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## NAFTThe Road to Free Trade: Chilean Accession

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Beyond NAFTA:

# The Road to Free Trade: Chilean Accession

*James E. Etri*<sup>1</sup>

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## I. Introduction to NAFTA.

After much deliberation and ballyhoo, the anticipated arrival of the North American Free Trade Agreement was finally realized on January 1, 1994.<sup>2</sup> The immediate effect was the creation of the world's largest market, consisting of 380 million people, trading some \$8 trillion worth of goods and services annually.<sup>3</sup> The North American continent launched a new approach to business dealings, designed to eliminate barriers to free trade and commerce.<sup>4</sup> The United States, Canada, and Mexico's primary objectives were to provide greater market access, to make that access more secure, and to allow market forces to work.<sup>5</sup> In order to satisfy these goals, tariff barriers and quota systems that limit the entry of foreign goods were eliminated.<sup>6</sup>

The long-term goal of the United States, however, is the successful integration of the entire Western Hemisphere. The United States wishes to utilize the NAFTA as a vehicle to achieve this objective, eventually eliminating all barriers to trade. Part II of this comment traces the decision of the NAFTA signatories to extend an invitation to Chile. Next, this comment briefly analyzes the concept of the Western Hemisphere Free Trade Area ("WHFTA") and the United States' role in its procurement, with a discussion of the Summit of the Americas. Part III will trace the historical development of Chile's economy, examine the benefits of accession to Chile and to the United States, identify the problems facing the Chilean accession with particular focus on the problems with the Chilean environment and the preventive measures Chile has taken to remedy the concerns, and discuss the failure of the U.S. Congress to grant fast track authority to the President. Finally, Part IV of the article addresses the impact of Chile's decision to join the MERCOSUR and the ramifications of this decision on possible accession to the NAFTA.

## II. The Development of a Free Trade Zone.

### A. THE UNITED STATES' ROLE AND THE ENTERPRISE FOR THE AMERICAS.

Throughout the past century, the United States guarded its economic independence.<sup>7</sup> The U.S. chose to enter into numerous bilateral relationships rather than join the

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2. The North American Free Trade Agreement, drafted Aug. 12, 1992, revised Sept. 6, 1992, U.S.-Can.-Mex., 32 I.L.M. 296 (entered into force Jan. 1, 1994) [hereinafter NAFTA].
  3. J.F. Hornbeck, *Chilean Trade and Economic Reform: Implications for NAFTA Accession*, CRS Report for Congress, June 23, 1995, at 1.
  4. NAFTA, *supra* note 1. See Preamble, which states in part, "REDUCE distortions to trade; ESTABLISH clear and mutually advantageous rules governing their trade; ENSURE a predictable commercial framework for business planning and investment."
  5. Michael Reynolds, Comment, *Examining the Foundation for a Free Trade Zone in the Americas*, 3 J. INT'L L. & PRAC. 521, 528 (1994).
  6. Christopher J. Iamarino, Note, *Technical Barriers to Trade Under the NAFTA System: A Call for Legitimate Protection*, 21 J. LEGIS. 111, 111 (1995).
  7. JOSEPH GRUNWALD ET AL., *LATIN AMERICAN ECONOMIC INTEGRATION AND U.S. POLICY* 65-67 (1972).
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integration processes prevalent throughout the world.<sup>8</sup> Beginning in the 1960s, the United States gradually began to shift away from protecting its economic independence and toward the creation of a free hemispheric trade zone.<sup>9</sup> The movement from the distant neighbor relationship coincided with the growth of Latin American economies, now recognized as the fastest growing regional market for U.S. exports.<sup>10</sup>

The initial development signaling the economic decision to secure free trade throughout the hemisphere can be traced to President Bush's announcement of the Enterprise for the Americas Initiative ("EAI").<sup>11</sup> During his December 1990 visit to South America, Bush called for a new economic partnership, envisioning a hemispheric free trade area stretching "(f)rom Anchorage to Tierra del Fuego."<sup>12</sup> The goal of the EAI was to support Latin American economic reform efforts through programs that emphasized trade, as opposed to aid.<sup>13</sup> However, the principal pillar of the EAI was the creation of a hemispheric free trade area, defined as a market in which goods and services circulate and sell without the levying of tariffs or duties at national borders.<sup>14</sup>

During this visit, Bush clearly identified Chile as a candidate for a free trade agreement with the United States.<sup>15</sup> However, negotiations between the two nations were delayed until the conclusion of the NAFTA.<sup>16</sup> When President Clinton took office in 1993, he reassured the Chilean government that the United States would renew free trade negotiations upon the completion of the NAFTA.<sup>17</sup>

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8. Paul A. O'Hop, Jr., *Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System*, 36 HARV. INT'L L. J. 127, 148 (1995).
  9. *Id.*
  10. *Latin America: Policy Reforms Fueling Economic Growth in Latin America, US Exports*, 9 INT'L TRADE REP. (BNA) 890 (1992); *Latin America: Latin America Fastest Growing Market for US Exports*, 9 INT'L TRADE REP. (BNA) 1101 (1992).
  11. *See Remarks Announcing the Enterprise for the Americas Initiative*, 1 PUB. PAPERS 873, 875 (1990).
  12. *Id.*
  13. *Id.*
  14. Sharon Bowden & Martin Elling, *Recent Development*, In *The Shadow of 1992: Developing Country Efforts at Economic Integration*, 32 HARV. INT'L L. J. 537, 552, n.1 (1991).
  15. *Chile and US Sign Accord Seen Leading to Free-Trade Pact*, WALL ST. J., Oct. 2, 1990, at B6.
  16. Kevin M. Jordan, *Comment, Intellectual Property Under NAFTA: Is Chile Up to the Challenge?*, 2 TULSA J. COMP. INT'L L. 367, 367-368 (1995).
  17. *Id.*
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Yet, in early 1994, the United States was still unclear about how to proceed with achieving its goal of free trade with Chile. Ultimately, several domestic problems emerged with the negotiation process, mainly involving political maneuvering around the approval of fast-track authority for the President. Finally, combined with some political pressuring from both Canada and Mexico, the United States extended a formal invitation to Chile to join NAFTA at the Summit of the Americas held in Miami, December 9-11, 1994.<sup>18</sup> Canada's Prime Minister, Jean Chretien, stated, "(f)or one year now we have been three amigos, starting today we will become the four amigos".<sup>19</sup>

B. THE SUMMIT OF THE AMERICAS—CHILE'S FORMAL INVITATION TO THE NAFTA EXTENDED.

The Summit of the Americas ("Summit"), hosted by President Clinton, united all thirty-four democratically elected leaders of the Western Hemisphere.<sup>20</sup> The thirty-four countries in attendance pledged to negotiate the "Free Trade Area of the Americas" by 2005, in order to improve the relationships among the nations and improve the quality of life in the hemisphere.<sup>21</sup> These resolutions are contained in two documents: the Declaration of Principle, which outlines the broad objectives of a Hemispheric Partnership for Development and Prosperity; and the Plan of Action, which delineates specific actions that the summit governments pledge to take in implementing the commitments in the declaration.<sup>22</sup> These two principles establish the foundation for creating a free trade area throughout the Western Hemisphere.

By 2002, the creation of a Western Hemisphere Free Trade Area is projected to result in a \$36 billion rise in exports from the United States to Latin America, a 51% increase over estimates absent integration.<sup>23</sup> Further, Latin America's gross domestic product ("GDP") could increase by over \$273 billion.<sup>24</sup> This improvement in economic stability is increasingly important to the U.S., considering that Latin America is the only region left in the world where the United States enjoys a trade surplus.<sup>25</sup> Moreover, U.S. trade with Latin America will surpass that with Europe by the year 2000.<sup>26</sup>

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18. The initial problems surrounding the Chilean accession involved the decision of whether to utilize NAFTA, or sign a separate free trade agreement with Chile. U.S. DEP'T OF STATE, DISPATCH 31, Vol. 6 (1994).
  19. Julian Beltrame, *Chile Becomes Fourth 'Amigo' to Board North American Free Trade Bandwagon*, VANCOUVER SUN, Dec. 12, 1994, at A1.
  20. Only Cuba was absent. *Id.*; see also Helene Cooper & Jose de Cordoba, *Chile is Invited to Join NAFTA as US Pledges Free-Trade Zone for Americas*, WALL ST. J., Dec. 12, 1994, at A3.
  21. U.S. DEP'T OF STATE, DISPATCH 31, *supra* note 18.
  22. *Id.*
  23. GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, ASSISTED BY DEANNA CLARK, *WESTERN HEMISPHERE ECONOMIC INTEGRATION*, (1994); see also *Western Hemispheric Free Trade to Boost Economy*, XINHUA NEWS AGENCY, July 6, 1994, available in LEXIS, NSAMER Library, ALLNSA File.
  24. HUFBAUER & SCHOTT, *supra* note 23.
  25. Michael G. Wilson, *Building on the NAFTA: Forging a Free Trade Agreement with Chile*, HERITAGE FOUND. REP., June 27, 1994 at n. 991, available in LEXIS, NEWS Library, HFRPTS File.
  26. Jorge Banales, *NAFTA Deal Unlikely this Year*, UPI, July 20, 1994.
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### III. The Effects of the Chilean Accession.

#### A. TRACING THE DEVELOPMENT OF CHILE.

The announcement of Chile's invitation was the culmination of several reports examining the feasibility of a successful accession.<sup>27</sup> The initial determinations focused on the political as well as the economic stability of Chile.<sup>28</sup> At one time, Chile enjoyed the longest uninterrupted democratic tradition in Latin America.<sup>29</sup> However, following the election of Salvadore Allende in 1970, Chile began to suffer tremendous turmoil as Allende implemented a socialist system.<sup>30</sup> As a result, General Augusto Pinochet assumed power from Allende in 1973, abruptly ending the line of peaceful governmental transitions.<sup>31</sup> The new regime solicited help from American economic advisors at the University of Chicago and returned Chile to a capitalist, free-market economy.<sup>32</sup>

Chile is the most economically developed nation in South America, primarily as a result of General Augusto Pinochet's decision to experiment with free-market principles.<sup>33</sup> Pinochet's reforms sought to reduce tariffs, eliminate subsidies and price controls, and privatize state enterprises.<sup>34</sup> General Pinochet's tough fiscal policies also stimulated the economic recovery by reducing the national debt.<sup>35</sup> These policies resulted in an average "GDP" growth of 7.1%, while reducing tariff levels to a flat rate of about 10%, the lowest in South America.<sup>36</sup>

In 1990, Patricio Aylwin assumed the presidency from General Pinochet, returning Chile to a democratic nation.<sup>37</sup> In light of the success Pinochet experienced, President Aylwin wisely decided to continue his economic policies.<sup>38</sup> Inflation is projected to fall to single digits, and the unemployment level hovers at 4.5%.<sup>39</sup> Meanwhile, the

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27. See Wilson, *supra* note 25.

28. *Id.*

29. David Gilmore, *Expanding NAFTA to Include All of the Western Hemisphere: Making Chile the Next Member*, 3 J. INT'L L. & PRAC. 413, 414 (1994).

30. *Id.* at 414.

31. *Id.*

32. PAMELA CONSTABLE & ARTURO VALENZUELA, *A NATION OF ENEMIES: CHILE UNDER PINOCHET* 166-189 (1991).

33. *Id.*

34. Wilson, *supra* note 25.

35. *Id.*

36. *Id.*; see Michael Lyster, *NAFTA's Next Stop: Chile*, ORANGE CO. BUS. J., April 11, 1994, § 1 at 1; see also *Pinochet Sends the Chicago Boys Back to School*, THE ECONOMIST, Aug. 10, 1985, at 60.

37. Edward C. Snyder, Notes and Comments, *The Menem Revolution in Argentina: Progress Toward a Hemispheric Free Trade Area*, 29 TEX. INT'L L. J. 95, 98 (1994).

38. *Id.*

39. Timothy O'Leary, *Jewel of Latin America Booming; Chile Stands in Line After Mexico to Join NAFTA*, MONTREAL GAZETTE, Jan. 31, 1994, at B3; Wilson, *supra* note 25.

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"GDP" has continued to grow, reaching almost \$42 billion, making Chile one of the fastest growing economies in the world.<sup>40</sup> This economic liberalization and robust growth prompted the United States's interest in including Chile in the NAFTA.<sup>41</sup>

Current President Eduardo Frei<sup>42</sup> has faced enormous pressure to yield results similar to the successful regime of Aylwin. In contrast to Pinochet's relentless pursuit of unregulated growth, Frei has directed Chile toward a policy of measured economic growth.<sup>43</sup> Frei continues to expand Chile's trade, encouraging foreign investment and seeking additional trade partners in Latin America.<sup>44</sup> The decision to establish additional trade pacts with other Latin American nations enhances Chile's economic viability and the NAFTA's choice of a fourth member.

#### B. THE BENEFITS TO CHILE.

Chile's accession to NAFTA will create numerous advantages, the foremost being facilitated entrance to one of the largest markets in the world.<sup>45</sup> With a population of over 380 million and a "GDP" representing 30% of the globe, the NAFTA will provide a strong market for Chilean exports.<sup>46</sup> Conversely, increased access to Chile's markets will invite tremendous economic investment opportunities from both the United States and Canada, along with the technological advancements that invariably accompany such investments.<sup>47</sup> These investments will further the Chilean economy through modernization and improved access to capital.<sup>48</sup>

Moreover, accession to the NAFTA will not harm Chile because its primary exports are goods, such as fruits, vegetables, and fish, rather than services.<sup>49</sup> Although some sectors of Chilean agriculture worry that the NAFTA will eventually eliminate subsidies, the overall impact on farming should be minimal.<sup>50</sup> Chile's growing season is opposite that of the United States, thus reducing harm from competition.<sup>51</sup> In fact, Chilean producers tend to complement U.S. fresh fruit deficiencies during winter months.<sup>52</sup>

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40. Lyster, *supra* note 36.

41. *Chile is Only Latin American Country Ready to Negotiate FTA*, 9 Int'l Trade Rep. (BNA) 946, 946 (May 27, 1992).

42. Frei, son of former President Montalva, won the December 1993 election with 58% of the presidential vote. Frei took office on March 11, 1994 for a six-year term. *Chilean President Elect Outlines Environmental Policy for Next Administration*, ENV'T WATCH LATIN AM., Jan. 1, 1994.

43. Scott C. Lacunza, Note, *From Dictatorship to Democracy: Environmental Reform in Chile*, 19 HASTINGS INT'L & COMP. L. REV. 539, 591 (1996).

44. Roger Turner, *Chile Sets an Example for Others to Follow*, BUS. AM., May 1994, at 18.

45. Hornbeck, *supra* note 3.

46. *Id.*

47. Gilmore, *supra* note 29, at 418.

48. *Id.*

49. *Id.*

50. Hornbeck, *supra* note 3, at 17.

51. *Id.*

52. *Id.*

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The overall impact of the NAFTA on Chile should be very beneficial.<sup>53</sup> Currently, the United States accounts for over 16% of Chilean exports, as well as 22% of imports,<sup>54</sup> making the U.S. Chile's top trading partner, reaching over \$4.4 billion annually.<sup>55</sup> The United States represents not only a large market for Chilean traded goods, but also a market that will continue to absorb more Chilean goods as the U.S. economy expands.<sup>56</sup> More importantly, membership in the NAFTA will provide future benefits in addition to short-term assistance.<sup>57</sup> With the removal of tariff barriers, foreign investment will spur economic growth in Chile.<sup>58</sup> Moreover, accession to NAFTA will lead to increased trade with other Latin American countries.<sup>59</sup> Ultimately, this influx of cash and capital will increase salaries and improve employment opportunities domestically, providing an opportunity to pursue economic integration with the world.<sup>60</sup>

### C. BENEFITS TO THE UNITED STATES.

Chile is not the only nation that will garner the benefits from entry into the NAFTA. U.S. businesses, particularly in technology sectors, will thrive.<sup>61</sup> Despite Chile's small economic base, U.S. imports have increased more than 200% in the last seven years.<sup>62</sup> This increase has created a trade surplus that has widened in five of the last six years.<sup>63</sup> With the continued maturation of Chile's economy, no end is in sight for Chilean demand for technology.<sup>64</sup>

With the eventual goal of procuring free trade throughout the Western Hemisphere, the accession of Chile serves the identical political purpose as Mexico's entry in the NAFTA.<sup>65</sup> While the inclusion of Chile will have a minute overall economic impact on the NAFTA, accession will be viewed as a symbol of the commitment by the U.S. toward strengthening economic ties with the rest of Latin America. Similar to Mexico, Chile is identified as a leader among many South and Latin American nations.<sup>66</sup> Currently, many countries, including El Salvador, Costa Rica, and Colombia, are following Chile's economic blueprints.<sup>67</sup> In fact, Mexico followed Chile's lead in creating a free market economy, privatizing state enterprises and reducing inflation by more than 150% in four years.<sup>68</sup> The inclusion of Chile into the NAFTA would promote further economic

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53. *Id.* at 9; Wilson, *supra* note 25.

54. Hornbeck, *supra* note 2, at 10.

55. *Id.* at 10, 15.

56. *Id.* at 15.

57. See Wilson, *supra* note 25; see also Hornbeck, *supra* note 3.

58. Wilson, *supra* note 25.

59. *Id.*

60. *Id.*

61. Most of the U.S. imports into Chile are high-technology products, such as computers. *Id.*

62. Gilmore, *supra* note 29, at 419.

63. Hornbeck, *supra* note 3, at 11.

64. See Gilmore, *supra* note 29, at 419.

65. *Id.* at 419-420; see Hornbeck, *supra* note 3, at 1.

66. Wilson, *supra* note 25.

67. *Id.*

68. Snyder, *supra* note 37, at 98.

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reform and, more importantly, instill confidence that a Western Hemispheric Free Trade Area is possible.<sup>69</sup>

D. PROBLEMS WITH CHILE'S ACCESSION TO NAFTA.

1. *Environmental Concerns.*

a. Introduction.

The robust growth of Chile's economy has taken its toll on the ecology. The unregulated growth favored by Pinochet's administration has caused serious environmental degradation, in particular air pollution and rampant water contamination.<sup>70</sup> Primarily, the concerns about the environment resulted from the exploitation of Chile's natural resources, most notably the mining industry.<sup>71</sup> As a result of Chile's aggressive economic policies, Chile was characterized as an ecological disaster.<sup>72</sup>

Chile, however, has recognized its serious environmental problems and has initiated programs designed to correct the deficiencies. As discussed below, Decree 185 was enacted in 1991 to establish air quality standards, while simultaneously creating and outlining the duties of the responsible authority, the National Commission of the Environment ("CONOMA").<sup>73</sup> Finally, Chile also constructed the Environmental Framework Law ("EFL") in 1994.<sup>74</sup> The EFL fully incorporates all environmental regulations and enforcement authorities relating to pollution control.

b. Decree 185.

The unregulated dumping of hazardous waste by the mining industry prompted the Chilean government to take immediate corrective measures.<sup>75</sup> In response to the increasingly dangerous level of toxic emissions, the Chilean Mining Ministry issued Decree 185.<sup>76</sup> The purpose of Decree 185 was to control the emission levels of plants. In

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69. Hornbeck, *supra* note 3, at 16.

70. Tim Frasca, *Chile Seeks to Reverse Years of Pollution*, CHRISTIAN SCI. MONITOR, Apr. 23, 1990, at 4.

71. Alexander Huneeus, *Chile Environmental Mess Prompts Warning by U.S.*, S.F. CHRON., Oct. 7, 1992, at A9.

72. Paul Mylrea, *Chile's Capital, Plagued by Smog, Begins to Fight Back*, REUTER LIBR. REP., Sept. 14, 1990, available in LEXIS, NEWS Library, TXINWS File.

73. *Chilean Government Promotes New Sense of Environmental Responsibility*, 16 INT'L ENVTL REP. (BNA) 309 (Apr. 21, 1993) [*hereinafter* Chilean Government Promotes].

74. The Environmental Framework Law, *Ley de Bases del Medio Ambiente*, codified at D.L. 19,300, was promulgated on March 14, 1994. [*hereinafter* "EFL"] The EFL encompasses provisions governing water contamination and air pollution.

75. Chilean Government Promotes, *supra* note 73.

76. *Id.*

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order to accomplish this goal, the levels of sulfur, arsenic, and particulate emissions were regulated.<sup>77</sup> The decree divided the country into two regions. The central and southern sections of Chile, where the majority of the population is located, have stricter standards than the scantily-populated northern region.<sup>78</sup>

As stated previously, Pinochet allowed the environment to suffer as the economy prospered at its expense. Alywin, Pinochet's successor, attempted to curtail the damage to the environment by enacting numerous laws and regulations.<sup>79</sup> However, in his attempt to form a solution, Alywin failed to create a uniform body of law and a regulatory board to monitor the progress of environmental reform and to enforce the newly enacted laws.<sup>80</sup> Therefore, to eliminate the conflicts and confusion surrounding these regulations, Decree 185 created the governing body responsible for promoting the environmental policies of Chile, CONOMA.<sup>81</sup> The government granted CONOMA temporary authority to enforce the provisions of Decree 185 while developing an environmental framework.<sup>82</sup>

Although Decree 185 has had a profound impact on the mining industry,<sup>83</sup> extensive progress is unlikely. Combined with the steep costs of overhauling the mining industry's reformation efforts and the government's decision to integrate the environmental protection movement gradually, Chile is still far from a model in environmental revolution.<sup>84</sup>

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77. *Achieving World Class as a Polluter; Mining Industry is Main Source of Sulphuric Acid Emissions*, LATIN AM. WKLY. REP., Mar. 19, 1992, at 11.

78. The more densely populated southern region had a maximum limit of 260 micrograms per cubic meter of air, while a less stringent level of 365 micrograms per cubic meter of air was set for the northern area. *Air Polluters in Santiago Install Scrubbers as New SO and Particulate Emissions Regulations Take Effect*, ENV'T WATCH LATIN AM., Mar. 1, 1992. In addition, all smelters were forced to decontaminate their emissions. Chilean Government Promotes, *supra* note 73.

79. *Chilean Congress Approves Environmental Framework Law*, BUS. LATIN AM., Feb. 14, 1994.

80. Karin Ranta, *Balancing Hardrock Mining and the Environment: The Chilean Model*, 6 COLO. J. ENVTL. L. POL'Y 423, 430 (1995).

81. Chilean Government Promotes, *supra* note 73.

82. *Id.* Ultimately, CONOMA established the Environmental Framework Law.

83. *Air Pollution Laws for Mines, Smelters Will Meet Global Standards Within Decade*, 18 INT'L ENVTL. REP. (BNA) 959 (Dec. 13, 1995).

84. *Id.*

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c. The Environmental Framework Law.

Prior to the EFL, Chile enacted numerous environmental laws to correct its ecological problems. Chile lacked, however, a comprehensive system to oversee the reform efforts. The goal of the EFL is to organize Chile's existing environmental regulations and coordinate the enforcement of the laws.<sup>85</sup> According to the EFL, CONOMA became the responsible authority for creating policy and enforcing the regulations promulgated by other agencies.<sup>86</sup> Although the EFL fails to set specific standards, the framework does seek to accomplish certain objectives by including broad standards for quality and policy.<sup>87</sup>

The EFL redefined the role of CONOMA in monitoring environmental reform. Regional branches of CONOMA, Consejo Regional de Medio Ambiente, or COREMA, are responsible for the actual enforcement of the laws.<sup>88</sup> The COREMAs' duty to monitor is triggered when its particular region is affected.<sup>89</sup> By delegating the authority to enforce the EFL to the particular region affected, CONOMA is able to administrate and monitor the effectiveness of the regulations.

The EFL also explicitly imposes liability for environmental degradation.<sup>90</sup> Historically, the government, through its state-owned plants, was the primary perpetrator of environmental harm.<sup>91</sup> Since only the government, the main violator, previously had standing to sue, lawsuits seeking enforcement were non-existent.<sup>92</sup> Now, the EFL authorizes citizens, nongovernmental organizations, and government officials to bring lawsuits.<sup>93</sup> This provision should help curb the selective enforcement practiced in the past.

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85. CONOMA created the EFL to establish clearer standards for environmental quality and emissions control. *CONOMA Creates Guidelines to Evaluate Environmental Impact Studies*, ENV'T WATCH LATIN AM., Nov. 1, 1993.
86. *Chilean Senate Passes Environmental Framework Law*, ENV'T WATCH LATIN AM., Sept. 1, 1993.
87. CONOMA deliberately established broad standards. The Chilean government decided to determine specific standards in later regulations after a proper evaluation could occur.
88. The Environmental Framework Law, art. XXVI, *supra* note 74.
89. *Id.*
90. Ranta, *supra* note 80, at 434.
91. *Chile's Environmental Framework Law Awaits President's Signature*, ENV'T WATCH LATIN AM., Feb. 1, 1994.
92. *Id.*
93. The Environmental Framework Law, art. LIV, *supra* note 74. The law only requires the plaintiff to demonstrate that a violation occurred, eliminating any requisite of intent to pollute. *Chile's Environmental Framework Law Awaits President's Signature*, *supra* note 91.
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Although the EFL does possess flaws,<sup>94</sup> this comprehensive framework represents a solid foundation upon which to base Chile's environmental clean up efforts. Chile has taken affirmative steps to eradicate the past environmental horrors while implementing a system to prevent similar situations from occurring in the future.

Chile has been criticized by the international community for its lax standards regarding environmental matters. These failures to comply with accepted environmental procedures raise serious concerns about Chile's accession to the NAFTA.<sup>95</sup> Although the Chilean public steadfastly opposes any changes, the government privately appears to be conceding this matter.<sup>96</sup> In fact, the head of Chile's National Environmental Commission stated that an environmental agreement for NAFTA would be impossible to avoid because, "[t]here is no trade agreement between any two countries that does not include some kind of environmental element, to a greater or lesser degree."<sup>97</sup>

## 2. *Additional Obstacles Facing Chilean Accession.*

Another problem facing the Chilean accession is the eventual removal of barriers to competition.<sup>98</sup> Currently, the Chilean National Society of Agriculture enjoys substantial subsidies in sugar and wheat.<sup>99</sup> However, the NAFTA has numerous provisions designed to eliminate these subsidies.<sup>100</sup> The reaction of the Chilean agriculture to the loss of the subsidies is unknown.<sup>101</sup>

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94. First, the EFL is not retroactive. Unless a current violation can be established, plants are not responsible for rectifying past pollution. *Chile: Towards Greener Pastures*, BUS. LATIN AM., Apr. 25, 1994. Second, CONOMA attempts to coordinate a large number of laws and regulations under a single administrative unit. Conflicts between existing laws and jurisdictional requirements are bound to complicate any efforts to successfully monitor and enforce the laws. Ranta, *supra* note 80, at 434. Finally, the scope of what constitutes "environmental damage" under the law is unclear. The interpretation of this term will change the extent of liability for companies. The Environmental Framework Law, art. LIII, *supra* note 74.

95. *NAFTA: Chile-US Trade Talks at "Risk" Over Enviro Regs?*, GREENWIRE, Apr. 29, 1994.

96. Gilmore, *supra* note 29, at 417.

97. *Environment Must be in NAFTA—Chile EPA Head*, REUTERS, Sept. 1, 1994.

98. See generally Reynolds, *supra* note 5.

99. *Id.* at 543.

100. *Id.*

101. Meanwhile, several American agricultural groups are opposed to Chile's accession to the NAFTA as well. On April 25, 1995, the USTR held a public hearing concerning Chilean accession, allowing interest groups to voice their reactions. Among the numerous groups that participated, the California Cling Peach Advisory Board and the National Association of Growers and Processors for Fair Trade stated that the inclusion of Chile would substantially hurt their industries through job displacement and their low-cost production capabilities. see 5 U.S. MEX. FREE TRADE REP. 8, Apr. 30, 1995.

Some U.S. lawmakers still oppose Chilean accession on the grounds that Chile is still not stable as a democratic nation.<sup>102</sup> The current stand-off between the civilian government of Chilean President Eduardo Frei and Army Chief Gen. Augusto Pinochet poses a major concern.<sup>103</sup> Opponents urge that talks with Chile be shelved until the military is "shown to be firmly under the control of the elected government."<sup>104</sup>

Some scholars also believe that Chile is not yet ready to accede to the NAFTA.<sup>105</sup> Although the economy has improved dramatically, the exports sector lagged behind in its development.<sup>106</sup> This lack of development is evidenced by the relatively low fixed investments, barely exceeding 20% of the "GDP".<sup>107</sup> Therefore, opponents of immediate Chilean accession are requesting that talks be delayed until Chile develops a diversified export sector.<sup>108</sup> This sector should include products involving a greater degree of processing and technological efforts in order to take advantage of available natural resources while simultaneously integrating the sector more closely with the rest of the economy.<sup>109</sup>

### 3. "Fast Track" Authority: *The Major Roadblock to Accession.*

The grand design that emerged from the Miami Summit appears to have stalled. The problem has little to do with Chile and everything to do with American domestic politics.<sup>110</sup> Currently, the United States has failed to provide President Clinton and U.S. Trade Representative Mickey Kantor fast track authority to negotiate with Chile.<sup>111</sup> Fast track authority, developed for the Tokyo Round in 1974, is the procedure under which Congress considers the submission of a trade agreement by the President with an "up-or-down vote". Without fast track authority, most nations are reluctant to negotiate with the U.S. for fear that Congress will amend the agreement and force still more concessions. Fast track generally assures the bill actually presented is the one that the legislation will likely pass.<sup>112</sup> Instead of fast track, the House Ways and Means Committee approved a version of fast-track legislation that does not address the two key issues: labor and the environment.<sup>113</sup>

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102. U.S.: *Civilian-Military Stand-Off in Chile "Of Concern" to U.S.*, INTER PRESS SERVICE, Sept. 12, 1995.
103. *Id.*
104. *Id.*
105. See Manuel R. Agosin, *Free Trade Agreements for Chile: Potential Benefits and Costs*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 21 (1994).
106. *Id.* at 23.
107. *Id.*
108. *Id.*
109. *Id.*
110. Finlay Lewis, *Free Trade on Fast Track to Oblivion*, THE SAN DIEGO UNION, Oct. 10, 1995, at C3.
111. Peter Morton, *Chile Won't be in NAFTA Before End of Year: MacLauren*, THE FIN. POST, Oct. 13, 1995, at 5.
112. See Alissa J. Rubin, *Trade: GOP Fast-Track Plans May Split Fragile Free Trade Coalition*, CONG. Q. WK. REP., July 10, 1995; see also Jeffrey E. Garten, *American Trade Law in a Changing World Economy*, 9 INT'L L. 15, 20-21 (1995).
113. Tony Monroe, *Clinton, Gingrich Divided on NAFTA Expansion*, THE WASHINGTON TIMES, May 23, 1995, at B6.
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At their first meeting in June 1995, trade ministers from Canada, Mexico and the United States guaranteed that Chile would become the newest member of NAFTA before January 1996.<sup>114</sup> However, this prediction was before President Clinton solicited negotiating authority from a Republican Congress.<sup>115</sup> Impeding the road to fast track is an unlikely coalition consisting of left-wing Democrats and conservative Republicans, the same group that opposed the NAFTA itself.<sup>116</sup> Republicans are concerned with the impact on their home-state industries, while Democrats worry over labor and environmental concerns.<sup>117</sup> Democrats are expected to be particularly opposed to Chilean accession because these two topics are absent from the modified fast-track legislation.<sup>118</sup>

Additionally, the November 1996 election further complicates the issue of fast track.<sup>119</sup> With former Senator Bob Dole running for President, Congress's approval of fast track authority is unlikely.<sup>120</sup> In addition, Pat Buchanan, a staunch critic of Clinton and a necessary ally in the battle for approving fast track, has been particularly vocal in his opposition to the Chilean accession.<sup>121</sup> Pointing to the current Mexican recession, Buchanan argues that American exports are dwindling, and claims that more than 42,000 Americans have been thrown out of work as a result of the NAFTA.<sup>122</sup> Although these figures may be a bit abstract and unfounded, the loss of American jobs pales in comparison with the frightening stories of American factories shutting down and moving to low-wage Mexico.<sup>123</sup>

Precedents for establishing agreements despite the lack of fast track authority do exist.<sup>124</sup> Kantor has pointed out that the United States began negotiations on the Uruguay Round, as well as free trade talks with Israel, before fast track authority was granted.<sup>125</sup> In fact, Congress would probably approve an agreement without significant change.<sup>126</sup>

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114. Morton, *supra* note 111.

115. *Id.*

116. Rubin, *supra* note 112.

117. *Id.*

118. *Id.*

119. Tony Monroe, *Chile's NAFTA Membership Lost in Limbo White House-Congress Battle Stalls Approval*, THE WASHINGTON TIMES, Oct. 15, 1995, at A8.

120. Lewis, *supra* note 110; Dole appears unwilling to take a stand on free trade and is presumed likely to block any fast track authority bill. See also Morton, *supra* note 111.

121. Lewis, *supra* note 110.

122. *Id.*

123. *Id.*

124. Susan Yellin, *Chile Readies to be Part of NAFTA Ranks*, WINDSOR STAR, June 8, 1995, at F10.

125. *Id.*

126. Catherine Harris, *Chile in NAFTA May be a Non-Starter for Now*, THE FIN. POST, Oct. 7, 1995, at 30.

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However, absent fast track legislation, reaching an agreement is virtually impossible.<sup>127</sup> First, Chile would not negotiate with the U.S., knowing that the agreement could be changed significantly when the NAFTA finally passes through Congress.<sup>128</sup> Moreover, despite the possibility that Congress might pass the agreement without fast track, the U.S. can not guarantee the accession and Chile is not prepared to negotiate without this guarantee.<sup>129</sup>

The issue of fast track authority is a crucial one. Without fast track authority, Chile's accession to the NAFTA will be delayed.<sup>130</sup> Although most U.S. Congressional leaders along both party lines firmly support Chilean membership, several key procedural disagreements remain.<sup>131</sup> While the absence of fast track only extends the eventual acceptance of Chile, the delay sends a disquieting message to other Latin American countries who are following the negotiations, and to the goal of creating a free trade area throughout the Western Hemisphere.<sup>132</sup>

#### IV. Chile Formalizes Agreement with the MERCOSUR.

On March 26, 1991, Argentina, Brazil, Paraguay, and Uruguay formed the Southern Common Market (in Spanish, the Mercado del Cono Sur, or "MERCOSUR") by signing the Treaty of Asunción.<sup>133</sup> With a population close to 190 million people, the governments of these countries agreed to create a common market by 1995.<sup>134</sup> Seeking to establish the MERCOSUR as a regional economic hub, the treaty was founded on a free market philosophy.<sup>135</sup> Therefore, the Member States committed to eliminate intra regional tariffs and to create a common external tariff to allow the MERCOSUR nations to compete in the global marketplace.<sup>136</sup>

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127. Morton, *supra* note 111.

128. Harris, *supra* note 126.

129. *Id.*

130. *See* Monroe, *supra* note 119.

131. Monroe, *supra* note 113.

132. Wilson, *supra* note 25.

133. The Treaty of Asunción, Mar. 26, 1991, Arg-Bra-Para-Uru., 30 I.L.M. 1041.

134. Paul A. O'Hop, Jr., *Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System*, 36 HARV. INT'L L. J. 127, 143 (1995).

135. The primary functions of a common market are the gradual elimination of tariffs, the coordination of macroeconomic policies, and the implementation of a common external tariff. *Id.*

136. James Stamps, *Free Trade Area for the Americas: Chile is the Linchpin*, 5 NO. 10 MEX. TRADE & L. REP. 7, 9 (1995).

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The MERCOSUR began negotiating with Chile in 1994. However, discussions reached an impasse while attempting to coordinate Chile's trade policies with those of the MERCOSUR.<sup>137</sup> Chile possessed bilateral preferential trade agreements with each of the MERCOSUR nations. Because each individual trade pact was determined by the nations' level of economic development, these separate arrangements complicated the negotiation process.<sup>138</sup>

Viewed by Chilean businesses, however, a MERCOSUR pact was essential to expand upon Chile's increasing trade with the region. Therefore, to preserve access to the bloc's 190 million consumers, Chilean President Fernando Frei cemented Chile's role with the customs union by signing a formal agreement to become an associate member of the MERCOSUR effective October 1, 1996.<sup>139</sup>

Chile currently maintains a uniform 11% import duty. In order to reconcile its differing rates, Chile and MERCOSUR have erected a staggered timetable.<sup>140</sup> Approximately 80% of all Chilean exports will be subject to tariff reductions of 40% when the agreement becomes effective. Similarly, two-thirds of the MERCOSUR exports will be reduced by the same 40% rate.<sup>141</sup>

According to the agreed schedule, almost half of Chile's exports to the MERCOSUR nations will be duty-free by year 2004.<sup>142</sup> At the same time, duties will be eliminated on close to 60% of MERCOSUR's total exports to Chile.<sup>143</sup>

The addition of Chile increases the number of consumers in the MERCOSUR to over 200 million.<sup>144</sup> Further, the MERCOSUR's gross domestic product rose to more than \$900 million.<sup>145</sup> Critics, however, are already debating the immediate economic

137. *Id.*

138. *Id.*

139. *MERCOSUR, at last, Inks Contract with Chile*, LDC DEBT REPORT, July 1, 1996 [hereinafter LDC DEBT REPORT]. The difficulty of merging Chile's 11% uniform duty with MERCOSUR's external tariff structure forced the negotiators to bypass full-fledged membership and instead focus on reaching an agreement as an associate member.

140. *Chile Formalizes Agreement for Associate Membership in Southern Cone Common Market*, NOTISUR-LATIN AMERICAN POLITICAL AFFAIRS, July 19, 1996 [hereinafter NOTISUR-LATIN AMERICAN POLITICAL AFFAIRS].

141. *Id.* Moreover, one-third of Chilean exports will become available for a zero tariff rate. Chilean exports, on the whole, will be subject to a 3.2% duty rate, substantially lower than the current rate of 8.2%.

142. David Pilling and Imogen Mark, *Jilted Chile Hitches its Wagon to MERCOSUR: Washington' Stalling on Letting the Country Join NAFTA Prompted Santiago to Link up with its Second Choice*, THE FIN. POST, June 27, 1996.

143. *Id.* However, particular product sectors will maintain individual rates. Certain goods, mainly farm-related, will persist with the same tariff rates for the next ten years, lowering the duty fees over a period of five years. In addition, the associate membership allows other products previously covered to maintain separate tariffs. *Id.*

144. *Chile Joins MERCOSUR*, LAGNIAPPE LETTER, July 5, 1996.

145. LDC DEBT REPORT, *supra* note 139.



impact of Chile's inclusion. The Argentine Chamber of Commerce predicts that trade between the MERCOSUR and Chile will jump by \$4 billion.<sup>145</sup> Given Chile's relatively diminutive size, other analysts are forecasting smaller returns.<sup>146</sup> Regardless of the disparate economic forecasts, Chile provides several intangible benefits, including stability and credibility, which are arguably more important than the economic impacts.

Initially, skeptics dismissed the creation of the MERCOSUR. Analysts scoffed at the notion of four under developed South American countries forming a trading bloc.<sup>147</sup> However, these nations were already in the process of overhauling their economies through deregulation and privatization.<sup>148</sup> The bloc recognized the huge potential of establishing a marketplace within South America. Therefore, the trade pact sought to eliminate tariff barriers among themselves. Looming ominously over the MERCOSUR was the fragile nature of the nations' domestic politics, as well as their relatively untested economies. Although the MERCOSUR's success over the past five years has earned the respect of analysts, Chile's addition solidifies the MERCOSUR as a substantial force in the Western Hemisphere.

Chile represents the most stable nation in South America, politically and economically. The MERCOSUR is more than simply a vehicle for trade and investment.<sup>149</sup> Rather, the customs union is an attempt to achieve global recognition as a democratic and economic power.<sup>150</sup> Chile's presence, in addition to bolstering the economic framework of the South American bloc, provides a foundation rich in democracy and economic prosperity that the MERCOSUR previously lacked. Moreover, the inclusion of Chile, signifying the MERCOSUR's commitment to integration, has led indirectly to a pending agreement with Bolivia scheduled to be completed by the end of 1996; negotiations to incorporate Venezuela, Colombia, Ecuador and Peru are soon to follow.<sup>151</sup>

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145. NOTISUR-LATIN AMERICAN POLITICAL AFFAIRS, *supra* note 139.

146. LDC DEBT REPORT, *supra* note 138.

147. Michael S. Serrill, *Keep it in the Neighborhood Forget NAFTA—South America is Busy Building its Own Powerful Trading Bloc, Called MERCOSUR*, TIME INT'L, Aug. 26, 1996.

148. *Id.*

149. *Id.*

150. The original four nations of the MERCOSUR amended the Treaty of Asuncion by including a paragraph stipulating that democracy was an "essential element" in the consideration of new members. This commitment was demonstrated when, coupled with the backing of the MERCOSUR, Paraguayan President Juan Carlos Wasmosy successfully confronted General Lino Oviedo after the general responded to his firing by threatening a coup. *Id.*

151. NOTISUR-LATIN AMERICAN POLITICAL AFFAIRS, *supra* note 139.

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Chile's associate membership includes express provisions that allow the nation to continue to pursue other trade negotiations, notably the NAFTA.<sup>153</sup> Although the MERCOSUR hopes that a South American free trade zone ("SAFTA") will be in place before the NAFTA turns southward in the search for a Western hemispheric free trade area, Chile's membership lends tremendous credence to the bloc's goal for trade integration.<sup>154</sup> Furthermore, Chile's geographic location provides additional benefits to the MERCOSUR. Chile stretches along the majority of South America's western coastline, denying access to the Pacific Ocean to the original members. With the rise in economic developments of Asian nations, Chile thus represents the "missing link" between MERCOSUR and Asia.<sup>155</sup>

## V. Conclusion.

As the premier nation in the Western Hemisphere, the U.S. has undertaken the responsibility of eliminating all barriers to free trade. The United States has already taken the initial step with the establishment of the NAFTA. Although the ultimate success of the NAFTA remains unclear, a framework has been laid upon which to base future agreements. The next step is the accession of additional nations beyond North America. The U.S., Canada, and Mexico have identified Chile as the next most economically developed nation in the hemisphere, and hope to use Chile's accession as a springboard towards a WHFTA. Although each nation concedes that all parties will benefit from the removal of free trade barriers, formidable obstacles remain to Chile's membership.

Chile is currently in the midst of correcting the environmental problems that originated during the Pinochet administration. The deliberate ignorance of the environment to further the economy left Chile's ecology severely maligned. In order to satisfy the NAFTA's requirements and bolster future trade possibilities, Chile has taken affirmative steps to correct the past environmental degradations. The success of these preventive measures rests largely upon whether the Chilean government can successfully balance the stable growth of its economy while simultaneously creating and enforcing effective laws.

Moreover, the United States must resolve its internal political disputes surrounding fast track authority and focus on the actual negotiations. An early failure to fulfill its promise to formalize Chile's accession has had a two-fold effect. First, Chile turned to the MERCOSUR for trade partners. More importantly, the United States lost critical momentum in the push to secure the confidence of Latin American nations. The completion of Chile's accession to the NAFTA is a vital step in achieving a free trade zone in the Western Hemisphere and can only be accomplished once Congress grants fast track authority.

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153. *Id.*

154. Pilling and Mark, *supra* note 142.

155. *Id.* Equally important, Chile now has access to the Atlantic Ocean. Further, Chile will be able to capitalize on the in-roads the MERCOSUR has already made during its negotiations with Asia. Chilean agricultural products, in particular, will thrive on the trade relations with Asia's newly developing nations. LDC DEBT REPORT, *supra* note 139.

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