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THE NEW PROTECTIONISM. SANITARY AND PHYTOSANITARY MEASURES: THE UNITED STATES AND CHILE.

Tesis para optar al grado de Magíster en Estudios Internacionales

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Abstract

The objective of this investigation is to explore the trade relationship between the U.S. and Chile within the framework of non-tariff measures. Using as its context debate between free-trade and protectionism, the question is presented as to whether or not the U.S. is misusing sanitary and phytosanitary (SPS) measures with the ulterior motive of protecting national agricultural industries and thus unfairly shifting the balance in the trade relationship with Chile. Quantitative and quantitative analysis is done to extract patterns based on the number of refusals found for different sanitary measures, particularly for fruit and seafood products. Through examination of the formation of the trading agreement between the U.S. and Chile, WTO transparency mechanisms, interviews and the study of refusal documents that describe concrete cases of rejections of agricultural imports from Chile to the U.S. for violation of SPS measures, inferences are made as to the whether or not intentions of the U.S. Food and Drug Administration (FDA) are to protect health of consumers or national industry.

Resumen

El objetivo de esta investigación es explorar la relación comercial entre Chile y EEUU en el marco de las nuevas barreras comerciales. En el contexto del debate entre libre comercio y proteccionismo, se presenta la pregunta sobre si EEUU está abusando de las Medidas Sanitarias y Fitosanitarias (MSF) para proteger su industria nacional agropecuaria y como resultado, distorsionando la relación comercial entre estos dos países. Esta investigación se lleva a cabo a través de un análisis cuantitativo y cualitativo, con una mirada en particular productos de frutícolas y mariscos y pescados. Con la revisión de: el tratado de libre comercio entre EEUU y Chile, los mecanismos de transparencia de la OMC, entrevistas y los casos de rechazos de productos agrícolas desde Chile hacia EEUU por violaciones de las MSF; es posible afirmar que la U.S. Food and Drug Administration (FDA) aplica las MSF para proteger la salud de los consumidores o industria nacional.

INTRODUCTION

International trade has significantly changed the way in which countries plan and prioritize their foreign policy strategies. The benefits that international trade provides to enhance and improve economic development continue to be relevant. It is not difficult to understand why international trade has increased significantly among foreign nations in the last three decades (Food and Agriculture Organization of the United Nations [FAO], 2005). As we will address later on, the World Trade Organization (WTO) was created in January of 1995 in order to establish an institution dedicated to the liberalization, facilitation and regulation of international trade. Although the predecessor to the WTO, the General Agreement on Tariffs and Trade (GATT), had been in existence since the end of World War II, it had become clear by the latter part of the twentieth century that a more modern successor would be required to move international trade and the management of these relationships between nations into the new millennium.

Despite these significant advances, there continue to be issues within the international trade community. Although one of the founding objectives of the WTO is the reduction of tariffs in order to liberalize trade among member nations, recent years have shown the emergence of a more worrisome trend, which is the emergence of non-tariff barriers or non-tariff measures (NTMs), as a

mechanism for protecting national industries. These “non-tariff” measures are more difficult to negotiate than actual tariffs, as it is increasingly difficult to present definitive proof that a nation is in fact utilizing them; whereas with regular tariffs, it was plain to see if countries were obligating nations they traded with to pay a tariff. There is currently a particularly intense debate between WTO nations as to whether or not certain countries are utilizing non-tariff barriers as a strategy to protect domestic food producers by falsely applying the WTO’s Sanitary and Phytosanitary Agreement (SPS Agreement).

Most developed countries in the world, such as the United States (U.S.) and the European Union (EU), are often among those most commonly cited for rejecting imports on the basis of SPS measures (Unnevehr, 2003). Moreover, a debate has begun on whether or not these product rejections are a new form of protectionism by these developed nations. In order to investigate this debate more in-depth, this thesis will study product rejections made on the basis of SPS standards by the U.S. toward a lesser-developed country (that exports products in identical or similar categories) with the end goal of trying to clarify whether or not protectionism is truly behind this trend of increased rejections.

In addition, this investigation will focus on the trade relationship between these two countries and attempt to prove whether or not the U.S. is “playing by the rules” (with respect to free trade theory) or if their actions are actually by

definition, ‘protectionist.’ Since it would be impossible to do this study for all products exported to the U.S., we will focus only on rejected imports to the U.S. that were exported by Chile. Therefore, the investigation question for this thesis is: ***Have SPS measures become a new form of protectionism used by the U.S. towards Chile?***

To complete the necessary research for this investigation, background information was collected on relevant international trade events, including the creation of the SPS agreement and the occurrence of NTMs in international trade since this time. Understanding of these topics is crucial in order to identify whether or not such elements appear to have been present since the establishment of the trade relationship between the U.S. and Chile. Also, it will be important to explain the theories that pertain to free-market and protectionist international trade tendencies so that we can better understand in which end of the spectrum the historical events of the aforementioned trade relationship seem to belong. In order to do this, this investigation provides a theoretic framework which explains both sides of the free-trade v. protectionist debate, according to recognized economists, making it possible to see how the use of NTMs applies to protectionist trade tactics.

As mentioned previously, the trade relationship between the U.S. and Chile and the history of events that comprises it are of utmost importance in

order to infer if there are any persisting patterns that indicate any trends that could help answer the investigation question for this project. Starting with the Free Trade Agreement (FTA) between these two countries and the activities of both within the framework of the WTO will be analyzed in an effort to understand the significance of WTO agreements and mechanisms for the U.S.-Chile trade relationship, with particular emphasis on the SPS Agreement. In addition, this investigation will continue by giving a profile of the U.S. Food and Drug Administration (FDA) in order to understand the processes involved for refusing entry of agricultural imports and how this has occurred with products from Chile during a specified time period.

In order to obtain further information to assist with the proposed investigation question, it was also necessary to conduct an in-depth quantitative and qualitative analysis of a compiled database. This set of data is comprised of refusal data of imports from Chile to the U.S. for the designated ten-year time period in order to provide a representative sample of recent trade activity. This data was analyzed based on the kind of sanitary measure that was reported as having been violated, where in the U.S. the import was refused entry as well as a number of additional factors. Also, special focus was done on fruit and seafood products in order to gain deeper insight on key products. Finally, this database analysis contains a second component, which is a qualitative

interpretation based on correlations identified to provide additional information about possible protectionist tendencies.

In the final section of this thesis, we return to the investigation question above and give supporting conclusions to thoroughly respond to the question presented and to accept or reject the following hypothesis:

SPS measures have become a mechanism for the U.S. to protect domestic agricultural industries from Chilean competition.

There have been specific parameters selected for this investigation and numerous research techniques employed, including interviews, database analysis as well as consultation of reliable, scholarly sources. The main goal of this project is to evaluate, based on logical and methodic processes, if the trade relationship of agricultural products from Chile to the U.S. can be considered a positive one or not, using as a gauge the existence or absence of protectionism by the U.S. against Chilean agricultural imports.

CHAPTER 1. BACKGROUND INFORMATION ON INTERNATIONAL TRADE ORGANIZATIONS AND INTERNATIONAL TRADE AGREEMENTS

This investigation was begun by first researching the history of international trade over the past century, with a focus on the activity between nations since the founding of the WTO. It was important to do a special analysis of the SPS Agreement in order to be able to compare actions of the U.S. with regards to its trade relationship with Chile based on what is permitted and what is not according to this agreement. In addition, research was done on the history of NTMs so that it would be possible to identify if the abovementioned actions by the U.S. towards Chile qualify as an NTM. This first section also includes an in-depth study of the foundation of the trade relationship between the U.S. and Chile, as the history of the relationship has the possibility to affect trading behavior from either side.

1.1 The Sanitary and Phytosanitary Agreement (SPS Agreement)

The SPS agreement was created to inform governments how they can "apply food safety and animal and plant health measures (sanitary and phytosanitary or SPS measures) sets out the basic rules in the WTO" (WTO, 2014b). This agreement was established during the Uruguay Round (at the same time as the creation of the WTO), which took place in 1995. The SPS

agreement was created so that WTO member nations could maintain sovereignty to protect their consumers as well as their national interests without creating, “unnecessary, arbitrary, scientifically unjustifiable, or disguised restrictions on international trade”. In other words, the SPS agreement says that, “WTO members may only impose these standards in the effort to protect human, animal or plant health or life, and cannot not be more trade restrictive than necessary unless they have scientific evidence to justify it” (WTO, 1994).

The SPS agreement also exists as a tool for harmonizing SPS measures in an attempt to circumvent market-access issues countries might otherwise face when attempting to comply with various national standards. Also, SPS measures must abide by the “most-favored nation” principle of the WTO, which states that member countries may not discriminate against foreign products (Wouters, Marx & Hachez, 2009). We see here how this agreement was created since the WTO realized many national governments face pressure from domestic producers to shield them from the effects of doing trade with countries who provide competition to their food industries (WTO, 1998). In fact, the WTO recognizes that, “SPS measures, by their very nature, may result in restrictions on trade” and concedes that “an SPS measure which is not actually required for health reasons can be a very effective protectionist device, and because of its technical complexity, a particularly deceptive and difficult barrier to challenge” (WTO, 1998).

One of the official sources on which the abovementioned scientific standards are based is found in the *Codex Alimentarius*, which is “a collection of international food safety standards that have been adopted by the *Codex Alimentarius* Commission (the “*Codex”*). The *Codex* is based in Rome and funded jointly by the Food and Agriculture Organization of the United Nations (FAO) and the World Health Organization (WHO) (WTO, Preamble of the SPS Agreement, 1994). The adoption by the WTO of the Codex *Alimentarius* as the international standard for the SPS Agreement requirements also took place at the same time as the Uruguay Round in 1995, the same year the WTO was established (Jukes, 1998). The Codex *Alimentarius* was previously created in the 1960s via a project done by the WHO and the FAO in an effort to “harmonize international food standards, guidelines and codes of practice to protect the health of the consumers and ensure fair practices in the food trade" (FAO & WHO, 2012).

1.2 The History and Significance of Non-Tariff Measures (NTMs)

It is important to also mention that the topic of NTMs as a result of the SPS agreement is often discussed in conjunction with the WTO’s Agreement on Technical Barriers to Trade, commonly referred to as the TBT Agreement. This agreement was also created during the Uruguay Round when the WTO was

created at the same time as the SPS agreement (WTO, 2014c). The mission of this agreement is to attempt to ensure that regulations, standards, testing and certification procedures do not create unnecessary obstacles in international trade within WTO member states while still allowing members to have the right to implement measures to achieve legitimate policy objectives, such as the protection of human health and safety or the environment. In other words, the TBT agreement was created by the WTO to discourage the practice of protectionist behavior via arbitrary standards created by member states (WTO, 1994).

According to a report done for the Sixth WTO Ministerial Conference held in Hong Kong in December of 2005, the propagation of NTMs (most notably by developed countries) has increased considerably over the past two decades, despite the existence of the SPS and TBT agreements which were created to formalize the criteria for differentiating justified and unjustified barriers to trade. In a 2013 report from the United Nations Conference on Trade and Development (UNCTAD), “slightly less than 15 per cent of trade is affected by SPS measures but more than 60 per cent of agricultural products [are affected]…In practice, SPS measures and TBTs may erode the competitive advantage that developing countries have in terms of labor costs and preferential access” (Nicita & Gourdon, 2013).

The above leads us to what will be the central idea for this thesis: how SPS measures often can act as NTMs and how they affect trade relations. As mentioned above, countries may impose more stringent sanitary standards on exports than what is explicitly stated in the *Codex Alimentarius* if there is scientific justification. However, if a country rejects an import because it appears to be of lesser quality based on other, less comprehensive methods of evaluation, this is does not qualify as justification on the basis of SPS standards and is purely a NTM. Moreover, if such a rejection happens to take place on a product that also is a key product for the rejecting country's economy, this is an example of an NTM (Organization for Economic Co-operation and Development [OECD], 2008). It goes without saying that protectionism by definition goes against norms of free trade and accordingly against founding principles of the WTO, which exist for the purpose of member states implementing more liberal trade mechanisms and lessening barriers to trade wherever possible (Nichols, 2000).

1.3 Profile of an International Trade Case Study: The United States and Chile

One of the reasons why this thesis will focus on rejections of food exports from Chile by the U.S. is that trade liberalization in the area of agricultural products has been an imperative factor in contributing to Chile's significant

economic advances over the past two decades (OECD, 2008). Therefore, the possibility of these exports being rejected on the basis of unjustified SPS measures is a clear threat to Chile's economic prosperity. Since the creation of a Free Trade Agreement (FTA) between the U.S. and Chile in 2003, Chile has benefited in many areas, with exports to the U.S. totaling $9.4 billion USD in 2012, an increase of almost 153% since the FTA entered into force (Office of the Press Secretary, The White House, 2013).

However, there were also complaints in the Chilean agricultural sector that not enough was being done to help Chileans working in these industries domestically and that more should be done to the infrastructure within Chile before agreeing to the ambitious conditions the FTA contained, such as sanitary requirements for agricultural products (Troncoso, 2011). Nevertheless, it is clear that the U.S. is an important trade partner for Chile and arbitrary standards put on agricultural products can have a significant impact on the Chilean economy.

The time period that will be used for this thesis will be from the founding of the WTO in 1995 through 2012. This particular time period is relevant since as previously mentioned, it coincides with the creation of the SPS agreement. Moreover, the establishment of these two institutions is particularly notable since as was briefly discussed in the introduction above, the WTO was created to facilitate a more automatic, streamlined and transparent system of international

trade, especially in the area of agricultural products between developed and developing countries (Wouters et al., 2009).

Therefore, it is easy to see the irony that may exist between the creation of this global organization dedicated to liberalization of trade and all it has accomplished in the past 17 years and the possibility that during this same time period, there has been an increase in protectionism of agricultural products by one of the WTO's most vocal supporters, the U.S. While there is more research and investigation required to confirm this hypothesis, this thesis will use the abovementioned time period to analyze trends in agricultural trade between the U.S. and Chile during this time along with the creation of new SPS measures. This will be done in conjunction with correlating these trends with statistics on agricultural export rejections during the same time frame. This purpose of such an exercise is be to find out if new SPS impositions were justified or if they could be considered more protectionist in nature.

It is also important to point out the limits of this investigation, which include private food safety standards (which are often mentioned in literature pertaining to SPS standards) and the additional repercussions they can cause in international trade as a trade barrier. Since including private food safety standards would go beyond the scope of this investigation, it will focus solely on SPS standards (which exist for regulating international trade, not necessarily for

consumer protection), despite claims made by food safety research that the Codex Alimentarius is outdated and perhaps should begin to include private standards for increased consumer protection (Wouters et al., 2009). Therefore, it is impossible to overlook how SPS measures and the Codex Alimentarius Commission are necessary to have some basic protection for consumers in the area of food safety to prevent food borne illnesses.

Just to give some background on this matter, in the U.S., almost 1 in 6 people get sick each year from food borne illness, 128,000 are hospitalized (and end up suffering from lifelong chronic diseases, including arthritis and renal failure) and about 3,000 per year die as a result. It is obvious to see why such occurrences cause diminished consumer confidence, creating significant disruptions economically for the food system (Taylor, 2011). As a result of these events in addition to increased access to information, today's consumer base is made up of individuals who are better informed than ever before and demand certain standards when purchasing food and agricultural products, making agricultural standards and systems of harmonization all the more relevant (S. Boza, personal communication, November 7, 2014).

Subsequently, it is easy to see how these issues create a fine line between protecting consumers' health and protecting national agricultural industry. Although it is very important to protect people from any preventable

illness, the question remains as to whether or not some countries have lost sight of the significance and purpose of the SPS agreement and have begun using SPS measures to justify their own protectionist practices. The goal of this investigation is to find out if the U.S. is one of them.

Finally, we emphasize why international trade is being focused on in this investigation and why it is relevant. International relations today are greatly affected or even determined by actions taken regarding commercial issues. As Robert Gilpin stated in his book The Political Economy of International Relations, “Trade is the oldest and most important economic nexus among nations. Indeed, trade along with war have been central to the evolution of international relations” (Gilpin, 1987). Therefore, it is easy to see why the issue of rejected exports in international trade is cause for concern and worthy of further investigation.

As stated above, the relationship between Chile and the U.S. is important for many reasons and protectionist agricultural practices on the part of the U.S. can affect their relationship by damaging Chile’s ability to grow economically. Since this is not in line with what the WTO stands for, this investigation will be dedicated to discovering what SPS standards required by the U.S. are really trying to achieve and if they are necessary or just a new way to protect U.S. agricultural industry.

CHAPTER 2: EXPLANATION OF THEORIES SURROUNDING FREE-MARKET AND PROTECTIONIST INTERNATIONAL TRADE

This chapter seeks to provide insight into the theoretic aspect of this investigation. The debate in international trade as to whether or not a free-market, pro-capitalist approach is preferable to a more protectionist one for achieving long-term economic growth and stability is thoroughly argued from both sides. Well-known authors that provide their own opinions regarding this topic were studied in order to present both sides of this debate, including Robert Gilpin and Jagdish Bhagwatti as examples for the pro-free-trade side of the argument and Ha-Joon Chang and Dani Rodrik on the opposite end. Finally, this chapter uses the aforementioned analysis and theoretic framework as background information for addressing the issues presented by the misuse of SPS measures for trade protectionism among WTO member countries and how this affects international trade.

2.1 Theoretic Framing of Investigation

WTO Director Pascal Lamy stated during a speech in 2012 that, “Protectionism is like cholesterol: the slow accumulation of trade restrictive measures since 2008 -now covering almost 3% of world merchandise trade, and almost 4% of G20 trade- can lead to the clogging of trade flows.” These trends have in large part been attributed to the 2008 financial crisis, since significant

declines in exports have led to government-sponsored bailouts, subsidies and “nationalistic provisions” (Global Trade Alert.Org, n.d.). In other words, protectionism has slowly crept back under other disguises in order to avoid going against WTO rules that prohibit blatant protectionism (The Economist, 2013). This observed growth of protectionism is clearly concerning to the WTO, an organization created for the facilitation of international free trade. The theoretic framing of this investigation will concentrate on the debate between free trade and protectionism and a sampling of distinguished economists who provide insights into both sides of the argument.

First, it is important to define what the definitions of free trade and protectionism are in order to understand the parameters on which this project will be based. Protectionism is often referred to as a defensive measure used by countries when they feel their industries are being damaged by competition from other countries, typically carried out by using methods such as import tariffs, quotas, subsidies or even direct intervention by the state (Carbaugh, 2010). While there is a general consensus among pro-free trade economists that these protectionist tactics may achieve desired effects short-term, their opinion is that in the long-run, protectionism can end up damaging the country attempting to protect itself from outside forces by making it even less competitive in the global marketplace than it would have been had it allowed international trade to continue unimpeded.

Many times, one of the arguments given in favor of protectionism is that developing countries that pay lower wages for more hours than they would in developed countries will end up eliminating these same jobs in high-wage countries, thus putting a significant part of the population at a disadvantage and subsequently diminishing the strength of these industries domestically (Rothbard, 1986). Although “definitions” of what free trade really means greatly vary, a definition that the WTO has endorsed in the past is that it is “trade that is free of discrimination” (Driesen, 2000). This definition corresponds to the central theme of this thesis that was presented above, which is that the GATT and later the WTO have been instrumental in the promotion of significant reduction of non-tariff barriers and the growth of international trade.

2.1.1 Arguments in Favor of Free-Market trade

Liberal theory evolved from the primary theories of economists such as Adam Smith, who rejected protectionism and believed that British mercantilist policy of the 19th century was not conducive to economic growth and that a system with less state involvement could be more helpful for the domestic economy (Mokyr, 2003; Balaam & Veseth, 1996). Similarly, Gilpin (2001) describes how trade liberalization results in more efficient trade patterns

determined by the idea of comparative advantage or “relative factor prices of land, capital and labor.”

Comparative advantage refers to the ability of one party to produce a good or service at a lower marginal and opportunity cost than another. In terms of countries engaging in international trade, both will gain by trading with the other even if one of the two produces all goods more efficiently than the other. The important factor is that both countries have “different relative efficiencies” (Baumol & Blinder, 2009). Gilpin (1987) maintains that the benefits of economic liberalism are clear if one looks back at various historical events that have supported the ideals of free trade. He cites events such as how Great Britain did better than rival nations during the mid-19th century because of having adopted a policy of free trade. France, fell behind during this same time period due to its policies of protectionism, thus rendering its industries inefficient. Moreover, Gilpin outlines that “every economy has a comparative advantage in something and therefore should not fear free trade.”

The literature regarding the debate on free trade vs. protectionism points out that trade liberalization provides numerous benefits. These include the creation of lower prices, greater national efficiency and increased consumer choice as a result of increased competition in domestic markets. In addition, Gilpin (2001) feels that another positive aspect of free trade is that it promotes

the spread of knowledge and technology internationally, giving developing countries the chance to close the income and productivity gaps between their economies with those whom are more advanced. Perhaps most importantly, Gilpin states that international cooperation that trade necessitates will encourage “prospects for world peace.”

According to Gilpin (2001), the costs of protectionism are substantial. He gives as an example the ratification of the North American Free Trade Agreement (NAFTA) in 1994 and how studies proved that protectionist measures included in this ratification saved few jobs and cost U.S. consumers significantly. Gilpin also states that trade protection can have a negative impact on income distribution, since a restrictive measure such as a tariff causes income shifts away from consumers and sectors that do not have economic protection.

As a support to one of the possible results of this investigation which states that the U.S. has engaged in some protectionist activity in recent years, Gilpin (1996) has stated that perhaps the U.S. is losing sight of benefits of free trade and in turn, what liberal economic theory suggests. Even in a paper from back in 1996, he felt that although the 1990s had already seen a positive boom in free-trade activity, longer-term trends suggest a dwindling commitment to trade liberalization, which has, in his opinion, been a cornerstone for post-war

peace and prosperity and continuing along a more protectionist path could have negative consequences post-Cold War.

Furthermore, global economic powers like the U.S. and Western Europe are shying away from global economic interdependence because of domestic industry costs and thus provoking aversion to economic liberalization and greater acceptance of state intervention and protectionist policies (Gilpin, 1996). Based on the above, we can deduce that Gilpin would clearly not be in favor of agricultural industry protectionism using SPS measures due to its contradiction with liberal trade theory and the costs it presents to long-term economic development.

Another noteworthy author on the positive aspects of free trade and the drawbacks of protectionism is Jagdish Bhagwatti. Shortly after the establishment of the WTO, Bhagwatti wrote of three main reasons free trade should be supported. First, he wrote that to date there has been no demonstrated rationale to support not embracing free trade. Second, he maintains that “the Visible Hand” (or protectionist intervention) will be worse for all economically since “interventions will reflect lobbying rather than social advantage”. And finally, Bhagwatti wrote that retaliatory reaction by other nations in response to one nation’s protectionist economic policy will counteract any benefits this intervention could hope to have (Bhagwatti, 1998).

Bhagwatti also cites his native India as a case for supporting free trade, by describing the poor trade conditions before free-market, less protectionist policies were finally adopted. He wrote how real reductions in poverty levels were finally seen after these kinds of changes were made. Moreover, he believes that rather than maintain interventionist policies as a means to avoid free trade, developing countries should be able to rely on organizations like the International Monetary Fund (IMF) or the World Bank to offer assistance while they adjust to the implementation of more liberalized trade policies. According to Bhagwatti (2001), free trade is the obvious and preferable choice over protectionist policy, as many nations provide success stories that demonstrate how the reduction of trade barriers in the 1970s and 1980s yielded real benefits while restrictions due to state intervention have had negative consequences.

2.1.2 Arguments in favor of Protectionist trade: Ha-Joon Chang and Dani Rodrik

Although it is important to point out in this part of the investigation that in today's world, there are very few people who feel that "absolute" protectionism or free-trade is the answer to economic successes. However, for purposes of exposing both sides of this debate, we are examining authors who have a tendency one way or the other. In order to examine the other side of this

argument, we begin by taking a look at the writings of an economist who, unlike Gilpin, points out the shortfalls of liberal economic theory and where protectionist policies, in his opinion, have led to the success of developed countries. The book Kicking Away the Ladder (2002) by Ha-Joon Chang analyzes how the U.S. and other developed countries sometimes give a misleading picture on how they achieved their economic success. He describes how during the 1980s a “neoliberal” agenda of privatization, deregulation, protection of intellectual property rights, and market oriented financial institutions was pushed by developed countries such as the U.S. as the solution for developing countries to achieve economic success.

Chang (2003) signals that this is an unfair position for developed countries to take, since they themselves throughout the century leading up to this had employed interventionist measures in order to promote their industries, thus helping them achieve their economic strength. He includes examples such as how in the 19th century, France followed a relatively strong mercantilist economic policy during the time in which it became a leading world power. In addition, Chang references how Switzerland also became a world leader in its own right in technology during the 20th century in *absence* of laws that strictly regulate intellectual property.

Therefore, Chang’s opinion is that it is hypocritical for developed

countries like the U.S. to claim that developing countries should not allow any interventionist economic policy. His view is that in practice, developed countries have applied “bad” industrial and trade policies in the past, often relying on industry protectionism to protect infant industries via export subsidies that nowadays would be all but prohibited. Chang also highlights the German economist Friedrish List, who maintained that in the presence nowadays of developed countries, developing countries cannot truly develop new industries without some state interventions. Developed countries are in a way attempting to ‘kick away the ladder’ on which they themselves climbed up to become developed so that no one else can follow this same path.

In addition, Chang signals that when Adam Smith wrote The Wealth of Nations back in 1776, it actually encouraged certain government interventions in the market in order to kick start national economic development. Chang (2002) wrote that this included items such as the initial state support of infant industries; which, the U.S. utilized to its full advantage and has not always purely promoted laissez-faire capitalism and supply-side economics.

Finally, another well-known economist that supports the possible benefits that protectionism can offer is Dani Rodrik. In his article, “Rethinking Growth Policies In The Developing World” (2004), Rodrik talks about how the early 1990s saw a wave of various events attempting to increase economic

development for developing countries via more liberal free trade policies and how the Washington Consensus was one of the most noteworthy of these attempts (Rodrik, 2004; Williamson, 2004). However, Rodrik (2006) maintains that this yielded lower results in GDP per capita growth than expected, particularly in Latin America.

He also points to countries like China, who, while maintaining high levels of trade protection and low privatization, has obviously been unrivaled in economic growth achieved throughout the 1990s. According to Rodrik, a one-size-fits-all mentality for trade policy is not reasonable, and that "different *contexts* require different solutions to solving common problems. Enhancing private investment incentives may require improving the security of property rights in one country but enhancing the financial sector in another". It is important to point out here that although Rodrik gives compelling reasons for when some "protectionist" actions are helpful for economic development, there is no reference to the idea that regulations meant for specific purposes (i.e. SPS measures) should fraudulently be applied for protectionist means.

2.2 Identifying the use of SPS Measures as NTMs in International Trade and how they relate to Free-Market and Protectionist Theories

It is important to clarify that the topic of protectionism that will be referred to in this investigation is what results from rejected exports from Chile to the U.S. on the basis of SPS measures. This hypothetical situation demonstrates an example of SPS measures becoming an NTM enacted by the U.S. to protect itself from competition from Chile. The reason why these measures are referred to as barriers is because in the end, they end up having the same restrictive effect on trade as a normal tariff would have. The occurrence of this kind of barrier became more prevalent during the latter half of the 20th century while the use of regular trade tariffs in international trade has diminished from 40% in 1947 to around 3.8% in 2005 (Villarroel Ríos, 2013).

However, despite this, since the mid-1990s, the number or notifications regarding the supposed use of NTMs has greatly increased. This activity has been measured based on the number of cases presented to the WTO's Committee for Technical Barriers to Trade, thus demonstrating the increased presence of NTMs in the absence of actual tariffs (Bacchetta & Beverelli, 2012). Moreover, the WTO wrote in its 2012 International Trade Report about how the fragmentation of supply chains and increased consumer awareness regarding standards of food safety has caused an increase in the number of standards enacted for food safety, both domestically and for imports (WTO, 2012a).

Therefore, it is easy to understand where the pressure has originated for the U.S. to reject Chilean imports based on SPS measures. On one hand, government officials are obligated to allay consumers' fears as well as appease domestic agricultural sectors. Here is where we begin to question or *not if these* obligations have made it easier for the U.S. to engage in economic protectionism by passing off certain export rejections as having been violative of SPS measures since they already are responsible for referencing these standards when there has in fact been a violative import received. This scenario is where we begin the debate regarding the use of protectionism by the U.S. towards Chile -that perhaps the U.S. has found a new NTM in SPS measures.

Here we also start to see how the previously described theoretic framing between protectionism and liberalization of trade (or "free trade") is potentially represented in the trade relationship between the U.S. and Chile. As we have already seen, the debate between free trade and protectionism is complicated and subject to various opinions as to which is preferable. This thesis will investigate in depth within this theoretic background regarding the SPS measures that have been cited by the U.S. for rejection of Chilean imports. In addition, it will seek to present, based on specific research, whether or not it can be objectively determined that the U.S. has used SPS measures as a way to enact NTMs and in turn, subscribe to "protectionist" theory in order to *protect* its national agricultural industries.

One often hears general declarations that the U.S. is a manipulative and unfair international trading partner (Gillmor, 2013; Jackson, 2011). Therefore, it is important to conduct concrete investigations based on reliable sources of information to either confirm or discard such proclamations. It is possible that this investigation will conclude that the U.S. is effectively engaged in protectionist behavior that does not submit to the economic ideologies it publicly supports, such as greater liberalization of open trade and minimal state intervention (Chang, 2002). If results do in fact demonstrate that this is the situation, it could provoke a shift in the tone of future analysis of the trade relationship between Chile and the U.S.

This is an important topic to be studied as there already exist several investigations regarding how SPS measures can be potentially protectionist, there is relatively little written regarding how this plays out in real-life trading practices between WTO member nations, particularly between the U.S. and a Latin American nation. The question of “what challenges” this scenario presents to the trade relationship between the U.S. and Chile is what this thesis seeks to answer by determining first whether or not the U.S. is using SPS measures for protectionism or is simply applying these measures when necessary with the end goal of protecting its consumers.

CHAPTER 3: THE TRADE RELATIONSHIP BETWEEN THE UNITED STATES AND CHILE

In this chapter the focus was to present a more detailed picture of how the trading relationship between the U.S. and Chile began, particularly by giving background on the negotiation of their FTA. Also, this chapter provides information regarding how their particular trade relationship operates in the backdrop of modern international trade within the WTO and how agricultural products have been discussed with relation to SPS measures. In addition, the chapter is concluded by taking a closer look at the Trade Policy Review of the WTO and how this serves as a mechanism within the organization to prevent or alleviate protectionism on the part of one member nation towards another. This section goes into detail on the history of this mechanism and how it has affected the U.S. and Chile.

3.1 Implementation of the Free Trade Agreement (FTA) between the U.S. and Chile

Chile has had many positive results from its efforts to make trade and economic growth a key element of foreign policy, especially via international trade. As of 2013, Chile had trade agreements with more than 60 countries, including FTAs with 23, thus gaining preferential access to over 60% of the world's population and more than 90% of the world's GDP (Murray, 2013). Chile

has favored a more neoliberal approach to economic policy than many of its regional neighbors, perhaps giving it much of the success it enjoys today. Therefore, it is clear that in this way, Chile has subscribed to the “pro-free trade” side of the previously described argument between trade liberalization and protectionism.

In addition, the existence of the numerous Free Trade Agreements (FTAs) Chile has with other countries has given it additional diplomatic presence. According to Universidad de Chile Economics Professors Joseph Ramos and Alfie Ulloa Urrutia (2003), one of the main reasons Chile needed to negotiate a FTA with the U.S. was to expand economically in an effort to reduce the effects of the isolation it had endured during the dictatorship of Pinochet for nearly two decades. Chile has also received praise for complying with Uruguay Round trade agreements and the unanimous support of the Chilean Congress by joining the WTO (Gobierno de Chile, n.d.). Since the U.S. has been one of the most vocal supporters of liberalized trade over the past century, we see that up until this point, they would have seen Chile as an ideal trading partner for them due to these notable improvements.

However, one economic downside Chile has experienced at times in spite of numerous successes is strained economic relations within its region. For example, Chile’s full membership into MERCOSUR was blocked when Chile

signed an FTA with the U.S. (BBC News, 2012). Since then, there have been continuing tensions in the relationship between Chile and MERCOSUR, with both sides often critiquing one another. In 2010, Chilean President Sebastián Piñera was quoted as saying, “MERCOSUR, in its first stage, focused on the integration between its member states. In my opinion, this trade block neglected [the importance of also] becoming integrated with the rest of the world,” (Ámbito.com, 2010). Although such sentiments can put certain regional relationships at risk, it is clear that larger ‘players’ in the world trade scene such as the U.S. might appreciate Chile’s ability to stick to its ideals of liberal international trade, thus making them more desirable partner to trade with over the long term.

Negotiations for the FTA between the U.S. and Chile began in 2000 and although they were lengthy, this helped iron out issues before more sensitive items began to be negotiated, such as agricultural and environmental issues. The measure was given wide support from all levels of Chilean government, giving it a “national” quality that made it a popular decision and the FTA was approved in 2003 (Troncoso, 2011). Chile’s unwavering dedication to being a consistent trading partner with the U.S. has endured, despite some critics that say the relationship is not reciprocal enough to warrant such support and such a ‘pro-USA’ stance could alienate other trade partners, such as those in the MERCOSUR trade bloc.

Moreover, at the time of the approval of the FTA between the U.S. and Chile, there were some complaints by those from the agricultural sector that felt not enough was being done to help Chileans working in these industries domestically and that more should be done to the infrastructure within Chile before agreeing to such ambitious terms in the FTA (Troncoso, 2011). There was already concern that the U.S.'s food safety standards were a form of a non-tariff barrier the U.S. was imposing on Chile and that Chile must be more forthright in demanding that the U.S. not to impose arbitrary food safety standards (Lamy, 2013). According to Gonzalo Rios Kantorowitz, Head of International Agreements for the International Affairs Division of the SAG, Chile has indeed in the past not taken advantage of certain forums available within the WTO to challenge potentially unfair sections of FTA's with larger trading partners so as not to create a foreign policy rift.

Although there seem to have been disadvantages for Chile by committing to have a close trading relationship with the U.S., the above represents how it has been important enough to risk alienating neighboring countries (i.e. those in MERCOSUR) and aggravating local producers. Therefore, we must deduce that the government has decided that the benefits to be gained from potential economic growth as a result of this trade relationship outweigh these potential disadvantages. Chile has made no secret of the fact that it wishes to grow

economically via increased FTAs with other countries, as is clearly demonstrated in the beginning paragraphs of this chapter. It is obvious that such progress cannot be made without compromising in certain situations, which it perhaps was forced to do when negotiating the FTA with the U.S.

According to Christian Häberli (2013), Senior Research Fellow at the World Trade Institute in Switzerland, FTAs are not sufficient to harmonize standards (regulations) between countries; issues persist, like the one we see here with food safety regulation demands. Therefore, it is important to establish with the above background data that Chile willingly and freely agreed to the terms of this FTA with the U.S. and therefore accepted terms being offered to them, including what some considered to be overly strict food safety regulations. Therefore, a later chapter will address specific cases regarding rejected imports from Chile to the U.S. in order to evaluate in detail if what was once perceived as overly strict (however acceptable at the time for Chilean decision-makers who agreed to the terms in the FTA) has actually shifted into pure protectionism.

3.2 Significance of the World Trade Organization (WTO) in the Trade Relationship between the U.S. and Chile

3.2.1 Relevance of the Trade Policy Review (TPR) Mechanism of the WTO

To gain a more objective perspective on whether or not U.S. trade activities operate within the confines of WTO regulations (and by definition, not in a protectionist fashion), this section will analyze the most recent Trade Policy Review (TPR) that was done for the U.S. by the WTO. The most recent TPR done for the U.S. was in December 2012 and the next one will take place in December 2014. According to the WTO website that explains the TPR and its significance to the organization, Trade Policy Reviews are an exercise, mandated in the WTO agreements, in which member countries' trade and related policies are examined and evaluated at regular intervals. Significant developments that may have an impact on the global trading system are also monitored. All WTO members are subject to review, with the frequency of review depending on the country's size" (WTO, 2014d).

The TPR is also referred to as the Trade Policy Review Mechanism (TPRM), which came about as a result of the Uruguay Round and exists to facilitate the streamlining of multilateral trade between member countries and above all, increase transparency of each country's trade policies (WTO, 2014d).

Moreover, this regulation requires that the current members who hold the largest shares of world trade to have this review every two years. Currently, the U.S. is one of these four countries, this making scrutiny regarding transparency of their policies more concentrated. This is useful for addressing the hypothesis of this thesis on whether the U.S. is circumventing WTO rules to facilitate protectionist ends. As the following paragraphs will demonstrate, the U.S. is subject to one of the most scrutinizing “audits” of any WTO member country. Therefore, we can already begin to see how protectionist trade practices would be especially difficult under the watchful eye of the Trade Policy Review Body (TPRB).

One key document used for the research of this most recent TPR for the U.S. was the TPRB Review document, which serves as a record of the meeting and contains written questions by member countries who wish to present concerns regarding the trade practices of the member country being reviewed as well as replies provided by the member country being reviewed. Ironically, in the section where Chile brought up concerns regarding its trade relationship with the U.S. in the years leading up to and during the year this review took place, there was no mention of SPS measures and how the U.S. has applied these in regards to Chilean exports to the U.S. In fact, the majority of questions Chile had for the U.S. during this review had to do with intellectual property topics (WTO, 2013).

Therefore, it is possible to assume that the question of whether or not the U.S. has been using SPS measures as a new form of protectionism, as the investigation question for this thesis suggests, was not enough of an issue for Chile to bring up in a forum that would have put such concerns into the open. This would have been an opportunity for Chile to solicit the assistance of the WTO to require the U.S. to be held accountable for these supposedly protectionist behaviors in very public way. No doubt, this kind of pressure would have yielded at least some beneficial results for Chile. However, since this was not the case, one can deduce as well that perhaps the hypothesis of this thesis, that the U.S. has been exploiting SPS measures as a way to protect national production from competition by Chilean imports, is not a realistic scenario and at the very least, not a problem considered to be a priority by the Chilean government. This information is significant for analyzing the hypothesis originally set forth in this thesis.

Moreover, the Trade Policy Review Report by the Secretariat for this latest TPR states: “The United States continues to be active in the areas of standards and phytosanitary measures, especially in the work of the WTO Committees, with respect to making notifications, and with disputes concerning these subjects. Between 1 January 2010 and 30 June 2012, the United States made 520 notifications to the Committee on TBT of which, 337 were addenda or corrigenda, and 537 to the Committee on SPS. With a few exceptions, such as

the Food Safety Modernization Act, the procedures for developing technical regulations and conformity assessment procedures for TBT and SPS matters have not changed over the past few years." (WTO, 2012b). Again, we do not see in this evaluation an indication that the actions of the U.S. with regards to SPS measures are against WTO regulations, as this report would be obligated to mention.

Nevertheless, the above report does mention the Food and Drug Administration (FDA) of the U.S.'s Food Safety Modernization Act (FSMA) that was signed into law by President Obama in January of 2011 (FDA, 2014c). The reason for the noteworthiness of this new act is the fact that it declared that importers are now responsible for all costs associated with inspection and reexaminations of food exports to the U.S. Since close to 20% of food products consumed in the U.S. are imported (Sloane, 2013), the purpose of the creation of the FSMA was to shift focus more to *prevention* of food contamination rather than just responding to it once it is already a problem. This development of making other countries responsible for the *costs* of the U.S.' strict sanitary regulations in addition to compliance with them were bound to provoke some reaction among other WTO member countries the U.S. trades with.

According to Gonzalo Ibáñez, International Regulatory Analyst for the FDA, among significant Chilean exports affected by this new law include

approximately 50% of fruit products exported to be consumed in the U.S. as well as nearly 90% of seafood products consumed. Interviews for this thesis showed that the topic of this new act does prompt some apprehension among those who work in and for the Chilean agricultural sector while other responses indicated less unease over this legislation. Although this act is not yet fully operative, Jaime González, Agricultural Engineer for International Negotiations for the Agricultural and Livestock Service for the Chilean government (SAG), expressed concern that in his opinion, a downside of the FSMA is that it in some ways violates sovereignty of countries with the part of this act that indicates the FDA will now have the right to conduct “surprise” or unannounced inspections/audits of facilities of producers that export to the U.S.

This sentiment of trepidation was also echoed somewhat in an interview with Elizabeth Hoffmann, Export Manager for Comtesa, a Chilean exporter of crab products. Her reaction to the FSMA seems to impose many requirements of foreign exporters that end up causing variances to their end product. For example, a new requirement she gave means their crab products must be cooked to a certain temperature, thus altering the flavor and quality of the product. Her opinion was that this could perhaps be protectionist by design.

However, there were also reactions in interviews for this topic that expressed little anxiety over the changes that may be brought about as a result

of the FSMA. In an interview, Rios Kantorowitz said that while this new act is indeed demanding, especially for a smaller country, Chile is fortunate to have frequent and in-depth conversations with agencies in the U.S. that regulate exports from Chile and it was not his opinion at the time that the FSMA will have dire consequences for Chilean exporters. This sentiment was also echoed by Claudio Contreras, Quality Control Manager of Del Monte Fresh Chile as well as Rodrigo Contreras (no relation), International Trade Consultant and former lead negotiator for the Chilean Ministry of Agriculture. The opinions expressed by both were that changes of this kind are always complicated at first; however, Chile has consistent, respectful dialogue with U.S. agencies in charge of these matters and it is just a part of international trade in today's world.

Therefore, if we consider responses from both sides above, we can see that although the FSMA was mentioned in the WTO Secretariat report for the TPR for the U.S. recently as noteworthy and austere in many ways, there has not been overwhelming alarm among Chilean agricultural experts that the FSMA is a protectionist ploy on behalf of the U.S. towards them. Consequently, since the only issue mentioned in the TPR was the creation of the FSMA and Chilean representatives do not overwhelmingly see this new act as a direct threat, we can essentially deduce that the WTO's strict, periodic review does not indicate suspicion of protectionist practices by the U.S. towards Chile. Therefore, this

supposition is a significant point *against* our hypothesis that the U.S. is using WTO agreements for protectionist means against Chilean agricultural imports.

3.2.2 Current significance of the WTO's SPS Agreement in the U.S.-Chile Trade Relationship

Next, we will focus on the SPS agreement, which gives the WTO's requirements for refusing an export due to food safety standards. The reason for this is so that we can compare in later sections whether or not U.S. regulatory agencies' processes for refusing and inspecting imports are in compliance with this agreement. According to the WTO, countries must make strides to ensure that the health and safety of plants and animals is measured in comparison with "objective and accurate scientific data" as much as they possibly can and that "if the national requirement results in a greater restriction of trade, a country may be asked to provide scientific justification, demonstrating that the relevant international standard would not result in the level of health protection the country considered appropriate (WTO, 1998).

In other words, the WTO's position on SPS measures is that countries have the right to protect themselves in enacting additional sanitary legislation if it is for the purpose of protecting consumers and is scientifically justified. In addition, the WTO suggests that these demands made by certain countries for

food sanitary regulation can actually contribute to the greater good, giving other countries that are unable to conduct the same high levels of research additional scientific mechanisms for ensuring their food exports are safe (WTO, 1998). Therefore, we see that based on our investigation up until now, the U.S. is not necessarily acting outside the confines of the SPS agreement and is in many ways helping improve quality of food exports everywhere. We will use a following chapter to study specific rejections of Chilean exports by the U.S. to gain a clearer insight as to whether or not the U.S. has been acting accordingly in this practice.

This leads us to the topic of transparency and how the WTO tries to supervise (without infringing on the sovereignty of member nations) the regulation of member countries' national SPS standards. Ensuring transparency begins with the WTO requiring member nations to notify other countries of updates to their lists of SPS requirements that affect international trade. In addition, countries must create "Enquiry Points", which are offices that field questions regarding new or existing requirements. Member nations who revise and update SPS agreements must also submit to official examination of how and where these requirements are applied. This is done by the SPS Committee, which reviews their compliance with the SPS agreement. Finally, the WTO oversees a dispute settlement mechanism to ensure legitimacy should an issue

arise between two nations regarding the scientific justification of the new SPS measure(s) (WTO, 1998).

Given this multi-faceted system of checks and balances, it already appears difficult for any nation to attempt to use SPS standards as a non-tariff barrier, given the transparency requirements just described. Nonetheless, according to Sofía Boza, professor of Agriculture Economics, the U.S. has the highest number of SPS notifications submitted to the WTO compared to other developed nations. However, Boza also writes in a paper from 2013 that basing opinions of countries' trade behavior on SPS notifications can be greatly biased, since, "…WTO notifications may not indicate necessarily that more trade limits are imposed than before, but that countries are more concerned with reporting" (Boza, 2013b).

In addition, since we have just seen above how transparency is such a significant concern for the WTO when it comes to SPS measures, the U.S. would have a harder time concealing protectionist intent with the SPS Committee's examinations and as described above, more frequent TPRs. Therefore, it is conceivable to propose the logical assumption that that the U.S. is simply a larger country with more trade activity and while its frequent SPS notifications are cause for more scrutiny, it is not adequate evidence to be considered 'proof' of protectionism. As the WTO is constantly evaluating their

validity, this would be extremely difficult to achieve when so often in the spotlight. Therefore, we see further abating of the hypothesis that the U.S. uses SPS measures to discreetly create non-tariff barriers. We can conclude form this chapter that:

1. When the time comes to evaluate the validity of the hypothesis presented in the previous chapter that the U.S. has used SPS measures to protect national agriculture against Chilean imports, it will be necessary to recall information from this chapter that demonstrated how Chile entered into agreement with U.S. aware of the requirements it entailed, even though it provoked concern and disagreement among certain individuals in the Chilean agricultural industry. Although we have seen that the U.S. is one of the more demanding countries in the WTO when it comes to SPS measures, Chile nonetheless signed an FTA anyway.

2. Second, we also saw in this chapter how mechanisms like the WTO's TPRB, supplemental trade dispute settlement body and SPS Committee investigations are concrete examples of how much exists for the means of transparency with regards to SPS measures among WTO member countries. As previously seen above (and will be presented more in following chapters), numerous interviews with

experts who work in the area of international agricultural trade have mentioned their belief in the legitimacy of these mechanisms and that even if the U.S. does have somewhat discriminatory practices towards some countries based on SPS measures, it is not their opinion that this is the case with Chile.

CHAPTER 4: INVESTIGATION OF IMPORT REJECTIONS FROM CHILE TO THE U.S.

4.1 Background Information on Database to be analyzed

This next chapter begins the part of this investigation which examines more closely the import refusals and rejections from Chile to the U.S. The research conducted for this chapter is to help the reader understand who the authorities are in the U.S. who have the power to refuse or accept agricultural imports and specific instances of these kinds of cases. Also, this chapter gives details about the time period and products to be analyzed in order to have a sufficiently representative sample of actual Chilean import rejections. Finally, there is special emphasis on the FDA and its Import Refusal Report, which serves as the database for analysis for this project.

4.1.1 Delimitation of investigation

The time period that will be analyzed for this investigation will be from 2002-2012. The reason for this is it includes several important events in the international trade relationship between the U.S. and Chile -the most recent TPR of the U.S. was conducted in 2012 and ten years before this the FTA between the U.S. and Chile entered into force. Moreover, studying less than ten years would make it difficult to achieve a diversified perspective on trade events

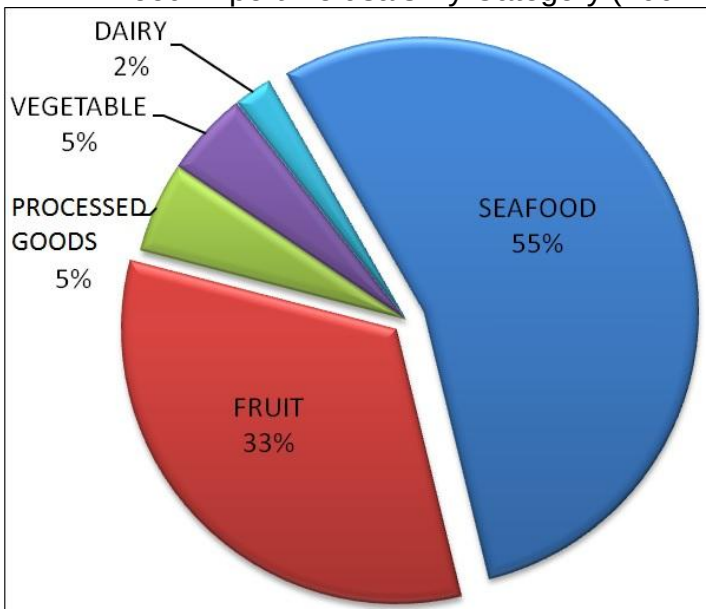
between these two countries.

Nonetheless, since it would be overly ambitious to attempt to analyze and study all agricultural imports from Chile to the U.S. within for a ten-year time span, the following analysis was limited to only include imports that are under inspection jurisdiction of the Food and Drug Administration (FDA) of the United States. FDA data are a good selection for analysis because they constitute roughly 90% of all food products imported to the U.S. (G. Ibáñez, personal communication, August 26, 2014) and cover the broadest variety of food imports and potential food safety issues. However, since the FDA still oversees a substantial quantity of imports from Chile, as an additional filter, this investigation will focus on refusals by the FDA for fruit and seafood categories in order to better analyze the data collected and obtain clearer results.

One reason for this is that both seafood and fruit exports constitute over 13% of Chile's international exports (The Observatory of Economic Complexity, 2012) and the FDA is the U.S.' government inspection agency that has food safety oversight of all domestic and imported foods except for the meat, poultry, and processed egg products, which are regulated by the United States Department of Agriculture's (USDA) Food Safety and Inspection Service (FSIS). Also, as is shown in Graph 1, FDA import refusal data from the ten-year time period being studied in this investigation showed that the top two most

commonly rejected product categories of food imports from Chile to the U.S. were fruit (33% of total) and seafood (55% of total) products:

Graph 1: FDA Food Import Refusals By Category (2002-2012)



Source: Compiled by Author from FDA Import Refusal Reports, 2002-2012

4.1.2 Existing legal framework for U.S. Government Inspection Agency - the U.S. Food and Drug Administration (FDA)

In order to better understand how and why the FDA operates the way it does with respect to inspection of agricultural imports, it is important to review the regulations that authorize the FDA to function. This way, we can objectively

separate actions by the FDA towards refused agricultural imports from Chile to the U.S. and decide if evidence suggests the FDA was just following procedure or if there was a break in protocol, thus suggesting the potential for the possibility of protectionism as the root of this change in the usual processes followed by the FDA.

The first legislation that should be addressed is the act that established the FDA as an organization with jurisdiction over inspection of food products, the Federal Food, Drug and Cosmetic Act (FD&C Act). The U.S. Congress passed this act in 1938 and it states that the FDA has the authority to oversee safety of food, drugs and cosmetics. In addition, this act says the FDA has the right to reject an export if it “appears” to be in violation with certain sanitary measures. This act dedicates the entire eighth chapter to import and export regulation and has been amended several times, most recently in 2007. One of the most significant sections in this chapter of the FD&C Act is section 801, where it states that the FDA is directed to “refuse admission of any article that “appears” to be in violation of the Act” (FDA, 2012d).

As we will see throughout this chapter, this language of “appears” is often controversial. This is because the word “appears” leads some to believe the FDA can arbitrarily reject imports without proving an actual violation. Investigation for this thesis indicated that this is a concept that is not easily

explained. In fact, this rule means that an import can be rejected without having necessarily been violative, but because it did not adhere to certain prerequisite standards. According to Benjamin England, a 15-year FDA import officer and founder of importer awareness site FDA Imports.com, the “appearance” of a violation can be considered any number of things, even something as minor as a previous mislabeling of a product that never posed any serious threat to consumer health (Quinn, 2011).

As we will see in more detail later on, this could mean the exporter did not submit required paperwork or obtain specified certifications required by the U.S. to export food products. Therefore, due to this kind of oversight, the FDA can refuse entry citing the FD&C Act (Buzby, Unnevehr, & Robers, 2008). This topic is extremely important for the overall discussion in this thesis since to an outsider, the idea that the a U.S. regulatory agency can reject an import for appearing to have violated a certain criteria, can be easily misinterpreted as confusing and inconsistent at best.

It is also important to mention another key government actor that affects U.S. trade with Chile, which is the Federal Register of the U.S. government. This public forum, which is updated daily, contains information regarding new regulations for international trade, including sanitary measures for agricultural products. In addition, the FDA maintains that this register includes all

notifications for new SPS measures they have made to the WTO as soon as they are submitted (G. Ibáñez, personal communication, August 26, 2014). This Federal Register was created to give U.S. citizens as well as countries the U.S. trades with an understanding of regulatory processes enacted by U.S. government agencies. Therefore, transparency of new U.S. legislation with regards to SPS measures is actually increased via this mechanism that provides a forum for U.S. and foreign organizations alike to gather information on new technical regulations created by agencies like the FDA (Office of the Federal Register of the United States, n.d.).

4.2 FDA's Import Refusal Report (IRR Report) – Database for Thesis Investigation

The database for this investigation is comprised of data taken from the FDA's Import Refusal Report or IRR. Information was collected for all refusals of agricultural imports from Chile listed on this report from 2002-2012 and then analyzed to recognize trends that can assist in identifying if there are indicators to suggest the U.S. has continually acted in compliance with the pillars of free-trade as identified in the theoretic framing of this project or if specific refusal cases suggest a more protectionist agenda. The IRR is a good representation of rejected exports from Chile to the U.S. since the FDA oversees the inspections

of all but 10% of all food products imported to the U.S. (Buzby, Unnevehr, & Robers, 2008). In addition, the IRR includes supplementary data on the refused imports mentioned in these reports that can be used to understand what FDA criteria these imports failed to meet.

4.2.1 Definition and Analysis of FDA Import Alerts

One of the main reasons why certain imports were refused entry to the U.S. and subsequently listed on the above mentioned IRR is because the person or company that is in charge of said import was on FDA Import Alert. Exporters (person, company, manufacturer, etc.) are put on Import Alert (IA) for not having complied with one or more FDA regulations when previously attempting to export a shipment to the U.S. Another important item to mention with regards to IAs is that although we know that refusals on the IRR can often be the result of IAs, it is not possible to determine which refusals were a direct result of an IA just from analysis of IRRs (Buzby, Unnevehr, & Robers, 2008).

IAs will be an important part of this chapter, as they many times are created for a certain manufacturer, country or product and therefore are the reason for import refusals even though the particular product being refused hasn't been inspected and/or is not deficient in any way. For example, there could a case of a listeria outbreak in one country for oranges, and therefore all

items from that same country are automatically rejected for a period of time even for products completely unrelated to oranges. The FDA website itself even states that it can elicit “Detention Without Physical Examination (DWPE)” -or refusal of a product without laboratory testing if the manufacturer of the import (the “importer”) is listed on an Import Alert and/or the inspecting officer has a reasonable doubt that the import appears to be in violation in some way to the FD&C Act (FDA, 2013b).

Another example of a reason for an IA being issued could be a company that forgot to file a registration paper certifying it is a low-acid canned-good producer and attempted to export its canned goods to the U.S. anyway. If the FDA realizes this mistake, this exporter will be listed on import alert until FDA-required steps are taken by the exporter to prove it has made the changes required to attempt to export to the U.S. again later on (Import Alerts.com, n.d.). It is clear to see that this could be frustrating for exporters since they could end up receiving an IA on a perfectly sanitary export. Elizabeth Hoffmann of Comtesa explained during an interview that this firm was put on Import Alert for not having sent a required document by certain date, not because a shipment of seafood they sent did not fulfill SPS regulations. She said that this was frustrating for them, since they had complied in every other way.

England also states in one of his writings that that many times other countries are forced to make costly changes and go through compliance audits to avoid further product refusals by the FDA when either they only committed a minor infraction (such as a labeling or English-spelling error) or happened to be a part of a country-wide import alert (Quinn, 2011). Hoffman's comments echoed this sentiment, as she also said that another problem with the FDA IA system is that almost six months later, their company still has not been informed if they have been removed from IA yet for not even though the required paperwork has now been submitted.

Obviously, this is an issue for Comtesa since in early 2015 they plan to export another shipment of their product to be received in Miami, Florida. If for some reason the paperwork that was submitted has not yet been processed and the FDA's electronic system still recognizes Comtesa as being on IA, their entire shipment could be rejected. Clearly this would be a huge problem for their company and result in a tremendous loss of product since fresh crab is clearly a highly perishable export. What is more, Comtesa already receives more demand than they can fill and in this case they would be losing money instead of exporting this same product to another market that would have accepted it without such demanding conditions (E. Hoffmann, August 1, 2014).

However, it is important to point out here as well that Hoffman did say they have had worse experiences when trying to comply with the same sort of requirements when exporting their seafood products to numerous EU countries. While she did not specifically indicate which countries she was referring to, it does make an important point that perhaps the interpretation that protectionism is the reason behind tedious paperwork required by the FDA to export food products to the U.S. is incorrect and that it is simply something that must be accepted when exporting to more developed countries with more sophisticated sanitary requirements.

4.2.2 FDA Import Alert Cases

One high-profile case that refers to the FDA's practice of assigning import alerts was in 2011 when Del Monte Fresh Produce filed a lawsuit against the FDA for putting them on IA. Del Monte filed this suit in response to what they cited as an unfounded action against cantaloupes they were importing from Guatemala. Del Monte asserted that the reason for IAs issued by the FDA should be more transparent and have clear guidelines based on sound practices and scientific data (Rothschild, 2011). Many Chilean exporters, such as was the case here for Del Monte and previously for Comtesa, try to ship highly perishable food commodities that can be ruined by a two or more week

detention whilst it is determined whether or not an IA or import refusal is justified or not (PRNewswire, 2014).

In addition, the FDA is not even required to contact importers to inform them that they have been placed on import alert, further complicating the steps needed to import to the U.S. (Condra, 2011). Moreover, the only way to get taken off of Import Alert is to submit documentation from the last five shipments of that product from the same importer (or manufacturer) demonstrating that each shipment was in total compliance with the FD&C Act (FDA, 2013b). Moreover, the FDA will only take the decision to remove this importer from Import Alert if there is “clear, convincing and documented evidence proving that the conditions that gave rise to the appearance of a violation have been resolved and the agency can be confident that future entries will be compliant with the new law” (Import Alerts.com, n.d.).

Moreover, according to England, experts in the area of import regulations for the FDA recognize that exporters often do not realize that challenging the regulatory actions of the FDA are necessary since many times it is possible and even likely that their rulings are incorrect. However, since exporters see this as costly and time consuming for a process not guaranteed to improve their status as an exporter to the U.S., they do not attempt to dispute the FDA rulings and must deal with the consequences of being put on IA (FDA Imports.com, 2013).

According to Hoffmann, the sheer quantity of updates and improvements required by the FDA is extremely expensive. Her experience during an FDA inspection Comtesa had in 2013 was that the representative from the FDA, while thorough and informed, had demanded changes that would be too costly for a smaller exporter and nearly was for them as well.

Here, we see arguments for both sides of our hypothesis. On the one hand, the U.S. is simply looking out for its consumers but automatically refusing imports that “appear” to be high-risk. However, we must also concede that the idea of open, liberal international trade as was described at the beginning of this project does not suggest that one country should constantly be obligating its trading partners to automatically be on the defensive and incur more costs exporting to them than when it is the other way around. Therefore, the above points, while wearisome, are not without merit, as they exist in writing to protect the health of consumers, which is the purpose of SPS measures. Nonetheless, we also recognize that the frustration that results from this level of exigency can cause some to believe that protectionism is behind such challenging bureaucracy.

4.2.3 Physical inspection of imports by the FDA

Due to the extremely high volume of imports it receives, the FDA is unable to inspect each shipment. Therefore, according to a report by the Economic Research Service of the USDA (ERS), the FDA "relies on risk-based criteria to choose which shipments to examine (e.g., sampling, label review) and which food safety and other problems to post as import alerts…In essence, to an important yet unquantifiable extent, IRR data reveal where the FDA has focused its efforts (e.g., developing and disseminating specific import alerts) and/or resources (e.g., choosing shipments to examine) in response to identified problems…" (Buzby, Unnevehr, & Robers, 2008). This means that a current refusal could have been automatic (e.g., the result of an IA) and not based on the condition of the current import. Here it is important to recall that an IA means that the importer will automatically have future imports refused until proper paperwork is filed to prove that the necessary actions have been taken to resolve any previous issues.

From 2003-2006, the FDA only did a physical, scientific sampling of roughly 2% of seafood products imported to the U.S. (Food & Water Watch, 2007). One factor that contributes to the low number of physical inspections is budget for staff to do these inspections. For example, in 2007, U.S. Congress cut funding for the budget allotted to inspect seafood imports from $211,000

USD annually to $0, thus rendering the FDA unable to adequately inspect seafood imports (Food & Water Watch, 2007). Because of this, certain imports are automatically refused as a result of import alerts as there is no budget to properly examine all of them. This takes us back to the concept of IAs again, as rejecting certain products because they belong to a certain food category is what the FDA resorts to in absence of being able to conduct a thorough physical inspection.

Using IAs (and, as a result, import rejections) as a solution for not being able to physically inspect imports can understandably irritate exporters from other countries. Also, the fact that there are so few physical inspections of imports, prior violations that result in IAs can have significant future consequences not only for the manufacturer who was responsible for the original infraction, but for others attempting to import similar products or from the same country. In addition, these kinds of rejections do not adequately address food safety issues they hope to prevent, as many times they can penalize exporters who were not guilty of violating SPS measures in the first place. Therefore, the case can be made that refusing shipments from companies that are “guilty by association” only makes the trade relationship between the U.S. and other countries less amiable and beneficial and prompt some frustrated foreign exporters to suspect protectionism by the U.S. as the motivator.

However, as we will see in late chapters, many Chilean exporters do understand these processes as necessary difficulties.

CHAPTER 5: DATABASE ANALYSIS

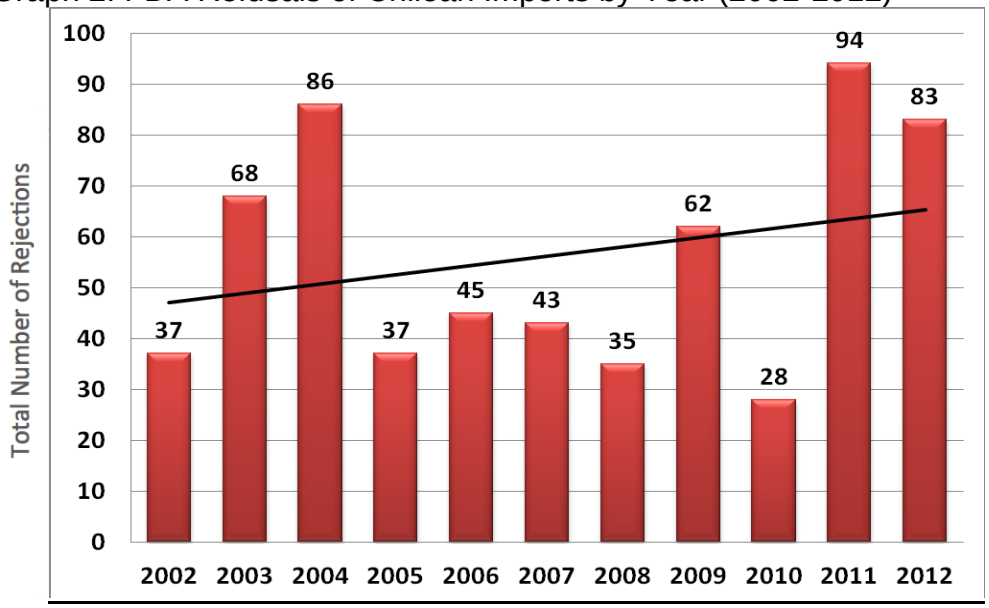
This chapter will present the processes that went into the qualitative investigation for this thesis and how data was analyzed based on previously presented quantitative background information. Also, this chapter gives details on the FDA reports used to comprise the database created for this project and specific numbers on what products were refused entry to the U.S. from Chile and the reasons given by the FDA for these rejections. In addition, this chapter manipulated the data in several ways to give more detail about rejections of agricultural products from Chile to the U.S. Separate data sets and charts were created for Fruit and Seafood products, as these are the main products being analyzed for this project. Moreover, this chapter begins to assert conclusions based on findings up to this point.

5.1 FDA Rejections from 2002-2012

According to the corresponding IRRs for these years, there were a total of 473 food import rejections from Chile to the U.S. that were rejected by the FDA between 2002 and 2012. However, as is shown on Graph 2, the total number of *rejections* listed for during this time was actually 618. This is because some shipments that were rejected during the abovementioned time period had more than one violation listed as the reason for its rejection. Therefore, the following

database analysis will use 618 as the official total number of rejections of Chilean exports by the FDA from 2002-2012, since the IRRs compiled to generate this database counted each violation as an individual refusal on the individual reports, even if some of these listed violations were for the same import (Buzby, Unnevehr, & Robers, 2008).

Graph 2: FDA Refusals of Chilean Imports by Year (2002-2012)



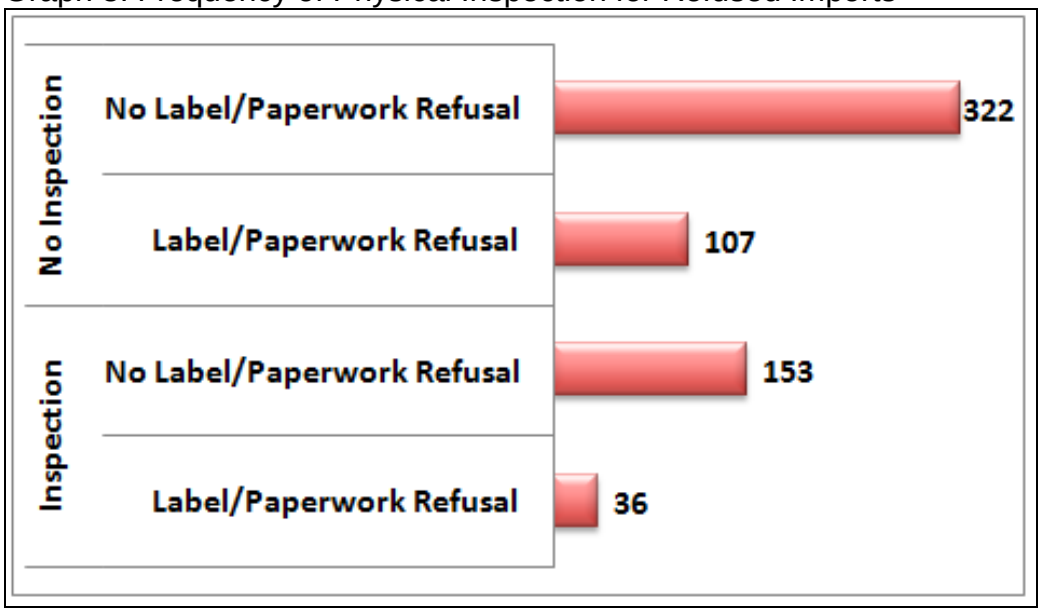
Source: Compiled by Author from FDA Import Refusal Reports, 2002-2012

5.1.1 IRR Rejections for Labeling and Import Alert errors

In Graph 3 above, there are two factors being represented; first, the first division of refusals between “yes” and “no” refers to whether or not there was an FDA Sample Analysis (i.e. a physical inspection by a FDA officer) done on a

particular refused import. Out of a total of 618 import refusals between the years of 2002 and 2012, only 189 were examined. Also, the chart above shows how the majority of refused imports that were not examined in a lab, were also not rejected for something obvious such as a mislabeling. This finding makes it important to recall how as mentioned previously, many times these IRRs include refusals that are the result of previous IAs. Therefore, we can infer that it is possible that some or many of these refusals that were not the result of an inspection were refused automatically as a result of having been on IA for being from a certain exporter, country, etc.

Graph 3: Frequency of Physical Inspection for Refused Imports



Source: Compiled by Author from FDA Import Refusal Reports, 2002-2012

Here, we see a potential issue in the way the FDA's import refusal processes could be perceived. Even if most of the above import refusals were based on prior import alerts that were the result of an unsatisfactory physical examination at one time, the fact that it is so difficult to be taken off import alert makes exporting to the U.S. extremely difficult after one minor infraction for complying sanitary measures, let alone for an exporter who ended up with an IA for a reason that was not their fault. Moreover, FDA Imports.com states how rescinding an FDA Import Refusal is far more difficult than removing and Import Alert. If the correct, senior FDA official is not contacted within a finite window of time, goods can be destroyed and the party exporting can face penalties preventing them from continuing to export their products to the U.S. In addition, even if the cause of the refusal is disproven or remedied, many FDA officers do not readily admit to their errors or withdraw a refusal without significant legal pressure (FDA Imports.com, 2014).

Obviously, the above scenario is an issue because a manufacturer from outside the U.S. many times cannot afford to constantly be both a litigator and an exporter; especially if they have been had a shipment refused and/or be put on IA for an outside issue that was only related to their country or product category. Therefore, such demanding rules and unforgiving policies can understandably lead some to suspect that the FDA is instructed to be overly strict in some cases as an attempt to also protect national industries of the same

items being imported. Again, we recall that SPS measures are only to be used to protect public health – however, here we see whether or not that is truly being addressed in the FDA's import refusal processes or not. In order to provide examples of how the above system affects international trade between the U.S. and Chile and how some Chilean exporters might begin to see some of the methods the FDA uses for refusals as arbitrary, we will refer to statistics in the previously cited IRR report from 2002-2012.

As stated previously, the two product categories that we will use for in-depth analysis are fruit and seafood. For fruit imports, there were a total of 203 refusals for the selected time period. Of these refusals, only 49 (less than 25%) were physically inspected by the FDA. Out of the 154 refusals that were not inspected, only 16 were refusals based on clear violations of labeling or certification requirements, with the two most common refusal codes pertaining to the product being "filthy" or containing some sort of chemical or pesticide residue.

In regards to seafood imports, there were a total of 337 refusals from 2002-2012. Out of these, 121 refusals were physically examined by the FDA. In addition, of the remaining 216 refused imports that were not examined by FDA inspectors, only 48 were as a result of clear errors in labeling and/or certifications being filed. While the percentage of products that *were* examined is

higher than that examined for fruit, it is still only roughly 36% of the total refused seafood products, which make up 55% of all refused Chilean imports to the U.S. during the studied time period.

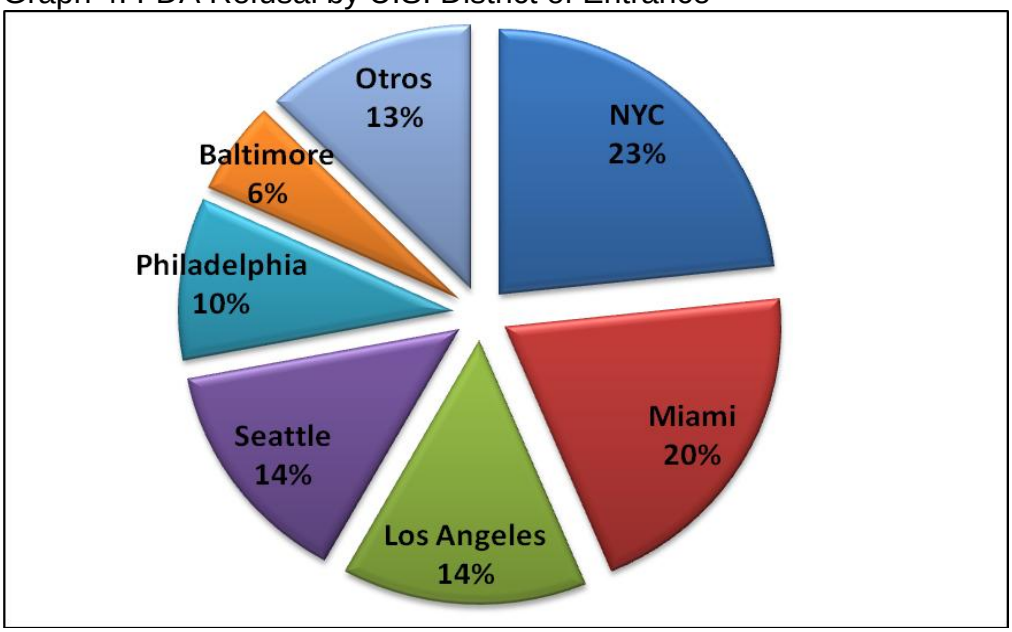
Based on the above information, we can clearly see that seafood is a significant source of refusals for food imports to the U.S. from Chile. Since seafood is a significant source of income for Chile, (The Observatory of Economic Complexity, 2012) this scenario is cause for concern for the Chilean agricultural industry. Moreover, the lack of physical inspection can obviously be puzzling to exporters to the U.S. who may have had attempted to export a perfectly compliant product that was rejected as a result of an IA. It is an understandable notion to think that exports should only be rejected if there is a clear violation found as a result of inspection. Nonetheless, the scope of exports received by the U.S. does not permit the FDA to be this thorough and IAs have become a logistical necessity, as frustrating and suspicious as this may seem to some.

5.1.2 Rejections analyzed by Port of Entry to the U.S.

Discovering whether or not protectionism plays a role at the heart of all the difficulties caused by U.S. sanitary regulations for importers is the main goal

of this project. However, as we have seen from the evidence above, sometimes import refusals based on noncompliance with certain “sanitary” measures can be the result of a prior or unrelated incident. In order to get another perspective on the idea of protectionism potentially existing, it is necessary to examine where and how Chilean agricultural products crossover with agricultural products of the same type that are produced in the U.S. in order to determine if any connections exist.

Graph 4: FDA Refusal by U.S. District of Entrance



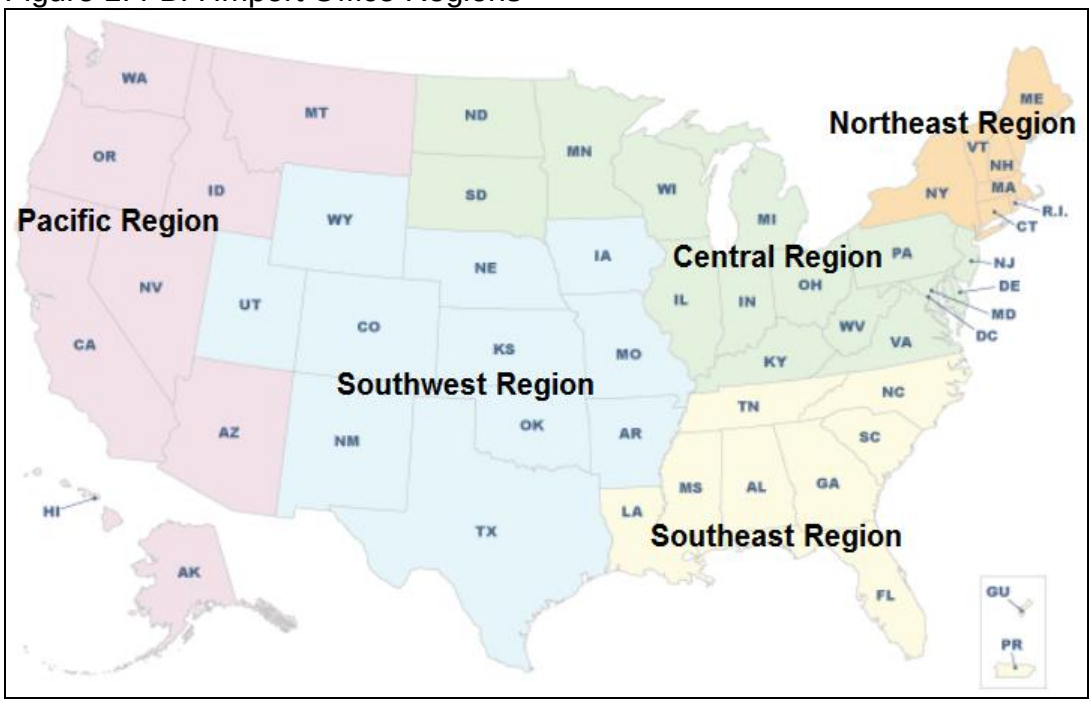
Source: Compiled by Author from FDA Import Refusal Reports, 2002-2012

Graph 4 above demonstrates which FDA Regional Office imports are directed to for revision upon clearing U.S. customs. This analysis was done in order to see if there is a correlation between where in the U.S. exports from

Chile arrived and if there is production of the same product being exported from Chile in this same area of the U.S. where the FDA Regional Office is located. The idea is to see if statistics show that there is potentially a conflict of interest in this area and thus perhaps protectionist tactics to protect local industry. Therefore, in the following section, we will use data from agricultural literature and other sources in order to find out the background of certain products produced in the U.S. and if there would be logic to support the fact that the U.S. would want to "protect" them from international competition.

In Figure 1 below, we can see where in the U.S. the FDA has jurisdiction over inspection and ultimately whether or not imports being received from other countries will be accepted or refused. The map shows that for these purposes, the FDA has divided the U.S. into five regions where imports entering the U.S. could be redirected to based on where they arrived:

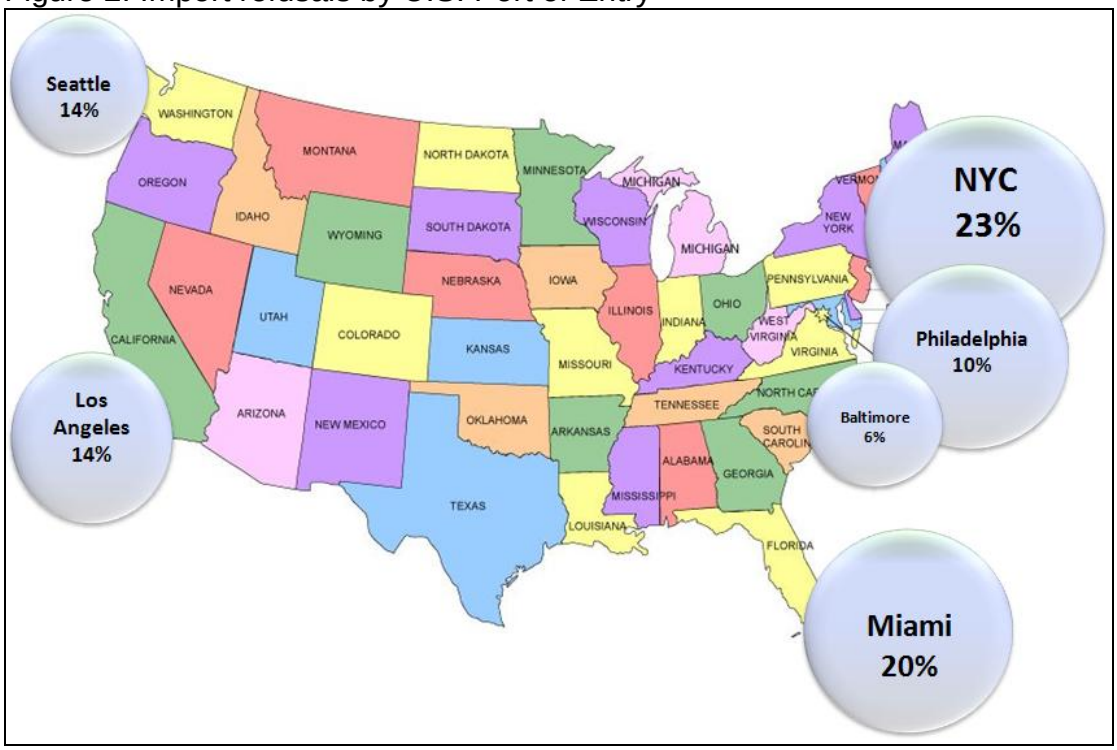
Figure 1: FDA Import Office Regions



Source: "FDA Import Office Locations and Contact Information [Map Illustration]," (FDA, 2014b).

In addition, analysis was done to determine where in the U.S. there is the most significant production of the same products that Chile exports to the U.S. and often times has refused by the FDA. The following map shows where in the U.S. this production (of the same items that were refused as Chilean imports) takes place based on proximity to ports of entry supervised by the FDA. As we can see in Figure 2 below, there is a fairly even distribution of production in the U.S. of the same products from Chile that are being refused *to* the U.S. by geographic region:

Figure 2: Import refusals by U.S. Port of Entry



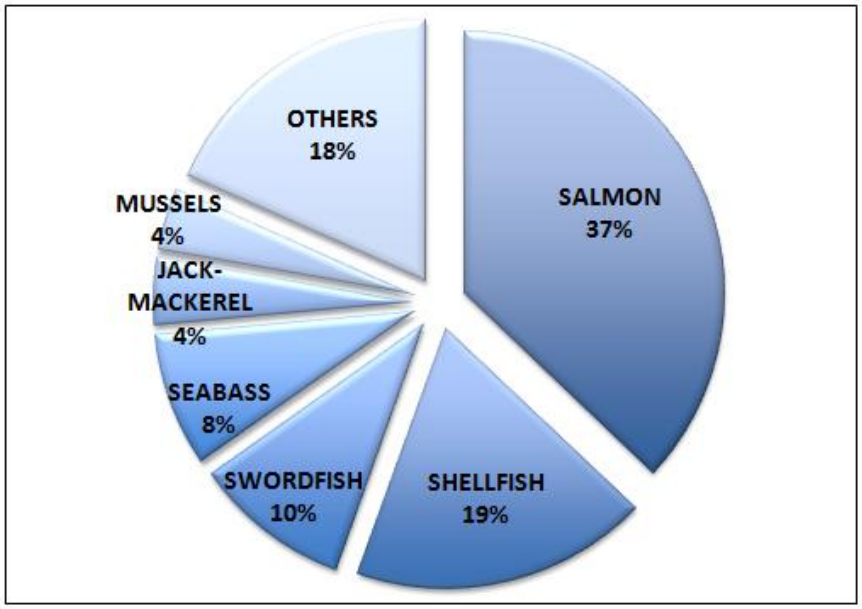
Source: Compiled by Author from FDA Import Refusal Reports, 2002-2012

It will be necessary to analyze more in detail the above findings in order to see if it is just a coincidence that production in the U.S. of the same products being rejected from Chile that are produced in the same areas of the U.S. where the Chilean products are refused entry or if there is more conclusive evidence of protectionism. After all, it is important to remember that the two categories of agricultural refusals from Chile that we are analyzing here are seafood and fruit, good which require certain aquatic and climatic conditions in order to be produced.

5.1.3 Seafood Import Rejections

In order to better address the questions proposed in the previous section above, it is crucial to identify the most commonly refused items from Chile for the timeframe being used for this investigation and reference these when analyzing which of these overlap with items produced in the U.S. As we saw previously, refusals of seafood exports from Chile to the U.S. make up 55% percent of all agricultural product refusals by the FDA. Out of these seafood products, as we see in Graph 5 below, the highest percentage of refused imports were salmon (37%) followed by shellfish items (19%):

Graph 5: Seafood: FDA Refusal by Sub-Category



Source: Compiled by Author from FDA Import Refusal Reports, 2002-2012

In the U.S., salmon production is mostly concentrated in Maine and Washington (Fishwatch.gov, n.d.a). Ironically, 14% of FDA refusals of Chilean imports to the U.S. take place in Seattle, Washington. Out of a total of 113 refusals of salmon imports from Chile to the U.S. between 2002 and 2012, 45 of these took place in the Seattle regional office. In addition, only two of these had FDA sample analysis done. As we saw above, the absence of sample analysis could be due to a variety of factors, including a previous import alert for salmon or seafood products from Chile as well as labeling errors or failure to secure a required certification. However, it does make an outsider take notice considering the coincidental location of arrival of Chilean salmon to the U.S. and where the U.S. produces the majority of its own salmon.

Additional analysis of the data shows that the majority of salmon refusals were due to manufacturers' failure to obtain preventative sanitary process control practice certification(s) as well as Hazard Analysis and Critical Control Point (HACCP). HACCP was a system adopted by the Codex *Alimentarius* Commission starting back in 1992 as a system for identifying specific hazards and measures to control safety of food beginning with before production even begins; in other words, a preventative system that does not just depend on testing of products once they have been manufactured (FAO, 1997). Therefore, we can deduce in these cases where imports were refused for not complying with HACCP standard requirements, the FDA is not acting arbitrarily, as HACCP

certification is a fundamental necessity for food safety (International HACCP Alliance , n.d.).

Figure 3. Seafood refusals by U.S. Port of Entry

Source: Compiled by Author from FDA Import Refusal Reports, 2002-2012

Next, Figure 3 above shows where in the U.S. refused Chilean seafood imports (that are products the U.S. also produces) have been refused at port of entry. Seafood production in the U.S., especially that of shellfish, is highly concentrated in Maine and Washington, although there is significant production in California, Florida, Alaska and Louisiana as well. Among the most significant shellfish produced, varieties include oysters, shrimp, mussels, clams, crab and lobster (Fishwatch.gov, n.d.b). There does not appear to be a particular pattern regarding port of entry where shellfish imports from Chile to the U.S. and U.S.

production of identical or similar shellfish products *in* the U.S. In terms of refusal codes, out of 91 refusals of shellfish products for the ten years being studied in this chapter, 33 of them were for listeria (which usually originates from contamination with fertilizer, something all companies use) (Haiken, 2011) while the majority of other rejections were for manufacturers' failure to comply with registration and/or certification of preventative sanitary process control practices as well as HACCP and labeling errors.

Research for this project has so far been inconclusive regarding a clear, protectionist trend in behavior on the part of the FDA for fish and shellfish products. Although one of the largest areas of salmon production in the U.S. is the state of Washington, where half of refused Chilean salmon entered the U.S. between the years of 2002-2012, there has been no literature found during this investigation to support the notion that ulterior motives exist to use FDA import rejections to protect this local industry. While it is no secret Washington seeks to expand its presence as a producer of salmon, there is also nothing that indicates it is in direct competition with Chile or other areas that produce salmon. The reality is the demand for salmon continues to grow and as of right now, new production has yet to ignite significant competition (Paulson, 2007).

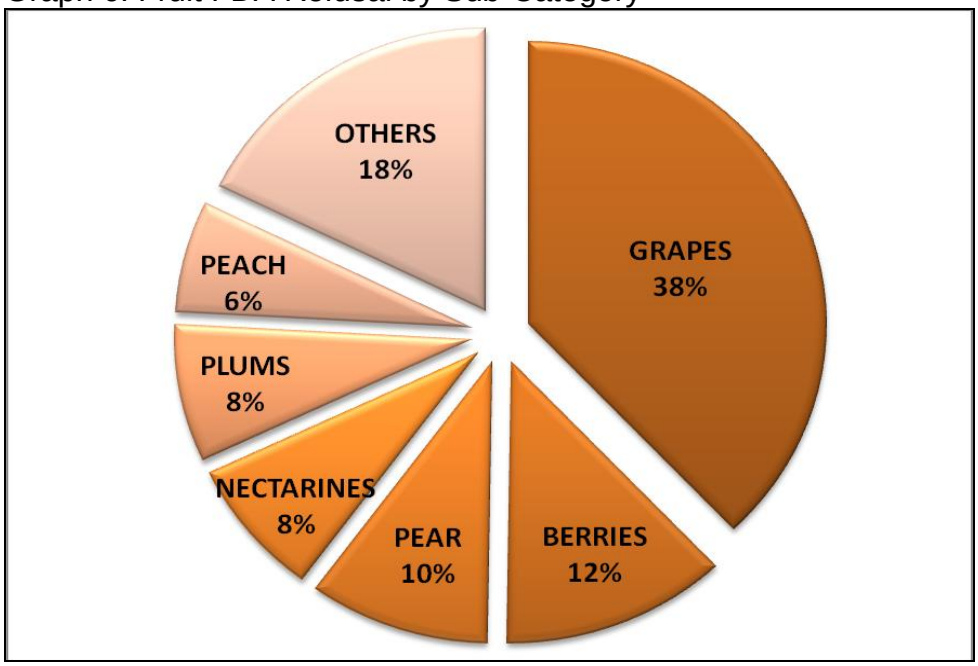
Regarding shellfish production, there appears to be even less of a connection with production and port of entry to the U.S. Nonetheless, we see

that the majority of refusals for salmon and shellfish imports to the U.S. are due not to the quality of the imported product itself, but the failure to take required certification steps before importing. Since these regulations are something the FDA has always been transparent and upfront about for informing would-be exporters of these requirements, one could say it could be either a highly sophisticated attempt at protectionism *or* simply the fault of the these same exporters for not taking the adequate steps and conducting necessary research before attempting to export their products to the U.S. In addition, it is important to remember that the WTO states in the SPS agreement that although sanitary regulations must be consistent with the Codex Alimentarius, the agreement also gives country the right to protect themselves against what they see as a potentially real threat for consumers' safety.

5.1.4 Fruit Import Rejections

As we also saw previously, refusals of fruit exports from Chile to the U.S. make up 33% percent of all agricultural product refusals by the FDA, the second most refused category after seafood products. Below (Graph 6) we see that out of these fruit imports, the highest percentage of refused imports (and half of all fruit product refusals) were grapes (38%) followed by the berries' products (12%):

Graph 6: Fruit FDA Refusal by Sub-Category



Source: Compiled by Author from FDA Import Refusal Reports, 2002-2012

Grapes

In the U.S., grape production is concentrated in California, with 90% of domestic grape production taking place there (FDA, 2012c). Out of 77 grape shipment refusals from 2002-2012, only eight of these were fresh grapes, with the rest being dehydrated or "raisin" grapes. In addition, 72 of these refusals were refused for being "filthy," which according to FDA refusal codes, means, "The article appears to consist in whole or in part of a filthy, putrid, or decomposed substance or be otherwise unfit for food," (Quiroz, 2013). None of these shipments, including the fresh grape shipments, were inspected, according to the consolidated IRRs for the indicated time period. Again, we see potentially subjective criteria for refusal here. Even if some of these were based

on prior import alert, sheer quantity of rejections would suggest that only some items were inspected and the rest rejected since, as we saw above, product-wide or countrywide IAs are not uncommon.

This sort of “profiling” is reminiscent of the 1989 “grape scare” that saw entire harvests of Chilean table grapes refused by the U.S. because of two infected grapes and what was arguably an isolated attempt to inflict widespread consumer panic against Chilean produce (Grigg & Modeland, 1989). However, according to Allison Scott, Rotational Duty Officer of FDA-Division of Import Operations, "there are a number of violations in every commodity type that do not require confirmation by a lab". Therefore, we see that it is still the case that the FDA has processes in place to reject imports based on IAs as well visual inspections in place of laboratory testing and examination (i.e. the import “appeared” to be filthy or contain some other flaw that rendered it unacceptable) (A. Scott, personal communication, March 31, 2014).

This may be one example of why some might consider FDA evaluation to be a somewhat subjective process and promulgates the suspicion that rejection of Chilean grapes is a way to boost U.S.-produced grape sales (Nelson, 2013). Nonetheless, as common sense would dictate, grapes that do not visually appear edible or connected to a previous IA should not be accepted as they cannot be consumed due to obvious health risks. We see here how opinion on

motives behind FDA rejections can be swayed both ways; however, there is still not conclusive evidence to support the idea that FDA rejections of grapes from Chile have been baseless.

Berries

Out of a total of 25 refusals, imports that are part of a “berries” sub-category (designated out of studied data described previously for organizational purposes for this thesis), all except one were refused for use of a banned pesticide. However, less than half of these refusals were tested by the FDA to confirm the presence of such pesticides. In these cases, either the Chilean manufacturer was unaware of such a ban and the use pesticide was explicitly mentioned in the product description of the export, or, the products “appeared” to have used this pesticide. Per our previous explanations, “appearance” of a banned pesticide in this scenario could mean: (1) the exporter was on IA for a previous violation of this same type, (2) the FDA was able to identify the presence of the named pesticide on the export without a physical inspection, or (3) the exporter did not obtain required documentation previously to certify that they do not use the referenced pesticide in their production.

According to Claudio Contreras, if the refusal the result of a Chilean exporter using a banned pesticide or not fulfilling their obligation to obtain certification required by the U.S. government that such a pesticide is not used in

their production, this would be the exporter's own fault for not educating themselves on FDA regulations. For example, he said for the last 14 years Del Monte has been compliant with all mandatory HACCP requirements and other compulsory preventative measure prerequisites and therefore has not had issues of rejection by the FDA (C. Contreras, personal communication, May 19, 2014). However, if it is one of the first two possibilities out last three possible reasons mentioned above, it is possible that the exporter could be upset with the FDA for their product being refused as an import to the U.S. First, if the IA was as a result of another manufacturer of the same product or country or this exporter has already taken the required steps to be removed from IA for a previous refusal, this is frustrating as their export this time is likely compliant with required SPS standards.

In addition, if the visual *appearance* of their product prompted an FDA officer to say that based on this visual inspection there was presence of a pesticide without a physical examination of the product in question, the exporter can also understandably be vexed that such a judgment can be taken considering that opinions of this kind can vary from person to person. While it is impossible to say even if this sort of decision is taken frequently by FDA officers, there were no interviews conducted during the investigation of this thesis nor was their literature to support one way or the other that the FDA officers making decisions on whether or not to accept exports to the U.S. that are in question for

meeting certain SPS standards have any reason to or have displayed in the past any kind of protectionist behavior against foreign products that they are inspecting.

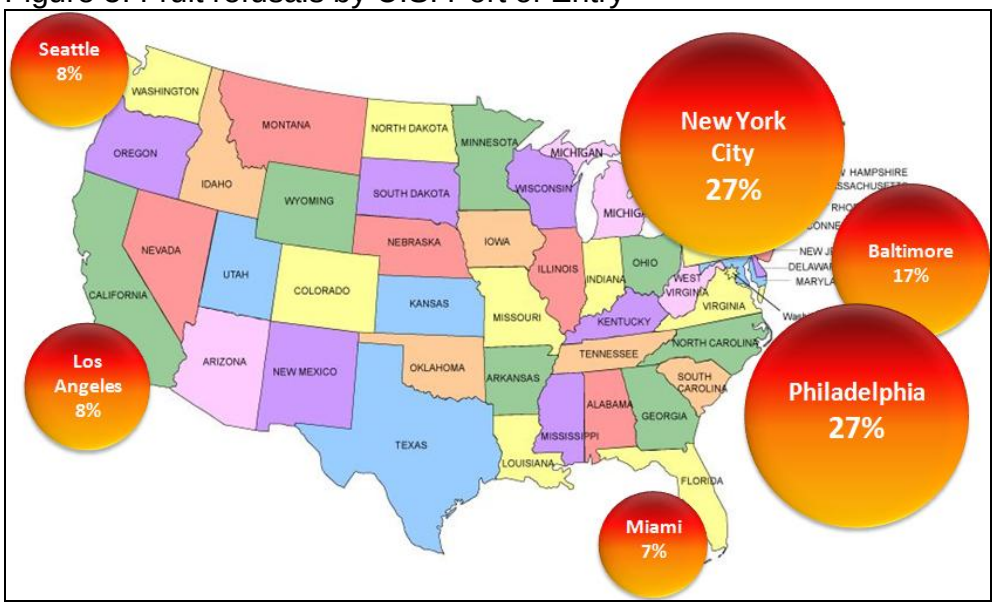
In the U.S., production of berries is prominent in Washington, California, Oregon and Michigan. Strawberry production is larger in the U.S. than any other country, with 30% of the world's strawberries coming primarily from California and other areas in the southern cost of the country (FDA, 2013c). According to a previously mentioned report done by the ERS, **"**The largest fruit-producing States are California, Florida, and Washington. California accounts for about half of the harvested fruit acreage, Florida almost one-fourth, and Washington around one-tenth. Michigan, New York, Oregon, Pennsylvania, and Texas are also important fruit-producing States…together these States account for over one-tenth of the Nation's fruit acreage" (FDA, 2012b). These statistics are represented in Figure 4 below:

Figure 4: U.S. Fruit: Top Producing States, based on 2010 bearing acreage (FDA, 2010b).

Source: USDA, Economic Research Service using data from USDA, National Agricultural Statistics Service, *Citrus Fruits 2010 Summary and Noncitrus Fruits and Nuts 2010 Preliminary Summary*

As was seen on an earlier chart for seafood refusals, we see a breakdown of which ports of entry in the U.S. refusals for Chilean fruit imports (that are products the U.S. also produces) have taken place during the time period studied for this project in Figure 5 below:

Figure 5: Fruit refusals by U.S. Port of Entry



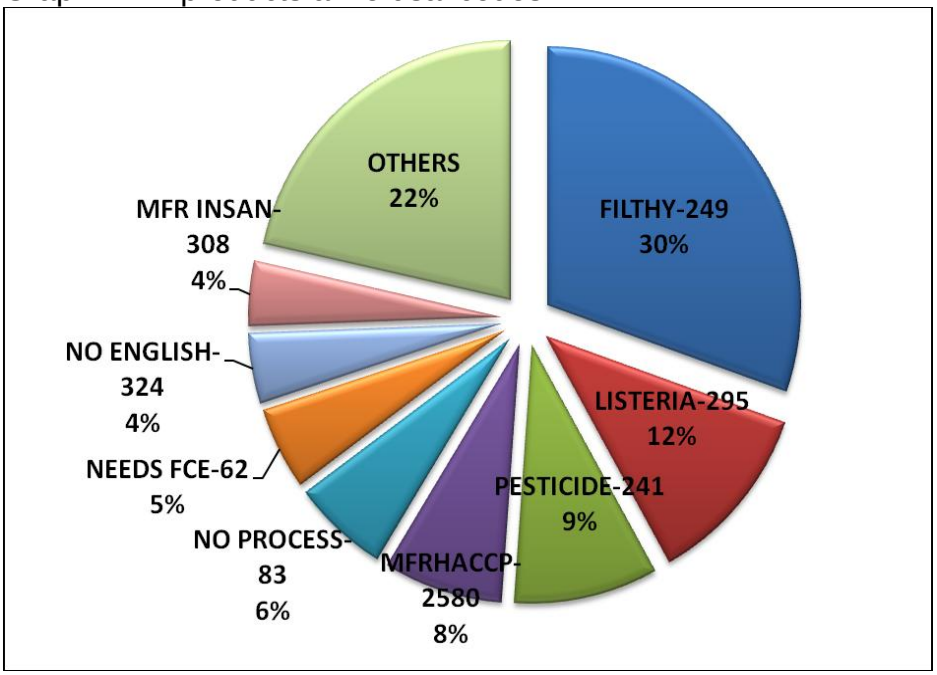
Source: Compiled by Author from FDA Import Refusal Reports, 2002-2012

It is clear that there is overlap between the higher fruit-producing areas in the U.S. with where these same products that were sent from Chile are being rejected by the FDA. However, it is also an obvious reality that these areas are the only places where fruits like the ones mentioned above can be grown close to the ocean, hospitable climate and soil, correct sunlight, etc. In the next part of this chapter, research will focus on what specific violation codes are the most common among these refusals. The idea is that analyzing this information with sources such as the above map, we can see if these rejections appear arbitrary and protectionist or if they are in fact warranted.

5.2. FDA IRR Rejections by Violation Group (Import refusal charge)

We have broken down the 618 refusals from our database of IRR reports compiled from 2002-2012 that were used for our analysis into a pie chart in order to see which ones have been the most common. Graph 7 below shows all of the violation codes assigned from 2002-2012 by the FDA for refused imports:

Graph 7: All products all refusal codes

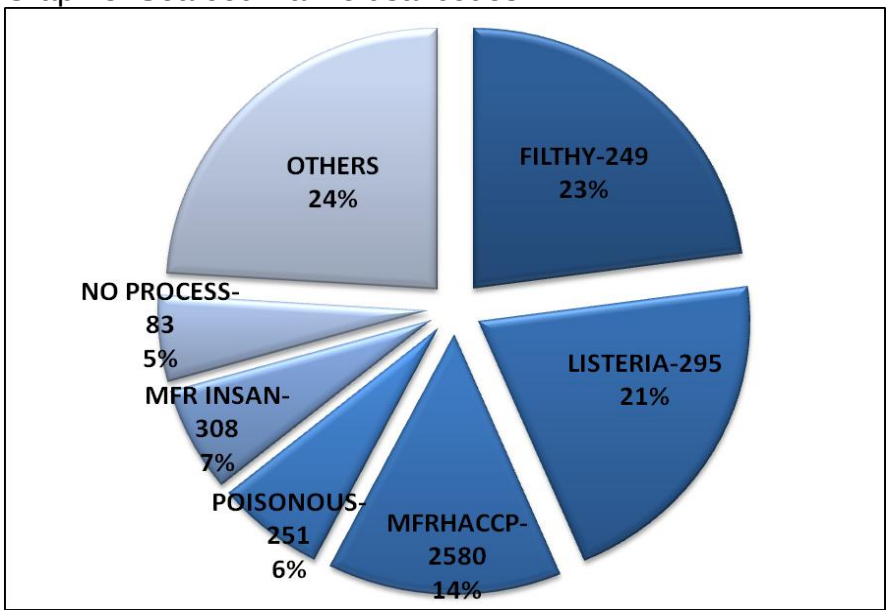


Source: Compiled by Author from FDA Import Refusal Reports, 2002-2012

As we can see, half of the violations that resulted in refusal of an import were from just three categories, which are “Filthy (30%),” “Listeria (11%),” and “Pesticide (9%)”.

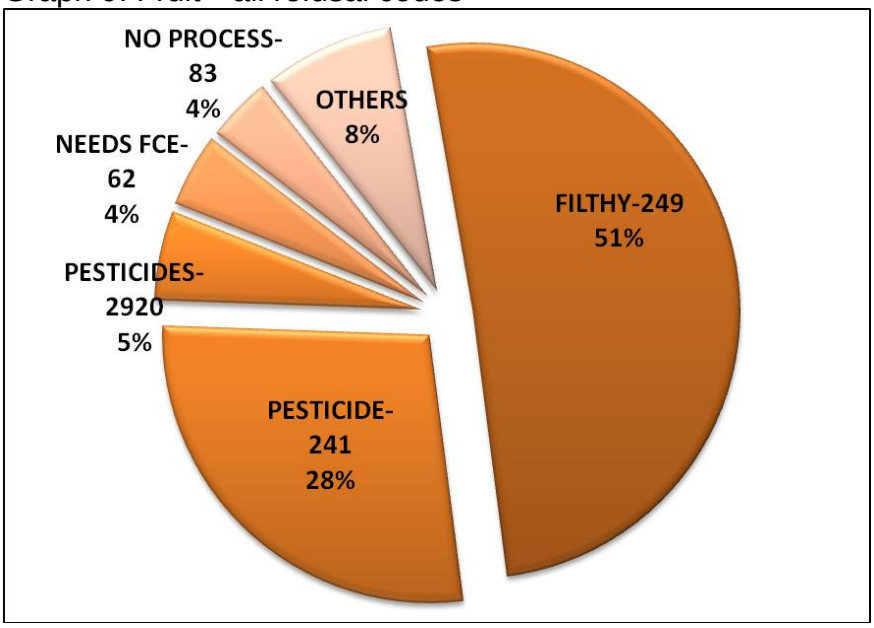
Ironically, we also see that these repeat as the highest percentage of refusal codes when products are broken down into fruit and seafood categories. The one exception is the third most common refusal code for seafood products from this report of for not being in compliance with HACCP requirements, as demonstrated in Graph 8:

Graph 8: Seafood—all refusal codes



Source: Compiled by Author from FDA Import Refusal Reports, 2002-2012

Graph 9: Fruit—all refusal codes



Source: Compiled by Author from FDA Import Refusal Reports, 2002-2012

The violation reason “filthy” indicates that according to FDA inspection: “The article appears to consist in whole or in part of a filthy, putrid, or decomposed substance or be otherwise unfit for food” (FDA, 2013a). The second most listed violation charge for the imports we have been studying is for “listeria,” which says the product in question appears to contain “a poisonous and deleterious substance which may render it injurious to health. Third, we have “pesticide.” Although for the overall graph (Graph 7) and the fruit graph (Graph 9) there are two different codes listed as the violation, they both share the overall explanation that: “The article is subject to refusal of admission pursuant to section 801(a)(3) in that it appears to be adulterated because it

contains a pesticide chemical, which is in violation of section 402(a)(2)(B) [or 21 CFR 123]" (FDA, 2014a).

Lastly, we see listed for 14% of all seafood rejections the violation charge listed as "MFRHACCP". As mentioned previously, this indicates FDA inspectors felt that the product appears to have been prepared, packed, or held under insanitary conditions, or it may be injurious to health, due to failure of the foreign processor to comply with 21 CFR 123." Since this indicates the exporter failed to realize a preliminary task before attempting to export, it is different from the previous violations since it is not considered an "adulterated" product. The first three codes fall under "Adulterated food" violations according to 402 of the Federal Food, Drug and Cosmetic Act. A summary of this section states that "a food shall be deemed to be adulterated- 1 (a) (1). If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health" (FDA, 2012a).

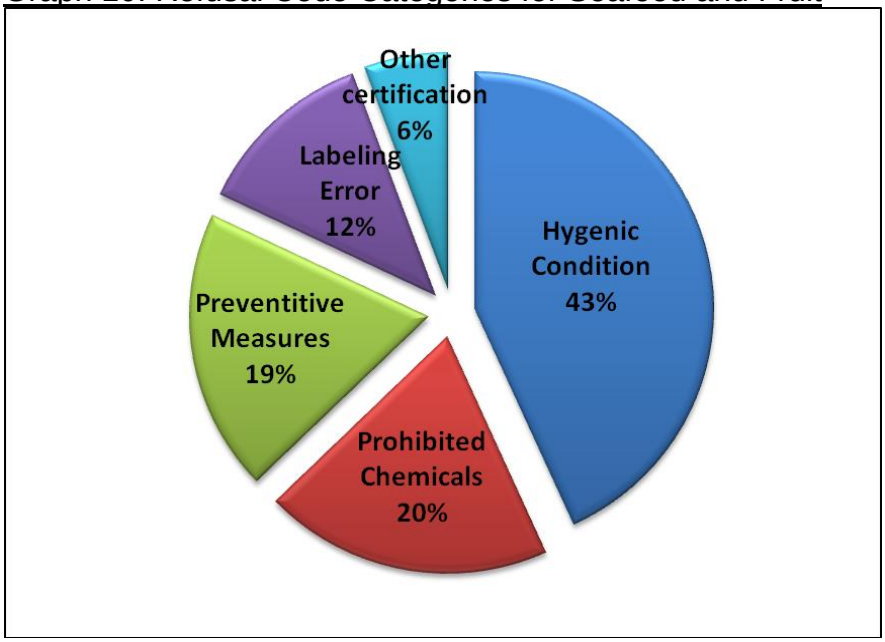
5.3 Consolidated Import Rejection Groups

In order to better analyze these rejections based on their violation codes, they have been divided into more general categories based on their violation in

order to provide a more comprehensive understanding of *why* these products were rejected and make conclusions based on overall trends that can be identified. The table and Graph 10 below show five categories the violations were divided into out of the total 32 rejection codes cited in the FDA's IRR report from 2002 to 2012:

Hygienic Condition	**43%**
Prohibited Chemicals/Ingredients	**20%**
Non-compliant with Preventative Measures	**19%**
Labeling Error	**12%**
Lacking other certification	**6%**

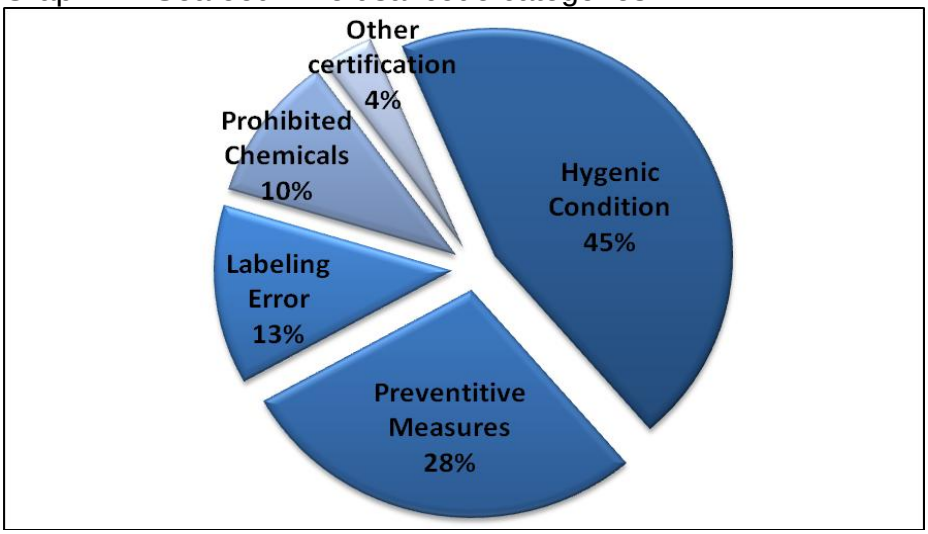
Graph 10: Refusal Code Categories for Seafood and Fruit



Source: Compiled by Author from FDA Import Refusal Reports, 2002-2012

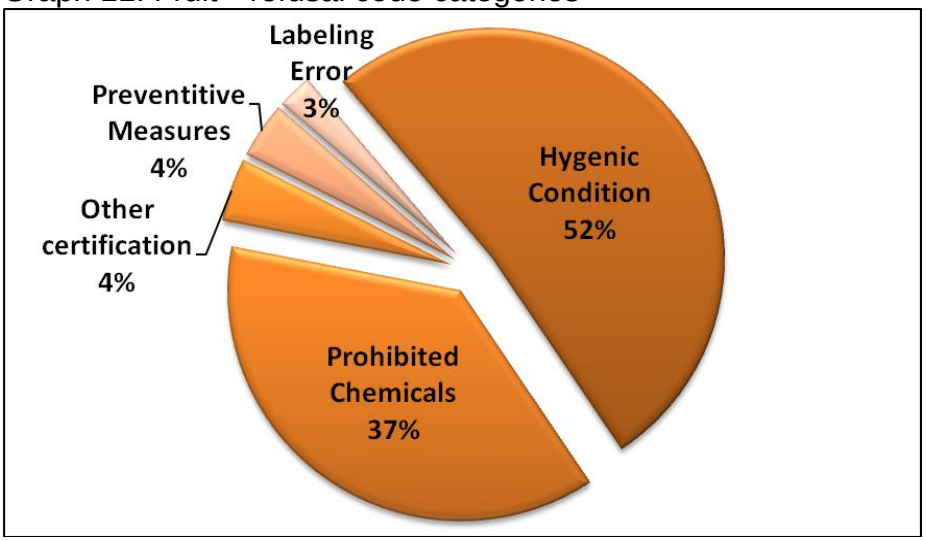
These consolidated import rejection groups were also applied separately to show how they appear for both the seafood import refusal category (Graph 11) and the fruit import refusal category (Graph 12) below:

Graph 11: Seafood—Refusal code categories



Source: Compiled by Author from FDA Import Refusal Reports, 2002-2012

Graph 11: Fruit—refusal code categories



Source: Compiled by Author from FDA Import Refusal Reports, 2002-2012

5.4 Conclusions from Analysis of Consolidated Import Rejection Groups

Out of these consolidated import rejection group categories that we listed above for all the import refusals of the consolidated database used for this analysis, we can see that “hygienic condition” is overwhelmingly the most common reason for refusal (43%) followed by prohibited chemicals (20%) and preventative measures (19%) respectively. Since these violations encompass 82% of all rejected imports to the U.S. from Chile from 2002-2012, we can take these categories as our base for analysis. For each consolidated group used above, we will address the meaning behind the reason for the refusals they

comprise and whether or not the analysis of the database done in this chapter shows that the reasoning for their refusal appears to be protectionist.

First, for preventative measure certifications like HACCP, it is difficult to argue that this is protectionist, since this information is publicly available and is the responsibility of exporters to know what is required before attempting to export to the U.S. As Claudio Contreras said in his previously cited interview, Del Monte has abided by these regulations for many years and never had an issue in this regard. Granted, a large corporation like Del Monte has more resources to make sure research for these regulations is completed recurrently than a smaller exporter would. Nonetheless, the FDA must automatically reject exports that do not meet these preventative measure requirements for reasons mentioned previously regarding basic food safety.

Next, we evaluate the consolidated category of import refusals as a result of detection of prohibited chemicals being discovered in the imports in question. As we have already seen, the debate lies in whether or not the FDA physically inspected an import or if it was rejected on “appearance” (i.e. for IA or for visual identification of a prohibited chemical by an FDA officer, which can be considered subjective). Nonetheless, if they *were* in fact found, it would be the fault of the exporter for not educating themselves better on these requirements. However, as we saw previously in this chapter, it is not so much the inspection

process itself that can cost exporters so dearly but getting off the IA “blacklist” once they have been identified as a problematic exporter. The issue many exporters have with the U.S. and FDA’s tactics in particular is that there is not enough physical examination and too many arbitrary regulations, such as relying on IAs to filter out potential issues even if they unfairly penalize some exporters.

However, if we look at the quantity of exports that the U.S. receives, not just from Chile (FDA, 2010a), it is understandable that a system is used that manages the enormous flow of goods to be inspected and erring on the side of caution to avoid harm to consumers. This brings us to the analysis of our final consolidated category, which deals with shipments that were refused because of “hygienic condition.” It is unlikely that anyone will argue in favor of the idea that a decidedly unhygienic import should be rejected.

As seen previously in this project, we addressed how although the suspicion has existed that the U.S. has engaged in protectionism while using SPS measures as an excuse to reject competing countries’ imports, SPS measures still exist for a very good reason: protecting consumers. In addition, we also saw that rejection of unhygienic products that do not meet a WTO member country’s standards they have in place for protecting their consumers, they have the right to reject the product so long as it is supported with scientific evidence based on effective import evaluation processes. Moreover, IAs can

also be the reason for rejections for hygienic condition, therefore the same explanation applies as with the prohibited chemicals category – that this is the evaluation process that the FDA must have in place at this time to protect its consumers and still manage to address all possible issues food imports may propose for maintaining high standards of food safety.

CHAPTER 6: INTERPRETATION OF DATABASE ANALYSIS

The objective of this section is to utilize the previously analyzed information and adapt certain variables (with the help of statistic formulas) in order to measure if there is a correlation that exists between them. In this chapter we will review findings from the previously analyzed database presented in the previous chapter to construct a more strictly qualitative analysis. By using designated variables that represent elements that could prove or disprove protectionist intent by the U.S. towards Chile, we are able to make deductions based on numerical depictions. Again, this chapter is divided by Seafood and Fruit categories in order to gain a more comprehensive understanding of the intentions of the U.S. based on a variety of scenarios that would need to exist in order to indicate protectionist intent.

6.1 Formula Results and Interpretation

In order to clarify the framing of the data and avoid its distortion, it is necessary to consider the following questions:

1. Are the selected categories (fruit and seafood) seasonal in the U.S.?

2. Is there a relationship between the months in which the U.S. rejected imports from Chile and the seasonality of these same product categories within the U.S.?
3. Does a relationship exist between the month of production and seasonality?
4. Does a relationship exist between district/region where the import was received in the U.S. with the *production* of the same product category *in* the district/region where the import was received?

In order to adequately respond to these questions, variables were identified and adapted in order to be used in formulas that measure: correlation, standard deviation, mode, and median. Microsoft Excel software was used for the calculation of these formulas.

Variables that were designated to be used in the investigation were the following:

1. Quantity of rejections in the “Seafood” and “Fruits” categories
2. Months where there were rejections of imports from the “Seafood” and “Fruits” categories
3. Seasonal months for “Seafood” and “Fruits” categories
4. FDA District in the U.S. where there were rejections for “Seafood” and “Fruits” categories

5. Region within the U.S. where there where rejections for “Seafood” and “Fruits” categories
6. District in U.S. where “Seafood” and “Fruits” are produced
7. Region in U.S. where “Seafood” and “Fruits” are produced

6.2 Assumptions:

1. Month of production of fruit and its harvesting is the same
2. Frozen seafood was considered to be available year-round, therefore, not subject to limitations of seasonality
3. Months, districts and regions were assigned numbers to identify them so that they could be quantitative variables to be applied in formulas
4. Six import refusals were excluded from the “Fruits” category for lack of information in the product description
5. Rejections were counted based on each reason or “violation code,” not for each individual import rejected. This is due to the fact that as previously mentioned, some imports were rejected for more than one violation.

6.3 Data from Seafood Import Rejections: *See Figure 6 "*Data from Seafood Import Rejections" *in Appendix 2 p. 132*)

I. The mode of the data is the month of August with 15% of the total;

II. Of all imports refused during the time period studied for this investigation, 92% of these are *not* "seasonal" products in the U.S. (i.e. they are available year-round);

III. In addition, 68% of the studied refusals occurred in the districts of Miami, Seattle and Los Angeles. Therefore, we can see that the majority of this 68% occurred in the Pacific region (i.e. Seattle and Los Angeles). Also, it goes without saying that Los Angeles receives the most imports from everywhere else in the world because of its location (and for this logical region also is where most refusals occur). Similarly, it receives the most imports from Chile to the U.S. due to its proximity and correspondingly, more economical shipping costs;

IV. 85% of the refused Chilean products are also produced in the Pacific region of the U.S.;

V. The standard deviation of the "refusal" region variable is low (1.57) and demonstrates that the data is concentrated in the Pacific region;

VI. The standard deviation of the "production" region is also low (1.26) and demonstrates that the data is also concentrated in the Pacific region;

VII. The correlation between “rejection” region and “production” region is almost negligible (.09);

VIII. Therefore, we can deduce that a correlation does *not* exist between the above two variables and that the coincidence of “rejection” and “production” regions is due to the fact that the Pacific region is a preferred maritime route and therefore also the most commonly used port of entry in the region for Chile as well as other countries. Another factor due to geographical location is that of the Pacific seaboard, which is rich in seafood products from the north to the south of its coast. This is why we see the high levels of production of these products in Washington and Oregon, where both fresh and frozen seafood products, which are of comparable quality to their Chilean counterparts, are available year-round.

IX. Finally, due to the above information as well as low correlation between “production” and “rejection” regions, we can conclude that for the Seafood category, the data does not demonstrate presence of a NTM or protectionist measure by the U.S. towards Chile.

6.4 Data from Fruit Import Rejections: (*See Figure 7*: "Data from Fruit Import Rejections" *in Appendix 3 p. 142)*

I. The modes of the data for this category are the months of January and April, with 47% of total refusals having been during these months;

II. Of all the imports refused during the time period studied for this investigation, 56% are *not* "seasonal" products in the U.S. (i.e. 44% are of these products are available year-round in some form);

III. Out of these studied refusals, 72% occurred in the district of Philadelphia, Baltimore or NYC. These districts constitute the Central region of FDA inspection districts. It is an obvious point here that the east coast receives the most imports of fruit due to high demand and high cost of transport of fruit from the west coast, where there is higher production of these items within the U.S.;

IV. 93% of the refused Chilean products are also produced in the Pacific region of the U.S.;

V. The standard deviation of the "refusal" region variable is low (1.36) and demonstrates that the data is concentrated in the Central region;

VI. The standard deviation of the “production” region is also low (1.26) and demonstrates that the data is concentrated in the Central region as well;

VII. The correlation between “rejection” region and “production” region is almost negligible (-.15);

VIII. Therefore, we can deduce that a correlation does *not* exist between the above two variables and that the coincidence of “rejection” and “production” regions is again due maritime route preference related to import region;

IX. Finally, due to the above information indicates as well as low correlation between “production” and “rejection” regions, we can conclude that for the Fruit category, the data does not demonstrate presence of a NTM or protectionist measure by the U.S. towards Chile.

CHAPTER 7: CONCLUSIONS

In this chapter, we return to addressing the investigation question that was planted at the beginning of this thesis: ***Have SPS measures become a new form of protectionism between used by the U.S. towards Chile?*** Also, this chapter will address the hypothesis mentioned in a previous section and give conclusions to support its rejection. This will be done by referencing the U.S.-Chile trade relationship over the years, analysis of FDA processes and interviews with experts in areas of agricultural trade.

7.1 Response to Investigation Question and Hypothesis

Based on the investigation conducted throughout this project, the answer to investigation question quoted above is negative. It is important to recall here that this thesis used numerous research techniques in order to arrive at this conclusion. First, it is significant that this project consulted resources from both the private and public sectors, by interviewing corporations that export to the U.S. (Del Monte, Comtesa) as well as institutions and representatives of the private sector in Chile as well as the U.S. (SAG, Chilean Ministry of Agriculture, FDA, etc.) that have extensive knowledge on the subject of the agricultural trade relationship between Chile and the U.S.

Moreover, the investigation for this thesis was not only based on interviews with experts, but numerous other sources, including research of literature from other scholars who have investigated this topic of protectionism and trade relations between the U.S. and other countries for agricultural imports as well as government publications done by public agencies from both the U.S. and Chile. Finally, this project also contained detailed analysis of refusals of Chilean imports to the U.S. by the FDA by using a compilation of these refusal reports for the ten-year time period that was chosen as the delimitation for this investigation. Therefore, it is evident that the research conducted for this project was comprised of several categories of sources in order to be able to present the concrete conclusions that will be presented in detail below.

As stated in the first section of this thesis, protectionism would mean that the U.S. is using SPS measures as a kind of non-tariff barrier. This would mean the misuse of the SPS agreement, which was created as a mechanism to create consistent SPS requirements for trade of agricultural goods between WTO member countries and avoid market access conflicts in international trade. As we will re-cap in detail in this chapter, the investigation for this project did not indicate the U.S. has exploited the SPS Agreement in order to protect national industry against competition from Chilean imports. Therefore, the principal conclusion in this section is that the original hypothesis that ***"SPS measures have become a mechanism for the U.S. to protect domestic agricultural***

***industries from Chilean competition*"** is rejected based on the results yielded from this investigation.

7.2 Supporting Conclusions

7.2.1 Foundation of free-trade between the U.S. and Chile

Another element discovered during this investigation is the fact that Chilean exporters have by and large abided by the requirements of the FDA and experts interviewed for this project concurred that the trade relationship between Chile and the U.S. is a good one. Despite the fact that there was considerable "noise" regarding concerns over whether or not Chile was getting the best possible deal while the FTA discussions took place before this agreement was signed between the two countries, at no time during this process were talks suspended by either party. Therefore, we see that Chile had their window of opportunity to dispute trade terms with the U.S. if they suspected protectionism for agricultural items. Consequently, we conclude that historical investigation of the creation of this FTA shows Chilean lawmakers believed the benefits of trade with the U.S. were worth the additional, exigent conditions it entailed.

According to Rodrigo Contreras, one of the real problems affecting Chilean exporters that wish to export to the U.S. is a lack of information. His opinion is that Chilean exporters are not aware that certain requirements have

been updated and therefore makes them susceptible to having products refused or being placed on IA. However, he emphasized that the U.S. has not done anything in this way that is outside the rules of the OMC and that typically once you have “broken-down the barrier” of initially exporting to the U.S., it is unlikely you will be arbitrarily “shut-out” again for some unjustified reason which *can* be the case with some other countries Chile trades with. Contreras also said that due to the fact that SPS measures and their application are highly regulated by the WTO, it would be difficult for any member nation to ignore the SPS agreement, even for a country as powerful as the U.S.

Finally, we can also add to this conclusion the element that there are likely just as many untruthful exporters that the FDA must take precautions against in order to protect their consumers. Elizabeth Hoffmann stated this point in her interview, saying how the U.S. must make the FDA apply all sanitary standards the same to all countries, since so many countries export to the U.S. Rios Kantorowitz also echoed this sentiment in his interview, saying that the U.S./FDA must be privy to exporters that for example would “forgot” to file a registration paper certifying it is a low-acid canned-good producer and attempted to export its canned goods to the U.S. anyway. Chilean experts understand the U.S. must protect itself from people who would otherwise ignore the system and attempt to export substandard products by ignoring certain requirements and

hoping not to be caught. Remaining consistent is their best argument when outside forces attempt to accuse the U.S. of being unfair to them.

Another important component in the trade relationship between Chile and the U.S. is comparing SPS regulations towards Chile from other countries Chile trades with to those of the U.S. Hoffmann stated that the U.S. is by far the most transparent and easy to work with government when it comes to import standards in comparison with several European countries as well as China. She also said that the bureaucracy (forms to file, documentation required, etc.) involved in these nations is far more time-consuming to circumvent than the U.S. This sentiment was repeated by Jaime González as well as Claudio Contreras, who added that Canada is has more difficult obstacles to overcome in order to be removed from import alert. Contreras also stated that Japan has the strictest sanitary requirements they have ever encountered despite the fact that the Japanese market does not make-up nearly the percentage of products exported to the U.S.

7.2.2 Analysis of FDA Practices

As a continuation to the point made above, interviews with agricultural experts from Chile and the U.S. overwhelmingly demonstrated that that the FDA is considered transparent with its SPS requirements and does not attempt to falsely invent measures for protectionist means. One particular issue mentioned throughout this thesis was in regards to the FDA's use of the word "appearing to be in violation" as justification for refusing an import to the U.S. per the FD&C Act. During an interview, Claudio Contreras gave the opinion that what the FDA actually does is transfer sanitary responsibilities to the exporter. Ergo, if they do not take preventative action in areas such as obtaining packing certificates or filing certain paperwork before attempting to export to the U.S., this is when the FDA must reject their products based on "appearing" to have been negligent in some capacity thus prompting refusal of their shipment by the FDA.

This explanation demonstrates that the use of the word "appearance" is less the FDA being arbitrary in its rejections for protectionism means and more to do with exporters failing to take required steps before attempting to export or not seeking the necessary information. It is easy to also see how this emphasis on preventative action on the part of potential exporters is the basis of the FDA's Food Safety Modernization Act (FSMA) (FDA, 2014c) discussed previously in this investigation. Therefore, we can conclude that the use of the word

“appearance” of a violation per the aforementioned acts is not a rule created on a whim by the FDA and does not technically violate any part of the WTO’s SPS Agreement.

Hoffman also described in her interview that she feels that the FDA is absolutely clear regarding import requirements for their seafood product and usually gives plenty of notice when updating sanitary requirements, albeit challenging ones since these requirements are constantly being updated. This last sentiment was also echoed in an interview with Piero Vercellino of Verfrut. He said that sometimes, new regulations are announced quicker than they can respond. Nonetheless, Hoffman, Vercellino, Rodrigo Contreras and others stated that despite the fact that the FDA is very demanding when it comes to certain sanitary requirements, they at no time appear to be, in their opinion, arbitrary in enacting food safety regulation that could be misconstrued as veiled protectionism.

Moreover, they expressed the belief that much of this regulation is in response to consumer demands, as errors in monitoring foods being sold in the U.S. can not only create a national scandal, but also can have dangerous health repercussions for consumers. For example, in September of 2011, cantaloupes contaminated with listeria from one farm made 147 people fall ill and killed 30 (Rothschild, 2011). The Center for Disease Control (CDC) has estimated

around 1,600 illnesses and 260 deaths are a result of foods contaminated by listeria each year in the U.S. (Wilson, 2014). Therefore, it is understandable why U.S. government agencies must address potential food safety crisis as any other threat to national security would be.

7.3 Evaluation of Codex Alimentarius

Another issue that pertains to the beginning chapters in this thesis is the theme of the Codex Alimentarius being one of the “three sisters” for harmonizing food safety standards in the frame of WTO member trading. As numerous interviews for this thesis confirmed, the Codex is widely regarded as being severely outdated and not sufficiently comprehensive to ensure safety of food products that are to be consumed by humans. In interviews with Elizabeth Hoffmann, Jaime González, Rodrigo Contreras, Gonzalo Ibáñez and Claudio Contreras, all shared this opinion when asked about the Codex *Alimentarius*. In addition, this group of agricultural trade experts all expressed the belief that the *Codex* is not updated enough to be consistent with the most modern food safety measures and therefore countries are obligated to enact additional SPS measures just as the U.S. does.

According to Ibáñez, the Codex is merely a reference for countries that are not able to carry out their own investigation and analysis for domestic food safety requirements. Since the U.S. is able to do this and has more resources that most of the other WTO countries for such research, it is logical that they will end up having higher, more demanding standards than those of their counterparts as they have been fortunate to have the ability to make more scientific advances in food safety. Another significant data source that supports this point is a statistical report pulled from the WTO's Integrated Trade Intelligence Portal (I-TIP). The report run shows the number of rejections by the U.S. of Chilean imports for SPS measures from 2002-2012.

During this time period, there were only three rejections of Chilean exports of seafood and/or fruit products to the U.S. listed in the WTO's records as having been refused for SPS measures during the ten-year time period we have been using for this thesis (WTO, 2014a). Clearly, this is different than the FDA's IRR report, which includes sanitary measures that are in addition to those in the SPS agreement which, as we have just discussed, are not all encompassing as many WTO member countries, especially the U.S., have conducted far more scientific investigation to find additional ways to protect consumers from potential foodborne illnesses. However, this report shows that had the Codex Alimentarius and the WTO's SPS agreement been the only "requirements" for Chilean exports to the U.S. between 2002-2012, there would have only been

three rejections instead of the 473 that were listed on the various IRRs during this time.

Therefore, we see supported again that the U.S.' sanitary requirements, albeit far more demanding than those of the SPS agreement or the *Codex*, likely appear to be far more advanced in terms of scientifically proving ways that can help improve standards for food safety measures. Common sense indicates that it would be impossible for only three imports over a ten-year time span to have had some sort of sanitary issue, even after having traveled from Chile to one of the FDA's receiving ports in the U.S. This is especially true considering that seafood products are the imports most susceptible to contamination by pathogens generated by interruption of refrigeration or incorrect handling (G. Ibáñez, personal communication, August 26, 2014).

7.4 Reflection on trade relationship between the U.S. and Chile

Finally, one other important point that will be made to support the rejection of the hypothesis that SPS measures have become a mechanism for the U.S. to protect its agricultural industries is the nature of the trade relationship between the U.S. and Chile during the studied time period. As previously mentioned, the importance of the trade relationship between Chile and the U.S. is highly valued

by both countries, particularly by the U.S. as Chilean imports help meet domestic demand for certain products. In addition, the often overlooked truth is that Chile and the U.S. are not traditionally rivals in agricultural trade due to the fact that they are on opposite seasons, thus diminishing the presence of competition of seasonal goods.

According to Ibáñez, the U.S. imports 91% of the seafood products that it consumes and therefore would have a hard time enacting barriers that would impede entrance of these imports. Similarly, 50% of all fruits consumed in the U.S. are also imports. What's more, since the FTA between Chile and the U.S. was signed, imports from Chile to the U.S. have increased at an average percentage of 11% annually, making Chile between the 8th and 9th top provider of food products to the U.S while imports from the U.S. to Chile have increased by an average 23% per year as well (G. Ibáñez, personal communication, August 26, 2014).

The above statistics are also supported by investigation of how disposable income for U.S. citizens grew during 1990s, allowing them to buy more imported food products for higher prices, this makes imports more necessary than ever. According to a report by the USDA from 2004, U.S.-based food producers, "do not and cannot produce all or enough of the foods that Americans desire…trade is simply a means of providing for needs and wants

that are not satisfied domestically or are more cheaply produced elsewhere," (Jerardo, 2004). In addition, this report states that such a scenario does not diminish the "competitiveness" of U.S.-based food producers, but instead growing/changing tastes of consumers. Therefore, trade with countries like Chile is a means to meet demand and does not directly threaten U.S. production or create a reason to enact barriers to trade in fact, we can conclude the effect is exactly the opposite.

Finally, a concrete example of this is seen in one of the products studied in the Import Refusal Report analysis chapter of this thesis. According to the USDA's Agricultural Marketing Resource Center, Chile is far and away the most important supplier of grapes to the U.S. In 2010, over 406,000 metric tons of grapes were imported by the U.S. from Chile. The only other country that even began to be close to this figure was Mexico, from where 148,000 metric tons were imported (FDA, 2012c). Again, we see how Chilean products, particularly grapes, are key to meeting U.S. demands. Although the IRR analysis showed a high percentage of rejection of grape and grape products in comparison to other products, we see here that such data is logical considering the sheer volume of grapes imported by the U.S. from Chile in order to begin to meet domestic demand.

While there is no doubt that non-tariff barriers continue to present problems in international trade today, we do not appear to have uncovered the presence of such barriers in the trade activates between Chile and the U.S. International trade continues to be an extremely beneficial and positive component for the economies of these two nations, especially when it is with one another. Therefore, we now see that the above conclusions emphasize how these two countries have a trade relationship based on legitimate needs and there does not appear to be contempt from either side regarding how each country conducts itself as a trading partner for agricultural goods. In the end, we see that both Chile and the U.S. actions in the international trading stage appear to fit the description of a more “free market” ideology rather than a protectionist one, as befitting the definitions given during the at the beginning of this thesis.

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Appendix 1. List of FDA refusal codes

Reason: FILTHY
Section: 402(a)(3), 801(a)(3); ADULTERATION
Charge: The article appears to consist in whole or in part of a filthy, putrid, or decomposed substance or be otherwise unfit for food

Reason: LISTERIA
Section: 402(a)(1), 801(a)(3); ADULTERATION
Charge: The article appears to contain Listeria, a poisonous and deleterious substance which may render it injurious to health.

Reason: PESTICIDE
Section: 402(a)(2)(B), 801(a)(3); ADULTERATION
Charge: The article appears to be a raw agricultural commodity that bears or contains a pesticide chemical which is unsafe within the meaning of Section 408(a).

Reason: MFRHACCP
Section: 402(a)(4), 801(a)(3) (*no adulteration for obvious reasons*)
Charge: The product appears to have been prepared, packed, or held under insanitary conditions, or it may be injurious to health, due to failure of the foreign processor to comply with 21 CFR 123.

Reason: PESTICIDE2
Section: 402(a)(2)(B); 801(a)(3); ADULTERATION
Charge: The article is subject to refusal of admission pursuant to section 801(a)(3) in that it appears to be adulterated because it contains a pesticide chemical, which is in violation of section 402(a)(2)(B).