Florida State University Journal of Transnational Law & Policy

Volume 16 | Issue 2 Article 6

2007

Peru's Too Expensive - I'll Get My Cheese from Chile: The Agricultural Market Access Provisions of the U.S.-Chile FTA and the U.S.-Peru TPA

Guillermo Gabriel Zorogastua

Peru's Too Expensive - I'll Get My Cheese from Chile: The Agricultural Market Access Provisions of the U.S.-Chile FTA and the U.S.-Peru TPA

Cover Page Footnote

University of Kansas School of Law, J.D., 2007; Wichita State University, B.A., B.S., 2004. Many thanks to Professor Raj Bhala and to David R. Jackson for their help in the ideas and preparation of this article and to my family for their continuing support. For Beau A. Jackson-thanks for your help on this article and, most importantly, for your friendship.

PERU'S TOO EXPENSIVE—I'LL GET MY CHEESE FROM CHILE: THE AGRICULTURAL MARKET ACCESS PROVISIONS OF THE *U.S.-CHILE FTA* AND THE *U.S.-PERU TPA*

GUILLERMO GABRIEL ZOROGASTUA*

I. INTRODUCTION

The United States exports more than two billion dollars per year in goods and services to Peru.[1] If the United States ratifies

* University of Kansas School of Law, J.D., 2007; Wichita State University, B.A., B.S., 2004. Many thanks to Professor Raj Bhala and to David R. Jackson for their help in the ideas and preparation of this article and to my family for their continuing support. For Beau A. Jackson—thanks for your help on this article and, most importantly, for your friendship.

1. OFFICE OF THE U.S. TRADE REP., PERU TPA FACTS, FREE TRADE WITH PERU: SUMMARY OF THE U.S. PERU TRADE PROMOTION AGREEMENT, at 1 (Dec. 2005), *available at*

the *U.S.-Peru Trade Promotion Agreement* (*U.S.-Peru TPA*), this number will rise dramatically. The *U.S.-Peru TPA* seeks to promote trade between the United States and Peru by reducing trade barriers over seventeen years.[2] Specifically, the *U.S.-Peru TPA* proposes to eliminate tariffs on roughly 80 percent of U.S. consumer and industrial exports to Peru "immediately upon entry into force of the Agreement."[3] "Tariffs on most remaining U.S. farm products will be phased out within fifteen years, with all tariffs eliminated nearly all in seventeen years."[4] Textiles and apparels will be completely duty-and quota-free immediately, so long as the products meet the rule of origin provisions of the Agreement.[5] At its broadest level, this Agreement will continue the success of Peru's membership in the Andean Trade Promotion Agreement.[6]

Countless commentators have criticized the *U.S.-Peru TPA.* Some argue the Agreement fails to address worker rights.[7] Others argue the environment will certainly suffer.[8] International organizations criticize the Agreement in that it fails to secure life-saving medicines at affordable prices for Peruvians.[9] According to the President of Oxfam America, "Agreements between trading partners should offer opportunity and development, not the demise of a poor country's agriculture sector or impediments to public health. . . . This agreement's provisions on intellectual property, agriculture and investment do not add up to a good deal for farmers, workers and consumers in Peru."[10]

---

www.ustr.gov/assets/Document_Library/Fact_Sheet/2005/asset_upload_file490_8547.pdf [hereinafter USTR, PERU TPA FACTS].

2. *Infra* Part III.A.

3. USTR, PERU TPA FACTS, *supra* note 1.

4. *Id.*

5. *Id.* U.S. Peru Trade Promotion Agreement, Apr. 12, 2006, Annex 3-A, U.S.-Peru, Hein's No. KAV7623, State Dep't. No. 06-128, *available at* www.ustr.gov/Trade_Agreements /Bilateral/Peru_TPA/Final_Texts/Section_Index.html [hereinafter Peru TPA].

6. Andean Trade Preference Act, Pub. L. No. 102-182, §§ 201-208, 105 Stat. 1233, 1236-44 (1991) (codified as amended at 19 U.S.C. §§ 3201-3206 (2000)).

7. *See* Press Release, Congressman Sandy Levin, U.S.-Peru FTA Fails to Address the Realities on the Ground in Peru (Apr. 12, 2006) (*available at* www.house.gov/apps/ list/press/mi12_levin/pr041206.html) ("Without basic internationally-recognized worker rights Peruvians will not be able to fully address the conditions of poverty and deep income inequalities which are causing such turmoil in the electoral process."); Cyril Mychalejko, *U.S.-Peru TPA in Jeopardy* (March 15, 2006), *available at* http://upsidedownworld.org/ main/content/view/229/68/.

8. *See* SIERRA CLUB, DON'T TRADE AWAY OUR ENVIRONMENT: OPPOSE THE U.S.-PERU FREE TRADE AGREEMENT (2006), *available at* www.citizenstrade.org/pdf/sierraclub_ peruftaactionalert_022006.pdf.

9. Press Release, Oxfam America, U.S. Peru Free Trade Deal a Step Back for Development (Apr. 12, 2006) (*available at* www.oxfamamerica.org/newsandpublication/press_ releases/press_release.2006-04-12.9607759677).

10. *Id.* (quoting Raymond C. Offenheiser).

This paper takes another approach in its critique of the *U.S.-Peru TPA*. Rather than focusing on its human rights, labor, or environmental contexts, this paper argues that the *U.S.-Peru TPA* does not sufficiently liberalize trade, at least insofar as multilateral liberalization of trade is the ultimate goal. Specifically, this paper argues that the *U.S.-Peru TPA* does not meet the trade-liberalization mark established by the *United States-Chile Free Trade Agreement* (*U.S.-Chile FTA*), signed by the United States and Chile only three years ago.

Despite the trade-liberalization potential of the *U.S.-Peru TPA*, the *U.S.-Chile FTA* liberalizes agricultural trade more deeply and quickly than the *U.S.-Peru TPA*. Upon enactment, the *U.S.-Chile FTA* eliminated tariffs on 90 percent of U.S. exports to Chile and 95 percent of Chilean exports to the United States;[11] the *U.S.-Peru TPA*, if enacted, will eliminate tariffs immediately on approximately 80 percent of total goods.[12] With regard to agricultural goods[13], the *U.S.-Chile FTA* immediately eliminated tariffs on 71.6 percent of U.S. exports to Chile; the *U.S.-Peru TPA* immediately eliminates tariffs on only 52 percent of U.S. exports to Peru.[14]

The *U.S.-Peru TPA* phases out the remaining tariffs on agricultural goods in seventeen years, whereas its Chilean counterpart does so in twelve. During these five years U.S. consumers will economically prefer Chilean imports, and U.S. suppliers will economically prefer to export to Chile, given the lower tariffs under the *U.S.-Chile FTA*. Significantly, the *U.S.-Peru TPA* protects certain sensitive products much more significantly than the *U.S.-Chile FTA*. For example, the United States never phases out its tariff-rate quotas (TRQs) and safeguard measures on Peruvian sugar. In contrast, the *U.S.-Chile FTA* phases out TRQs and safeguard measures on sugar within twelve years after the Agreement enters into effect. This discrepancy encourages sugar trade between Chile and the United States at the expense of sugar trade from Peru to the United States.

The economic effect of these discrepancies between bilateral free trade agreements has not been previously studied. Countries

---

11. USTR, THE U.S.-CHILE FREE TRADE AGREEMENT: AN EARLY RECORD OF SUCCESS (2004), *available at* www.ustr.gov/Document_Library/Fact_Sheets/2004/The_U.S.-Chile_Free_Trade_Agreement_An_Early_Record_of_Success.html [hereinafter USTR, Chile FTA: EARLY RECORD OF SUCCESS].

12. USTR, PERU TPA FACTS, *supra* note 1.

13. This article utilizes the term "agricultural goods" to refer to goods in Chapters 1 through 24 of the Official Harmonized Tariff Schedule of the United States (HTSUS).

14. TARIFF INFO. CTR., U.S. INT'L. TRADE. COMM., OFFICIAL HARMONIZED TARIFF SCHEDULE, *available at* www.usitc.gov/tata/hts [hereinafter HTSUS]. This calculation refers to the Category A and F goods in both Agreements that correspond to classifications in Chapters 1 through 24 of the HTSUS.

signing bilateral free trade agreements have nearly ignored the resulting trade diversion effect—thus ignoring the problem that a bilateral agreement itself may be a "stumbling block" to broader trade liberalization.[15] In a multilateral liberalization regime, a bilateral trade agreement that fails to liberalize trade further than existing bilateral agreements between the parties and their respective trading partners contributes to trade diversion. Instead, a trade agreement conducive to multilateral liberalization would seek to encourage future bilateral trade agreements through competition by liberalizing trade more significantly than preceding trade agreements. Viewed through this lens, bilateral trade agreements can serve as "stepping stones" rather than "stumbling blocks" of the trade liberalization debate.

This paper argues that the *U.S.-Peru TPA* has not met the agricultural tariffs free-trade standard in Latin America as established by the *U.S.-Chile FTA*. In failing to do so, the *U.S.-Peru TPA* has missed an opportunity to fuel multilateral trade liberalization. Part II discusses the origins of the *U.S.-Peru TPA* and the *U.S.-Chile FTA*.[16] Part III compares the trade agreements' provisions, showing how the *U.S.-Chile FTA* liberalizes agricultural trade more thoroughly than the *U.S.-Peru TPA*.[17] Part IV makes two arguments to explain this distinction. First, it argues that Chile was likely more willing to utilize its agricultural goods as bargaining chips than Peru.[18] Chile nearly "sold its farm,"[19] perhaps in exchange for increased market access for important Chilean exports, such as copper. Second, it argues that Peru had significant bargaining power, a factor that may be attributed in part to the negotiating bloc of the Andean countries vis-à-vis the United States.[20] Part V explores, first, whether, as a theoretical matter, the discrepancy in trade liberalization of agricultural goods between the *U.S.-Chile FTA* and the *U.S.-Peru TPA* is justifiable from multilateral trade system lens and, second, the potential economic effect of these discrepancies.[21] Part VI concludes and describes lessons that one may learn from the *U.S.-Peru TPA* regardless of its success in the U.S. Congress.[22]

---

15. RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE 582 (Thompson/Sweet & Maxwell 2005) (making this point regarding regional trade agreements in the automobile industry in Latin America).

16. *Infra* Part II.

17. *Infra* Part III.

18. *Infra* Part IV.A.

19. *See also infra* Part IV.A. for development of this concept.

20. *Infra* Part IV.B.

21. *Infra* Part V.

22. *Infra* Part VI.

II. A HISTORY OF THE CHILE AND PERU FTAS

A. The United States-Chile Free Trade Agreement

Chile and the United States signed the *U.S.-Chile FTA*, the first comprehensive FTA between the United States and a South American country,[23] on June 6, 2003.[24] Negotiations began under President George H. W. Bush's "America's Initiative." President George H. W. Bush signed into law the *U.S.-Chile FTA* on September 3, 2003.[25] The *U.S.-Chile FTA* went into effect January 1, 2004.[26]

According to the Office of the United States Trade Representative, U.S. exports of manufactured goods to Chile have increased by 19.5 percent, and exports of U.S. agricultural products have grown 22.6 percent.[27] By the end of 2005, U.S. exports to Chile rose by almost $2.5 billion, reaching $5.2 billion.[28] The Chilean export economy has similarly benefited. According to the USTR, "during the first quarter of [2004] Chilean exports to the U.S. grew 12.1%, to a total of . . . $1.17 billion."[29]

B. The United States-Peru Trade Promotion Agreement

The United States and the Andean countries signaled their commitment to free trade with the Andean Trade Preference Act (ATPA). The ATPA seeks to assist the Andean countries in eliminating the production of illegal drugs, to foster economic activity, and to facilitate export diversification in the Andean countries.[30]

The ATPA achieved its goal of increasing trade. According to the Congressional Research Service,

> In 2004, the United States imported $15.5 billion

23. USTR, 2004 TRADE POLICY AGENDA AND 2003 ANNUAL REPORT (2004), *available at* www.ustr.gov/Document_Library/Reports_Publications/2004/2004_Trade_Policy_Agenda/Section_Index.html?ht= ; United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, Section 101, 117 Stat. 909, 910 (2003).
24. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, FREE TRADE AGREEMENTS, *available at* www.iipa.com/fta_issues.html.
25. *Id.*
26. *Id.*
27. USTR, CHILE FTA: EARLY RECORD OF SUCCESS, *supra* note 11.
28. USTR, TRADE AGREEMENTS WORK FOR AMERICA (May 26, 2006), *available at* www.ustr.gov/Benefits_of_Trade/Section_Index.html.
29. USTR, CHILE FTA: EARLY RECORD OF SUCCESS, *supra* note 11.
30. Hale Sheppard, *The Andean Trade Preference Act: Past Accomplishments and Present Circumstances Warrant its Immediate Renewal and Expansion*, 34 GEO. WASH. INT'L L. REV. 743, 743 (2003).

> from the four Andean countries and exported $7.7 billion. Colombia accounted for about half of U.S. trade with the region. Peru and Ecuador almost evenly split the other half, and Bolivia represented a very small share. The leading U.S. import from the region in 2004 was crude petroleum oil, which accounted for 37 % of imports. Leading U.S. exports to the region were mining equipment, wheat, broadcasting equipment, and maize.[31]

Similarly, Peruvian officials attribute the recent increase in Peru-U.S. economic activity largely to the ATPA. According to the Peruvian Ministry of Exterior Commerce and Tourism, Peruvian exports to the United States increased from $696 billion to $5,100 billion, an increase of roughly 633 percent in twelve years.[32] The number of businesses exporting to the United States increased from 1,260 in 1994 to 2,301 in 2004, an increase of 82.6 percent.[33] From 1994 to 2005, more than 550,000 exportation jobs were created in Peru.[34] From 1993 to 2005, Peruvian agricultural exports to the United States increased by 561 percent.[35] Leading categories included asparagus, mangoes, onions, grapes, bananas and flowers.[36]

The United States and the Andean countries have negotiated a six-month extension of the ATPA.[37] To replace the ATPA, the United States is seeking to establish bilateral trade agreements with the individual Andean countries. In late 2003, the United States Trade Representative Robert Zoellick informed the U.S. Congress of his intent to initiate trade talks with the Andean countries, Bolivia, Colombia, Ecuador, and Peru.[38] The United

---

31. Bilaterals.org, Congressional Research Services, *CRS Report for Congress: Andean-U.S. FTA Negotiations* (Dec. 16, 2005), *at* www.bilaterals.org/article.php3?id_article =3321.

32. EL SISTEMA DE INFORMACIÓN SOBRE COMERCIO EXTERIOR (SICE), MINCETUR, RESULTADOS DE LA LEY DE PROMOCIÓN COMERCIAL Y ERRADICACIÓN DE LA DROGA ATPDEA (December 2005), at 3.

33. *Id.* at 5.

34. *Id.* at 7.

35. *Id.* at 9.

36. *Id.* at 11.

37. Press Release, Doc Hastings, Hastings Stands with Asparagus Growers in Opposition to Andean Trade Act Extension (Dec. 8, 2006) (*available at* http://hastings.house.gov/Read.aspx?ID=753); *see also Ministra Aráoz: ATPDEA Podria Ingresar Mañana a la Agenda del Congreso de EE.UU.*, http://www.tlcperu-eeuu.gob.pe/index.php?id_noticia=354.

38. USTR, USTR NOTIFIES CONGRESS OF INTENT TO INITIATE FREE TRADE TALKS WITH ANDEAN COUNTRIES (Nov. 18, 2003), *available at* www.ustr.gov/Document_Library/Press_Releases/2003/November/USTR_Notifies_Congress_of_Intent_to_Initiate_Free_Trade_Talks_with_Andean_Countries.html.

States and the Andean countries held their first round of negotiations with Colombia, Ecuador, and Peru, with Bolivia participating as an observer, in Cartagena, Colombia, in May of 2004.[39] The United States has finalized agreements with Colombia and Peru[40] and continues negotiations with Ecuador,[41] though the future of the Ecuadorian negotiations is bleak.[42]

The negotiations between Peru and the United States took nineteen months and concluded in Washington, D.C. on December 7, 2005.[43] Peru signed the *U.S.-Peru TPA* on April 12, 2006.[44] The Peruvian Congress ratified the Agreement on the early morning of June 28, 2006 by a vote of 79 in favor, 14 against, and 7 abstentions.[45] The U.S. Senate Committee on Finance held a hearing on the agreement's implementation on June 29, 2006, and the U.S. House Committee on Ways and Means held one on July 12, 2006. Each held a "mock markup"—an informal vote before the Agreement's submission—with votes of 12-7 and 23-13 in favor of the Agreement, respectively, with Democrats mostly opposing the Agreement.[46]

Congress will determine the *U.S.-Peru TPA*'s fate within the next year. In the last congressional election, Democrats took the majority of both houses of Congress. During the 110th Congress, the Senate will be comprised of 49 Republicans, 49 Democrats, and 2 Independents who have aligned themselves with the Democrats. The House of Representatives is comprised of 234 Democrats and 201 Republicans, a solid Democratic majority. Because the Democratic majority is likely to oppose ratification, whether the United States will ratify the Agreement is uncertain. Nevertheless, the comparative lessons of the *U.S.-Peru TPA* are ripe for ex-

---

39. *Id.*

40. Press Release, USTR, U.S. and Peru Sign Trade Promotion Agreement (2006) (*available at* www.ustr.gov/Document_Library/Press_Releases/2006/April/United_States_Peru_Sign_Trade_Promotion_Agreement.html) [hereinafter USTR, U.S.-Peru Sign TPA].

41. Press Release, USTR, United States and Peru Conclude Free Trade Agreement (Dec. 7, 2005) (*available at* www.ustr.gov/assets/Document_Library/Press_Releases/2005/December/asset_upload_file744_8518.pdf).

42. Bilaterals.org, *U.S.-Ecuador Free Trade Agreement Frozen* (May 14, 2006), *at* www.bilaterals.org/article.php3?id_article=4710; Bilaterals.org, *Ecuador-US FTA Hinges on Farming* (Feb. 16, 2006), *at* www.bilaterals.org/article.php3?id_article=3857.

43. TRATADO DE LIBRE COMERCIO PERU-ESTADOS UNIDOS, RENUNDACIÓN DE RONDA XIII EN WASHINGTON (Dec. 7, 2005), *available at* www.tlcperu-eeuu.gob.pe/index.php?ncategoria1=206&ncategoria2=207.

44. USTR, U.S.-Peru Sign TPA, *supra* note 40.

45. *Por amplia majoría Congreso aprobó ratificación del TLC*, El Comercio (June 28, 2006), *available at* http://www.elcomercioperu.com.pe/EdicionOnline/Html/2006-06-28/onlEconomia0531424.html.

46. Mark Drajem, Bloomberg News, *Senate Committee Approves Trade Legislation for Peru, Vietnam* (July 31, 2006), *at* www.bloomberg.com/apps/news?pid=newsarchive&sid=alc4kXOtpYFg.

ploration, as the United States continues its bilateral agenda with other Latin American countries, such as Panama.[47]

III. A COMPARATIVE LOOK AT THE *U.S.-CHILE* AND *U.S.-PERU* TRADE AGREEMENTS

This part shows that the *U.S.-Peru TPA*'s provisions in market access of agricultural goods simply have not met the *U.S.-Chile FTA*'s trade-liberalizing mark. This part makes this comparison in two steps. First, the agreements differ in one of their more general points—timing.[48] The *U.S.-Chile FTA* phases out tariffs on agricultural goods much more quickly than the *U.S.-Peru TPA* does.[49] Second, the *U.S.-Peru TPA* is more protectionist of its sensitive agricultural products, particularly sugar, than the *U.S.-Chile FTA*.[50] By combining tariffs, tariff-rate quotas (TRQs), and safeguard measures, the *U.S.-Peru TPA* indefinitely protects the U.S. sugar market from Peruvian sugar exports.[51]

A. Timing: Phase-Outs on Agricultural Goods and Related Factors

1. The Phase-Outs in the U.S.-Peru TPA Encourage U.S. Consumers to Import from Chile

The Agreements discourage agricultural business between the United States and Peru for two reasons. First, the phase-out periods in the *U.S.-Peru TPA* subject Peruvian agricultural goods to five more years of tariffs. Second, the possible four-year difference between the ratification of the *U.S.-Chile FTA* and the *U.S.-Peru TPA* hinders trade between Peru and the United States. Because the parties to the *U.S.-Peru TPA* did not negotiate around this timing factor, these possible four additional years may affect all tariffs not immediately phased out by the *U.S.-Peru TPA*.

At its broadest, *U.S.-Peru TPA* immediately eliminates tariffs on approximately 80 percent of goods;[52] whereas the *U.S.-Chile FTA* immediately eliminates tariffs on 90 percent of goods.[53] The *U.S.-Chile FTA* immediately eliminates tariffs on 71.6 percent of

---

47. Press Release, USTR, U.S. and Panama Complete Trade Promotion Agreement Negotiations (Dec. 19, 2006) (*available at* www.ustr.gov/Document_Library/Press_Releases/2006/December/US_Panama_Complete_Trade_Promotion_Agreement_Negotiations.html).
48. *Infra* Part III.A.
49. *Infra* Part III.A.
50. *Infra* Part III.B.
51. *Infra* Part III.B.
52. USTR, PERU TPA FACTS, *supra* note 1.
53. USTR, CHILE FTA: EARLY RECORD OF SUCCESS, *supra* note 11.

U.S. exports to Chile,[54] whereas the *U.S.-Peru TPA* immediately eliminates tariffs on only 52 percent of U.S. agricultural exports to Peru.[55]

Regarding the remaining tariffs, the *U.S.-Peru TPA*'s longer phase-outs encourage U.S. consumers to demand Chilean imports at the expense of Peruvian imports, and U.S. suppliers to export to Chile, as opposed to Peru. The *U.S.-Chile FTA* phases out all tariffs on agricultural goods in twelve years. The tariff elimination schedule of the *U.S.-Chile FTA* outlines eight categories. The Agreement eliminates tariffs on Category-A goods on the date the Agreement enters into force and on Category-E goods, the longest time period for tariff elimination, in twelve equal annual stages beginning on the date the Agreement enters into force.[56] The specific tariff schedules of Chile and the United States provide for an additional nine categories, all phasing out within the twelve-year period.[57]

In contrast, the *U.S.-Peru FTA* phases out tariffs in seventeen years.[58] Specifically, the Agreement eliminates tariffs on Category-A goods immediately upon the date the Agreement enters into force.[59] Tariffs on Category-E goods remain at base rates through years one through ten and subsequently are reduced in seven equal annual stages until eliminated.[60] Cheese and condensed and evaporated milk are examples of Category-E goods under the U.S. Annex to the U.S. Tariff Schedule.[61]

The additional five years indicate a longer, and thus more protectionist, phase-out period. Although all goods the United States exports to and imports from Chile will be duty-free on January 1, 2016, tariffs on goods exported to and imported from Peru will not expire until January 1, 2025, assuming the *U.S.-Peru TPA* enters into effect on January 1, 2008. During the eight-year difference, U.S. exporters and importers will prefer to conduct business with Chile—at least with respect to agricultural goods for which tariffs have yet to phase out. True, this conclusion assumes that U.S. consumers are motivated primarily by price in deciding what

54. HTSUS, *supra* note 14.
55. *Id.*
56. U.S.-Chile Free Trade Agreement, 2003, Annex 3.3(1)(a),(e), U.S.-Chile, Hein's No. KAV6375, Temp. State. Dept. No. 04-35, *available at* www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html [hereinafter Chile FTA].
57. *Id.*at Annex 3.3(3),General Notes: Tariff Schedule of the U.S. at 1; Annex 3.3(4), General Notes: Tariff Schedule of Chile, at 2.
58. Peru TPA, *supra* note 5, Annex 2.3(3)(a), General Notes: Tariff Schedule of the U.S. (2003), at 1.
59. *Id.* at Annex 2.3(1)(a).
60. *Id.* at Annex 2.3(1)(e).
61. *Id.* at Annex 2.3, Appendix I.

products to buy and applies only with respect to Peruvian and Chilean goods that are substitutes. However, with respect to many agricultural products this will be the case; many U.S. consumers will generally not distinguish between, say, Peruvian and Chilean cheese. Price may be one of the only factors considered by buyers.[62]

Even if, under both Agreements, a good phases out in ten years, the simple fact that the *U.S.-Peru TPA* may come into effect four years after its Chilean counterpart compounds the tariff discrepancy. Take tuna, for example. Assume, arguendo, the United States ratifies the *U.S.-Peru TPA* in 2007 and it enters into effect in 2008. A U.S. client wants to import $10,000 worth of tuna from either Chile or Peru in 2008. Under the proposed contract terms, his company has to pay the import tariffs, so the client is interested in determining from which country he should import the tuna. HTS classification 1604.14.20 provides a base-rate tariff of 6 percent to tuna imports from Peru and from Chile.[63] The *U.S.-Chile FTA* classifies this type of tuna as a Category-D good,[64] and the *U.S.-Peru TPA* classifies it as a Category-C good.[65]

A Category-D good under the *U.S.-Chile FTA* phases out in ten equal annual stages beginning in 2004, the date the Agreement entered into force.[66] Five years will have passed at a .6 percent[67] reduction per year, which means the duty on Chilean imports of tuna in 2008 will be 3 percent. Thus, the tariff on $10,000 of Chilean tuna will be $300. A Category-C good under the *U.S.-Peru TPA* also phases out in ten equal annual stages, this time beginning in 2008. One year will have passed at a .6 percent reduction per year, so the duty on Peruvian imports of tuna in 2008 will be 5.4 percent. Thus, the tariff on $10,000 in Peruvian tuna will be $540. All else being equal, the four-year difference between the Agreements' ratifications encourages the client to import tuna from Chile—at least until the Peruvian tuna tariffs phase out. The phase-out provisions thus encourage U.S. business to import certain products, such as certain forms of tuna, from Chile and discourages Peruvian tuna imports.

62. The author draws some of the economic reasoning from BHALA, *supra* note 15, at 575-84.

63. Peru TPA, *supra* note 5, Annex 2.3, General Notes: Tariff Schedule of the U.S.; Chile FTA, *supra* note 57, Annex 3.3, General Notes: Tariff Schedule of the U.S.

64. Chile FTA, *supra* note 56, Annex 3.3, General Notes: Tariff Schedule of the U.S.

65. Peru TPA, *supra* note 5, Annex 2.3, General Notes: Tariff Schedule of the U.S.

66. Chile FTA, *supra* note 56, Annex 3.3(d), Tariff Elimination, at 3-25.

67. 6 percent / 10 = .6 percent

2. The Interplay Between the U.S.-Peru TPA and the U.S.-Chile FTA Encourages U.S. Suppliers to Export to Chile

The client now wants to export $10,000 of corn flour to either Peru or Chile in 2008. He will pay the tariffs on the goods and is thus interested on the most preferential tariff treatment. His attorney has classified the product under HTS 1102.20.00.[68] The *U.S.-Chile FTA* classifies corn flour as a Category-B good.[69] This means the 6 percent base tariff[70] on corn flour phases out in eight equal, annual stages beginning in 2004, the date the Agreement entered into force.[71] Five years will have passed at a .75 percent[72] reduction per year, so the duty on U.S. exports of corn flour to Chile in 2008 will be 2.25 percent.[73] Hence, the tariff will be $225. The tariff on U.S. exports of corn flour to Peru in 2008 will be significantly higher. The *U.S.-Peru TPA* classifies corn flour as a Category-C good.[74] This means the 17 percent base tariff rate[75] on corn flour phases out in ten equal annual stages beginning in 2008.[76] One year will have passed at a .17 percent reduction per year, so the duty on U.S. corn flour exports to Peru in 2008 will be 15.3 percent. Hence, the tariff will be $1,530.

One can note an important discrepancy from this example. The Peruvian base tariff rate on corn flour is much higher than the Chilean base tariff rate on corn flour. The rest of the agricultural goods in the tariff schedules echo this discrepancy. With limited exceptions, the Chilean base tariff rates on agricultural goods are 6 percent.[77] In sharp contrast, most of the Peruvian base tariff rates are 12 percent, with many between 17 and 25 percent.[78] The corn flour example, above, suggests that the overall phase-out periods will be further affected by the base tariff rates. This overall base tariff rate discrepancy will significantly affect many U.S. ag-

68. HTSUS, *supra* note 14.
69. Chile FTA, *supra* note 56, Annex 3.3(4), General Notes: Tariff Schedule of Chile, at 21.
70. *Id.*
71. *Id.* at 3-25.
72. 6 percent / 8 = .75 percent
73. The total reduction equals 3.75 percent, or .75 percent times five years. 6 percent - 3.75 percent = 2.25 percent.
74. Peru TPA, *supra* note 5, Annex 2.3, Peru Tariff Schedule, at 48.
75. *Id.*
76. *Id.* at 2-16. Again, throughout these examples, we have assumed that the Peru TPA enters into force in 2008.
77. Some of the exceptions are some forms of turkey, at 25 percent, HTSUS, 0207.26.00, wheat flour, at 31.5 percent, HTSUS, 1101.00.00, cane sugar, at 98 percent, HTSUS, 1701.11.00-.99.00, and various oils, at 31.5 percent, HTSUS, 1507.10.00-1514.90.00.
78. Several base tariff rates are 4 percent. A very limited number of exceptions set the base tariff rate at 0 percent.

ricultural goods exported to Peru for which tariffs do not phase out immediately.

B. Sensitive Products: The Case of Sugar

The *U.S.-Chile FTA* states that each Party "may impose a safeguard measure in the form of additional import duties . . . on an originating agricultural good . . . ."[79] The *U.S.-Chile FTA* also limits the use of safeguard measures. For example, the safeguard amount cannot exceed "the lesser of: (a) the prevailing most-favored-nation (MFN) applied rate; or (b) the MFN applied rate of duty in effect on the day immediately preceding the date of entry into force of this Agreement."[80]

Most importantly, the *U.S.-Chile FTA* phases out the parties' ability to impose these measures with three provisions. According to Article 3.18(6), Chile and the United States "may impose a safeguard measure only during the 12-year period beginning on the date of entry into force of this Agreement. Neither party may impose a safeguard measure on a good once the good achieves duty-free status under this Agreement. Neither party may impose a safeguard measure that increases a zero in-quota duty on a good subject to a tariff-rate quota."[81]

Together, these three elements provide significant limitations on the use of safeguard measures. The first element provides for a twelve-year phase-out: the parties may not impose safeguard measures past twelve years after the date of entry into force of the Agreement. The second element prohibits parties from imposing a safeguard measure on a good once the good achieves duty-free status. The tariff phase-out provisions are critical to an understanding of the effect of this sentence. As mentioned above, the general tariff elimination phase-out provisions require all duties to be removed by January 1, 2016, with a few exceptions.[82] For example, tariffs on malt extract, a category B item, under HTSUS 190.90.20, expire on January 1 of year four. The United States cannot impose safeguard measures for malt extract after January 1, 2008, because tariffs on malt extract will have expired on that date. The third provision pertains to goods subject to TRQs. This provision prohibits Parties from imposing safeguard measures on a good before it exceeds the in-quota quantity permitted under the TRQ.

79. Chile FTA, *supra* note 56, art. 3.18(1), at 3-11.
80. *Id.*
81. *Id.* art 3.18(6), at 3-12.
82. Chile FTA, *supra* note 56, Annex 3.3, Tariff Elimination, at 3-25.

The *U.S.-Peru TPA* provides less stringent limits on the use of agricultural safeguards. The *U.S.-Peru TPA* provides that "[n]o Party may apply or maintain an agricultural safeguard measure on a good: (a) on or after the date that the good is subject to duty-free treatment under the Party's Schedule to Annex 2.3; or (b) that increases the in-quota duty on a good subject to a TRQ."[83] The *U.S.-Peru TPA*, in contrast with the *U.S.-Chile FTA*, does not provide for an overall phase out of agricultural safeguard measures.

The lack of such a provision significantly affects sugar. Although both Agreements share a clause limiting safeguard measures once the good achieves duty-free status, the *U.S.-Peru TPA* does not phase out U.S. tariffs on Peruvian sugar. Rather, the *U.S.-Peru TPA* imposes a growing in-quota quantity of 180 metric tons per year followed by a provision that imposes MFN treatment to goods entered in excess of the in-quota quantity. Theoretically, once the in-quota quantity exceeds the quantity that under a purely-free trade system Peru would export to the United States, the tariffs will have "expired." But that point is speculative, and the key here is that the United States did not agree to a set phase-out on sugar, thus protecting it for a significant period of time. Similarly, both Agreements prohibit safeguards that increase a zero in-quota duty on goods subject to TRQs. However, this provision in the *U.S.-Peru TPA* will not benefit Peruvian sugar exporters for several years because the sugar TRQ never reaches a zero in-quota duty.

If the *U.S.-Peru TPA* had a provision similar to Chile's twelve-year phase-out, then the United States could not impose a safeguard measure on sugar after the phase-out. However, the *U.S.-Peru TPA* lacks such a provision, and no other provision in the Agreement prevents the United States from imposing an agricultural safeguard measure on sugar that exceeds the in-quota quantity.

This part compared the agricultural market access provisions of the *U.S.-Peru TPA* with the corresponding provisions of the *U.S.-Chile FTA*, concluding that the *U.S.-Chile FTA* liberalizes agricultural trade more significantly than the *U.S.-Peru TPA* on two grounds. First, the *U.S.-Peru TPA* liberalizes agricultural trade more slowly than the *U.S.-Chile FTA*.[84] Second, the *U.S.-Peru TPA* protects sensitive agricultural goods, in particular sugar, much more that the *U.S.-Chile FTA*.[85] The following part at-

83. Peru TPA, *supra* note 5, Chapter 2, National Treatment and Market Access for Goods, art. 2.18(5)(a)(b), at 2-11.

84. *Supra* Part III.A.

85. *Supra* Part III.B.

tempts to explain these discrepancies.[86]

IV. EXPLAINING THE DIFFERENCE: ECONOMIC AND POLITICAL FACTORS

In explaining the discrepancies described in the previous part, this part makes two arguments (1) Chile nearly "sold the farm," perhaps in exchange for increased market access of copper and for protection of some of its bottom-line domestic industries;[87] and (2) a recently emerging political bargaining bloc among the Andean countries strengthened Peru's bargaining power during its negotiations of the *U.S.-Peru TPA*.[88]

A. Chile "Sold the Farm"

Chile made significant agricultural concessions. It eliminated nearly all tariffs on agricultural goods immediately upon entry into force of the *U.S.-Chile FTA*. Furthermore, those tariffs that the *U.S.-Chile FTA* did not immediately eliminate phase out within twelve years of the Agreement's date of entry into effect. In contrast, the *U.S.-Peru TPA* eliminates tariffs immediately on a substantially lower number of agricultural products immediately and phases out tariffs within seventeen years.[89]

As the copper capital of the world, Chile may have sold its farm in exchange for access for its copper industry into the U.S. market.[90] To illustrate, Chile is the prime copper exporter to China. In May of 2005, Chile and China signed a joint venture free trade agreement on copper, which "will function as a vehicle to secure long-term copper supply from CODELCO [Corporacion Nacional del Cobre de Chile] to China Minmetals."[91] Similarly, copper is the most substantial source of income for Chile.[92] Being the premier copper exporter in the world, Chile ensured market access of its copper products into the United States through the *U.S.-Chile FTA*. Although the United States and Chile agreed on a TRQ on Chilean copper exports at 55,000 metric tons for the first year, the

86. *Infra* Part IV.
87. *Infra* Part IV.A.
88. *Infra* Part IV.B.
89. *Supra* Part II.A.
90. Español Pueblo en Línea (Spanish People's Daily Online), *Antofagasta, Capital Mundial del Cobre, Concentra Turismo en Chile* (Aug. 10, 2005), *available at* http://spanish.peopledaily.com.cn/31620/3748952.html.
91. English People's Daily Online, *China, Chile Sign Agreement on Copper Cooperation* (May 31, 2005), *available at* http://english.people.com.cn/200505/31/eng20050531_187740.html.
92. Español Pueblo en Línea, *supra* note 90.

U.S.-Chile FTA eliminated the TRQ on the second year after the agreement entered into effect. Thus, Chile negotiated nearly-duty-free treatment for its copper.

Making a causal connection here may be difficult—after all, evidence suggesting that the Chilean negotiators exchanged U.S. market access into several agricultural goods for better treatment of its copper exports is difficult to come by. For one, one cannot simply ask the negotiators for the respective countries, as this might well violate an attorney-client privilege. For another, the negotiation reports generally do not provide this information; they merely provide the results of the negotiations. In any event, the Agreement in its entirety shows that Chile significantly opened its agricultural industries to trade and that the United States significantly opened up its market to Chilean copper. The negotiations thus make sense—Chile may have decided it can obtain its greatest export gains from copper.

And indeed it has. Despite the diversification of exports in the last fifteen years, copper exports are still a significant percentage of Chilean exports to the United States.[93] In 2005 alone, a total of 2,092 Chilean enterprises exported an estimated 2,066 different products to the United States. Copper represented almost 28 percent of total exports with sales at almost $1.8 billion, an increase of 117 percent from the previous year.[94]

B. Policy and Political Factors

This section provides two additional arguments to explain the discrepancies between the *U.S.-Peru TPA* and the *U.S.-Chile FTA*. First, it argues that Peru and Chile differ significantly with respect to their overall trade policy. Whereas Peru is currently defining its position in favor of free trade, Chile has, over the years, established a significant commitment to democracy and free trade. Further, it argues that Peru and the rest of the Andean nations have united as a negotiation bloc, which may explain Peru's ability to ward its agricultural sector from United States products.

1. Trade Policy

On one hand, the Latin America's state of political disarray has forced many countries to take sides in the free trade/protectionist

93. MINISTERIO DE ECONOMÍA,GOBIERNO DE CHILE, TLC CON EEUU: OPORTUNIDADES Y DESAFÍOS, *at* www.economia.cl/aws00/servlet/aawsconver?1,,102730.

94. Amcham Chile, Business Chile, *Chile-U.S. Trade in 2005* (Nov. 2006), *at* www.businesschile.cl/portada.php?w=old&id=280&s=0&lan=en&q=main.

debate. Bolivia, Cuba, and Venezuela have clearly sided with protectionist measures and rejected trade with the United States. Venezuelan President Hugo Chaves has spoken of a "government-led rebellion."[95] Venezuelan investors watch the "Chavez risk," namely, "the risk that Chavez might change laws and legislation at his will and adopt market unfriendly policies that negatively impact investor's interests in Venezuela."[96] Moreover, Venezuela has left the Community of Andean Nations (CAN), and Bolivia is following close behind.[97] Significantly, in April 2006, Bolivia and Venezuela joined Cuba in signing People's Trade Agreement (PTA) in opposition to the Free Trade Agreement of the Americas and other FTAs.[98] This PTA "is a response to the failed neo-liberal model, based as it is on deregulation, privatization and the indiscriminate opening of markets," and aims to promote "a model of trade integration between the people that limits and regulates the rights of foreign investors and multinationals so that they serve the purpose of national productive development."[99]

Other Latin American countries have opted for strengthening their trade relations with the United States, sometimes at the expense of furthering or continuing trade relations with other Latin American countries. Colombia and Peru signed FTAs with the United States and negotiations between the United States and Ecuador continue.[100] Morales called former Peruvian President Alejandro Toledo a "traitor" to South America for signing the *U.S.-Peru TPA*,[101] and Chavez called current Peruvian President a "corrupt and shameless thief."[102] Recently, Bolivia has even expressed its desire to recover the Pacific territories that it lost in a war

---

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*; *see also* Jason Tockman, *Bolivia Advocates Alternative Vision for Trade and Integration* (July 11, 2006), *available at* http://upsidedownworld.org/main/content/view/355/31/ .

99. Timothy A. Wise & Kevin P. Gallagher, *The Doha Deal: More Harm than Good to Developing Countries?*, THE SOUTH BULLETIN (May 1, 2006), *available at* www.sarpn.org.za/documents/d0002030/South_bulletin_May2006.pdf, at 223.

100. Press Release, USTR, United States and Peru Sign Trade Promotion Agreement (Apr. 12, 2006) (*available at* www.ustr.gov/Document_Library/Press_Releases/2006/April/United_States_Peru_Sign_Trade_Promotion_Agreement.html.

101. World Public Opinion.org, *Peruvians Unsympathetic to Chavez, Morales* (May 26, 2006), *available at* www.worldpublicopinion.org/pipa/articles/brlatinamericara/199.php?nid=&id=&pnt=199&lb=btgl.

102. *Latinoamerica Tiene una Nueva Politica: La Desunión*, El Nuevo Herald, May 23, 2006. This is particularly interesting because, according to Peruvian Minister of Exterior Commerce Alfredo Ferrero, the FTAs negotiations between the United States and the CAN countries began after unanimous authorization from the members, including Bolivia and Venezuela. *Bolivia y Venezuela se Oponen a los TLC con EEUU*, El Comercio, April 25, 2006.

against Chile in the Nineteenth Century.[103]

On the other hand, Chile has established its place as Latin America's free trade champion. According to the Chilean government, "one of the pillars of Chile's economic development strategy in the last three decades has been trade liberalization" at the bilateral and multilateral levels.[104] In accord with this policy, Chile has signed bilateral trade agreements with several countries, including Canada, Mexico, South Korea, China, the CACM nations (Costa Rica, El Salvador, Honduras, Guatemala, Nicaragua), the EFTA, and the European Union and has entered a multilateral trade agreement with New Zealand, Singapore and Brunei, the Trans-Pacific Strategic Economic Partnership.

The *U.S.-Peru TPA* negotiators bargained among a state of trade policy development, where most of Latin America is in the process of determining its stance in the free trade debate. At the time of the *U.S.-Chile FTA* negotiations, Chile was nearly unencumbered by this theoretical debate—it had already opted for free trade, and it was in the process of liberalizing trade at full force. Thus, Chile may have seen the negotiations as a win-win situation. Through the *U.S.-Chile FTA*, Chile would further strengthen relations with the United States and, in doing so, it would gain market access of its goods into the U.S. market. On the other hand, Peru may have been more wary of the trade negotiations, as the countries negotiated the *U.S.-Peru TPA* during a time in which Peru itself was defining its overall trade policy. The basic policy and theoretical differences between Chile and Peru significantly influenced the text of the two Agreements.

2. *The Andean Negotiating Bloc*

Peru also possessed significant bargaining strength in its negotiations with the United States. After all, Peru negotiated a trade agreement that protects many of its agricultural goods, despite the United States' emphasis in liberalization. This may have been the result of a bargaining bloc of the Andean nations vis-à-vis the United States. In other words, the United States bargained and continues to do so with a bloc of Andean nations, not just Peru as an individual country.[105] In a letter to the United States, the

---

103. *Latinoamerica, supra* note 102.

104. MINISTERIO DE ECONOMÍA,GOBIERNO DE CHILE (Chilean Government, Ministry of the Economy), *Sexto Catastro Nacional Sobre Barreras Externas al Comercio 2005* (2005), *available at* http://www.economia.cl/aws00/Estatico/repositorio/j/e/P/AOIL9qiypE5VJZYj_1R_8yXk=.pdf .

105. *Perú se Solidariza con Andinos para Pedir más Preferencias Arancelarias de EEUU*, El Comercio (Ecuador), June 14, 2006.

presidents from Bolivia, Colombia, Ecuador, and Peru reproached an extension of the ATPA and instead opted for creating a bloc in their negotiations with the United States.[106] As a general matter, the negotiation bloc may have prompted the Andean countries to resist significant concessions on their part and seek more concessions from the United States.

Despite Peru's bargaining power, sugar stands out as a product in which the United States did not give in to Peruvian demands. The combined effect of the TRQ, the MFN rate as a penalty for sugar that exceeds the TRQ, and the seemingly indefinite ability of the United States to impose safeguard measures on this product[107] may suggest that the apparent trend in favor of Peruvian negotiators may not hold true with respect to all goods.

However, this conclusion does not necessarily follow from the United States' reluctance to offer sugar as a trade-in concession. Rather, if one looks at the United States' reluctance through a negotiation lens, one sees that the United States may have simply reacted to Peru's negotiation position. Unlike Chile's negotiation strategy of conducive trade, Peru may have established a zero-sum atmosphere during negotiations, whereby it emphasized the protection of its industries from U.S. exports. While Chile traded spinach, apples, grapes, and avocado with the United States for market access in goods and services, Peru made less concessions and slowly eliminated tariffs on the products it did concede. This, in turn, may have prompted the United States to solidify its stance with respect to sugar and other sensitive products. In other words, Peru's bargaining power and stance may have induced the United States to substantially limit Peruvian sugar access from the U.S. market.

V. IS SUCH A DISCREPANCY JUSTIFIABLE AS A FREE TRADE MATTER?

Free trade theory may very well support a progressive system of liberalization, whereby countries liberalize trade more extensively with every step they take. In this sense, trade liberalization may be horizontal. Every step the United States takes with Peru and other Andean countries ought to liberalize trade further than the previous step. Each new trade agreement ought to reach broader, deeper, faster—it should cover more trade in goods and services, should seek to reduce tariffs and control other non-tariff

106. *Id.*
107. *Supra* Part III.B.

measures, and should do so as quickly as possible.

Even assuming this perspective is a proper critique of free trade policy, the *U.S.-Peru TPA* should not be criticized under the idea that it does not liberalize trade "enough." Such is too simplistic a point of view and, more importantly, contradicts the facts. If ratified, the Agreement will liberalize trade tremendously between the United States and Peru. The ATPA never sought to eliminate tariffs; the *U.S.-Peru TPA* does so with respect to nearly all goods, albeit eventually. Moreover, because the base tariff rates in the *U.S.-Peru TPA* are higher than the base tariff rates in the *U.S.-Chile FTA*, Peru may have conceded a great amount—maybe even greater than Chile with the *U.S.-Chile FTA*—in tariffs. From this perspective, the *U.S.-Peru TPA* may be significantly trade-liberalizing.

Whether this step is in the "right" direction may be better answered after an evaluation of the *U.S.-Peru TPA*'s effects on both the Peruvian and U.S. economies. Nevertheless, at this point one may still explore the potential effect that one agreement will have on the other. One way of analyzing this question is through the concept of trade diversion.[108] At issue is whether the *U.S.-Peru TPA*'s potential for trade creation outweighs the potential for trade diversion. This part concludes that the trade-liberalization potential of the *U.S.-Peru TPA* will likely be hindered by the trade diversion effect of the *U.S.-Chile FTA*. In this sense, the *U.S.-Peru TPA* is less trade-liberalizing than it seems at first glance.

If the United States enacts the *U.S.-Peru TPA*, the parties may expect a significant trade-creation effect. Peruvian consumers would enjoy a greater range of goods at lower prices.[109] As the United States and Peru reduce tariffs, import prices between these countries will fall, thereby stimulating a higher demand for imports. Trade creation ought to occur from the demand stimulation induced by the *U.S.-Peru TPA*. Similarly, U.S. consumers would enjoy Peruvian goods at lower prices than other goods. These consumers would theoretically demand the lower-priced Peruvian goods, thus encouraging Peruvian imports and strengthening the Peruvian economy by increasing Peru's export output. This logic assumes that consumers are principally motivated by price and that the goods produced within and outside the *U.S.-Peru TPA* ae-

108. *See generally* JACOV VINER, THE CUSTOMS UNION ISSUE (Carnegie Endowment for International Peace, New York; Stevens & Sons, London, 1950) for background on the concept of trade diversion.

109. *See* BHALA, *supra* note 15, at 575—84 for a neoclassical portrayal of trade creation and diversion.

gis are substitutes.[110]

By the same token, if ratified the *U.S.-Peru TPA* would cause significant trade diversion. As a general rule, the trade-distortion theory holds that liberalization of trade between country X and country Y distorts trade between country X and Y, on one hand, and all other countries, on the other hand (assuming, of course, that these other countries do not liberalize trade with countries X and Y). One may expect trade diversion to result from the elimination of tariff barriers between the United States and Peru. Nonmembers to the TPA do not benefit from the tariff cuts. Consumers in Peru and the United States are likely to shift to the lower-priced goods from the two countries, away from higher priced substitute products from non-TPA members.

However, trade diversion may also occur among Chile, Peru, and the United States. The distinction is that the *U.S.-Chile FTA* will continue to divert trade between Peru and the United States, albeit to a lesser degree. Peru, as a non-member to the *U.S.-Chile FTA*, does not benefit from the tariff cuts and shorter tariff phase outs of the *U.S.-Chile FTA*. Consumers in Chile and the United States are thus likely to continue buying lower-priced goods from these countries and to continue rejecting the relatively higher priced substitute Peruvian products. Peruvian prices on agricultural goods will not fall as quickly and as much as the Chilean prices have, which then encourages U.S. consumers to continue their demand of Chilean goods at the expense of the substitute Peruvian goods. If one assumes that U.S. consumers are motivated primarily by price in deciding what to buy and that the goods produced in Chile and Peru are substitutes, then the Peruvian goods will simply be unable to compete with the Chilean goods in the U.S. market. In this sense, the complex and overlapping tariff structures of the *U.S.-Chile FTA* and the *U.S.-Peru TPA* may encourage trade in favor of Chile and away from potentially more efficient Peruvian suppliers. If this is the case, then the Peruvian economy may be better off if Peru extends the concessions it granted to the United States to other trading partners.

Theoretically, trade diversion between the agreements rules out, in the short term, movement toward a multilateral regime in the Americas.[111] The *U.S.-Peru TPA* may signify the loss of an opportunity to liberalize trade progressively, to the extent trade diversion would be a necessary corollary of a trade agreement. The

---

110. This paragraph draws its economic reasoning from BHALA, *supra* note 15, at 575-84.

111. *See id.* (making this point with respect to trade diversion, generally).

free-trade cost is clear: by diverting trade between Peru and its other trading partners, the interaction between the agreements temporarily prevents the multilateral trading regime from getting closer to its free trade goal.[112] Thus, the *U.S.-Peru TPA* takes two steps forward by liberalizing trade between the United States and Peru, and one step back by failing to liberalize trade in agriculture more deeply and more quickly than the *U.S.-Chile FTA*.[113]

One may argue that if the *U.S.-Peru TPA* liberalized the agricultural provisions more significantly than the *U.S.-Chile FTA*, then a similar trade diversion would occur. This time, trade between Chile and the United States would suffer and the deeper, quicker tariff elimination of the hypothetical *U.S.-Peru TPA* would do little to benefit the global trade balance. However, this argument misses a central point—the danger here is not in that, by failing to liberalize trade more significantly than Chile, Peru and the United States ultimately will harm the multilateral trade liberalization ideal. Rather, it is in the Parties' failure to see themselves as players within the multilateral trade liberalization regime, whereby liberalization of trade between two countries will generally lead to deeper liberalization between those countries and other trading partners seeking to compete with the already established free trade agreements. Viewed through this lens, each free trade agreement acts as a stepping stone to encourage other countries to further liberalize trade. With respect to its agricultural provisions, the *U.S.-Peru TPA* simply missed its opportunity to encourage other members of the multilateral community to liberalize trade.

VI. CONCLUSION: LESSONS LEARNED

If ratified by Congress, the *U.S.-Peru TPA* promises to significantly liberalize trade between the United States and Peru.[114] Following the Chilean initiative,[115] the *U.S.-Peru TPA* is the United States' second major bilateral trade agreement with Latin America.[116] Despite their similar goals, the *U.S.-Peru TPA* and the

---

112. *Id.*

113. *See* BHALA, *supra* note 15, at 576; Jagdish Bhagwati & Arvind Panagariya, *Preferential Trading Areas and Multilateralism—Strangers, Friends, or Foes?*, *in* THE ECONOMICS OF PREFERENTIAL TRADE AGREEMENTS, (Jagdish Bhagwati & Arvind Panagariya eds. 1996); and Jagdish Bhagwati, *Preferential Trade Agreements: The Wrong Road*, 27 L. & POL'Y IN INT'L BUSINESS 865 (1996) for various arguments regarding the negative effect of trade diversion.

114. *Supra* Part II.

115. *Supra* Part II.A.

116. *Supra* Part II.B.

U.S.-Chile FTA differ significantly in their timing and depth of trade liberalization.

The *U.S.-Peru TPA* liberalizes agricultural trade less significantly than the *U.S.-Chile FTA* in at least two areas.[117] First, the *U.S.-Peru TPA* protects the Peruvian economy from many U.S. exports.[118] Second, the United States has significantly protected some of its sensitive products, such as sugar, in its negotiations with Peru, but not in its negotiations with Chile.[119] Query whether this discrepancy results from the United States' failure to recognize the importance of protecting its sugar industry from Chilean imports or whether the United States simply conceded more to Chile because of the deep and broad Chilean concessions. Regardless of the reason, the *U.S.-Peru TPA* could have reached deeper and either the United States, Peru, or both were not as trade-liberalizing as they could have been.

Several factors contributed to the sharp contrasts between the *U.S.-Peru TPA* and the *U.S.-Chile FTA*.[120] First, Chilean negotiators may have been more willing to open up its agriculture industry in exchange of access of more profitable goods, such as copper, to the U.S. market. Second, Chile has firmly established its trade policy, whereas Peru has not, which may have influenced Peruvian negotiators to be more wary during negotiations with the United States.[121] Third, Peru and the other Andean countries have formed a political negotiation bloc, thereby strengthening the Peruvian negotiation prowess vis-à-vis the United States.[122]

The broad question is whether the discrepancies are justified under free trade principles.[123] The theory of trade diversion argues that dismantling trade barriers between two countries ultimately may divert trade between those countries and the countries not parties to the trade agreement. In this situation, trade diversion may also occur, whereby the source of the trade diversion is the status quo, the *U.S.-Chile FTA*, rather than the new trade agreement, the *U.S.-Peru TPA*. By neither meeting nor exceeding the depth and timing of the Chilean paragon, the *U.S.-Peru TPA* has missed an important opportunity to encourage other countries to liberalize trade and instead has continued the trade diversion effect under the *U.S.-Chile FTA*.

Given the newly-elected Democratic Congress, the *U.S.-Peru*

117. *Supra* Part III.
118. *Supra* Part III.A.
119. *Supra* Part III.B.
120. *Supra* Part IV.
121. *Supra* Part IV.B.1.
122. *Supra* Part IV.B.2.
123. *Supra* Part V.

TPA may fail ratification. Regardless, the United States and other countries may learn at least two lessons from the U.S.-Peru negotiations. The first lesson concerns trade analysis. During negotiations, trade partners ought to analyze the effects of neighboring trade agreements—or, more specifically, those trade agreements that cover substitute goods in the respective trade partners of the parties. As in this case, the United States negotiated a trade agreement with Peru that was more protectionist than it first appears. The *U.S.-Peru TPA* then resulted in two sets of trade barriers. First, the tariffs in the *U.S.-Peru TPA* itself protected the Peruvian agricultural industries, to the detriment of free trade. Second, the interaction between the *U.S.-Peru TPA* and the *U.S.-Chile FTA* create a trade diversion effect, whereby the *U.S.-Peru TPA* does not capitalize on its trade creation potential because of the more trade-liberalizing *U.S.-Chile FTA*. Thus, Peru and the United States developed a free trade agreement that, if enacted, will liberalize trade only to the extent the *U.S.-Chile FTA* does not interfere with trade between Peru and the United States.

The second lesson concerns trade policy. Insofar as multilateral trade liberalization is a goal, trade partners ought to consider themselves part of the multilateral system, even during bilateral negotiations. During the *U.S.-Peru TPA* negotiations, Peru and the United States may have forgotten that their trade agreement would play a crucial role in the greater multilateral trade scheme. The Agreement could have served as a significant stepping stone to encourage other trading partners to further liberalize trade with the parties. In this sense, the United States and Peru may have missed an opportunity to strike a bilateral free trade agreement that fuels the momentum toward multilateral trade liberalization.