THE LABOR AND ENVIRONMENT CHAPTERS OF THE UNITED STATES-CHILE FREE TRADE AGREEMENT: AN IMPROVEMENT OVER THE WEAK ENFORCEMENT PROVISIONS OF THE NAFTA SIDE AGREEMENTS ON LABOR AND THE ENVIRONMENT?

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I. INTRODUCTION

A. Significance of the U.S.-CFTA

On January 1, 2004, just over three years after negotiations formally began, the United States – Chile Free Trade Agreement (U.S.-CFTA) became effective.[1] The U.S.-CFTA is the first free trade agreement between the United States and a South American nation and signifies a "strategic step" toward the creation of a Free Trade Area of the Americas (FTAA).[2] The U.S.-CFTA is

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1. Press Release, U.S.-Chile Free Trade Coalition, Coalition Celebrates Passage of U.S.-Chile Free Trade Agreement (Aug. 1, 2003), *at* http://www.uschamber.com/portal/uscftc/news/030801_senatepassage.htm.

2. J.F. HORNBECK, CONG. RESEARCH SERV., THE U.S.-CHILE FREE TRADE AGREEMENT, ECONOMIC AND TRADE POLICY ISSUES 2 (2003), http://chileusafta.com/save_images/res_pdf3e402a8510849bel_4228.pdf (last modified Feb. 3, 2003) (on file with author); Edward Gresser, *The U.S.-Chile Free Trade Agreement: Concrete Benefits, Strategic Value*, PROGRESSIVE POLICY INSTITUTE (May 17, 2001), *at* http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=108&subsecID=127&contentID=3369. The Free Trade Area of the Americas (FTAA) would unite 34 nations in the Western Hemisphere in a single free trade agreement. The participating nations announced their intention to create the FTAA at the Summit of the Americas in Miami in 1994. Formal FTAA negotiations began in 1998 at the Second Summit of the Americas in Santiago, Chile. Free Trade Area of the Americas, *Antecedents of the FTAA Process*, *at* http://www.ftaa-alca.org/View_e.asp (last visited January 21, 2004). Although the FTAA partners agreed to complete negotiations by 2005, that goal now appears overly optimistic. U.S. election-year politics may delay the negotiations, due to such issues as agricultural subsidies and tariff protections that play well to domestic U.S. constituencies but run counter to the rhetoric of dismantling trade barriers and the wishes of other FTAA partners. Indeed, according to a senior fellow at the International Institute for Economics, "[n]obody but the administration in Washington talks about it [completing FTAA negotiations by 2005] with a straight face." Charles Roth, *Doubts Abound that FTAA Will See Daylight by 2005* (May 30, 2003), *at* http://www.geocities.com/ericsquire/articles/ftaa/dowjones030530.htm.

comprehensive in scope, covering market access, investment, services, intellectual property rights, government procurement, labor, and the environment, among other areas.[3]

The road to negotiation of a United States-Chile free trade agreement was anything but smooth.[4] Chile was invited into the North America Free Trade Agreement (NAFTA) in 1994[5] but never actually acceded, in part because the Clinton Administration was unsuccessful in preventing the lapse of "fast-track" authority.[6] Chile, growing frustrated with the United States' inability to renew fast-track authority, soon concluded free trade agreements with Canada and Mexico.[7] When Trade Promotion Authority (TPA)[8] was passed in 2002, essentially granting fast-track authority once again, the United States was already in the process of negotiating a simpler bilateral agreement with Chile.[9]

The passage of the U.S.-CFTA was hailed as a victory by the Bush Administration, which views free trade agreements as a vehicle for increased trade and growth of the U.S. economy.[10] U.S. Trade Representative Robert Zoellick, the lead negotiator for the U.S.-CFTA, said after the House of Representatives passed the U.S.-CFTA and the U.S.-Singapore Free Trade Agreement that "[t]he votes today are a victory for openness and an important recognition by Congress of the positive role that trade plays in growing America's economy."[11]

B. The Purpose of Free Trade Agreements

Free trade agreements facilitate the movement of goods and services by eliminating tariffs, reducing non-tariff barriers, and providing member states with

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3. United States-Chile Free Trade Agreement, June 6, 2003, U.S.-Chile, http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html.

4. *See* Rafael X. Zahralddin-Aravena, *Chilean Accession to NAFTA: U.S. Failure and Chilean Success*, 23 N.C.J. INT'L L. & COM. REG. 53, 54 (1997).

5. *Id*. NAFTA includes the United States, Canada, and Mexico.

6. "Fast-track" legislation forces Congress to vote for-or-against an agreement without introducing amendments. Without fast-track authority, trade agreements are likely to be derailed because Congress can propose protectionist measures that potential free trade partners would not accept. Fast-track legislation expired on April 15, 1994. *See* Joseph G. Block & Andrew R. Herrup, *Addressing Environmental Concerns Regarding Chilean Accession to NAFTA*, 10 CONN. J. INT'L. L. 221, 229 (1995).

7. *See* Carol Pier, *Labor Rights in Chile and NAFTA Labor Standards: Questions of Compatibility on the Eve of Free Trade*, 19 COMP. LAB. L. & POL'Y J. 185, 188 (1998).

8. TPA is discussed in section IV(A)(1) of this note.

9. HORNBECK, *supra* note 2, at 1.

10. *U.S. House Passes Free-Trade Deals with Singapore, Chile* (July 25, 2003), *at* http://quickstart.clari.net/qs_se/webnews/wed/cv/Qus-trade-singapore.R4J9_Dl0.html (on file with author).

11. *Id.*

increased access to financial and service sectors.[12] Companies operating within the free trade bloc[13] gain new markets for their products because consumers in member states can buy the products at a lower cost than before the bloc was created, and usually at a lower cost than goods originating outside of the bloc.[14] This decrease in cost to the consumer can provide a competitive edge for member country firms, but also subject them to increased competition from other companies that benefit from the elimination of tariffs.[15] Less efficient firms are thus threatened and may not be able to compete.[16] Market forces, instead of government intervention, determine which firms have a sufficient level of productivity and a low enough cost structure to survive.[17]

The competitive atmosphere and increased market access created by reduced barriers to trade is thought to eventually increase the economic growth of nations that pursue free trade policies.[18] Many economists agree that such nations have experienced faster annual per capita growth than less open economies because of this reduction in trade barriers.[19] In fact, the U.S.-CFTA is expected to increase annual GDP by approximately $4.2 billion in the United States and by $700 million in Chile.[20] The expansion in bilateral trade would thus boost the overall economic output of both nations.

Despite the potential benefits of free trade agreements, there is no shortage of criticism. Many industries must confront fierce competition from free trade partners, labor unions must compete with foreign workers who are paid far less, and environmental groups fear an increase in environmental degradation if

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12. *See* RICKY W. GRIFFIN & MICHAEL W. PUSTAY, *Formulation of National Trade Policies, in* INTERNATIONAL BUSINESS: A MANAGERIAL PERSPECTIVE 254 (2nd ed. 1999).

13. A "free trade bloc" is a group of nations that belong to a common free trade agreement.

14. GRIFFIN & PUSTAY, *supra* note 12, at 256. Costs for goods originating within the free trade bloc are lower because tariffs for those goods are eliminated. For example, a $187,000 Caterpillar tractor made in the U.S. before the U.S.-CFTA faced $11,220 in tariffs. The same tractor made in Brazil and sold to Chile was subject to a 2% tariff rate, or $3740. Once the U.S.-CFTA became effective, if the tractor was made in the U.S. and shipped to Chile it would not be subject to any tariffs, and would thus be less expensive for the Chilean importer than the tractor imported from Brazil. *Chile-U.S. Free Trade Agreement Trade Facts*, *at* http://www.chileusafta.com/rsrch_facts.html (last visited July 23, 2003) (on file with author). The reduction in cost for the Chilean importer is then reflected in a lower cost for the ultimate consumer, which increases the competitiveness of the U.S. exporter relative to companies exporting from countries that do not have a free trade agreement with Chile.

15. *See* GRIFFIN & PUSTAY, *supra* note 12, at 256.

16. *Id.*

17. *See id.*

18. *See* David Dollar & Aart Kraay, *Spreading the Wealth*, FOREIGN AFF., Jan.-Feb. 2002, at 121.

19. *Id.*

20. *Chile-U.S. Free Trade Agreement Facts*, *supra* note 14.

adequate safeguards are not built into the agreements.[21] There is also a more generalized "anti-globalization" movement, which has successfully disrupted such meetings as the World Trade Organization meeting in Seattle, Washington in November 1999.[22] These various interest groups "raise the question of whether trade agreements enhance the social welfare of participating countries."[23]

Whatever the perspective on their merits, free trade agreements are inevitable building blocks in an increasingly interdependent global economy. The United States appears to be taking on a new leadership role in advancing free trade agreements in the western hemisphere,[24] after "risk[ing] being relegated to a subsidiary role" because of internal political disagreements.[25] Besides currently negotiating the FTAA, the United States has recently concluded a Central American Free Trade Agreement (CAFTA) and has pursued agreements with several other Latin American countries.[26] As the mosaic of free trade agreements expands, new models will be proposed to incorporate the interests of the groups mentioned above without sacrificing the overall objective of unfettered trade.

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21. *See* HORNBECK, *supra* note 2, at 2, 13.

22. *Information About the WTO Protests in Seattle*, WTO Seattle Collection, *available at* http://content.lib.washington.edu/WTOweb/more-info.html (last visited Feb. 19, 2004).

23. HORNBECK, *supra* note 2, at 2.

24. *See* U.S. Trade Representative, U.S. and Costa Rica Reach Agreement on Free Trade (Jan. 25, 2004), *at* http:// www.ustr.gov/Document_Library/Press_Releases/2004/January/U.S._Costa_Rica_Reach_Agreement_on_Free_Trade.html. The United States concluded a Central American Free Trade Agreement (CAFTA) with El Salvador, Guatemala, Honduras, and Nicaragua in December 2003. An agreement was then reached in January 2004 for Costa Rica to join CAFTA. *Id.* In January 2004, the USTR also began negotiations for the Dominican Republic to join CAFTA. U.S. Trade Representative, Zoellick to Visit the Dominican Republic January 14 as Free Trade Negotiations Begin (Jan. 13, 2004), *at* http://www.ustr.gov/Document_Library/Press_Releases/2004/January/Zoellick_to_Visit_the_Dominican_Republic_January_14_as_Free_Trade_Negotiations_Begin.html.

25. David A. Gantz, *The United States and the Expansion of Western Hemisphere Free Trade: Participant or Observer?*, 14 ARIZ. J. INT'L & COMP. L. 381, 408 (1997).

26. *See* U.S. and Costa Rica Reach Agreement on Free Trade, *supra* note 24; Zoellick to Visit the Dominican Republic January 14 as Free Trade Negotiations Begin, *supra* note 24.

C. Labor and Environmental Provisions in Free Trade Agreements

1.The Pros and Cons of Labor and Environmental Provisions in Free Trade Agreements

The U.S.-CFTA Labor and Environment Chapters represent the United States' most recent attempt[27] to reconcile the promotion of labor and environmental standards with the goal of removing barriers to trade. The degree to which labor and environmental issues should be included in free trade agreements continues to be controversial, particularly because of the stakes involved for industry leaders, politicians, environmental groups, and organized labor.[28] The debate centers on "whether a difference in environmental or labor standards between developed and developing countries creates economic and social issues that should be addressed in trade agreements."[29]

Some free trade advocates argue that environmental and labor issues should not be considered on equal footing with central trade issues.[30] The contention is that their inclusion in free trade agreements can create barriers to

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27. The North American Agreement on Labor Cooperation (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC) were "side agreements" to the North American Free Trade Agreement (NAFTA) and included labor and environmental provisions; all three agreements became effective on January 1, 1994. Laura Okin Pomeroy, Note, *The Labor Side Agreement Under the NAFTA: Analysis of Its Failure to Include Strong Enforcement Provisions and Recommendations for Future Labor Agreements Negotiated With Developing Countries*, 29 GEO. WASH. J. INT'L L. & ECON. 769, 769 (1996).

The U.S.-Jordan Free Trade Agreement, signed on October 24, 2000, also included labor and environmental provisions. Agreement on the Establishment of a Free Trade Area, Oct. 24, 2000, U.S. – Jordan, 41 I.L.M. 63. Interestingly, Mr. Zoellick, the USTR, wrote a "Side Letter on Labor and Environment" to the Jordanian Ambassador in July 2001 in which he stated that the United States "would not expect or intend to apply the [U.S.-Jordan Free Trade Agreement] dispute settlement procedures to secure its rights under the Agreement in a manner that results in blocking trade." Letter from Robert B. Zoellick, United States Trade Representative, to Marwan Muasher, Ambassador of the Hashemite Kingdom of Jordan to the United States of America (July 23, 2001), http://www.tcc.mac.doc.gov/cgi-bin/doit.cgi?204:67:962467963:312.

28. *See* Jack I. Garvey, *Current Development: Trade Law and Quality of Life – Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L L. 439, 439 (1995). Domestic industries encounter increased competition from foreign firms, politicians seek to satisfy constituencies that may call for protectionist measures, labor unions must compete with cheaper labor in other nations within the trade bloc, and environmental groups fear that free trade partners will reduce environmental standards to attract investment. *See* HORNBECK, *supra* note 2, at 2.

29. HORNBECK, *supra* note 2, at 12-13.

30. *See* Heather Corbin, Note, *The Proposed United States – Chile Free Trade Agreement: Reconciling Free Trade and Environmental Protection*, 14 COLO. J. INT'L ENVTL. L. & POL'Y 119, 123 (2003).

trade, thereby diminishing a developing nation's ability to grow and acquire the economic resources needed to improve environmental and labor standards.[31] These advocates also contend that supra-national environmental and labor standards would not only be very difficult for many developing countries to adhere to, but could also be used by developed countries as a protectionist measure.[32] Many developing countries, including Chile, argue that a nation's sovereignty would be infringed upon if a trade agreement forced each member to comply with international environmental and labor standards.[33] Finally, opposition advocates point out that many developing nations also oppose the inclusion of such provisions because developed nations did not need to abide by strict labor and environmental restrictions during their initial stages of development.[34]

Conversely, supporters of strong labor and environmental provisions argue that the inclusion of the provisions is justified because of the mutual interaction between trade, labor, and the environment.[35] Environmental and labor groups, for example, maintain that failing to include provisions to protect the environment and workers' rights will encourage developing countries to lower their standards in order to create a competitive advantage that would attract investment and lower prices of export goods.[36] These groups maintain that the most effective way to increase environmental and labor standards among free trade partners is to include trade sanction provisions that penalize violations in order to ensure effective enforcement.[37]

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31. *Id.* at 122-23.

32. Block & Herrup, *supra* note 6, at 238.

33. HORNBECK, *supra* note 2, at 14. The Organization for Economic Cooperation and Development has noted that, "[a]lthough developed countries' concerns for developing countries' labor standards are motivated in part by a humanitarian desire to improve the conditions of work in other countries, they nonetheless strike many in the developing world as unwarranted intrusions into their internal affairs and affronts to their national sovereignty." RAJ BHALA, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE 1539 (2d ed. LEXIS Publishing 2001).

34. Block & Herrup, *supra* note 6, at 237-38. "Less developed nations chafe at being required to adopt more stringent environmental restrictions while they develop than currently developed nations had to follow at a similar stage . . ." *Id.*

35. *See Id.* at 238.

36. *See* Corbin, *supra* note 30, at 121; Pomeroy, *supra* note 27, at 773.

37. *See* Corbin, *supra* note 30, at 121; Marley S. Weiss, *Two Steps Forward, One Step Back – Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, 37 U.S.F. L. REV. 689, 700 (2003).

2. Criticisms of the NAFTA Side Agreements on Labor and the Environment

The North American Agreement on Labor Cooperation (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC) became effective January 1, 1994, exactly 10 years prior to the U.S.-CFTA effective date.[38] The NAALC and NAAEC grew out of a fierce debate during the 1992 U.S. presidential campaign over whether enforcement mechanisms should be created to safeguard labor and environmental protections.[39] Despite the commendable attempt of these NAFTA side agreements to "confront the natural tension between trade liberalization and quality of life," they have been criticized for including weak enforcement provisions that are subject to political manipulation.[40] The U.S.-CFTA Labor and Environment Chapters, as the latest U.S. attempt to recognize the need for labor and environmental protections in the context of a free trade agreement, can thus be analyzed to determine whether they constitute an improvement over the NAALC and NAAEC models.

3. Objectives and Conclusions of this Note

This Note will provide a brief overview of the U.S.-CFTA, followed by an examination of the Labor and Environment Chapters. The labor and environmental provisions will be compared to similar provisions in the NAFTA side agreements on labor and the environment. Next, current Chilean labor and environmental legislation and enforcement will be explored in terms of its compatibility with the guiding standards set forth in the relevant U.S.-CFTA chapters.

This Note argues that the U.S.-CFTA labor and environmental provisions are slightly stronger than the NAALC and the NAAEC but that the related dispute settlement provisions still heavily favor negotiation and consultation over ultimate trade sanctions. First, the U.S.-CFTA labor and environment chapters are included in the main text of the agreement, while the NAALC and the NAAEC

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38. *See* Pomeroy, *supra* note 27, at 769. The NAFTA itself also went into effect on January 1, 1994.

39. *See* Jonathan S. Blum, Comment, *The FTAA and the Fast Track to Forgetting the Environment: A Comparison of the NAFTA and MERCOSUR Environmental Models as Examples for the Hemisphere*, 35 TEX. INT'L L.J. 435, 449 (2000); Pomeroy, *supra* note 27, at 772.

40. Criticisms include the lengthy and complex nature of the dispute resolution process, the emphasis on negotiation rather than sanctions, and the numerous exceptions to enforcement of domestic labor and environmental laws. Garvey, *supra* note 28, at 441-43. "[M]any members of Congress expressed concern that the [NAALC's] enforcement provisions would not provide a sufficient incentive to deter the Mexican government from failing to enforce its own labor laws." Pomeroy, *supra* note 27, at 792.

are "side agreements" apart from the main NAFTA text. This allows labor and environment disputes to be addressed through the dispute settlement mechanism used to resolve all other covered areas. Nonetheless, there is a separate remedy section reserved exclusively for labor and environmental disputes, which compromises a true parity paradigm.

Second, the U.S.-CFTA Labor Chapter includes more labor rights that can be enforced by trade sanctions than does the NAALC. This could potentially provide greater protections for workers in the event that a Party's domestic labor laws are not being enforced effectively. Nevertheless, the U.S.-CFTA labor provisions stop short of establishing minimum standards or forcing each Party to comply with internationally recognized standards. Instead, each Party under the U.S.-CFTA retains the right to set its own labor (and environmental) standards, and dispute settlement can commence only if a Party is alleged to have persistently failed to effectively enforce its labor or environmental laws. In this regard, the U.S.-CFTA mirrors the NAALC's and NAAEC's emphasis on domestic enforcement.

Finally, this Note contends that the U.S.-CFTA labor and environmental provisions build on the recognition for labor and environmental protections and the framework for enforcement under the precedent-setting NAALC and NAAEC. At the same time, though, they underscore the inherent limits in raising labor and environmental standards through free trade agreements. Respect for sovereignty, consensus on how minimum standards are to be determined, and the suspicion of disguised protectionism all pose grave challenges for designing a model respectful of high labor and environment standards yet consistent with true trade liberalization. Even so, Chile's strengthening of domestic labor and environmental legislation in anticipation of a free trade agreement with the United States demonstrates that the desired benefits of market access can prompt developing countries to improve labor and environmental protections.

II. U.S.-CFTA OVERVIEW

A. Rationale Behind the Agreement: Why Chile is An Attractive Free Trade Partner

Although Chile is not a major U.S. trading partner,[41] it was an attractive candidate for a bilateral trade agreement because of its commitment to free market

41. In 2002, Chile was the United States' thirty-sixth largest goods trading partner. U.S. exports to Chile ($2.6 billion) constituted 0.4% of all U.S. exports and U.S. imports from Chile ($3.8 billion) accounted for 0.3% of all U.S. imports. U.S. TRADE REPRESENTATIVE, FINAL ENVIRONMENTAL REVIEW OF U.S.-CHILE FREE TRADE AGREEMENT 17 (June 2003), http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/asset_upload_file 411_5109.pdf.

principles,[42] its political and economic stability, its potential as a foothold for U.S. trade interests in South America, and the United States' desire to show its seriousness in pursuing a Free Trade Area of the Americas.[43] Various economic indicators demonstrate the strength of Chile's economy. Despite recent slowing in Gross Domestic Product (GDP) growth, Chile's GDP growth averaged 5% during the late 1990s and was expected to grow by approximately 3.5% during 2003.[44] Additionally, foreign investment in Chile totaled more than $86 billion between 1974 and 2002 and came from more than 4300 companies in 65 countries.[45] These factors illustrate why Chile has already secured free trade agreements with Canada, Mexico, the European Union (EU), and the European Free Trade Association (EFTA), among others.[46]

Chile reciprocated the United States' interest in a bilateral trade agreement. The United States is Chile's largest single-country trading partner, absorbing close to 19% of Chilean exports in 2001,[47] and Chile sought to expand its exports there as part of its overall development strategy.[48] Also, by becoming the first South American country to enter into a free trade agreement with the United States, Chile viewed the U.S.-CFTA as an opportunity to further improve its image as an economically stable nation committed to free trade.[49]

U.S. and Chilean businesses stand to reap significant profits from increased market access, particularly because the agreement immediately eliminates tariffs on over 85% of all goods.[50] The effect of the agreement on the economy appears positive, but its effect on each Party's labor and environmental standards is yet to be determined.

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42. *See* Zahralddin-Aravena, *supra* note 4, at 56-59 (discussing Chile's free market model based on export-led growth). In 2003, Chile was ranked 16th in the world, ahead of Canada, Germany, and Japan, in the Heritage Foundation Index of Economic Freedom, which is based on such indicators as government fiscal and monetary policies, and foreign investment codes. Heritage Foundation-Wall Street Journal, *Index Of Economic Freedom Rankings* (January 2003), *at* http://www.ild.cl/english/economic_freedom/ index_economic_ freedom-eng.pdf.

43. HORNBECK, *supra* note 2, at 2.

44. *See id.*; *Chile-U.S. Free Trade Agreement Trade Facts*, *supra* note 14.

45. *Chile-U.S. Free Trade Agreement Trade Facts*, *supra* note 14.

46. Chilean Government International Economic Relations Division, *International Agreements*, *at* http://www.direcon.cl/frame/acuerdos_internacionales/f_bilaterales.html (last visited Sept. 27, 2003).

47. HORNBECK, *supra* note 2, at 6.

48. *Id.* at 3.

49. *See id.* at 3.

50. Press Release, U.S.-Chile Free Trade Coalition, *supra* note 1.

III. U.S.-CFTA LABOR AND ENVIRONMENT CHAPTERS

A. Labor and Environment Provisions in Free Trade Agreements and Their Inclusion In the U.S.-CFTA

Discussions over labor and environment provisions have become fairly standard practice in the negotiation of free trade agreements and a variety of models have been proposed and implemented.[51] The U.S.-CFTA combines elements of some of the previous models in an attempt to reconcile the promotion of high labor and environmental standards with the overall goal of unimpeded trade.[52] For example, the U.S.-CFTA includes labor and environment chapters in the main text of the agreement, a step taken in the U.S.-Jordan Free Trade Agreement but not in the NAFTA.[53] The inclusion of these chapters in the main agreement is significant in that labor and environment disputes feed into the U.S.-CFTA's Dispute Settlement Chapter.[54] This appears to give labor and environmental concerns parity with other trade provisions and highlights their central role in the agreement.[55] There is, however, a separate remedy section within the dispute settlement chapter that applies only to disputes arising under the labor and environmental sections.[56]

B. U.S.-CFTA Labor Chapter

Chapter 18 of the U.S.-CFTA addresses the Parties' labor obligations.[57] The chapter reaffirms each Party's commitment to certain labor principles, sets out the duties of enforcement, provides that certain procedural guarantees must be respected, establishes a Labor Affairs Council and a Labor Cooperation Mechanism, provides for the establishment of panel members in disputes, and

51. *See* Weiss, *supra* note 37, at 689-92. The U.S.-Jordan Free Trade Agreement includes labor and environmental provisions in the main text of the agreement and there is a single dispute settlement mechanism. Additionally, trade sanctions may be imposed when either the United States or Jordan is not effectively enforcing its domestic labor or environmental laws. *Id.* The NAALC and NAAEC models are discussed in greater detail under Section IV of this Note.

52. *See* United States-Chile Free Trade Agreement, *supra* note 3, chs. 18-19.

53. Weiss, *supra* note 37, at 721-22.

54. *See* United States-Chile Free Trade Agreement, *supra* note 3, at ch. 22. The Dispute Settlement Chapter provides for dispute resolution procedures including consultations, establishment of arbitration panels, and remedies. *Id.*

55. *See* Weiss, *supra* note 37, at 721-22.

56. United States-Chile Free Trade Agreement, *supra* note 3, art. 22.16.

57. *Id.* ch. 18.

delineates the consultation process that must be used prior to dispute settlement under Chapter 22.[58]

The United States and Chile agreed to improve domestic labor protections.[59] They committed to "strive to ensure" that internationally recognized labor rights, including the right of association, the right to organize and bargain collectively, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health are protected by their respective domestic laws.[60] However, while agreeing to recognize these principles and improve upon them, the Parties reserve the right to establish their own domestic labor standards by adopting or modifying their labor laws accordingly.[61]

A Party can only begin the dispute settlement procedure if it believes that the other Party is not properly enforcing its domestic labor laws.[62] Article 18.2 provides that, "[a] Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties."[63] The following subsection qualifies Article 18.2 by stating that a Party will be in compliance with the enforcement provision if its actions were taken on reasonable discretionary grounds or because of a bona fide decision concerning resource allocation.[64] Furthermore, although no language in the agreement explicitly prohibits a Party from weakening its domestic labor laws in order to attract trade or investment, the Parties recognize that it is improper to do so.[65]

The Labor Chapter also provides for procedural guarantees that must be afforded to persons seeking enforcement of a Party's labor laws.[66] Each Party must ensure that individuals have access to appropriate tribunals, that proceedings are equitable and transparent, and that remedies are available under domestic labor laws.[67] Additionally, each Party agrees to promote public awareness of its labor laws.[68] These procedural guarantees and promotion of public awareness are subscribed to by the Parties, but neither Party may utilize dispute settlement to enforce them unless they are not "effectively enforced."[69]

A Labor Affairs Council, made up of cabinet-level Party representatives or their designees, was established pursuant to Article 18.4 of the Agreement.[70]

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58. *Id.*
59. *Id.* art. 18.1.
60. *Id.* arts. 18.1, 18.8.
61. United States-Chile Free Trade Agreement, *supra* note 3, art. 18.1, para. 2.
62. *Id.* art. 18.6, para. 8.
63. *Id.* art. 18.2, para. 1(a).
64. *Id.* art. 18.2, para. 1(b).
65. *Id.* art. 18.2, para. 2.
66. United States-Chile Free Trade Agreement, *supra* note 3, art. 18.3.
67. *Id.* art. 18.3, paras. 2-4.
68. *Id.* art. 18.3, para. 5.
69. *Id.* art. 18.2, para. 1(a).
70. *Id.* art. 18.4.

The purpose of the Council is to supervise the implementation of and progress under the Labor Chapter and to further the Chapter's objectives.[71] The Council must create a work program and procedures, and it may consult with non-governmental organizations and independent experts when carrying out its activities.[72] Each meeting of the Council must include a public session "unless the Parties otherwise agree," and all Council decisions must be made public "unless the Council decides otherwise."[73]

A Labor Cooperation Mechanism, whose work will be carried out by the Parties' labor ministries, was also created.[74] This body will seek to advance internationally recognized labor principles by undertaking activities on labor matters such as working conditions, social protections, labor relations, and the effective application of fundamental rights.[75] These activities may include: joint conferences and workshops, technical exchanges, joint research projects, fostering relationships between academic institutions, and sharing standards and procedures regarding labor practices.[76]

The Labor Chapter provides that each Party may request consultations with the other Party as to any issue arising under the Chapter.[77] The Party seeking consultations must first deliver a written request to an office of the other Party's labor ministry that has been designated as a point of contact.[78] After the request has been delivered, the Parties will have the opportunity to consult and attempt to mutually resolve the matter.[79] If these consultations fail, either Party may then request a meeting of the Council by delivering a written request to the other Party's point of contact.[80] The Council must thereafter convene and attempt to reach resolution of the matter.[81] If the matter has not been adequately resolved within 60 days of the initial request and the matter concerns whether a Party is failing to "effectively enforce" its domestic labor laws, the complaining Party may utilize the dispute settlement provisions in Chapter 22.[82]

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71. United States-Chile Free Trade Agreement, *supra* note 3, art. 18.4, para. 2.
72. *Id.* art. 18.4, para. 4.
73. *Id.* art. 18.4, para. 5. The language of Article 18.4 encourages public participation and transparency in the Labor Affair Council's activities, but the Council retains the authority to prevent public access. Since the Council oversees the implementation of the Labor Chapter's objectives, public input from individuals and groups concerned about labor rights seems to provide an important opportunity for ensuring that outside viewpoints are taken into account.
74. *Id.* Annex 18.5, para. 3.
75. *Id.* Annex 18.5, para. 4(a-e).
76. United States-Chile Free Trade Agreement, *supra* note 3, Annex 18.5, para. 5(a)-(g).
77. *Id.* art. 18.6, para. 1.
78. *Id.*
79. *Id.* art. 18.6, para. 3.
80. *Id.* art. 18.6, para. 4.
81. United States-Chile Free Trade Agreement, *supra* note 3, art. 18.6, para. 5.
82. *Id.* art. 18.6, para. 6.

Finally, the Parties agreed to establish a Labor Roster whose members will serve on panels for disputes regarding failure by a Party to enforce its own labor laws. The Parties must establish the roster within six months of the Agreement's effective date, and the roster will remain in effect for at least three years from that time.[83] The roster will hold up to twelve members, four of whom are non-Party nationals.[84]

C. U.S.-CFTA Environment Chapter

The structure of the U.S.-CFTA section on Environment, Chapter 19, substantially mimics that of the Labor Chapter.[85] The Environment Chapter provides that each Party will seek to enhance links between the Parties' trade and environment policies to promote trade expansion. The Chapter also sets out enforcement obligations, provides for certain procedural guarantees, establishes an Environment Affairs Council and cooperative activities, provides for the creation of a roster of potential panelists, and outlines the consultation procedure that must be used prior to Chapter 22 dispute settlement.[86]

The objectives of the Environment Chapter include the commitment to "mutually supportive" trade and environmental policies, utilization of resources in a manner compatible with sustainable development, and expansion of trade based on stronger connections between the Parties' trade and environmental policies.[87] The Parties specifically seek to expand trade by promoting non-discriminatory measures and preventing the use of disguised trade barriers.[88]

The duties of enforcement are essentially the same as under the Labor Chapter: each Party must "effectively enforce" its domestic environmental laws.[89] The Parties recognize the right to establish their respective levels of domestic environmental protection and to modify their environmental laws accordingly, while always providing for "high levels" of environmental protection.[90] As in the Labor Chapter, non-compliance with domestic enforcement obligations will not occur where a Party has used reasonable discretion or has made a bona fide allocation-of-resources decision regarding enforcement.[91] A Party's failure to effectively enforce its domestic environmental laws is the only matter under the chapter that may be brought to dispute settlement.[92]

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83. *Id.* art. 18.7, para. 1.
84. *Id.*
85. *Id.* ch. 19.
86. United States-Chile Free Trade Agreement, *supra* note 3, ch. 19.
87. *Id.* ch. 19, *Objectives*.
88. *Id.*
89. *Id.* art. 19.2.
90. *Id.* art. 19.1.
91. United States-Chile Free Trade Agreement, *supra* note 3, art. 19.2.
92. *Id.* art. 19.6, para. 8.

Each Party agrees to provide for procedural safeguards to allow complaining parties the right to pursue legal remedies for violations of domestic environmental law.[93] Proceedings must respect due process, be equitable, and be open to the public, "except where the administration of justice otherwise requires."[94] Effective remedies or sanctions must be available and may include fines, imprisonment, injunctions, and the cost of pollution clean-up or containment.[95] Additionally, each Party's appropriate government agencies must give "due consideration" to investigative requests by interested persons concerning alleged violations of environmental law.[96]

An Environment Affairs Council was established in order to discuss the implementation of commitments set forth in the Environment Chapter and to address environmental issues that the public considers significant.[97] The Council must provide a process whereby the public can participate in the development of Council activities, such as allowing the public to help create agendas for the meetings.[98]

The Parties agreed to undertake cooperative environmental activities that promote sustainable development and otherwise improve the environment, including the negotiation of a United States-Chile Environmental Cooperation Agreement ("Environmental Cooperation Agreement").[99] The provisions for environmental cooperation are quite explicit in terms of which projects should be pursued; they include the creation of a Pollutant Release and Transfer Register (PRTR), a reduction in methyl bromide emissions (a substance that depletes the ozone layer), an increase in the use of cleaner fuels, and a reduction in Chilean mining pollution.[100] The Environmental Cooperation Agreement will include procedures for work programs that set priorities for cooperative activities, encourage implementation of multilateral environmental agreements to which both the United States and Chile are parties, promote collection and publication of each Party's environmental regulations and enforcement activities, provide for consultations with the Environment Affairs Council, and allow the public an opportunity to participate in the development and implementation of cooperative activities.[101]

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93. *Id.* art. 19.8.
94. *Id.* art. 19.8, para. 1.
95. *Id.* art. 19.8, para. 1(b)(ii).
96. United States-Chile Free Trade Agreement, *supra* note 3, art. 19.8, para. 2.
97. *Id.* art. 19.3, para. 1-2.
98. *Id.* art. 19.3, para. 2.
99. *Id.* art. 19.5, para. 1(b); *Id.* Annex 19.3.
100. *Id.* Annex 19.3, para. 1(a, b, f, h).
101. United States-Chile Free Trade Agreement, *supra* note 3, Annex 19.3, para. 2(b).

An Environment Roster will be established according to the same criteria and procedure as the Labor Roster.[102] Dispute settlement procedures are the same as in the Labor Chapter, where disputes regarding a Party's failure to enforce its relevant domestic laws are funneled into the Chapter on Dispute Settlement if consultations do not resolve the issue.[103]

D. U.S.-CFTA Labor and Environment Dispute Settlement

Both the labor and environment chapters provide for consultations in the event of disputes.[104] Unresolved disputes regarding a Party's failure to effectively enforce its domestic labor or environmental laws can then be dealt with under the Chapter 22 Dispute Settlement provisions.[105] Either Party may request consultations by providing specific information to the other Party regarding the issue in dispute.[106] If the Parties are then unable to resolve the matter through consultations, either Party may request that the Environment Affairs Council or the Labor Affairs Council be convened.[107] This is the final step a Party may take for matters that are unrelated to a failure to effectively enforce domestic labor or environmental laws.

If the dispute involves a Party's inability to effectively enforce its domestic labor or environmental laws and the Parties have not resolved the matter within sixty days of an initial request for consultations, the complaining Party can utilize the provisions of Chapter 22 Dispute Settlement.[108] The complaining Party must first request either consultations under Article 22.4 or a meeting of the Commission under Article 22.5 before it can avail itself of the other dispute settlement provisions of Chapter 22.[109] If the Parties are unable to resolve the dispute within seventy-five days after a Party has requested consultations under Article 22.4 or within thirty days of the Commission convening, then either Party may request that an arbitration panel be established.[110] Panels will be made up of

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102. *See id.* art. 19.7, para. 1. The only difference is that panel members for the Environment Roster may have expertise in environmental law, as opposed to labor law. *See id.* art. 19.7, para. 2(a).

103. *Id.* art. 19.6.

104. *Id.* arts. 18.6, 19.6. A dispute could arise, for example, if Chile had a law governing minimum wage but was lax in enforcing it. The U.S. could then begin consultations regarding Chile's failure to effectively enforce its minimum wage law and, if the U.S. and Chile were unable to resolve this dispute, the formal dispute settlement process would commence.

105. *Id.* arts. 18.6(6), 19.6(6).

106. United States-Chile Free Trade Agreement, *supra* note 3, arts. 18.6(2), 19.6(2).

107. *Id.* arts. 18.6(4), 19.6(4).

108. *Id.* arts. 18.6, 19.6.

109. *Id.* arts. 18.6, 19.6, 22.4-5.

110. *Id.* art. 22.6(1).

three members; the chair of the panel is to be chosen mutually by the Parties and each Party selects one of the remaining two members.[111] Panelists are chosen from the Labor or Environment Roster, depending on the subject matter of the dispute.[112]

The arbitration panel must complete an initial report within 120 days after the last panelist was chosen,[113] and each Party then has a two-week window in which to submit written comments to the panel.[114] The panel must then present its final report within thirty days of releasing its initial report,[115] and the Parties must resolve the dispute in accordance with the "determinations and recommendations" of the panel.[116] The Parties may use a "mutually satisfactory action plan" to implement the resolution of the dispute; if an action plan is agreed upon but the defending Party fails to implement it, the complaining Party may use the non-implementation provisions of Article 22.16(1) to seek a monetary penalty.[117]

Under Article 22.16,[118] if the Parties fail to resolve the dispute within 45 days of receiving the final report or the complaining Party finds that the other Party has not complied with an agreed-upon resolution of the matter, then the complaining Party may request that the arbitration panel reconvene to determine the amount the other Party must pay.[119] The panel must decide on the amount of the fine within 90 days of reconvening, and must consider:

> 1) the bilateral trade effects of the Party's failure to effectively enforce the relevant law;
> 2) the pervasiveness and duration of the Party's failure to effectively enforce the relevant law;
> 3) the reasons for the Party's failure to effectively enforce the relevant law;
> 4) the level of enforcement that could reasonably be expected of the Party given its resource constraints;

111. United States-Chile Free Trade Agreement, *supra* note 3, art. 22.9(1)(a)-(c).
112. *Id.* arts. 18.7(1), 19.7(1).
113. *Id.* art. 22.12(3).
114. *Id.* art. 22.12(5).
115. *Id.* art. 22.13(1).
116. United States-Chile Free Trade Agreement, *supra* note 3, art. 22.14(1).
117. *Id.* art. 22.14(3).
118. Article 22.16 applies only in cases where a Party has failed to effectively enforce its domestic labor or environmental laws and the Party has not corrected its non-compliance after an arbitration panel has issued its final report. As mentioned in Section III (A) of this Note, these remedy provisions are contained within a separate article under Chapter 22, and differ in the type and extent of fines and compensatory measures that may be taken by the complaining Party. The available remedies for labor and environmental disputes are therefore in a separate category from that of other areas covered by the agreement, even though they are contained within the same Dispute Settlement Chapter.
119. *Id.* art. 22.16(1).

> 5) the efforts made by the Party to begin remedying the non-enforcement after the final report of the panel, including through the implementation of any mutually agreed action plan; and
> 6) any other relevant factors.[120]

Additionally, the panel cannot impose a fine greater than $15 million annually.

The Party complained against pays the fine into a fund created by the Commission and the money must then be used for labor or environmental programs, "including efforts to improve or enhance labor or environmental law enforcement . . . in the territory of the Party complained against."[121] If the fine is not paid, the complaining Party can take "other appropriate steps" to assure compliance, such as the suspension of tariff benefits granted by the Agreement.[122] In deciding whether or not to suspend tariff benefits, the complaining Party must consider that the U.S.-CFTA seeks to eliminate trade barriers and must attempt to "avoid unduly affecting parties or interests not party to the dispute."[123]

The suspension of benefits in disputes involving a Party's failure to effectively enforce its labor or environmental laws is intended as a measure of last resort, to be used only after a Party fails to pay the fine determined by the arbitration panel and no other alternative is available that is less harmful to the Agreement's goal of eliminating trade barriers.[124] In contrast, when the dispute concerns a "nullification or impairment" of benefits a Party expects to gain under covered areas such as National Treatment and Market Access for Goods, Rules of Origin and Origin Procedures, Government Procurement, Cross-Border Trade in Services, or Intellectual Property Rights, the complaining Party may suspend benefits after the final report is received and the Parties fail to agree on appropriate compensation.[125] Therefore, the U.S.-CFTA favors a suspension of benefits, otherwise known as trade sanctions, as a remedy in non-labor and –environment disputes more than in labor and environment disputes.

120. *Id.* art. 22.16(2)(a)-(f).
121. *Id.* art. 22.16(4).
122. United States-Chile Free Trade Agreement, *supra* note 3, art. 22.16(5).
123. *Id.* art. 22.16(5).
124. *See id.* art. 22.16(5).
125. *Id.* art. 22.15(1)-(2).

IV. COMPARISON OF THE U.S.-CFTA LABOR CHAPTER AND THE NAALC

A. Similarities and Differences Between Provisions of the U.S.-CFTA Labor Chapter and the NAALC

1. Enforcement of Domestic Labor Laws As the Only Obligation Subject to Dispute Settlement

The U.S.-CFTA Labor Chapter and the NAALC both seek to promote the protection of internationally recognized labor rights while reserving for each Party the right to establish its own domestic labor laws.[126] The overall objective of bringing domestic labor laws in line with internationally accepted labor principles is therefore limited by a Party's right to establish its own standards. The availability of dispute settlement for cases in which a Party fails to "effectively enforce" its domestic labor laws creates a procedural avenue for ensuring that each Party adheres to its own laws, but falls short of forcing compliance with international standards.

The U.S. Congress has mandated negotiating objectives for free trade agreements.[127] The Trade Act of 2002 included Trade Promotion Authority (TPA) legislation, which provides negotiating parameters for trade agreements, giving the Bush Administration the ability to conclude free trade agreements subject only to a yes-or-no vote in Congress.[128] One of the objectives stated in the TPA is "to promote respect for worker rights . . . consistent with core labor standards of the [International Labor Organization] ILO."[129] Although the United States and Chile agreed to "strive to ensure" that certain internationally recognized labor rights are "recognized and protected by . . . domestic law," neither Party can bring a dispute based on the failure to meet such standards.[130] It thus appears that the United States Trade Representative (USTR) may not have met the objectives mandated by Congress in the TPA.[131] Instead, the U.S.-CFTA essentially reproduced the

126. *Id.* art. 18.1(1)-(2); North American Agreement on Labor Cooperation, *done* Sept. 14, 1993, U.S.-Mex.-Can., arts. 1(b), 2, 32 I.L.M. 1499.

127. *See* § 3802 of the Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §§ 3801-13 (2002).

128. *Id.* §§ 3803(b), 3804.

129. *Id.* § 3802(a)(6).

130. United States-Chile Free Trade Agreement, *supra* note 3, arts. 18.1, 18.8, 18.6(6).

131. *See* U.S. TRADE REPRESENTATIVE, REPORT OF THE LABOR ADVISORY COMMITTEE FOR TRADE NEGOTIATIONS AND TRADE POLICY 5, http://www.ustr.gov/new/fta/chile/ac-lac.pdf (last visited May 5, 2004) [hereinafter REPORT OF THE LABOR ADVISORY COMMITTEE]. The USTR contends that the U.S.-CFTA provides for "equivalent" procedures and remedies for all areas covered by the TPA principal negotiating objectives, including labor and the environment. USTR, RESPONSE TO LABOR ADVISORY COMMITTEE REPORT, http://www.ustr.gov/ new/fta/chile/response-labor.pdf (last visited Aug. 14, 2004).

NAALC prescription of obligating a Party to enforce only its own domestic standards.[132]

Several specialized committees must report to the President of the United States, the USTR, and Congress regarding upcoming trade agreements.[133] The committee specialized in labor issues, the Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC), concluded that a singular focus on enforcement of domestic labor laws created a "perverse incentive" for the United States and Chile; complaints against a country for failure to enforce its own labor laws could prompt it to reduce worker protections in order to avoid dispute settlement.[134] Although such a weakening of labor laws would be politically difficult for either country and therefore unlikely, the U.S.-CFTA has no binding provisions that prevent a Party from pursuing this "absurd and self-defeating policy."[135]

2. Labor Rights Included In Dispute Settlement Procedures

While both the U.S.-CFTA and the NAALC allow for dispute settlement only when a Party fails to effectively enforce its domestic labor laws, the U.S.-CFTA includes more labor rights in the dispute settlement process than the NAALC.[136] Under the NAALC, a Party can request ministerial consultations regarding any of the labor principles included in its Annex 1. The Party cannot, however, refer matters concerning collective bargaining, strikes, or union organizing to a three-person Evaluation Committee of Experts (ECE), the next step in the enforcement process, should consultations fail.[137] If the matter does not relate to those categories, the ECE publishes a report on its findings. This report is the final stage of enforcement for issues such as employment discrimination, equal pay, worker compensation, migrant workers, and forced labor.[138] The only issues that can reach the next level of dispute settlement are matters concerning a Party's failure to effectively enforce its occupational safety and health, child labor, or minimum wage laws.[139] A two-thirds vote by the Labor Ministers Council can then send the matter to an arbitration panel, which can impose

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The USTR notes that the same set of procedures are used whether the dispute concerns commercial, labor, or environmental matters, but also acknowledges that the post-panel penalty stage of dispute settlement is different for commercial disputes than it is for labor or environmental disputes. *Id.*

132. North American Agreement on Labor Cooperation, *supra* note 126, art. 2.
133. REPORT OF THE LABOR ADVISORY COMMITTEE, *supra* note 131, at 1.
134. REPORT OF THE LABOR ADVISORY COMMITTEE, *supra* note 131, at 7.
135. *See id.*
136. *See* Weiss, *supra* note 37, at 721.
137. RALPH H. FOLSOM, NAFTA IN A NUTSHELL 222 (West Group 1999).
138. *Id.* at 223.
139. *Id.*

monetary penalties or a suspension of tariff benefits if the penalties are not paid.[140] Therefore, a failure to effectively enforce domestic labor laws that relate to only three of 11 labor principles listed in the NAALC can potentially be enforced through fines or a suspension of tariff benefits.

In contrast, under the U.S.-CFTA Labor Chapter, a Party can take a dispute to the highest levels of the dispute settlement process for domestic labor laws that relate to any of the labor principles listed in the Chapter.[141] The U.S.-CFTA enforcement mechanisms for a Party's labor laws have more teeth than those of the NAALC because a greater variety of disputes over a Party's failure to effectively enforce its own labor laws can ultimately be resolved by monetary penalties. The U.S.-CFTA labor provisions are therefore somewhat stronger in scope than those of the NAALC, and will likely push each Party to enforce a greater range of domestic labor laws more diligently.

3. Available Remedies

Both the U.S.-CFTA labor provisions and the NAALC provide for caps on monetary penalties,[142] a measure that limits the consequences of a Party's non-compliance with domestic labor laws. The cap in the U.S.-CFTA is $15 million,[143] or less than 0.24% of United States-Chile bilateral trade,[144] while the NAALC cap is 0.007% of total trade in goods between the NAALC Parties.[145] In commercial disputes under the U.S.-CFTA, fines are capped at half the value of what the trade sanctions would be, but in labor disputes the cap is absolute; even if trade sanctions would be very high in a given labor dispute, fines cannot rise beyond the designated level.[146] Also, if a Party to the U.S.-CFTA does not pay the fine in a commercial dispute, it can impose trade sanctions at the full amount, whereas in a labor dispute the suspension of tariff benefits cannot exceed the cap of $15 million.[147] The NAALC similarly limits the suspension of benefits amount

140. *Id.*

141. *See* United States-Chile Free Trade Agreement, *supra* note 3, art. 18.8. The labor principles listed are: the right of association; the right to organize and bargain collectively; a prohibition on the use of any form of forced or compulsory labor; a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. *Id.*

142. *Id.* art. 22.16(2); North American Agreement on Labor Cooperation, *supra* note 126, Annex 39(1).

143. United States-Chile Free Trade Agreement, *supra* note 3, art. 22.16(2).

144. REPORT OF THE LABOR ADVISORY COMMITTEE, *supra* note 131, at 8.

145. North American Agreement on Labor Cooperation, *supra* note 126, Annex 39(1). Trilateral NAFTA trade totaled $621 billion in 2002, making the NAALC cap approximately $43.5 million for that year.

146. REPORT OF THE LABOR ADVISORY COMMITTEE, *supra* note 131, at 8.

147. *Id.*

to the level of the cap used for monetary penalties.[148] These caps diminish the deterrent effect in both agreements because Parties are aware that a failure to comply with domestic labor laws will only force them to be penalized up to a settled maximum level.

Another aspect of the dispute settlement system under both the U.S.-CFTA labor provisions and the NAALC that lowers the deterrent effect of the penalty is that fines are paid into a fund, and are then used to improve the enforcement of labor law in the offending country.[149] Payment into a fund, as opposed to paying the complaining Party, may have the effect of "compensating the violator for its failure to effectively enforce its own laws."[150] Therefore, although the last resort of trade sanctions can provide for a stronger deterrent, it seems likely that a Party would choose to pay the fine before reaching that stage. Furthermore, neither agreement contains provisions that prevent a violating Party from using the returned money for cooperative activities, such as conferences and seminars, instead of using it strictly for enhanced enforcement.[151]

4. Parity of Labor Provisions With Other Covered Areas

A notable structural difference between the U.S.-CFTA and the NAALC is that labor standards and regulations were included in the main text of the U.S.-CFTA, whereas the NAALC is a side agreement negotiated apart from the core NAFTA provisions.[152] The inclusion of labor rights within free trade agreements, an approach first taken by the United States in the U.S.-Jordan Free Trade Agreement,[153] has been viewed as "a move toward entrenchment of labor rights within FTA's and parity of treatment for them in terms of enforcement and remedies."[154] While it is true that labor rights have gained at least a greater symbolic status by being included alongside chapters related to goods, services, investment, and others, the U.S.-CFTA labor provisions are still not granted true parity when compared to other covered areas.

First, as noted above, the capping mechanism significantly curtails the strength of monetary penalties and suspension of benefits when violations of labor

148. North American Agreement on Labor Cooperation, *supra* note 126, Annex 41B(1).

149. REPORT OF THE LABOR ADVISORY COMMITTEE, *supra* note 131, at 8; North American Agreement on Labor Cooperation, *supra* note 126, Annex 39(3). Under the U.S.-CFTA, the fund is established by the Dispute Settlement Commission of Article 22.5, and the Commission decides how the money is to be spent; under the NAALC, the fund is established by the Article 9 Council, which then decides how the fine will be spent.

150. REPORT OF THE LABOR ADVISORY COMMITTEE, *supra* note 131, at 8.

151. *Id.*

152. *See* Weiss, *supra* note 37, at 700-01.

153. *Id.* at 713.

154. *Id.* at 717.

obligations are found, but there are neither absolute caps on monetary penalties nor any set caps on trade sanctions for commercial disputes. Second, in labor disputes fines are paid into a fund that directs the money back to the offending party, whereas in commercial disputes it is presumed that the violating Party will pay any fines directly to the complaining Party.[155] Third, in commercial disputes the complaining Party can suspend benefits of "equivalent effect" to the harm caused by the violation, limited only if a panel finds that the proposed amount is "manifestly excessive" in relation to the harm caused.[156] In labor disputes, however, the arbitration panel considers a variety of factors when determining the monetary penalty or suspension of benefits.[157] These factors may provide a justification for lowering the penalty amount, thus diminishing the strength of the sanction.[158] Finally, the Labor Chapter mandates that the Parties must first attempt to resolve disputes through a sixty-day consultation period before having access to the dispute settlement provisions of the Dispute Settlement Chapter; in contrast, there is no required preliminary consultation period for commercial disputes.[159] Since the Parties can then request further consultations under the Dispute Settlement Chapter, there is an opportunity for a lengthy delay in the dispute resolution process that is not present for commercial disputes.[160]

As the above analysis indicates, the U.S.-CFTA may not "treat all negotiating objectives equally, and [may] not provide equivalent dispute settlement procedures and equivalent remedies for all disputes."[161] Although the labor provisions are within the main text of the U.S.-CFTA, the available procedures and remedies do not appear to achieve parity with other covered areas, excluding environmental provisions. The NAALC was negotiated apart from the

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155. REPORT OF THE LABOR ADVISORY COMMITTEE, *supra* note 131, at 8.
156. United States-Chile Free Trade Agreement, *supra* note 3, art. 22.15(2-3).
157. *Id.* art. 22.16(2). The factors to be considered are:

> 1) the bilateral trade effects of the Party's failure to effectively enforce the relevant law;
> 2) the pervasiveness and duration of the Party's failure to effectively enforce the relevant law;
> 3) the reasons for the Party's failure to effectively enforce the relevant law;
> 4) the level of enforcement that could reasonably be expected of the Party given its resource constraints;
> 5) the efforts made by the Party to begin remedying the non-enforcement after the final report of the panel, including through the implementation of any mutually agreed action plan; and
> 6) any other relevant factors. *Id.*

158. REPORT OF THE LABOR ADVISORY COMMITTEE, *supra* note 131, at 7.
159. United States-Chile Free Trade Agreement, *supra* note 3, art. 18.6(6).
160. *See* REPORT OF THE LABOR ADVISORY COMMITTEE, supra note 131, at 7.
161. *Id.*

NAFTA and has its own distinct dispute settlement procedure; the NAFTA dispute settlement provisions cannot be used to settle labor disputes arising under the NAALC. Even though labor disputes under the U.S.-CFTA can eventually be dealt with under the Dispute Settlement Chapter, the process is separated structurally and substantively from that of commercial disputes.[162] Therefore, while the U.S.-CFTA superficially recognizes a status for labor provisions equal to that of other covered areas, the weak and segregated dispute settlement procedures more closely resemble the NAALC's separate dispute settlement paradigm than a true parity system where labor disputes are treated as equals with commercial disputes.

B. Labor Laws in Chile

The effectiveness of labor provisions in the U.S.-CFTA for improving labor standards in the member states largely depends on each member's domestic labor laws because the only labor provision in the U.S.-CFTA Labor Chapter that can be enforced by the dispute settlement process concerns a Party's failure to effectively enforce its own laws. It is therefore necessary to briefly examine Chilean labor laws in order to determine whether they provide protections for workers that are consistent with the standards the U.S.-CFTA aspires to maintain.

1. Recent Improvements in Chilean Labor Law

Chile's domestic labor laws have been strengthened in recent years. The 1987 pro-business Labor Code, enacted during the 1973-1990 military government of General Augusto Pinochet, retained its "institutional framework highly prejudicial to workers" even after Chile's return to democratic rule in 1990.[163] But some timid changes that were not seen as being unduly harmful to big business interests were included in the 1994 Labor Code,[164] and more

162. United States-Chile Free Trade Agreement, *supra* note 3, art. 22.16. If the Parties fail to reach agreement on a resolution or the complaining Party asserts that the other Party has not observed the terms of an agreed-upon solution after a panel's final report, then labor (and environmental) disputes are resolved under Article 22.16 Non-Implementation in Certain Disputes, while commercial disputes are subject to the provisions of Article 22.15 Non-Implementation – Suspension of Benefits. *Id.* The substantive differences between the two articles were highlighted in the previous discussion.

163. Pier, *supra* note 7, at 193.

164. *Id.*

significant modifications were included as part of a 2001 labor reform package.[165] These recent changes will be discussed in detail below.

The U.S.-CFTA Labor Chapter mandates that each Party must "strive to ensure" that certain internationally recognized labor rights are "recognized and protected by its domestic law."[166] These international labor rights are patterned after ILO conventions and closely correspond to the eight fundamental conventions regarding forced labor, freedom of association, discrimination, and child labor.[167] Chile has ratified all eight fundamental ILO Conventions, which now carry the force of law.[168] Five of these eight conventions were ratified in either 1999 or 2000, which suggests that Chile may have ratified them in order to improve its compliance with international labor standards in anticipation of the U.S.-CFTA negotiations.

Chile's Constitution and Labor Code enshrine many fundamental labor rights.[169] The 1980 Constitution provides ". . . equal treatment under the law, guarantees every person the right to freely choose work, the right of freedom of association, the right to collective bargaining, and a prohibition against all forms of forced work, with the exception of military conscription."[170] The Labor Code contains regulations concerning such areas as trade union activity, the enforcement of wage, hour, and benefit laws, occupational safety and health, and collective bargaining and the right to strike.[171] The Ministry of Labor and Social

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165. U.S. DEP'T OF LABOR, LABOR RIGHTS REPORT: CHILE 3, http://www.dol.gov/ilab/media/reports/usfta/HR2738ChileLaborRights.pdf (July 2003) [hereinafter LABOR RIGHTS REPORT: CHILE].

166. United States-Chile Free Trade Agreement, *supra* note 3, art. 18.1(1). The internationally recognized labor rights which each Party must attempt to protect are:

> 1) the right of association;
> 2) the right to organize and bargain collectively;
> 3) a prohibition on the use of any form of forced or compulsory labor;
> 4) a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and
> 5) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. *Id.* art. 18.8.

167. *See id*.; International Labor Organization, *Ratifications of the Fundamental Human Rights Conventions by Country*, *at* http://www.ilo.org/ilolex/english/docs/declworld.htm (last visited Oct. 22, 2004).

168. *Labor Policies*, *at* http://www.chileusafta.com/backgrounders/bgs_labor-policies.html (last visited Jan. 7, 2004) (on file with author). The United States has only adopted two of these eight fundamental conventions. *Id.*

169. LABOR RIGHTS REPORT: CHILE, *supra* note 165, at 4.

170. *Id.*

171. *Id.*

Welfare administers Chile's labor law, and disputes between employers and employees that are not resolved by the Ministry's Labor Directorate[172] may be adjudicated in the Labor Courts.[173]

The Chilean Congress approved a reform package for the Labor Code in September 2001.[174] The reforms had been debated intensely since 1995, when the Unitary Labor Central (Central Unitaria de Trabajadores, or CUT) – Chile's most powerful workers' organization – had first succeeded in persuading then-President Eduardo Frei to submit the reform proposals to Congress.[175] The enactment of these reforms signaled an improvement in Chilean worker rights and helped bring Chile closer to full compliance with the labor standards articulated in the U.S.-CFTA. The 2001 legislation "expanded protection against dismissal of union officials, substantially increased penalties for unfair dismissals, provided for reinstatement of trade unionists dismissed unjustly," and improved laws dealing with freedom of association and the right to organize.[176] These modifications to the Labor Code provide greater protection for trade unionists, thereby softening the previous unfair advantage for employers under Chilean labor law.[177]

The strength of laws regarding freedom of association and the right to organize affect the ability of workers to freely form trade unions.[178] Chile's Labor Code previously allowed employers to invoke a "needs-of-the-company" clause to dismiss workers without providing them a procedural avenue for reinstatement.[179] This clause enabled employers to fire workers who were members of unions or

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172. *Id.* at 4-5. The Labor Directorate is part of the Ministry of Labor and Social Welfare's Labor Bureau and is charged with supervising the enforcement of labor laws, administrative procedures and sanctions. The Labor Directorate also carries out labor inspections and determines what fines or sanctions may apply if a company has violated the Labor Code. There were approximately 381 labor inspectors in Chile in 2000, and the Directorate expects to add 300 more over the next few years. *Id.*

173. *Id.* at 6. In 2003, there were 20 specialized labor courts and 188 general labor tribunals. Labor cases may eventually be appealed to the Supreme Court. *Id.*

174. LABOR RIGHTS REPORT: CHILE, *supra* note 165, at 3.

175. Pier, *supra* note 7, at 194. The CUT and the ruling Concertación Government supported the 1995 reforms but they were blocked by the Chilean Right in the Senate. Chile's 1980 Constitution provides for the appointment of nine designated senators by the Supreme Court, the armed forces, and the President, as well as a senator-for-life position created for outgoing presidents. These appointments yielded a seven-to-three advantage for those who opposed the reforms, and together with the votes of other right-wing senators, provided a senate majority capable of defeating the reforms until 2001. *Id.* at 195-96.

176. LABOR RIGHTS REPORT: CHILE, *supra* note 165, at 3.

177. *See* Pier, *supra* note 7, at 193. The 1994 Labor Code did not substantially alter the pro-business 1987 Labor Code created during the government of General Augusto Pinochet, and continued to allow for unfair dismissals based on union affiliation. *Id.*

178. *See id.* at 197-98.

179. LABOR RIGHTS REPORT: CHILE, *supra* note 165, at 10.

participated in strikes, thereby impeding the growth of union membership.[180] The 2001 reform legislation still permits employers to utilize the "needs-of-the-company" clause, but workers can now be reinstated if a labor tribunal finds that the employer unfairly dismissed the worker for anti-union reasons.[181] This modification to the Labor Code may help increase union membership in Chile, but the ability of employers to continue to dismiss workers because of an anti-union bias may force some employees to choose between refraining from union activity and taking legal action to return to work.

Trade union membership in Chile declined during the 1990s, but has slightly increased since 1999.[182] Union membership constituted 10.3% of Chile's workforce in 2001, down from 14.1% ten years earlier.[183] The decline has been attributed to promotion discrimination against members of unions, police intimidation, benefits and salary increases given only to those who promise not to join unions, a decrease in the number of working hours and salary for union members, and "needs-of-the-company" dismissals.[184] Anti-union police activity in recent years and financial incentives that favor non-union workers[185] are entirely inconsistent with a true protection of the right of association and the right to organize. Nevertheless, the recent reform legislation that provides for employee reinstatement should help increase the potential for union membership since the harshest and most frequently used method of anti-union bias during the 1990s was the "needs-of-the-company" dismissal.[186] Additionally, the 20% increase in the Labor Directorate's staff, part of the 2001 reforms, may help reduce anti-union practices because of the Directorate's ability to monitor adherence to labor laws and impose fines for non-compliance.[187]

Chile has shown a willingness to "ensure that its laws provide for labor standards consistent with the internationally recognized labor rights"[188] listed in the U.S.-CFTA Labor Chapter. The improvements made to Chilean labor law since the restoration of democracy in 1990, the reforms approved in 2001, and the ratification of all eight fundamental ILO conventions demonstrate that Chile is making a substantial effort to guarantee its workers internationally recognized rights. Although under the U.S.-CFTA each Party is entitled to "establish its own

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180. *Id.* The dismissals of workers based on the "needs-of-the-company" clause prevented workers from organizing to improve salaries and working conditions, because employers would rather fire workers and pay their severance pay than allow such efforts to continue. The invocation of this clause to stymie union membership was a widespread occurrence. Pier, *supra* note 7, at 204-05.

181. LABOR RIGHTS REPORT: CHILE, *supra* note 165, at 10.

182. *Id.* at 3.

183. *Id.*

184. Pier, *supra* note 7, at 206-07.

185. *Id.*

186. *Id.* at 212.

187. *Labor Policies*, *supra* note 168.

188. *See* United States-Chile Free Trade Agreement, supra note 3, art. 18.1(2).

domestic labor standards," the strength of those standards is vital to the strength of the Labor Chapter's provisions because only a Party's failure to "effectively enforce" its own labor laws can be taken through the dispute settlement process. Chile's recent reforms are therefore a positive sign not only for worker rights in Chile, but also for the ability of the U.S.-CFTA to maintain the improved level of labor standards through its enforcement provisions.

V. COMPARISON OF THE U.S.-CFTA ENVIRONMENT CHAPTER AND THE NAAEC

A. Similarities and Differences Between Provisions of the U.S.-CFTA Environment Chapter and the NAAEC

1. "High Levels" of Environmental Protection and Discouragement of Pollution Havens

The U.S.-CFTA Environment Chapter and the NAAEC both provide that each Party must ensure "high levels" of environmental protection under domestic law, but allow the Parties to set their own minimum standards.[189] Neither agreement explicitly defines "high levels" of protection, thereby omitting any international guideposts such as those used in the U.S.-CFTA Labor Chapter and NAALC.[190] The term "environmental law" is defined in exactly the same way in both the U.S.-CFTA Environment Chapter and the NAAEC.[191] A Party's failure

189. *Id.* art. 19.1; North American Agreement on Environmental Cooperation, *done* Sept. 14, 1993, U.S.-Mex.-Can., art. 3, 32 I.L.M. 1480 (1993).

190. See discussion in Section IV of this Note regarding the internationally recognized labor rights listed in the U.S.-CFTA Labor Chapter and the NAALC.

191. United States-Chile Free Trade Agreement, *supra* note 3, art. 19.11; North American Agreement on Environmental Cooperation, *supra* note 189, art. 45(2). "Environmental law" is defined in both agreements as

> any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through:
> 1) the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;
> 2) the control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto; or
> 3) the protection or conservation of wild flora and fauna, including endangered species, their habitat, and specially protected natural areas,
> in the Party's territory ….

to "effectively enforce" these domestic environmental laws in a persistent manner is the only issue that may be used as the basis for dispute settlement proceedings by the complaining Party.[192] Therefore, although each Party pledges under both agreements to ensure "high levels" of environmental protection, there is no mechanism to enforce such levels through the dispute settlement process.

The U.S.-CFTA Environment Chapter additionally provides that neither Party may weaken its domestic environmental laws in order to attract investment.[193] The NAAEC does not include such language, but this is most likely because the main text of the NAFTA had already included it.[194] This commitment is significant because it specifically discourages the creation of "pollution havens" that would bring down environmental standards overall and create an unfair advantage for countries that adopted such policies. While the Parties to the U.S.-CFTA Environment Chapter and the NAFTA agreed to refrain from lowering domestic environmental protections in order to attract new trade and investment, the commitment is unenforceable through either U.S.-CFTA dispute settlement[195] or NAFTA dispute settlement.[196] Therefore, while it is significant that both the NAFTA and the U.S.-CFTA explicitly recognize the inappropriateness of reducing environmental protections in exchange for new investment opportunities, the U.S.-CFTA did not strengthen this commitment by including language that would render such a reduction actionable via the dispute settlement provisions.

Comment [MCR1]: Do you mean "punishable"? We don't want to "enforce" a reduction in environmental protections

2. Dispute Settlement Under the U.S.-CFTA and the NAAEC

The U.S.-CFTA and the NAAEC both provide for environmental consultations and dispute settlement procedures that may ultimately be enforced through monetary penalties and trade sanctions, but the process and administrative bodies differ. Under the NAAEC, the Commission for Environmental Cooperation (CEC) handles all preliminary environmental matters and disputes.[197]

Additionally, in neither agreement is "a statute or regulation . . . the primary purpose of which is managing the commercial harvest or exploitation . . . of natural resources" considered an environmental law. United States-Chile Free Trade Agreement, *supra* note 3, art. 19.11; North American Agreement on Environmental Cooperation, *supra* note 189, art. 45(2).

192. United States-Chile Free Trade Agreement, *supra* note 3, art. 19.6(8); North American Agreement on Environmental Cooperation, *supra* note 189, art. 28(3).

193. United States-Chile Free Trade Agreement, *supra* note 3, art. 19.2(2).

194. *See* FOLSOM, *supra* note 137, at 208.

195. United States-Chile Free Trade Agreement, *supra* note 3, arts. 19.2(2), 19.6(8); FOLSOM, *supra* note 137, at 208.

196. FOLSOM, *supra* note 137, at 208.

197. *Id.*

The CEC Council of Ministers can "discuss, recommend and settle environmental disputes publicly by consensus" and the CEC Secretariat "investigates, reviews and reports with recommendations to the Council on environmental matters."[198] The Secretariat may prepare reports for the Council on almost any environmental matter as long as it is not related to a Party's failure to effectively enforce its domestic environmental laws.[199] The Council may then make this report publicly available[200] -- the last possible measure for matters not involving domestic enforcement of environmental laws.

The NAAEC also provides for submissions by NGOs and interested persons regarding a Party's failure to effectively enforce its environmental laws.[201] The Secretariat is empowered to review the submission and to determine whether it is worthy of a response by the Party it concerns.[202] Following receipt of the submission, the Party must inform the Secretariat of any additional pertinent information and whether the matter is pending in any judicial proceedings.[203] The Secretariat may then prepare a factual record concerning the matters raised by the submission,[204] and this record may be made publicly available after it is forwarded to the Council.[205] This public release is the only measure that can be taken unless there has been a "persistent pattern of failure" to effectively enforce the Party's environmental laws.[206] While making a factual record public is not nearly as

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198. *Id.* The CEC's Council of Ministers is made up of cabinet-level officers from the United States, Canada, and Mexico. The Executive Director of the Secretariat is alternated every three years among the United States, Canada, and Mexico.

199. North American Agreement on Environmental Cooperation, *supra* note 189, art. 13(1). In preparing a report, the Secretariat may use information submitted by non-governmental organizations (NGOs) and others who might provide technical or scientific advice. NGOs have successfully petitioned the Secretariat to prepare reports, demonstrating that there are avenues for public participation in the reporting phase of the NAAEC. *See* FOLSOM, *supra* note 137, at 209-10.

200. North American Agreement on Environmental Cooperation, *supra* note 189, art. 13(3).

201. *Id.* art. 14(1). The NGO or person must be established or reside in the Party's territory and the submission must appear to "be aimed at promoting enforcement rather than at harassing industry." *Id.* art. 14(1)(d).

202. *Id.* art. 14(2). The Secretariat must take into consideration such factors as whether harm to the person or NGO is alleged and whether private remedies have been sought.

203. *Id.* art. 14(3). If the matter is pending within the Party's judicial system, the Secretariat does not need to go on to the next stage.

204. *Id.* art. 15(1). The Secretariat may only prepare a factual record if the Council votes by two-thirds to do so. *Id.* art. 15(2).

205. North American Agreement on Environmental Cooperation, *supra* note 186, art. 15(7). The Council may make the record public only after a two-thirds vote.

206. FOLSOM, *supra* note 137, at 214. "Persistent pattern" is defined as a "sustained or recurring course of action or inaction." North American Agreement on Environmental Cooperation, *supra* note 189, art. 45. The U.S.-CFTA uses "sustained or recurring course of action or inaction" in its domestic enforcement provision instead of "persistent pattern"

detrimental as monetary penalties or trade sanctions, there is evidence that it has some deterrent effect; for example, public release of the first factual record compiled under the NAAEC prompted the Mexican government to call a halt to a cruise ship pier project that may have violated its environmental laws.[207]

A Party's request for consultations under the NAAEC initiates the formal dispute settlement procedure.[208] Such a request must pertain to a Party's "persistent pattern of failure" to "effectively enforce its environmental law."[209] If the Parties are unable to reach resolution of the matter, either Party may request mediation by the Council.[210] In the event that the Council's efforts to mediate are unsuccessful, the Council can forward the dispute to an arbitration panel.[211] Finally, if the panel finds that the Party complained against has persistently failed to effectively enforce its environmental law and has not complied with the panel's recommendations to correct the violation, monetary penalties may be imposed.[212] The complaining Party may increase tariffs as needed to collect the amount of the penalty if the penalty has not been paid.[213]

The U.S.-CFTA Environment Chapter and related dispute settlement provisions appear to streamline the dispute settlement process utilized by the NAAEC. First, the U.S.-CFTA Environment Chapter, like the NAAEC, allows interested persons and NGOs to submit requests for consultations.[214] Under the U.S.-CFTA Environment Chapter, the United States and Chile "shall make best efforts to respond favorably to requests for consultations by persons or organizations in its territory."[215] But while the NAAEC sets forth provisions for the submission to be reviewed by the CEC Secretariat with the possible release of a factual record if numerous conditions are met,[216] submissions under the U.S.-

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but since one term defines the other there seems to be no real difference. *See* United States-Chile Free Trade Agreement, *supra* note 3, art. 19.2(1)(a).

207. FOLSOM, *supra* note 137, at 213. The factual record resulted from a submission by Mexican NGOs "alleging that the Mexican government had failed to conduct an environmental impact review before authorizing a cruise ship pier at Cozumel Island." The record was released in 1997. *Id.* By February 2000, over 20 cases submitted by NGO's or interested persons had been reviewed; only two had reached the factual record phase, while others were still pending. Blum, *supra* note 39, at 453.

208. FOLSOM, *supra* note 137, at 214.

209. North American Agreement on Environmental Cooperation, *supra* note 189, art. 22(1).

210. *Id.* art. 23(1).

211. *Id.* art. 24(1). A two-thirds vote by the Council is needed to send the matter to arbitration.

212. *Id.* art. 34(1), (5)(b).

213. *Id.* art. 36(1).

214. United States-Chile Free Trade Agreement, *supra* note 3, art. 19.4(2).

215. *Id.* art. 19.4(2).

216. North American Agreement on Environmental Cooperation, *supra* note 189, arts. 14(1-3), 15. *See* initial discussion, *supra* Part V.A.2. of this Note.

CFTA Environment Chapter could presumably be used as the basis for initiating consultations without further process.[217]

Second, the length of delay between the initial complaint and ultimate sanctions is less under the U.S.-CFTA Environment Chapter and dispute settlement provisions than under the NAAEC. The minimum period under the NAAEC is 1225 days,[218] while under the U.S.-CFTA environmental provisions it is only 415 days.[219] This sharp decline occurred because the U.S.-CFTA Environment Chapter is within the main text of the U.S.-CFTA, instead of in a "side agreement," allowing dispute settlement to be handled under the Dispute Settlement Chapter that is used for disputes arising under other covered areas. Consultation periods and the amount of time arbitration panels have to produce reports were thus reduced. For example, under the U.S.-CFTA Dispute Settlement Chapter, an arbitration panel has 120 days in which to produce its initial report and 30 days to produce its final report;[220] under the NAAEC, a similar panel has 180 days and 60 days, respectively.[221] This reduction in delay between complaint and sanction could help soothe "doubts about enforcement . . . because of the length of time required to move through the dispute resolution process."[222] The lengthy and complex procedures under the NAAEC and the various opportunities for a Party to improve its domestic enforcement before sanctions are imposed could explain why no disputes had reached the arbitration stage during the first six years of the agreement.[223] However, opportunities remain for the United States and Chile to avoid strong sanctions for environmental disputes under the U.S.-CFTA because of the separate remedy section in the Dispute Settlement Chapter that applies only to labor and environmental disputes.[224]

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217. *See* United States-Chile Free Trade Agreement, *supra* note 3, art. 19.4(2).

218. Garvey, *supra* note 28, at 442.

219. *See* United States-Chile Free Trade Agreement, *supra* note 3, arts. 19.6(6), 22.5, 22.6, 22.9, 22.16.

220. *Id.* arts. 22.12(3), 22.13(3).

221. North American Agreement on Environmental Cooperation, *supra* note 189, arts. 31(2), 32(1).

222. *See* Garvey, *supra* note 28, at 442.

223. *See* Blum, *supra* note 39, at 454.

224. United States-Chile Free Trade Agreement, *supra* note 3, art. 22.16(1). If the Parties fail to resolve the dispute following the recommendations in the arbitration panel's final report, the complaining Party must request that the panel be reconvened to decide an appropriate monetary penalty. The panel then takes into account the multitude of factors listed in footnote 152. Only if the Party complained against fails to pay the fine can a suspension of tariff benefits be applied.

B. Environmental Laws in Chile

Because enforcement of domestic environmental laws is the only obligation in the U.S.-CFTA Environment Chapter that may be carried through the dispute settlement process once a violation is alleged, it is appropriate to briefly examine Chilean environmental legislation. Just as domestic Chilean labor legislation was reviewed in order to determine how closely it comported with the standards articulated in the U.S.-CFTA Labor Chapter, so too should Chilean environmental laws be viewed in light of the levels of protection the Environment Chapter proposes to achieve.

Since the early 1990s, Chile has taken significant steps toward improving its environmental laws and regulations.[225] Prior to that time, the environmental legislation and regulations were "onerous and somewhat confusing,"[226] and economic growth was favored over environmental protections.[227] In 1992, the existing laws were consolidated[228] and new regulations were introduced to combat contamination of the water supply, mining pollution, and the high level of air pollution in the Chilean capital, Santiago.[229] Even considering these new efforts at enhanced protection, however, several U.S. government agencies viewed the Chilean environmental regime as inadequate if Chile hoped to accede to the NAFTA.[230]

Due in part to a need to increase environmental protection that could withstand U.S. scrutiny during the NAFTA accession process, Chile began an extensive overhaul of its environmental regime.[231] In 1994, Chile enacted the Ley de Base del Medioambiente (Environmental Framework Law, or EFL) in order to

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225. *See* Block & Herrup, *supra* note 6, at 256-57; Jeffrey Lax, Note, *A Chile Forecast for Accession to NAFTA: A Process of Economic, Legal and Environmental Harmonization*, 7 CARDOZO J. INT'L & COMP. L. 97, 133-34 (1999).

226. Zahralddin-Aravena, *supra* note 4, at 75.

227. Lax, *supra* note 225, at 133.

228. Zahralddin-Aravena, *supra* note 4, at 75.

229. Lax, *supra* note 225, at 133.

230. The U.S. General Accounting Office (GAO) released a report stating that Chile's "continued environmental negligence would jeopardize its potential accession to NAFTA" and the USTR declared that further environmental protections would need to be put in place before Chile could accede to NAFTA. *Id.* at 135. Environmental groups echoed these sentiments. The director of Chile's Committee for the Defense of Flora and Fauna said, "there's an almost pathetic lack of enforcement. We have over a thousand laws and regulations covering the environment. But there's no political will to make them work." *Not Now, NAFTA*, SIERRA MAGAZINE (Jan./Feb. 1999), http://www.sierraclub.org/sierra/199901/1o1.asp. The Sierra Club also characterized Chile's environmental laws and enforcement as "weak" and called for use of U.S. standards to increase levels of protection. Corbin, *supra* note 30, at 133.

231. Block & Herrup, *supra* note 6, at 254 . One Chilean official declared at the time, "Chile doesn't want to lose out on a free-trade agreement with the United States due to a poor environmental record." Zahralddin-Aravena, *supra* note 4, at 80.

organize existing legislation and create a framework for new environmental regulations.[232] The EFL gave some concessions to both environmental and business groups. For example, individual citizens and environmental groups could challenge polluting industries in court, but the offending industries were given a "transition period" to comply so that economic development would not be constrained.[233] The EFL also elevated the National Commission on the Environment (CONAMA), created in 1992,[234] to the status of a federal agency and charged it with coordinating regulations established by the various ministries involved.[235]

The Chilean Constitution provides that Chileans have the right to live in a pollution-free environment,[236] and the EFL provisions reiterated and strengthened that right.[237] Although the EFL did not directly establish pollution limits, procedures were set out for the creation and implementation of environmental quality and emissions standards.[238] As a result, pollution regulations were released in 1995.[239] Due to these legislative efforts and industry investment in reducing emissions,[240] air pollution in Santiago has dropped significantly.[241] Additionally, because of the increased potential for lawsuits, the copper industry began extensive clean-up and pollution-minimization projects.[242]

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232. Block & Herrup, *supra* note 6, at 261-62. The EFL's objective was to "lay the foundation for all future environmental regulations, require environmental studies before major projects, direct industry clean-up plans, and act as a forum for resolving environmental disputes." Lax, *supra* note 225, at 135.

233. Block & Herrup, *supra* note 6, at 263. The EFL gave NGOs the right to legally challenge polluters for the first time, and did not exclude important government-controlled industries from its provisions. Zahralddin-Aravena, *supra* note 4, at 78.

234. *Chile-U.S. Free Trade Agreement Backgrounder – Environmental Protection*, *at* http://www.chileusafta.com/backgrounders/bgs_environmental-prot.html (last visited October 26, 2003) (on file with author).

235. Block & Herrup, *supra* note 6, at 263. Prior to the enactment of the EFL, CONAMA had been an advisory body. *Id.*

236. *Chile-U.S. Free Trade Agreement Backgrounder – Environmental Protection*, *supra* note 234.

237. *See* Block & Herrup, *supra* note 6, at 263-64. The EFL requires a showing of environmental damage in violation of environmental regulations, not an intent to pollute, for a court challenge to go forward. Zahralddin-Aravena, *supra* note 4, at 78.

238. Block & Herrup, *supra* note 6, at 264-65.

239. Zahralddin-Aravena, *supra* note 4, at 77.

240. Between 1991 and 1996, bus companies in Chile spent $300 million to reduce emissions. Lax, *supra* note 225, at 136.

241. *Chile-U.S. Free Trade Agreement Backgrounder – Environmental Protection*, *supra* note 234. Airborne particulate matter in Santiago dropped from 15.3 tons per day in 1990 to 4.3 tons per day in 1999. *Id.*

242. Zahralddin-Aravena, *supra* note 4, at 78.

Another significant contribution of the EFL was the creation of an environmental impact assessment (EIA) system.[243] The regulations for this system identify a long list of projects that must receive prior approval by CONAMA as to whether the likely environmental impact conforms with existing environmental legislation.[244] All companies or entities that propose an action listed in the EIA regulations must draw up comprehensive studies and reviews of their projects.[245] As of August 2001, 3700 projects were reviewed pursuant to the EIA regulations.[246] The Chilean EIA system closely parallels the EIA scheme in place in the United States,[247] demonstrating a harmonization of environmental regulations in this important area. Another example of Chilean environmental laws tracking similar U.S. laws is Chile's Decree 185, which forces the mining industry to reduce emissions and draft decontamination plans.[248] Decree 185 directly follows the standards established by the U.S. Environmental Protection Agency (EPA), thus bringing environmental protections aimed at Chile's mining industry in line with U.S. levels.[249]

Viewed through a wider lens, the EFL lays out broad guidelines for enforcing Chile's environmental laws and regulations.[250] Its comprehensive framework for protection and enforcement helps establish a foundation for compliance with the U.S.-CFTA's Environment Chapter provision regarding effective enforcement of domestic environmental laws.[251] Because Chile has demonstrated a willingness to implement the EFL's provisions, this should help "alleviate any U.S. concern that Chile would be lax in enforcing its environmental laws."[252]

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243. Baker & Mckenzie, *Latin American Legal Developments Bulletin* (Oct. 1997) Vol. 5, No. 3, http://www.natlaw.com/pubs/spchen1.htm.

244. *Id.* Detailed regulations of the EIA were released in April 1997. Some of the projects listed are ports, shipyards, roads that may affect protected areas, forestry projects within native forests, industrial waste-treatment plants, programs or activities in nationally-protected areas, and projects involving hazardous substances. *See id.* The EIA regulations were passed soon after a Chilean Supreme Court ruling that the EFL was too vague. In the *Trillium* decision, the Court held that CONAMA had illegally allowed a logging project to proceed in violation of the constitutional right of Chileans to live in a pollution-free environment. The decision not only prompted the release of the EIA regulations, but also made clear to environmental groups that the Court was willing to challenge significant economic projects. Zahralddin-Aravena, *supra* note 4, at 82-83.

245. Zahralddin-Aravena, *supra* note 4, at 86.

246. *Chile-U.S. Free Trade Agreement Backgrounder – Environmental Protection*, *supra* note 234.

247. Zahralddin-Aravena, *supra* note 4, at 86.

248. Lax, *supra* note 225, at 136.

249. *Id.* at 136-37.

250. *See id.* at 135.

251. *See* United States-Chile Free Trade Agreement, *supra* note 3, art. 19.2(1).

252. Lax, *supra* note 225, at 135.

Nevertheless, several major environmental problems in Chile are cause for concern.[253] Perhaps most significant is the questionable sustainability of natural resource exportation,[254] on which Chile's rapid growth has been based.[255] Because the U.S.-CFTA specifically excludes from its definition of "environmental law" any statute or regulation whose "primary purpose" is to manage the commercial exploitation of natural resources,[256] the agreement "leaves open the strong possibility that natural resource issues…will not be covered by the agreement's environmental rules."[257] Thus, the United States may not be able to initiate the dispute settlement process if Chile fails to effectively enforce its laws regarding exploitation of natural resources, because such laws are not considered "environmental laws" under the U.S.-CFTA.[258]

Overall, Chile's implementation of the EFL, improvements in environmental protections in anticipation of accession to the NAFTA during the 1990s,[259] and recent budget increases for environmental control and enforcement[260] demonstrate an increasingly serious commitment to raising standards.[261] Although the Environment Chapter of the U.S.-CFTA does not mandate specific levels of environmental protection, Chile's efforts appear

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253. UK TRADE AND INVESTMENT, ENVIRONMENT MARKET IN CHILE, *at* http://www.trade.uktradeinvest.gov.uk/environment/chile/profile/overview.shtml (last visited Aug. 14, 2004). Continued air, water, and soil pollution, exploitation of natural resources, and inadequate standards for hazardous waste and industrial sludge have been cited as environmental problem areas. *Id.*

254. Timber harvesting in southern Chile has caused the disappearance of some native species and increased soil erosion. *Id.* Chile's Central Bank has warned that all original native forests could be cleared by 2025 if timber exploitation methods are not changed. Jimmy Langman, *Letter from Chile: Neoliberalism Has Produced an Eco-crisis*, THE NATION, Dec. 16, 2002, http://www.geocities.com/jelangman/thenation1.html. Salmon farming for export causes high levels of water pollution and overfishing of certain species used to feed salmon. *Id.*

255. *See* HORNBECK, *supra* note 2, at 7. Copper, fish, fruit, and wood are Chile's major export products. *Id.* at 19.

256. United States-Chile Free Trade Agreement, *supra* note 3, art. 19.11

257. Letter from Center for International Law, Defenders of Wildlife, Friends of the Earth, National Environmental Trust, National Wildlife Federation, Natural Resources Defense Council, Sierra Club to Members of Congress, Chile and Singapore Free Trade Agreements are Wrong Models for the Environment (July 9, 2003), http://www.ciel.org/Tae/Chile_Singapore_10Jul03.html. This coalition of environmental groups also faulted the U.S.-CFTA for not creating an independent environmental cooperation institution similar to the CEC established under the NAAEC. *Id.*

258. *See id.*

259. Block & Herrup, *supra* note 6, at 254.

260. *Chile-U.S. Free Trade Agreement Backgrounder – Environmental Protection*, *supra* note 234. Chile's environmental control and enforcement budget increased by 23% between 1998 and 2001. *Id.*

261. UK Trade and Investment, *supra* note 253.

consistent with providing for "high levels of environmental protection" and "striv[ing] to continue to improve" environmental laws.[262]

VI. CONCLUSION

The U.S.-CFTA Labor and Environment Chapters and the related dispute settlement provisions provide slightly stronger enforcement mechanisms than their counterparts in the NAALC and the NAAEC. The U.S.-CFTA did not go so far as to establish common minimum standards for labor and environmental protection, but did expand the types of disputes that may reach the sanction phase of the dispute settlement process, included labor and environmental provisions within the main text of the agreement, and streamlined the dispute settlement procedure. These improvements over the NAFTA side agreements on labor and the environment demonstrate that the United States is willing to put more teeth into enforcement of labor and environmental standards in the context of free trade agreements.

However, the improvements are minor and still strongly favor negotiation and consultation. The U.S.-CFTA labor and environmental provisions provide many opportunities for the United States or Chile to comply with its domestic labor or environmental laws before monetary penalties or a suspension of tariff benefits may be imposed. The ample opportunities for each Party to avoid sanctions for labor and environmental transgressions thus demonstrate the reluctance of the United States and Chile to risk turning labor and environmental disputes into obstacles to freer trade.

262. *See* United States-Chile Free Trade Agreement, *supra* note 3, art. 19.1.

The balance between promoting high labor and environmental standards and ensuring free trade remains a controversial area. Many labor and environmental groups argue that the only way to raise standards through free trade agreements is to set common minimum levels of protection and enforce those levels through sanctions. That model might yield higher standards, but raises sovereignty issues, possible accusations of disguised protectionism, and is rejected by many developing countries. For these reasons, it carries a heavy political cost and does not appear at present to be a viable solution. On the other hand, the U.S.-CFTA prescription of mandating enforcement of domestic labor and environmental laws and providing for cooperative activities to improve domestic enforcement is both politically acceptable and has the potential to gradually improve standards. Therefore, the U.S.-CFTA approach will likely serve as a model for U.S. free trade agreements for the foreseeable future.