilateral trade agreement between Canada and Chile, which went into effect on July 15, 1997, contains a mutual exemption from the two countries' antidumping laws.[76] This step away from traditional protectionism is particularly interesting given the low level of economic

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69. *Id.* at 11.

70. *Id.*

71. U.S. INT'L TRADE COMM'N, ANTIDUMPING AND COUNTERVAILING DUTY ORDERS IN PLACE AS OF AUGUST 9, 2004 BY COUNTRY 1-2, 9, 11-12 (2004), *available at* http://info.usitc.gov/OINV/SUNSET.NSF/0a915ada53e192cd8525661a0073de7d/96daf5a6c0c5290985256a0a004dee7d/$FILE/orders-ctry-tbl.pdf (last visited Nov. 1, 2004) (on file with the author). The specific numbers are as follows: Argentina, eight; Brazil, twenty; Chile, two; Mexico, eleven; Trinidad and Tobago, one; Venezuela, one. *Id.*

72. *Id.* at 2.

73. TAVARES DE ARAUJO JR. ET AL., *supra* note 67, at 25. Additional regional trade agreements that do not provide for antidumping measures are "the European Union (EU), the European Economic Area (EEA), which came into force in 1994 by the treaty signed between the EU and the European Free Trade Association (EFTA) [and] the Closer Economic Relations Agreement (CER) between Australia and New Zealand." *Id.*

74. *See infra* Part I.D.2.

75. United States-Chile Free Trade Agreement, *supra* note 2, ch. 8, § B, art. 8.8, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file545_4002.pdf.

76. Canada-Chile Free Trade Agreement, Dec. 5, 1996, Can.-Chile, ch. M, art. M-01, 36 I.L.M. 1067, 1143.

integration between the two countries.[77] During the last half of the 1990s, trade between Canada and Chile constituted only 1.5% of Chile's foreign trade, and less than 0.1% of Canada's.[78] In 2002, U.S. foreign trade totaled 2,366,252 U.S. dollars (USD).[79] In the same year, trade with Chile totaled 6,393.3 million USD, or roughly .0027% of the United States' international trade.[80] Instead of using antidumping measures, Chile and Canada protect their domestic industries through the use of safeguard measures.[81] This approach provides a more economical way to offset disruptions in the market that result from sudden import surges, as it avoids the costs associated with the reduction of imports after the imposition of antidumping duties as well as the vulnerability to which antidumping investigations expose exporters.[82]

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77. TAVARES DE ARAUJO JR. ET AL., *supra* note 67, at 27. The countries of the EU also have abolished the use of antidumping measures in their trade agreement, but their intra-regional trade in the last half of the 1990s was forty-four percent. *Id.*

78. *Id.*

79. CENSUS BUREAU & BUREAU OF ECON. ANALYSIS, U.S. INTERNATIONAL TRADE IN GOODS AND SERVICES 1 exhibit 1 (2003) (figure obtained by adding 2002 totals for exports and imports), *available at* http://www.census.gov/foreign-trade/Press-Release/2002pr/Final_Revisions_2002/02final.pdf.

80. U.S. CENSUS BUREAU, TRADE (IMPORTS, EXPORTS, AND TRADE BALANCE) WITH CHILE, http://www.census.gov/foreign-trade/balance/c3370.html (last modified Dec. 10, 2004) (figure obtained by adding imports and exports between the United States and Chile).

81. TAVARES DE ARAUJO JR. ET AL., *supra* note 67, at 27. Safeguards avoid the "need to prove that the imports were traded unfairly." KATHLEEN MACMILLAN & PATRICK GRADY, *Disciplining Subsidies and Antidumping*, *in* SEATTLE AND BEYOND: THE WTO MILLENIUM ROUND, http://www.global-economics.ca/subsidies.htm (1997). Instead, "[a]ll that has to be established is that import volumes have been so high or increased by such an extent that they are causing serious injury to the domestic industry," in which case the affected country can impose a temporary import restriction. *Id.*

82. José M. Salazar-Xirinachs, *Proliferation of Sub-Regional Trade Agreements in the Americas: An Assessment of Key Analytical and Policy Issues*, 13 J. ASIAN ECON. 181 (2002), *reprinted in* OAS TRADE UNIT STUDIES 12 (2002) [hereinafter Salazar-Xirinachs, *Proliferation*], *available at* http://www.oas.org/main/main.asp?sLang=E&sLink=../../documents/eng/publications.asp; *see also* JOSÉ M. SALAZAR-XIRINACHS, IMPLICATIONS OF PROLIFERATING SUB-REGIONAL TRADE AGREEMENTS: LESSONS FROM THE LATIN AMERICAN EXPERIENCE 17 (2001) [hereinafter SALAZAR-XIRINACHS, IMPLICATIONS], *available at* http://www.pecc.org/trade/papers/bangkok-2001/salazar.pdf. A recent study published by the OAS explained that

> [s]afeguards are generally considered to be a less costly import relief mechanism than antidumping duties, because they "force" governments to address the domestic factors that may be hindering the competitiveness of the industry affected by increased quantities of imported goods, rather than simply assigning the blame for an industry's hardships to the exporters from another country . . . .

Salazar-Xirinachs, *Proliferation*, *supra*. Additionally, the Canada-Chile FTA contains "a side agreement on labor with enforcement provisions similar to those applicable to US-Canada disputes in the NAFTA (i.e., noncompliance penalties may involve monetary fines but not trade sanctions)." *Free Trade Deals: Is the United States Losing Ground as Its*

b. Mercosur and the Chile-Mexico FTA

Mercosur[83] and the Chile-Mexico FTA[84] are two additional examples of Chile's apparent willingness to forego antidumping measures in its trade agreements. Mercosur is a regional customs union that Brazil, Argentina, Paraguay, Uruguay, and Chile and Bolivia as associate members, signed in 1991.[85] It is the world's third largest trading bloc,[86] behind NAFTA and the EU, and has a combined GDP of over 1.4 trillion dollars.[87] The member states are expected to eventually eliminate antidumping.[88]

The Chile-Mexico FTA became effective on August 1, 1999.[89] In keeping with the Chilean approach to antidumping, as illustrated by its FTA with Canada and its agreement with the member countries in Mercosur, Chile agreed to negotiate with Mexico a bilateral abolition of antidumping duties on imports.[90]

2. The United States Maintains Antidumping Measures in Its FTAs

In addition to Chile, the United States has FTAs with four countries: Canada, Mexico, Jordan, and Israel, all of which allow for antidumping measures.[91] Under chapter 19 of the NAFTA, which became effective on

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Trading Partners Move Ahead?: Hearing Before Subcomm. on Trade, House Comm. on Ways & Means, 107th (2001) (statement of Jeffrey J. Schott, Senior Fellow, Institute for International Economics), http://waysandmeans.house.gov/legacy.asp?file=legacy/trade/107cong/3-29-01/3-9scho.htm001. In 2001 testimony before the House Subcommittee on Trade of the Committee on Ways and Means, a senior fellow for the Institute for International Economics argued that various countries in the Western Hemisphere view these provisions as viable for the FTAA. *Id.*

83. Treaty Establishing a Common Market, Mar. 26, 1991, Arg.-Braz.-Para.-Uru., 30 I.L.M. 1041 [hereinafter Mercosur], *available at* http://www.sice.oas.org/tradee.asp (last visited Oct. 9, 2003).

84. Chile-Mexico Free Trade Agreement, Oct. 1, 1998, Chile-Mex., http://www.sice.oas.org/trade/chmefta/indice.asp.

85. Mercosur, *supra* note 83.

86. DELPHI GROUP, CLEAN DEVELOPMENT MECHANISM (CDM) PROJECT OPPORTUNITIES IN ARGENTINA: A MARKET STUDY FOR CANADIAN COMPANIES 2 (2000), *available at* http://www.delphi.ca/cacbi/en/pdf/CDM_Opportunities_in_Argentina.pdf.

87. LARRY BROWN ET AL., U.S. DEP'T OF TRANSP., FREIGHT TRANSPORTATION: THE LATIN AMERICAN MARKET 12 (2003), *available at* http://www.international.fhwa.dot.gov/latinamer/freight_transp.pdf.

88. TAVARES DE ARAUJO JR. ET AL., *supra* note 67, at 25.

89. Chile-Mexico Free Trade Agreement, *supra* note 84.

90. *See* SALAZAR-XIRINACHS, IMPLICATIONS, *supra* note 82, at 6.

91. United States-Jordan: Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Oct. 24, 2000, U.S.-Jordan, LEXSEE 2000 U.S.T. LEXIS annex 2.3 § 2(a)(ii); North American Free

January 1, 1994, the United States, Mexico, and Canada retained their domestic antidumping laws.[92] While there has been some discussion as to the possibility of replacing NAFTA's antidumping provisions with antitrust remedies, this prospect is not widely regarded as a likely alternative.[93]

Like NAFTA and the Chile-United States FTA, the Jordan-United States FTA[94] and the Israel-United States FTA[95] are both largely recognized for their non-economic benefits.[96] The United States,

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Trade Agreement, Dec. 8, 1993, Can.-Mex.-U.S., 32 I.L.M. 289, 300 [hereinafter NAFTA]; Israel-United States: Free Trade Agreement, Apr. 22, 1985, Isr.-U.S., 24 I.L.M. 643, 654.

92. NAFTA, *supra* note 91, pt. 7, ch. 19, art. 1902, 32 I.L.M. at 682.

93. JOHN A. RAGOSTA & JOHN R. MAGNUS, ANTIDUMPING AND ANTITRUST REFORM IN THE NAFTA: BEYOND RHETORIC AND MISCHIEF, http://www.dbtrade.com/publications/overview.htm (last visited Dec. 28, 2004).

94. The major sections of the Jordan-United States FTA include: tariff elimination, which will occur over a ten-year phasing-out period; the opening of the Jordanian service sector; intellectual property rights; trade liberalization for electronic commerce; labor rights enforcement; labor standards improvement; the bilateral enforcement and improvement of domestic environmental laws; and consultation and dispute resolution. *See* WONG KA FU, CHINESE UNIV. OF HONG KONG, REGIONAL TRADE AGREEMENTS: US-JORDAN FREE TRADE AGREEMENT, http://intl.econ.cuhk.edu.hk/rta/index.php?did=12 (last visited Dec. 28, 2004). In terms of political significance, the International Economics Department of the University of Hong Kong identified the Jordan-United States FTA as powerful evidence of the benefits of peace and of the United States' support of Jordan's economic reform program. *Id.* Predictably, however, the Jordan-United States FTA does not include a provision that would eliminate the use of antidumping measures.

> [In summary, t]he Jordan Free Trade Agreement creates a multi-step, transparent dispute settlement process. Any dispute that cannot be resolved through consultation may be referred to a panel of independent experts for a non-binding opinion. If a dispute cannot be settled after panel proceedings are completed, the Free Trade Agreement authorizes the affected party to take any appropriate and commensurate measure, without specifying the form that this action should take. This process can help to ensure the efficiency and transparency of this free trade agreement.

Id. In article 2, Trade in Goods, the Jordan-United States FTA provides that "[e]xcept as otherwise provided in this Agreement, each Party shall progressively eliminate its customs duties on originating goods of the other Party in accordance with Annex 2.1 and its schedule to Annex 2.1." United States-Jordan Free Trade Agreement, *supra* note 91, art. 2, § 1.

95. The Israel-United States FTA follows an approach similar to that of the Jordan-United States FTA, with respect to antidumping. Article 19 of the Israel-United States FTA provides for dispute resolution in the event of a discrepancy in interpretation of the agreement, or when either country considers that the other member has violated its obligations therein. Israel-United States Free Trade Agreement, *supra* note 91, art. 19, 24 I.L.M. at 664-65. Although the Israel-United States FTA does not lay out rules regarding antidumping, it specifically states that the dispute settlement provision "shall not apply to the imposition of antidumping . . . duties." *Id.* at 665.

96. *See supra* notes 93-94 and accompanying text.

however, was unwilling to forgo antidumping measures in either agreement.[97] The United States' approach to antidumping also appears in the Uruguay Round Agreements[98] of the WTO,[99] to which Chile is also a signatory. With respect to unfair trade practices, "[the WTO agreement's] focus is on how governments can or cannot react to dumping—it disciplines anti-dumping actions, and it is often called the 'Anti-dumping Agreement.'"[100]

3. A Future Case: The Free Trade Area of the Americas

The Free Trade Area of the Americas[101] is a regional agreement that contemplates trade between thirty-four countries of the Western Hemisphere, including the United States and Canada.[102] If finalized, "it

97. *See supra* notes 94-95.

98. 19 U.S.C. § 3532 (2000).

99. WORLD TRADE ORG., UNDERSTANDING THE WTO: BASICS, *at* http://www.wto.org/english/thewto_e/whatis/_e/tif_e/facts5_e.htm (last visited Dec. 23, 2004). The WTO is the successor to General Agreement on Tariffs and Trade (GATT); however, GATT, which because of the Uruguay Round Agreements, was updated in 1994, "still exists as the WTO's umbrella treaty for trade in goods." *Id.*

100. WORLD TRADE ORG., ANTI-DUMPING, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (last visited Feb. 2, 2005). The WTO and the GATT contain a range of special provisions in favor of developing countries. WORLD TRADE ORG., *supra* note 99.

> These special provisions include:
> longer time periods for implementing Agreements and commitments,
> measures to increase trading opportunities for these countries,
> provisions requiring all WTO members to safeguard the trade interests of developing countries,
> support to help developing countries build the infrastructure for WTO work, handle disputes, and implement technical standards, and
> provisions related to Least-Developed country (LDC) Members.

WORLD TRADE ORG., WORK ON SPECIAL AND DIFFERENTIAL PROVISIONS, http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e_test_jp_july02.htm (last visited Dec. 23, 2004). *See also* WTO Agreement, *supra* note 11, art. XV. In particular, article XV, "Developing Country Members," of the Agreement on Implementation of Article VI of the GATT provides that where antidumping measures would having a bearing on the "essential interests" of developing country members, the initiating country must first consider the possibility of constructive remedies. *Id.* The United States approved article VI of the GATT—an annex to the WTO Agreement—under 19 U.S.C. § 3511. 19 U.S.C. § 3511 (2000). The World Bank classifies Chile as a developing country. *See* THE WORLD BANK GROUP, DATA & STATISTICS, http://www.worldbank.org/data/countryclass/classgroups.htm#LAC (last visited Dec. 23, 2004).

101. The official website of the Free Trade Area of the Americas is http://www.ftaa-alca.org/alca_e.asp.

102. Press Release, Office of the United States Trade Representative, U.S. Announces Regional Seminar on the FTAA: Unique Opportunity for Public Participation (July 2, 2002), http://www.ustr.gov/Document_Library/Press_Releases/2002/July/U.S._Announces_Regional_Seminar_on_the_FTAA.html.

will create the largest free trade zone in history."[103] Ongoing negotiations have involved much discussion as to the topic of antidumping policy, and contention in this area has been blamed for the delay in finalizing the agreement.[104] Provided the prospective member countries come to agreement by the January 1, 2005 deadline, Chile will be the vice-chair to the Negotiating Group on Dispute Settlement.[105] Thus, the United States' approach to antidumping in its future trade with Chile will have certain relevance in this regional trade agreement, which the current U.S. administration eagerly hopes will go into effect by the quickly approaching deadline.[106]

II. ARE THE U.S. ANTIDUMPING STATUTES A BAR TO FREE TRADE WITH CHILE?

As of August 2004, the United States had 359 antidumping actions in place.[107] Only two of these were against Chile, indicating that antidumping measures may be unnecessary in the U.S.-Chile FTA.[108] More importantly, these numbers suggest that the negative effects of the U.S. antidumping laws on trade with Chile may outweigh the protective benefits of their application.[109]

A. Are the Antidumping Statutes a Necessary Fair Trade Tool or Just a One-Sided Protectionist Measure in Disguise?[110]

Nobel Prize winner and renowned economist, Joseph Stiglitz, attacked the popular "fairness" justification for antidumping legislation by noting the other side of the "fairness" equation.[111] He argued that

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103. *Id.*

104. J.F. HORNBECK, CONG. RESEARCH SERV., A FREE TRADE AREA OF THE AMERICAS: STATUS OF NEGOTIATIONS AND MAJOR POLICY ISSUES 3-4 (2003), *available at* http://fpc.state.gov/documents/organization/9266.pdf.

105. FREE TRADE AREA OF THE AMS., DISPUTE SETTLEMENT, *at* http://www.ftaa-alca.org/ngroups/ngdisp_e.asp (last visited Feb. 4, 2005). See generally SUMMIT OF THE AMERICAS CTR., COMMENTARIES, *at* http://www.americasnet.net/trade/commentaries.htm (last visited Feb. 4, 2005), for information on the deadline.

106. *See supra* note 5 and accompanying text.

107. U.S. INT'L TRADE COMM'N, *supra* note 71, at 12.

108. *Id.*

109. *See id.*

110. At a hearing before the Federal Trade Commission, Joseph Stiglitz commented that dumping law is "'defined according to peculiar accounting principles that make it a disguised form of protectionism.'" Letter from Terrence P. Stewart, Managing Partner, Stewart & Stewart, to Donald S. Clark, Office of the Secretary, Federal Trade Commission (Jan. 29, 1996), http://www.ftc.gov/opp/global/stew.stew.htm (citation omitted).

111. Joseph E. Stiglitz, *Dumping on Free Trade: The U.S. Import Trade Laws*, 64 S. ECON. J. 402, 402 (1997).

"[p]erpetuating unfair trade laws that are themselves unfair . . . imposes substantial burdens on our consumers and on our most efficient exporters while protecting our least efficient import-competing firms."[112] The figures that support Stiglitz's argument are impressive.[113] As stated above, the U.S. ITC concluded that the economic costs of antidumping legislation amounted to $1.6 billion per year.[114] Furthermore, while domestic producers in protected industries experienced an increase in profits and wages of approximately $658 million during that time, unprotected firms and workers suffered a loss of approximately $1.85 billion.[115] A second study "estimate[d] that the collective net economic welfare cost in 1993 of [antidumping and countervailing duty] orders to be $4 billion."[116] The study took into account the welfare consequences that arise "when a foreign firm responds to an [antidumping] order by raising its U.S. price of the subject import, [which results in] an income transfer (i.e., an economic welfare gain) from the U.S. economy to the foreign firm."[117] The study concluded that "the U.S. [antidumping/ countervailing duty] laws are poised to become the costliest, in terms of net economic welfare, of U.S. import restraint programs."[118] Deputy Treasury Secretary, Kenneth Dam, echoed Stiglitz's argument, stating that "the antidumping proceeding always has been and is increasingly a protectionist device, as various Congresses have amended the underlying statute to make the proceeding and remedy more effective."[119] If the U.S. antidumping laws do not tend to promote fairness in the larger (economic) sense of the word, then can one not deduce that they merely serve protectionist interests and therefore contradict the fundamental concept of free trade?[120]

In terms of global perception of the U.S. antidumping laws—an important concern considering the United States' FTAA ambitions—

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112. *Id.* at 418.

113. *See* ELWELL, *supra* note 58, at 10.

114. *Id.*

115. *Id.*

116. Michael P. Gallaway et al., *Welfare Costs of U.S. Antidumping and Countervailing Duty Laws*, 49 J. INT'L ECON. 211, 211 (1999).

117. *Id.* at 221.

118. *Id.* at 236.

119. KENNETH W. DAM, THE RULES OF THE GLOBAL GAME 148 (2001); STUART ANDERSON, UNCLEAN HANDS: AMERICA'S PROTECTIONIST POLICIES, http://www.freetrade.org/pubs/freetotrade/chap6.html (last visited Dec. 23, 2004) (citation omitted). The Washington, D.C. based public interest group, Consumers for World Trade, noted that "'[a]ntidumping laws as they are written and implemented are protectionist and anti-consumer.'" *Id.*

120. CATO INST., CATO HANDBOOK FOR CONGRESS: POLICY RECOMMENDATIONS FOR THE 108TH CONGRESS 614, http://www.cato.org/pubs/handbook/hb108/hb108-61.pdf (last visited Dec. 22, 2004).

"many U.S. trading partners (especially the developing nations) view U.S. trade remedy laws as hidden protection because they are regarded as being biased towards findings in favor of U.S. industries."[121] This is not surprising given that the Department of Commerce, in determining whether a product has been dumped, "rules in favor of the U.S. industry in 95% of the cases."[122] Furthermore, "almost the entirety of [U.S.-initiated] antidumping investigations involve the application of provisional duties."[123] Beneath this fact lies the disconcerting assertion, which appeared in a recent report for Congress, that most economic analysts believe "that a series of amendments to U.S. antidumping law during the 1970s facilitated a major increase in the likelihood of achieving a successful antidumping finding."[124] Such changes included "use of sales below cost as a measure of dumping, establishment of strict and shortened time limits on cases, a shift of investigation power from the Department of Treasury to the Department of Commerce, and a lowering of the threshold for assessing imports' role in harming a domestic industry."[125] The report noted that there was indeed a substantial increase in affirmative findings with respect to the antidumping cases that came after these changes.[126] Those satisfied with the screening process might argue that this is a testament to its efficacy; however, assuming that the process is not seriously flawed, a position countered below, the fact remains that such statistics have a profound effect on all current or potential trade partners.[127]

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121. Colin A. Carter, *Why Is There So Much Interest in Trade Remedy Laws*, AGRIC. & RESOURCE ECON. UPDATE, Jan./Feb. 2002, at 1, 1, *available at* http://www.agecon.ucdavis.edu/outreach/areupdatepdfs/UpdateV5N3/N3_1.pdf.

> Where a class or kind of foreign merchandise is being, or is likely to be sold in the United States at less than its fair value and a domestic industry is either materially injured, threatened with material injury, or suffers retarded growth as a result, then an antidumping duty will be imposed on such merchandise in addition to any other duty imposed.
>
> The purpose of the antidumping statute is to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value, thereby remedying international price discrimination to prevent injury to domestic industries. As such, these laws are remedial not punitive; seek[ing] to be fair, rather than to build bias into the calculation of dumping margins.

21A AM. JUR. 2D Customs Duties and Import Regulations § 39 (1998) (footnotes omitted).

122. Carter, *supra* note 121, at 10.

123. TAVARES DE ARAUJO JR. ET AL., *supra* note 67, at 16 n.6. (last visited Oct. 9, 2003).

124. ELWELL, *supra* note 58, at 6-7.

125. *Id.* at 7.

126. *Id.*

127. *See* Carter, *supra* note 121, at 10.

Several arguably flawed aspects of the United States' antidumping investigation process, which could be at the root of the apparent bias, are related to the pricing system.[128] For example, if a home market index is not available to establish the "normal" price of the imported product in question, the Department of Commerce will use a third country index or a constructed value index, which, in practice, often becomes the measuring device.[129] The problem with the constructed value index is that the data is often derived from the arguably partial antidumping petition of the domestic complainant.[130] The skewed nature of such information was confirmed by an extensive Organisation for Economic Co-operation and Development study of the antidumping cases in Australia, Canada, the European Union, and the United States, which "found that 90% of the cases where imports were determined to be dumped under existing rules would *not* have been questioned as posing a predatory threat under these same countries' antitrust (or competition) laws."[131]

Supporters of antidumping legislation maintain that the United States' trade laws are generally essential to securing domestic rights and interests.[132] Perhaps the most prominent argument in favor of antidumping laws has to do with "predatory pricing."[133] Predatory

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128. ELWELL, *supra* note 58, at 6-8.

129. *Id.* at 7.

130. *Id.*

131. *Id.* at 7-8. Constructed value indexes often fail to incorporate low profit sales in the domestic market, which ultimately inflates the imputed dumping margin. *Id.* at 7. This is one of the reasons why the U.S. antidumping investigation system has been accused of having "a built-in asymmetry that biases it toward a finding that dumping has occurred," and helps to explain why there is substantial criticism of the antidumping laws as being protectionist measures. *Id.*

132. *See* Thomas R. Howell, *Cartels and Dumping: A Response*, 68 ANTITRUST L.J. 297-98 (2001) (discussing the need for antidumping legislation to counter the predatory trade practices of trade cartels, and arguing that antidumping laws are essential to a liberal trade system).

133. ELWELL, *supra* note 58, at 5. An additional, narrowly-drawn argument in favor of antidumping legislation is based on the "new trade theory" or "strategic trade theory." *Id.* at 5-6. This theory is founded on research that addresses the international competition between a few firms, as opposed to the rivalry that exists between an exporting and importing country with respect to the exchange of a particular good. *Id.* at 5. The theory holds that among the few firms, a

> strategic interdependence [will arise] such that pricing, investment, and output decisions by one firm will strongly affect similar decisions by others in the group. [As such, t]he firm that can move first to exploit sale economies and learning curve advantages can find itself in a position to earn extra-normal returns to the benefit of itself and the wider economy [and]
>
> . . . [a]ntidumping actions could help capture these benefits as they work to help the home firm and deter the foreign competitor.

pricing is monopolistic behavior whereby a producer seeks to drive all of its competition out of the market by using low prices.[134] Those in favor of antidumping measures argue that this practice ultimately reduces overall economic welfare because eventually, once it has eliminated competing producers, the monopoly will raise its prices.[135] This concern becomes heightened in the context of foreign predators, as the economic gains from such practice would flow back to the predator's home economy.[136] Additionally, "because domestic labor is not internationally mobile, there are likely to be more adjustment problems and more employment mismatches than if the output source had shifted within the domestic market rather than abroad."[137]

Economic analysts consider the threat of predatory pricing to be highly unlikely.[138] They attribute the "very low probability" of successful predatory pricing to the lengthy and expensive period of predation and the substantial challenge of fending off new predators.[139] A 2001 report published by the United Nations corroborated this argument, as it found that historical evidence and recent analysis both confirmed that the link between antidumping and predatory behavior was "weak at best."[140] The United Nations report points to the attenuated relationship between the system used for determining whether a product had been dumped and the "actual existence of price discrimination of sales below cost."[141] Furthermore, based on the "results of an empirical study for the

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Id. at 5-6. As with the predatory pricing argument, however, opponents of antidumping measures point out that the presence of the conditions which would allow these positive effects is unlikely and thus find little merit in the "new trade theory" argument for antidumping measures. *Id.* at 6.

134. *Id.* at 5.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. TAVARES DE ARAUJO JR. ET AL., *supra* note 67, at 21; *see also* MACMILLAN & GRADY, *supra* note 81. The authors stated that "[t]he truth is that few antidumping actions can be justified on the grounds of predatory pricing or import restrictions in the exporter's home market. Most are examples of plain old-fashioned protectionism in action." *Id.*; *see also* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588-91 (1986). Justice Powell stated that

> [a] predatory pricing conspiracy is by nature speculative. Any agreement to price below the competitive level requires the conspirators to forgo profits that free competition would offer them. The forgone profits may be considered an investment in the future. For the investment to be rational, the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered.

Id. at 588-89.

141. TAVARES DE ARAUJO JR. ET AL., *supra* note 67, at 21.

Organization for Economic Cooperation and Development [sic] . . . 'it turns out that in the overwhelming majority of antidumping cases that resulted in remedies, there was no plausible threat of monopolization in the importing market.'"[142]

B. Do the Drawbacks of Antidumping Measures in the Chile-United States FTA Outweigh the Questionable Benefits?

1. Economic Considerations

Given the broad support for the U.S.-Chile FTA, specifically with respect to Chile's desirability as a trading partner, it would be in the United States' best interest not to traumatize Chile's economy with the costs associated with antidumping measures.[143] The United Nations noted that it is not unusual for the cost of a legal defense for a U.S. exporter involved in an antidumping suit to exceed $500,000 to $1 million.[144] The United Nations further noted that "[a]t such costs, small exporting firms in developing countries are hardly able to take advantage of the procedural and substantive rights theoretically available to them."[145] The United States must consider that, even though the FTA aims to ensure free trade between the countries, if our antidumping investigations overburden the Chilean economy, Chile will be less likely to export to us for fear of incurring antidumping duties.[146] Additionally, if our trade relations sour as a result of antidumping duties, Chile might

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142. CONG. BUDGET OFFICE, ANTIDUMPING ACTION IN THE UNITED STATES AND AROUND THE WORLD: AN UPDATE 3 n.8 (2001) (citation omitted), *available at* http://www.cbo.gov/ftpdocs/28xx/doc2895/Antidumping.pdf. This report provides the following argument in favor of antidumping:

> Some supporters of antidumping law have put forward a mechanism by which such laws can benefit the United States economically even in the absence of predatory pricing. If the reason for the dumping is that the foreign exporter has a monopoly (or substantial market power) in its home market because that market is protected by trade barriers but has no such market power in the United States, the antidumping law may create pressure in the exporter's home market to eliminate the trade barriers that allow that market power. If the country eliminates the barriers, both the United States and the exporter's home country gain. If it does not eliminate them, however, both countries lose economically as a result of the antidumping law. In any event, U.S. antidumping policy makes no attempt to distinguish such cases when deciding whether to impose antidumping duties.

Id. at 4 n.10.

143. *See supra* Part I.B.2.

144. *Impact of Anti-Dumping and Countervailing Duty Actions*, U.N. TDBOR, at 29 n.17, U.N. Doc. TD/B/COM.1/EM.14/2 (2000), *available at* http://www.unctad.org/en/docs/c1em14d2.en.pdf.

145. *Id.*

146. *See infra* Part II.B.1.

decline to import our products and instead seek them from other countries.[147] A second economic concern related to the United States' use of antidumping measures against Chile is the possibility that Chile will impose similar restrictions upon U.S. imports.[148] This "golden rule" argument must be considered in light of the United States' frequent use of antidumping measures.[149] For example, in 2000, the United States

147. For example, the fact that the FTA between Chile and Canada contains no antidumping measure may make Canada a more desirable trading partner. *See supra* Part I.D.1.a.

148. *See* CATO INST., *supra* note 120, at 618. A 2001 report provided proof that antidumping measures against the United States have been increasing:

TABLE 5: RANKING OF COUNTRIES BY NUMBER OF ACTIVE ANTIDUMPING MEASURES THEY MAINTAIN AGAINST THE UNITED STATES

Country	December 31, 1999	December 31, 1994
Mexico	18	15
Canada	13	17
Australia	5	6
Colombia	5	3
South Africa	5	2
Brazil	4	6
India	4	1
EC/U	3	2
South Korea	3	1
Argentina	2	1
Israel	2	0
New Zealand	1	1
Venezuela	0	2
Total	65	57

. . . .

RANKING OF COUNTRIES BY NUMBER OF ACTIVE ANTIDUMPING MEASURES THEY MAINTAIN AGAINST THE UNITED STATES PER $10 BILLION OF U.S. EXPORTS

Country	December 31, 1999	December 31, 1994
South Africa	17.2	9.6
India	2.0	4.5
Colombia	11.3	10.7
New Zealand	5.6	8.2
Australia	4.4	7.0
Argentina	4.1	3.6
Israel	3.7	0
Brazil	3.1	10.1
Mexico	2.8	4.0
South Korea	1.3	0.7
Canada	1.0	2.0
EC/U	0.2	0.2
Venezuela	0	4.8

Id. at 51-52 tbls. 5, 6 (footnotes omitted).

149. *See* ELWELL, *supra* note 58, at 2-3; *see also Proceedings of the Second Annual Legal & Policy Issues in the Americas*, 14 FLA. J. INT'L L. 82 (2001) [hereinafter

accounted for more than twenty-six percent of world-wide antidumping measures.[150] As the *Cato Institute Handbook for Congress* points out, "foreign copycat laws now target U.S. exporters with depressing frequency."[151] During the latter half of the 1990s, "the United States was the third leading victim of worldwide antidumping actions."[152] If we want Chile to play fair, we must do so as well; otherwise, our antidumping legislation could come back to harm us.[153]

2. Social and Environmental Considerations

In addition to economic arguments, social norms and environmental concerns also form the basis of theories on why or why not antidumping measures are appropriate for the U.S.-Chile FTA.[154] Some proponents of antidumping measures are concerned that without such measures, domestic importers will take advantage of the less stringent environmental and labor laws of the exporting developing country.[155] This argument does not provide a sound basis for addressing dumping, environmental, or labor concerns, as it pits efficiency against fairness in claiming that the exporting country will not be deterred by the threat of costly antidumping legislation and will therefore disregard important environmental and social considerations in order to produce and export at a lower cost.[156] A more appropriate and direct approach to addressing these concerns is to include specific compliance provisions, with mutually-agreed upon standards.[157] This is the approach that the U.S.-

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Proceedings]. In the panel discussion, Kathy-Ann Brown, Legal Adviser in International Trade for Caribbean Regional Negotiation Machinery, *id.* at 82 n.1, stated that

> [a] growing number of countries are increasingly resorting to antidumping measures as a disguised protectionist tool in contrast to a legitimate measure to redress unfair trade. The gains which should accrue from the liberalization process are thereby effectively denied. U.S. exports will increasingly be the target of such measures. Over time, the U.S. administration is likely to see the wisdom of enhancing antidumping disciplines—adopting, at least, a minimalist perspective.

Id. at 98.

150. ELWELL, *supra* note 58, at 2-3.

151. CATO INST., *supra* note 120, at 618.

152. *Id.*; *see also* CONG. BUDGET OFFICE, *supra* note 142, at 51. In 1999, Mexico and Canada, our partners in NAFTA, ranked number one and two respectively. *Id.*

153. *See* CATO INST., *supra* note 120, at 618. The Cato report further states that "[t]he prospects for reform here and abroad, however, are dimmed by vehement congressional opposition to any trade negotiations that might 'weaken' U.S. trade laws." *Id.* The handbook further states that because of antidumping, "the United States could ultimately pay a grievously heavy price in lost opportunities to open markets around the world." *Id.*

154. *See* ELWELL, *supra* note 58, at 11-12.

155. *See id.* This is particularly the case with respect to child labor. *Id.*

156. *Id.* at 12.

157. *See* text accompanying notes 51-53.

Chile FTA took, illustrating that such concerns do not lend convincing support for antidumping measures in the FTA.[158]

3. FTAA Considerations

Part of the United States' motivation for entering into the FTA with Chile was that doing so would "'raise the bar for the Free Trade Area of the Americas negotiations.'"[159] For the United States, the FTAA is important because "the Western hemisphere is a large and growing market"[160] and, as U.S. Trade Representative Robert Zoellick noted, "[A]s of February 2002, [the United States] was a member of only three of the 130 free trade agreements in force around the world, and . . . as a result, 'U.S. businesses are losing marketshare.'"[161] In a 2001 panel discussion, Kathy Brown, legal adviser for Caribbean Regional Negotiation Machinery, stated that

> [i]n a free trade environment, it has been calculated utilizing several different models that our relationship with Latin America could double two-way trade within five to seven years of the signing of a comprehensive agreement. So, [an agreement with Latin America and the Caribbean, namely the FTAA,] is a tremendous thing.[162]

The U.S.-Chile FTA will demonstrate to other prospective FTAA members that the United States is committed to regional trade liberalization in the Western hemisphere. FTAA countries will want to share in the vast economic gains that are expected to follow from expanded trade between Latin America and the United States.[163] Already, "[s]ince opening its markets, Chile has doubled the size of its economy and halved its number of impoverished citizens."[164] Those who support the FTAA see Chile as a compelling example for other Latin

158. *See* United States-Chile Free Trade Agreement, *supra* note 2, ch. 18, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file535_3989.pdf; *id.* ch. 19, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file482_4013.pdf (stating that the United States-Chile FTA included provisions for labor and environment per chapters 18 and 19).

159. Press Release, *supra* note 47 (quoting John Murphy, U.S. Chamber Vice President, Western Hemisphere Affairs); *see also* Geri Smith & Paul Magnusson, *Chile: A Giant Step Toward Free Trade Across the Americas?*, BUS. WK. ONLINE, June 16, 2003, http://www.businessweek.com/magazine/content/03_24/c3837072_mz015.htm.

160. Christopher Bruner, Hemispheric Integration and the Politics of Regionalism: The Free Trade Area of the Americas (FTAA), 33 U. MIAMI INTER-AM. L. REV. 1, 5 (2002).

161. *Id.* (citation omitted).

162. *Proceedings*, *supra* note 149, at 90.

163. Smith & Magnusson, *supra* note 159.

164. *Id.*

American countries.[165] However, the effectiveness of the FTA, as a means of motivating FTAA countries, will hinge on whether the United States can demonstrate its ability to trade fairly, in light of its antidumping measures.[166] Indeed, "antidumping actions . . . will be sensitive in the FTAA negotiations."[167]

A study conducted by the Congressional Budget Office in 2001 "show[ed] that the United States continues to be a very active user of antidumping measures and those measures continue to create a significant and enduring impediment to trade in the targeted products."[168] A recent report presented to Congress that considered the United States' active use of antidumping measures noted that "[t]his [continued use of antidumping measures] is in sharp contrast to the nation's otherwise strong advocacy of free trade."[169] Not surprisingly, an apparent correlation exists between the amount of antidumping measures the United States imposes upon a country and how much we import from them.[170]

For example, in 2000, the People's Republic of China (PRC) and Japan ranked highest for targets of U.S. antidumping measures (forty

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165. *Id.*

166. TAVARES DE ARAUJO JR., *supra* note 5. This report argues that "antidumping spoils the critical driving force in every integration process." *Id.*

167. WEINTRAUB, *supra* note 18. An additional concern in FTAA negotiations relates to coordination between the FTAA and the other trade agreements that are already in place in the Western Hemisphere—a matter addressed by the Inter-American Development Bank:

> The FTAA faces a difficult job in defining the terms of coexisting with the spaghetti-bowl of trade agreements in the hemisphere. How can countries deal with current and potential market access conditions for the goods that will benefit from this complex set of trade agreements, each with its own tariff reduction schemes, rules of origin, and technical, procedural and even documental systems? Indeed, FTAA negotiators have a full plate before them.
>
> However, three scenarios are most likely: (i) the FTAA negotiates its own tariff elimination program, its own set of rules of origin and its own requirements, while exporters decide on a case-by-case basis whether to opt for FTAA treatment or for treatment in accordance with another agreement; (ii) the FTAA supersedes pre-existing agreements, making FTAA criteria the only valid ones; (iii) the FTAA does not step in to regulate tariffs, origin or procedural requirements among countries that already have a trade agreement in force. Each option has advantages and disadvantages. Still, if the FTAA manages to rationalize the spaghetti bowl, it will have achieved something that was not even on the menu.

The Spaghetti Bowl of Trade Liberalization, LATIN AM. ECON. POLICIES 2002, at 2, 7, *available at* http://www.iadb.org/res/publications/pubfiles/pubN-19E.pdf.

168. ELWELL, *supra* note 58, at 3.

169. *Id.*

170. *See id.* at 13.

and thirty-eight, respectively).[171] In the same year, U.S. imports from the PRC totaled 100,018,429 (in thousands of U.S. dollars)[172] and those from Japan totaled 146,479,404 (in thousands of U.S. dollars).[173] Chile, on the other hand, was the subject of two antidumping measures in 2000.[174] That year, U.S. imports from Chile totaled 3,269,035 (in thousands of U.S. dollars).[175] These facts take on a special significance with respect to the FTAA, considering that "[t]he United States' abundant anti-dumping legislation is currently seen as the biggest hurdle to finalizing negotiations on the Free Trade Area of the Americas."[176] The economic and political arguments for not utilizing antidumping measures in U.S. trade with Chile are strong, while the social and environmental arguments in favor of utilizing them are unconvincing. On the balance, the negative effects of antidumping measures in the context of the U.S.-Chile FTA outweigh the possible justifications for using them.[177]

III. TRADE WITH CHILE *COULD* BE FREE AND FAIR

There are a number of ways in which the United States could ensure that trade with Chile under the FTA will be more free and fair for both countries. First, although possibly delaying the date upon which the FTA goes into effect, the parties could amend the agreement to eliminate the use of the antidumping statutes altogether.[178] Alternatively, the parties could amend the agreement after the effective date. While the abolishment of antidumping measures in the U.S.-Chile FTA is unlikely, strong support for such action still exists on both sides, increasing the number of procedural challenges that would accompany the suspension of certain trade laws in the agreement.[179] Further, proponents of both arguments must look to the Canada-Chile FTA and consider, if Canada

171. CONG. BUDGET OFFICE, *supra* note 142, at 48 tbl.4.

172. U.S. CENSUS BUREAU, U.S. IMPORTS FROM CHINA FROM 1999 TO 2003 BY 5-DIGIT END-USE CODE, http://www.census.gov/foreign-trade/statistics/product/enduse/imports/c5700.html (last modified June 14, 2004).

173. U.S. CENSUS BUREAU, U.S. IMPORTS FROM JAPAN FROM 1999 TO 2003 BY 5-DIGIT END-USE CODE, http://www.census.gov/foreign-trade/statistics/product/enduse/imports/c5880.html (last modified June 14, 2004).

174. CONG. BUDGET OFFICE, *supra* note 142, at 48 tbl.4.

175. U.S. CENSUS BUREAU, U.S. IMPORTS FROM CHILE FROM 1999 TO 2003 BY 5-DIGIT END-USE CODE, http://www.census.gov/foreign-trade/statistics/product/enduse/imports/c3370.html (last modified June 14, 2004).

176. Gustavo Gonzalez, *US Antidumping Laws—a Hurdle to Free Trade in the Americas*, TWN ONLINE (Apr. 27, 2001), *at* http://www.twnside.org.sg/title/hurdle.htm.

177. *See supra* Parts I.B.2., II.B.

178. This is the approach taken by the Canada-Chile FTA. *See* TAVARES DE ARAUJO JR. ET AL., *supra* note 67, at 25, 27.

179. For a summary of the arguments for and against U.S. antidumping laws, see *supra* Part I.C.1.b.

thought it feasible and worthwhile to suspend antidumping laws in its FTA with Chile, why would the same consideration not profit the United States?[180] After all, Canada and the United States have similar trade relationships with Chile, in terms of the low quantity of Chilean imports and minimal antidumping activity, which strengthens the possibility that the United States could eliminate antidumping in the U.S.-Chile FTA.[181]

For example, in 1994, Canada imported 238,179 (in thousands of Canadian dollars) in goods from Chile.[182] To put these statistics in perspective, in the same year Canadian imports of U.S. products totaled 137,345 (in millions of Canadian dollars).[183] In the ten years that preceded the 1997 Canada-Chile FTA, Canada did not have any antidumping measures in place against Chile.[184] The United States should follow Canada's example and give serious consideration to substituting safeguards for antidumping.[185]

Furthermore, as the Canada-Chile FTA demonstrates, an isolated suspension of antidumping laws in a particular agreement is possible; Congress should consider this with respect to the FTAA.[186] The United States was apparently successful during the FTA negotiations in convincing Chilean negotiators that, given how infrequently the U.S. imposes antidumping measures against Chile, antidumping restrictions were a nonissue.[187] But, Chile does not seem to pose any real threat to domestic producers; perhaps the United States had another reason for not compromising its antidumping protection.[188]

Tension between the United States and Brazil is largely responsible for delays in the FTAA negotiating process.[189] Specifically, Brazil views U.S.

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180. *See* GROCERY MFRS. OF AM. (GMA), US-CHILE FREE TRADE AGREEMENT, http://www.gmabrands.com/publicpolicy/docs/whitepaper.cfm?DocID=783 (last visited Dec. 24, 2004) (recommending that "[n]egotiators should follow the Canada-Chile FTA model and eliminate export subsidies in the US-Chile FTA"). A comprehensive answer to this question is beyond the scope of this Comment; however, a comparative study of trade between Chile and Canada and between Chile and the United States could illuminate the argument against antidumping in the United States-Chile FTA.

181. *See supra* notes 69-72 and accompanying text (describing U.S. imports of Chilean products and U.S. antidumping measures imposed against Chile). For information regarding the recent antidumping history between Chile and Canada, see U.S. CENSUS BUREAU, *supra* note 80.

182. STRATEGIS.GC.CA, *at* http://strategis.ic.gc.ca/sc_mrkti/tdst/tdo/tdo.php (last visited Dec. 24, 2004) (providing customized reporting of Canadian trade data).

183. *Id.*

184. *See* TAVARES DE ARAUJO JR. ET AL., *supra* note 67, at 11.

185. *See supra* 180-181 and accompanying text.

186. Canada-Chile: Free Trade Agreement, *supra* note 20.

187. *See supra* notes 69-72 and accompanying text.

188. *See supra* Part II.B.2.

189. Bruner, *supra* note 160, at 6.

antidumping law as an unacceptable protectionist measure.[190] This perspective was voiced by "Brazil's Ambassador to the United States, [when he] stated that such barriers to Brazilian exports are 'inconsistent with the proclaimed 'free trade' rhetoric of the United States.'"[191] Knowing the importance of the antidumping issue for Brazil, perhaps the United States sees a concession on this point as its biggest negotiating chip—as it has not yet conceded antidumping in any of its other FTAs—which it will cash in closer to the nearing deadline for the FTAA.[192] However, while the Bush administration might be willing to give up antidumping in the FTAA in order to meet the 2005 deadline, those in Congress who support these laws have made it clear that they will not grant fast track for the FTAA if it weakens antidumping legislation.[193]

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190. *Id.* at 25-26.

191. *Id.* at 26.

192. *See supra* Part I.D.2, for the proposition that the United States has never conceded its antidumping laws in a FTA.

193. *Senator Baucus on Protecting U.S. Laws in Trade Talks*, U.S. MISSION EUROPEAN UNION, May 7, 2001, http://www.useu.be/ISSUES/ProtectingUSTradeLaws050701.html. President Bush "and administration officials have stated they want fast track especially to advance Free Trade Area of the Americas (FTAA) negotiations." *Id.* Senator Baucus, however, in reference to demands by Brazil that the United States change its trade law in multilateral negotiations, stated that "[i]f President Bush truly wants to win congressional support for fast track, . . . he should make a clear and unambiguous statement in support of these laws and communicate this message directly to his staff and to U.S. trading partners." *Id.* The letter, which was signed by sixty-one senators, read as follows:

> Dear Mr. President:
>
> We are writing to state our strong opposition to any international trade agreement that would weaken U.S. trade laws.
>
> Key U.S. trade laws, including antidumping law, countervailing duty law, Section 201, and Section 301, are a critical element of U.S. trade policy. A wide range of agricultural and industrial sectors has successfully employed these statutes to address trade problems. Unfortunately, experience suggests that many other industries are likely to have occasion to rely upon them in future years.
>
> Each of these laws is fully consistent with U.S. obligations under the World Trade Organization (WTO) and other trade agreements. Moreover, these laws actually promote free trade by countering practices that both distort trade and are condemned by international trading rules.
>
> U.S. trade laws provide American workers and industries the guarantee that, if the United States pursues trade liberalization, it will also protect them against unfair foreign trade practices and allow time for them to address serious import surges. They are part of a political bargain struck with Congress and the American people under which the United States has pursued market opening trade agreements in the past.
>
> Congress has made clear its position on this matter. In draft fast track legislation considered in 1997, both Houses of Congress have included strong provisions directing trade negotiators not to weaken U.S. trade laws. Congress has restated this position in resolutions, letters, and through other means.

Thus, domestic disagreement over the issue of U.S. trade laws could threaten the FTAA as much as international contention on the matter.[194]

A more drastic and therefore less likely alternative to phasing out or abolishing our antidumping laws in the Chile-United States FTA, and in the FTAA, would be for the United States to revise, or eliminate all together, their antidumping laws.[195] Indeed, this is the very recommendation that the Cato Institute made in its handbook for the 108th Congress.[196] The Cato Institute argued that, even where such action may be unilateral, "[f]ree traders should . . . launch a campaign for the . . . outright elimination of U.S. trade barriers—including the antidumping law."[197] Considering the numerous studies, and especially that of the ITC, which indicate that tremendous economic losses result from U.S. antidumping law and the relatively low level benefits of such protection, Congress ought to give serious consideration to the possibility of striking the antidumping laws.[198]

> Unfortunately, some of our trading partners, many of whom maintain serious unfair trade practices, continue to seek to weaken these laws. This may simply be posturing by those who oppose further market opening, but—whatever the motive—the United States should no longer use its trade laws as bargaining chips in trade negotiations nor agree to any provisions that weaken or undermine U.S. trade laws.
>
> We look forward to your response.

Id. *But cf.* Richard J. Pierce, *Antidumping Law as a Means of Facilitating Cartelization*, 67 ANTITRUST L.J. 725, 735 (2000) (stating that there are non-policy reasons for which politicians support antidumping law). Professor Richard J. Pierce argues that

> [p]oliticians like antidumping law for several related reasons. First, and most important, antidumping law permits politicians to appear to support free trade while they preserve their discretion to engage in ad hoc protectionism at the behest of constituencies with political clout. Second, simultaneously supporting free trade and antidumping law allows a politician to take the rhetorical high ground. Most people understand the value of free trade, but nobody likes "dumping." The word conjures up an image of an evil foreign corporation that is using the United States as a toxic waste dump. Third, few members of the electorate are likely to do the hard work required to understand the simple reality that the conduct that is prohibited by antidumping law is the normal, socially beneficial conduct of any participant in a competitive market and, conversely, that antidumping law is just as protectionist as high tariffs and low import quotas.
>
> As of 1999, over 200 U.S. markets were affected by antidumping orders. There is reason to believe that a high proportion of those markets, like the ferrosilicon market, were cartelized with the aid of antidumping orders.

Id.

194. *See* Pierce, *supra* note 193, at 735.

195. CATO INST., *supra* note 120, at 618.

196. *Id.* at 613, 618.

197. *Id.* at 615.

198. *See supra* notes 22-23, 116 and accompanying text.

Furthermore, in evaluating the damaging costs that developing countries such as Chile suffer in antidumping litigation, even when no duty is imposed, a third and more viable way in which the United States could increase the likelihood of more free and fair trade with Chile would be to make certain changes to the administrative processes involved in antidumping investigations.[199] First, in accordance with the 1994 General Agreement on Tariffs and Trade Act, the screening process could be reformed to give a more scrutinizing review of complaints against developing countries.[200] Secondly, as suggested in the above-mentioned 2002 report for Congress, the current pricing system, which has been accused of being largely to blame for the international community's perception of United States' biases in antidumping investigations, could be amended to ensure a more accurate and fair determination of whether a product has been dumped.[201]

IV. CONCLUSION

While trade with Chile might not be completely free or fair, the FTA brings us closer to these goals. The anticipated increase in trade between the two countries will certainly get the attention of Chile's watchful neighbors. In addition, changes in the United States' approach to antidumping would result in significant economic gains for the United States, while altering the world's perception that the United States' trade law is inherently biased. As the member countries look ahead to ratification of the FTAA, these considerations and what their implementation could say to hesitant members in terms of the desirability of having the United States as a trading partner, deserve the serious attention of our lawmakers.

V. ADDENDUM

The Chile-U.S. FTA became effective January 1, 2004.[202] The Office of the U.S. Trade Representative reported that "[i]n the three months following the entry into force of the U.S.-Chile Free Trade Agreement, total U.S. exports to Chile increased by 24 percent compared to the same period of 2003, growing from $617.29 million to $766.79 million."[203] The

199. *See supra* notes 17-18 and accompanying text.

200. WTO Agreement, *supra* note 11, art. XV.

201. *See supra* Part II.A.

202. OFFICE OF THE U.S. TRADE REPRESENTATIVE, THE U.S.-CHILE FREE TRADE AGREEMENT: AN EARLY RECORD OF SUCCESS, http://www.ustr.gov/Document_Library/Fact_Sheets/2004/The_U.S.Chile_Free_Trade_Agreement_An_Early_Record_of_Success.html (June 6, 2004).

203. *Id.* The Office of the U.S. Trade Representative noted significant increases in the exportation of "construction equipment[], medical equipment, and paper." *Id.*

Central Bank of Chile recorded a 12.1 percent growth in exports to the United States during the first quarter of 2004, totaling 1.17 billion USD.[204]

As of February 24, 2005, the FTAA had not been signed.[205] The Office of the U.S. Trade Representative commented that

> [t]he FTAA remains a priority for the United States and is an important part of our global, regional and bilateral trade agenda to open markets and level the playing field for American farmers, workers, businesses and consumers and in this specific case to promote economic growth, development integration throughout the hemisphere.[206]

The United States and Brazil, co-chairs to the FTAA, are scheduled to meet again in late March, 2005.[207]

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204. *Id.* Fifty percent of Chile's exports to the United States consisted of goods processed from natural resources, 39.6% of the exports were natural resources, and 10.4% were industrial products. *Id.*

205. OFFICE OF THE U.S. TRADE REPRESENTATIVE, TRANSCRIPT OF PRESS TELECONFERENCE CALL WITH RICHARD MILLS, ASSISTANT US TRADE REPRESENTATIVE FOR MEDIA AND PUBLIC AFFAIRS, http://www.ustr.gov/Document_Library/Transcripts/2005/February/Transcript_of_Press_Teleconference_Call_with_Richard_Mills,_Assistant_US_Trade_Representative_for_Media_Public_Affairs.html (Feb. 24, 2005).

206. *Id.*

207. *Id.*