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The Oregon Blueberry Industry and South Korea: An Opportunity for Growth

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The United States has become a sophisticated economy where its chief exports consist primarily of services and advanced technologies. The Industrial Revolution marked the significant turning point when the United States set aside the plow as an agrarian nation and became the industrious force it is today. That is not to say, however, that the plow has gone unused. As the country's technologies and work force have evolved, so too have its farmers. In the state of Oregon, 15% of all economic activity relates to agriculture; the industry as a whole directly creates 260,000 jobs and adds \$22 billion annually to Oregon's net state product.¹ A relatively new, but rapidly growing commodity in Oregon's agricultural mix is the blueberry. Due to its purported health benefits, the blueberry has seen rocketing demand growth both domestically and internationally, and exports of blueberries out of the United States have grown by 44% over the last three years.² Demand has seen particularly rapid growth on the Asian

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¹ *From Field to Fork*, 1000 FRIENDS OF OR., <http://friends.org/FieldtoFork> (last visited Nov. 30, 2012).

² See *U.S. Blueberry Industry*, ECON. RESEARCH SERVICE U.S. DEP'T OF AGRIC., tbl.24, <http://usda.mannlib.cornell.edu/MannUsda/viewDocumentInfo.do?documentID=1765> (last updated June, 2013).

continent, and South Korea is posed to join in the fray as they recently enjoyed importing their first fresh blueberries ever in the summer of 2012.

South Korea looks to be a great opportunity for the continued growth of Oregon's blueberry industry. Thanks to a recent "market-access agreement" between the United States and Korea, the state of Oregon is participating in a two-year probationary period where they will be the only state allowed the first-time opportunity to export fresh blueberries into South Korea.³ South Korea has very little domestic agriculture—in fact it makes up only 3% of the nation's GDP—and thus it depends on international trade and imports for many of its agricultural products.⁴ When added with the fact that the Korean consumer base has fully embraced blueberries health benefits, supply in the country is having a hard time keeping up with the demand.⁵ This has spurred Oregon blueberry producers into proceeding into the Korean market despite a large tariff of 40.5% on their product.⁶ This probationary period is being seen as an exclusive opportunity for Oregon companies to gain untapped market share in the Korean marketplace, and could prove to be a catalyst in the industry's already rapid rise.

Potential success aside, the large tariff on blueberries and other trade issues with South Korea create impediments to the industry's growth. To better understand how Oregon blueberries arrived in this position, and in order to see what options are available to the industry, this Article discusses the growth of the Oregon blueberry industry, the recent international agreements affecting Oregon blueberries, and the legal framework that make up those agreements. Specifically, this discussion looks into both the market-access agreement between Oregon and South Korea and the U.S.-Korea Fair Trade Agreement, as well as how to negotiate within these agreements moving forward.

³ A *Green Light for Fresh Oregon Blueberries to South Korea*, OR. DEP'T OF AGRIC. (Oct. 5, 2011), <http://www.oregon.gov/oda/pages/news/111005blueberries.aspx> [hereinafter *Green Light for Oregon*].

⁴ See *U.S.-Korea Free Trade Agreement: Potential Economy-wide and Selected Sectoral Effects*, U.S. INT'L TRADE COMM'N E-3 (Sept. 2007), www.usitc.gov/publications/332/pub3949.pdf.

⁵ *Green Light for Oregon*, *supra* note 3.

⁶ Mitch Lies, *Blueberries Get Boost from S. Korea*, CAPITAL PRESS (Sept. 13, 2012, 12:00 PM), <http://www.capitalpress.com/content/ml-korean-blueberries-090612>.

I OREGON BLUEBERRY INDUSTRY OVERVIEW

Oregon is the second largest blueberry producer in the United States.⁷ The industry has its roots in the northeastern part of the United States. It's the native home of wild blueberries and the birthplace of the "cultivated" blueberry—the berries seen sold on shelves today.⁸ Soon after the wild blueberry was cultivated in the early 1900s, the nurseries propagating the plants sold them to farmers in Oregon, Washington, New Jersey, and North Carolina.⁹ The past decade has been particularly good for the Oregon blueberry industry. Since the late 1990s the industry has experienced over 100% growth,¹⁰ and from 2009 to 2010 Oregon producers saw an increase of revenues from \$37,920,000 to \$63,609,000.¹¹ Oregon growers have recognized the growing demand for blueberries and have stepped up production to try and capture the unsatisfied consumer demand. Along with increasing the sheer number of producing acres of blueberry plants in the state, growers have made investments into research and development of the plant and have enjoyed success in increasing plants' yield per acre.¹² From 2000 to 2005, the acreage of producing blueberry plants in Oregon doubled; however, in that same time span the actual poundage of blueberries produced tripled.¹³

The success of the blueberry has come mainly from scientific research linking the fruits' antioxidant properties with amazing health benefits. Demand for the berry has grown so quickly that as it stands the current supply of blueberries is not meeting international demand.¹⁴ In the last two years alone, United States exports of blueberries have increased from 86.5 million pounds to 124.5 million

⁷ OR. DEP'T OF AGRIC., 2011 AGRIPIEDIA at 11 (2012), available at http://www.oregon.gov/ODA/docs/pdf/pubs/agripedia_book.pdf.

⁸ Cindy Rovins, *A Legend from the New Jersey Pine Barrens This One is True and It's Blue*, RUTGERS, www.njfarmfresh.rutgers.edu/jersey-blues.asp (last visited Sept. 23, 2013).

⁹ *History of the Cultivated Blueberry Industry*, U.S. Highbush Blueberry Council, http://foodservice.blueberrycouncil.org/about_history.html (last visited Nov. 30, 2012).

¹⁰ *Oregon Blueberry Industry*, OR. AGRIC., <http://oregonfresh.net/education/oregon-agriculture-production/oregon-blueberry-industry/> (last visited Nov. 30, 2012).

¹¹ OR. DEP'T OF AGRIC., *supra* note 7 at 14.

¹² Amelie Talcott Brazelton, *The Cultivate Blueberry Industry: Past Present and Future* (unpublished Honors thesis, University of Oregon) (on file with Knight Library, University of Oregon).

¹³ *Id.*

¹⁴ *Id.*

pounds.¹⁵ Blueberries have seen tremendous success in the Asian markets, particularly within Japan and Hong Kong.¹⁶ Frozen blueberries have also become a popular commodity in South Korea; and their recent success along with the recent access for fresh blueberries in Korea creates an appetizing opportunity for the Oregon blueberry industry.¹⁷

II MARKET-ACCESS OVERVIEW

Up until recently, the South Korean government had blueberries placed on a prohibited import list primarily due to health concerns associated with shipping fresh fruit into the country.¹⁸ As a member of the WTO, South Korea would typically be barred from creating such a sweeping restriction to trade as a flat out ban.¹⁹ However, Article XX(b) of the General Agreement on Tariffs and Trade 1947 (GATT) provides that no provision within the GATT shall be construed to prevent a country from implementing measures "necessary to protect human, animal or plant life or health."²⁰ South Korea imposed the ban on fresh blueberries as a supposed necessity to protect its domestic plant health from various pests and plant maladies foreign to South Korea.

Laws that regulate food and plant safety are categorized for purposes of international trade as sanitary and phytosanitary (SPS) measures. When SPS measures are used to restrict trade, Article XX(b) is supplemented by the World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).²¹ The SPS agreement requires, among other things, that a WTO member implementing domestic SPS measures base those measures on international standards unless the country has some sort

¹⁵ U.S. Blueberry Industry, *supra* note 2.

¹⁶ *Id.*

¹⁷ See Steve Herman, *Blueberries a Big Hit in South Korea*, VOICE OF AMERICA, <http://www.voanews.com/content/blueberries-a-big-hit-in-south-korea-100978094/124077.html> (last updated Aug. 17, 2010).

¹⁸ *Oregon Blueberries Enjoy Local and Worldwide Appeal*, OR. DEP'T OF AGRIC. (July 7, 2010), <http://www.buylocalthinkglobal.com/Article.php?newsID=2890> [hereinafter *Worldwide Appeal*].

¹⁹ General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XI:1, 55 U.N.T.S. 194 [hereinafter GATT] (proscribing quantitative restrictions on trade).

²⁰ *Id.* art. XX(b).

²¹ World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, art. 2.4, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

of scientific justification for exceeding those standards.²² Rather than challenge Korea's SPS measures as excessive, however, the United States sought more diplomatic resolutions to the ban on fresh blueberries.

The United States Department of Agriculture (USDA) and the Environmental Protection Agency (EPA) worked closely with Korean officials for over ten years to alleviate South Korea's phytosanitary concerns, and in 2011, they were finally successful in lowering sanctions on blueberries to allow fresh United States blueberries to be exported to Korea.²³ The primary negotiating authority in the agreement with Korea was the USDA's Animal and Plant Health Inspection Service (APHIS).²⁴ Typically, issues of opening up new markets for American commodities are reserved for the Office of the United States Trade Representative (USTR), who specifically handles international commodity agreements and the expansion of market access for United States goods.²⁵ When it comes to agriculture, however, there is the added SPS risk of transmitting disease or pests across borders. The Code of Federal Regulations allows APHIS to also negotiate for market access expansion in a more specialized context by granting it the direct authority and responsibility of "[d]eveloping and directing programs to enhance the trade in United States plants, animals, and their products in compliance with established international sanitary and phytosanitary standards."²⁶

The SPS measures agreed to with Korea generally reflect those SPS standards established by the World Trade Organization.²⁷ This has become standard practice among United States trade agreements; however, historically speaking, South Korea has used these technical barriers to trade as a means of protecting domestic producers from competition with imports.²⁸ As SPS measures are nontariff barriers to

²² *Id.* art. 3.

²³ See *Worldwide Appeal*, *supra* note 18.

²⁴ Press Release, Animal and Plant Health Inspection Services, First Shipment of Fresh Blueberry Exports Arrive in S. Kor. (July 17, 2012), http://www.aphis.usda.gov/newsroom/2012/07/blueberries_sk.shtml [hereinafter APHIS Press Release].

²⁵ *Mission of the USTR*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/about-us/mission> (last visited Nov. 30, 2012).

²⁶ 7 C.F.R. § 371.8(b)(6)(2013).

²⁷ *The United States-Korea Free Trade Agreement*, AGRIC. TECHNICAL ADVISORY COMM. ON TRADE IN FRUITS AND VEGETABLES 4 (Apr. 2007), http://www.ustr.gov/archive/assets/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Reports/asset_upload_file166_12777.pdf [hereinafter Technical Advisory Comm.].

²⁸ *Id.*

trade, they are negotiated outside and supersede any preferential tariff treatment otherwise negotiated for. Thus, any action towards eliminating standing tariff trade barriers for blueberries with South Korea is of little value if the country unjustifiably erects SPS barriers at a later date.²⁹ Fortunately, APHIS was successful in addressing SPS concerns with Korea, and on September 21, 2011, the Korean Ministry for Food, Agriculture, Forestry, and Fisheries announced an exemption for “Oregon fresh blueberries” from its prohibited imports list.³⁰

While the agreement satisfies the Korean government in terms of SPS concerns, it does so in the form of SPS measures that impose onerous growing and packaging regulations on Oregon producers. While all countries implement SPS measures for protection, most adhere to the SPS Agreement and conform to international standards and guidelines established primarily through custom and widespread use. In the blueberry industry, this typically entails state-certified inspection for defects on any shipment leaving the country, as well as a mix of annual and random chemical testing of the product to check for residual levels of pesticides and fungicides. South Korea’s SPS measures go above and beyond these international norms. For example, Oregon blueberry growers must select and register the specific fields from which they may export to Korea and subject those fields to regular inspection during growing periods by state officials.³¹ Additionally, once harvested, fruit designated for Korea must be completely segregated from product harvested in non-registered fields.³² Thus, an Oregon blueberry packing house must have protocols in place that stop production in order to remove any non-Korean blueberries in the production lines before being able to pack any berries in transit to Korea.³³

The agreement also imposes labeling in excess of those required by other importing countries. Packers are required to label each box of berries with identifying information regarding the packer and

²⁹ *Id.*

³⁰ U.S. DEP’T. OF AGRIC. FOREIGN AGRIC. SERIVCE, KOREA IMPORT PROTOCOL FOR FRESH BLUEBERRY FROM OREGON (2011) (on file with author).

³¹ Letter from Hyun-Kwan Shin, Dir. Of Export Mgmt. Div., Dep’t. of Plant Quarantine, to Murali Bandla, Director of Phytosanitary Issues Mgmt., U.S. Dep’t. of Agric. 3 (Sept. 22, 2011) (on file with author).

³² *Id.* at 4.

³³ OR. DEP’T. OF AGRIC., OPERATIONAL GUIDELINES: EXPORT OF FRESH BLUEBERRY FRUIT FROM OREGON TO KOREA 10, available at [http://www.oregonblueberry.com/korea/korea_operational_guidelines\(1\).pdf](http://www.oregonblueberry.com/korea/korea_operational_guidelines(1).pdf) (last visited on Nov. 30, 2012).

grower.³⁴ While this may seem trivial, no other country imposes this requirement on the tens of thousands of cartons of blueberries produced daily in a single packinghouse. Oregon packers were caught unequipped the first year of access and many producers resorted to labeling boxes by hand.

To top it off, pallets in shipments by air—in fact the only method of shipment utilized during the first year of trade—are required to be individually wrapped and sealed in approved, insulated material as to prevent insects from contaminating the shipment.³⁵ While preventing insect contamination is certainly a valid interest, the requirements for certified inspection before leaving the United States and when entering Korea provide that protection.³⁶ The wrapping and sealing requirement, on the other hand, does more harm than good when it restricts, or cuts off entirely, air flow necessary to keep the berries at cold temperatures. Once harvested, blueberries are kept cold during storage and transportation to maintain quality by using cooler warehousing and refrigerated transportation that utilize air movement to keep the fruit cold. Preventing the air from getting to the berries has the potential to heat the product during shipment and impair quality below acceptable standards, subjecting the Oregon packers to liability for shipping nonconforming goods.

Despite these frustrating compliance procedures, Oregon producers were generally enthusiastic about the opportunity to ship to Korea, as negotiations to get past the country's SPS concerns had been in the works for nearly ten years.³⁷ The coincidental ratification of the South Korea-United States Fair Trade Agreement (KORUS FTA) in the same year as the market-access agreement bestows the added benefit of the creation of the Committee on Sanitary and Phytosanitary Matters between the two countries.³⁸ This committee is responsible for enhancing cooperation and consultation on SPS matters and facilitating trade between the parties.³⁹ The committee does so by recognizing that scientific risk analysis will be used in establishing proper SPS procedures by working to increase the transparency of each country's SPS measures and regulatory process and to make a

³⁴ *Id.* at 11.

³⁵ *Id.* at 12–13.

³⁶ Shin, *supra* note 31, at 4–5.

³⁷ See APHIS Press Release, *supra* note 24.

³⁸ United States-Korea Free Trade Agreement, U.S.-Kor., Apr. 1, 2007, art. 8.3, 46 I.L.M. 642 (2007) [hereinafter KORUS FTA].

³⁹ *Id.* art. 8.3(2).

coordinated effort to address ongoing SPS concerns between the countries.⁴⁰ However, ratification of the KORUS FTA comes with drawbacks as well for the Oregon blueberry industry.

While the market-access agreement was going to proceed regardless of the free trade agreement's (FTA)⁴¹ ratification, the implementation of the treaty has a significant effect on the blueberry trade with South Korea. The primary goal of the market-access agreement was to simply get blueberries off Korea's prohibited imports list. Once that happened, and the FTA was ratified, blueberries became a subject of the FTA and fell under the general category of fruits in the genus *Vaccinium*—subject to a large tariff to be reduced gradually by 5% per year over 10 years. While the FTA grants immediate tariff elimination for nearly two-thirds of United States agricultural goods,⁴² blueberries were not fortunate enough to be included in that statistic, and Oregon's first shipment of blueberries into Korea were subject to a 40.5% tariff.⁴³ While the FTA superseded any tariff rates in effect prior to its ratification, it did not supersede any of the SPS measures imposed by the market-access agreement. Rather, the FTA provides that such measures will still be handled in the same manner as they were under the WTO, via domestic legislation—for example, the market-access agreement guided by the World Trade Organization Agreement on Application of Sanitary and Phytosanitary Measures.⁴⁴

The tariff on American blueberries was imposed primarily for the benefit of local producers in Korea. Blueberries have only been grown in Korea for five years, and the typical Korean economical stance is to be very protective of its local infant industries and slowly introduce foreign competitors.⁴⁵ In 2010 the country produced 1,500 tons of blueberries locally.⁴⁶ The local supply in Korea is far too small

⁴⁰ See *id.* art. 8.3(3)(a)–(g).

⁴¹ In many international texts, the abbreviation “FTA” is used in place of “free trade area.” This discussion uses the alternate definition of an FTA, which is “free trade agreement.”

⁴² WILLIAM H. COOPER ET AL., CONG. RESEARCH SERV., RL34330, THE U.S.-SOUTH KOREA FREE TRADE AGREEMENT (KORUS FTA): PROVISIONS AND IMPLEMENTATIONS 4 (2013).

⁴³ Tom Burfield, *First Oregon Blueberries Shipped to South Korea*, THE PACKER (July 20, 2012, 12:15 PM), <http://www.thepacker.com/fruit-vegetable-news/shipping-profiles/First-Oregon-blueberries-shipped-to-South-Korea-163195886.html>.

⁴⁴ KORUS FTA, *supra* note 38, art. 8.1.

⁴⁵ Technical Advisory Comm., *supra* note 27.

⁴⁶ Windsor Genova, *Blueberry Demand in South Korea Rises as Healthy Fruit Become [sic] Sought-After*, INTERNATIONAL BUSINESS TIMES (Aug. 19, 2010, 12:21 AM),

to possibly fill the demand in the country;⁴⁷ thus the actual effects seen from the tariff are the burdens placed on the consumer who must pay a premium for Oregon blueberries. And for how high the demand is, Oregon Blueberry Commission Chairmen Eric Pond thinks the Korean market is still “fairly untapped.”⁴⁸

It seems possible, then, that the two countries could serve one another’s purpose in reducing the tariff on United States blueberries. Not only would lowering the price of fruit in Korea help generate more demand via its affordability, but the increase in supply of blueberries in the country may also help increase consumer awareness of its availability and drive demand even further. Unfortunately for Oregon blueberries, the tariff’s location within the FTA with South Korea makes it practicably impossible to negotiate a tariff reduction for that single tariff line for the benefit of arguably only one of the country’s industries.

III THE U.S.-KOREA FREE TRADE AGREEMENT

As a rule of thumb, a member of the WTO may not grant separate, preferential treatment to another country without granting that same treatment to every other member of the WTO.⁴⁹ However, Article XXIV of the GATT allows members to create preferential trade arrangements amongst each other so long as other members of the WTO outside of the arrangement are accorded no less favorable treatment than they were prior to the any preferential agreement taking place.⁵⁰ This allows WTO members to circumvent many provisions of the GATT and grant exclusive preferential treatment to another member beyond what the WTO would otherwise allow. The most commonly used form of applying preferential treatment has been the creation of free trade areas, which is formed by two or more member countries signing a free trade agreement to eliminate trade barriers amongst themselves.

Generally speaking, elimination of tariffs under FTA’s occur at the ratification of the treaty itself—that is, after all, the purpose of fair

www.ibtimes.com/blueberry-demand-south-korea-rises-healthy-fruit-become-sought-after-193351.

⁴⁷ *Id.*

⁴⁸ *Green Light for Oregon*, *supra* note 3.

⁴⁹ GATT, *supra* note 19, art. I:1.

⁵⁰ *Id.* art. XXIV:5.

trade agreements. General Agreement on Tariffs and Trade Article XXIV:8(b) defines FTA's as comprising of "a group of two or more customs territories in which the duties and other restrictive regulations of commerce . . . are eliminated on substantially all trade between the constituent territories in products originating in such territories."⁵¹ However, the GATT provides no explanation on what is meant by "substantially all trade." With no clear measure of what is necessary to satisfy the GATT requirement, the resulting FTA's have ranged from the New Zealand-Singapore FTA, which eliminates all tariffs on goods originating in the parties upon entry into force into the agreement, to the Korean-U.S. FTA, which immediately eliminates tariffs on some products, eliminates tariffs on others over a number of years, and even excludes some products from tariff elimination altogether.⁵²

When choosing which tariffs to eliminate to fulfill the "substantially all trade" requirement, countries are guided by an implicit principle of reciprocity.⁵³ When read with Article XXIV, Article I of the GATT, which prohibits unilateral tariff concession to a preferred trading partner, creates a principal of reciprocity between the negotiating countries by requiring all trade barriers to be eliminated while simultaneously forbidding one country from making any unilateral concession to the other.⁵⁴ Some countries structure their FTA's on a "product-by-product" basis that essentially create a product-for-product elimination of trade barriers between countries.⁵⁵ For example, if Country A wishes to benefit from duty-free exports of blueberries to Country B, Country A would need to eliminate its tariff on imports of blueberries originating in Country B. This form of reciprocity is only effective, however, when both countries both have import and export sensitivities for the same product. Typically, as is the case with the Korean-U.S. FTA, concessions are made by both countries across different sectors until the percentage of tariff lines

⁵¹ *Id.* art. XXIV:8(b).

⁵² Compare KORUS *supra* note 39, at Annex 2-B, with Agreement Between New Zealand and Singapore on a Closer Economic Partnership, January 1, 2001, available at <http://www.bilaterals.org/IMG/pdf/s-cep-3.pdf>.

⁵³ Jong Bum Kim, *Legal Review of FTA Tariff Negotiations*, RIETI 10, http://www.rieti.go.jp/en/events/07080601/pdf/3-1_E_Kim_Paper_o.pdf (last visited Sept. 23, 2013).

⁵⁴ *Id.*

⁵⁵ *Id.* at 11.

given market access over total tariff lines are equal in both countries.⁵⁶

Since negotiating countries measure benefits from free trade in terms of net increased market access, little thought is given to consumers' economic welfare during negotiations.⁵⁷ Despite the fact that consumer welfare is often the rationale for entering into FTA's, countries tend to negotiate from postures that reflect the narrow interests of weak or sensitive domestic sectors rather than the domestic economy as a whole.⁵⁸ These narrow interests can be thought of as "political costs," and although two countries may be able to strike a balance in terms of economic benefits, the deal may still fall through if the political costs are seen as being out of equilibrium.⁵⁹ These political costs can range from domestic producers protesting the introduction of foreign competition to domestic laws mandating the achievement of principle negotiating objectives in trade agreements.⁶⁰ News of United States blueberries entering the South Korean market was met by resistance among domestic producers. The South Korean blueberry industry has enjoyed rapid growth since the early 2000s, and it may be that the large tariff on United States blueberries was the result of political pressures to protect the budding domestic producers in South Korea.⁶¹

IV MOVING FORWARD

The issues impeding Oregon blueberry producers' access to the South Korean market can be thought of as two separate battlefronts—the tariff on blueberries and the SPS measures imposed on blueberry exporters. Various tools and resources are located within the battlefields of tariff policies and SPS regulations, and this portion of the discussion addresses each of these fronts in turn.

⁵⁶ See *id.* at 7, 11.

⁵⁷ *Id.* at 6.

⁵⁸ *Id.* at 6–7.

⁵⁹ *Id.* at 7.

⁶⁰ See *id.*

⁶¹ *Organic Morning Farm Blueberry Lands in Japan*, AGRAFOOD (July 2011), http://www.agrafood.co.kr/news/news_view.asp?seq=2043&category=3010.

A. The Korean Tariff on Fresh Blueberries

Regardless of what motivated the tariff currently imposed on United States blueberries, the fact remains that the tariff, as it stands, will continue to hamper Oregon (and eventually United States) exports of blueberries into South Korea for the next ten years. What remedies, then, can Oregon producers seek with such a potentially vast market for their fruit just beyond their reach? The answer may be within the text of the FTA itself. The FTA provides that “[o]n the request of either Party, the Parties shall consult to consider accelerating the elimination of customs duties set out in [the FTA]. An agreement by the Parties to accelerate the elimination of a customs duty on a good shall supersede any duty rate . . . for that good when approved by each Party in accordance with its applicable legal procedures.”⁶² This clause creates what seems to be a standing opportunity to renegotiate tariff elimination rates at the request of either nation. However, there is a question as to what the “applicable legal procedures” are in order to take advantage of this clause.

The United States-Korea Free Trade Agreement Implementation Act allows the President to proclaim, subject to certain consultation and layover provisions, “such modifications as the United States may agree to with Korea regarding the staging of any duty treatment set forth in . . . the Agreement.”⁶³ The consultation and layover provisions require the President to obtain advice regarding the proposed action from private sector actors as well as the United States International Trade Commission.⁶⁴ Additionally, the President is required to submit a report to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives that details the action being proposed as well as the reasons for the action, and the advice obtained from the aforementioned groups.⁶⁵ The President subsequently delegates the responsibilities under the consultation and layover provisions to the USTR.⁶⁶ This information alone does not create a very distinct picture of how exactly one initiates or facilitates the initiation of accelerated

⁶² KORUS *supra* note 38, art. 2.3.

⁶³ To Implement the United States-Korea Free Trade Agreement, 77 Fed. Reg. 14,265 (Mar. 6, 2012), reprinted as amended in 19 U.S.C. § 3805 (2011) [hereinafter KORUS Implementation Act].

⁶⁴ United States-Korea Free Trade Agreement Implementation Act, Pub. L. No. 112-41, § 104(1), 125 Stat. 428, 431 (2011); 19 U.S.C. § 2155 (2011).

⁶⁵ United States-Korea Free Trade Agreement Implementation Act § 104(2).

⁶⁶ KORUS Implementation Act, *supra* note 63.

tariff elimination. Luckily, this is not the first time the United States has negotiated accelerated tariff elimination under FTAs.

There are multiple FTAs in which the United States has renegotiated for more rapid elimination of duties, including two treaties currently in force. In 1997, three years after its ratification, the North America Free Trade Agreement's (NAFTA) tariff elimination schedule was successfully renegotiated, with further rounds of accelerated tariff elimination negotiations occurring in 1998, 2000, and 2001.⁶⁷ Additionally, the United States-Chile Free Trade Agreement (USC FTA) received accelerated rates of tariff elimination a little over four years after its ratification.⁶⁸ Both these and prior FTAs contain clauses nearly identical to the accelerated tariff elimination clause and consultation and layover provisions located in the KORUS FTA.⁶⁹

The manner in which these clauses were implemented was also very similar. In the most recent cases the USTR posted notices in the Federal Register requesting the submission of petitions for certain products to receive accelerated tariff elimination treatment.⁷⁰ The NAFTA request for petition submissions included detailed descriptions of what articles could be petitioned for, the timetable for processing the petitions, general instructions, as well as a model format that could be used by petitioners originally developed for the Canada-U.S. Fair Trade Agreement's (CUS FTA) renegotiations.⁷¹ Petitions under the NAFTA renegotiations could only cover a single product and were required to include a detailed description of the good in question, a statement of why the petitioner believes the product was classified in the tariff category in which it was initially placed, and copies of any relevant rulings in any NAFTA territories

⁶⁷ OFFICE OF THE U.S. TRADE REP., ANNUAL REPORT 2012 ANNEX III (2012), available at <http://www.ustr.gov/sites/default/files/Annex%20III.pdf>.

⁶⁸ *Id.*

⁶⁹ Compare *supra* note 54, with North America Free Trade Agreement Implementation Act Sec. 201(b), 19 U.S.C. § 3301 (1993), and United States-Chile Free Trade Agreement Implementation Act § 201(b), Pub. L. No. 108-77 (2003).

⁷⁰ Compare Request for Petitions To Accelerate Tariff Elimination and Modify the Rules of Origin Under the U.S.-Chile Free Trade Agreement, 72 Fed. Reg. 29,355 (May 25, 1997), with Implementation of the First Round of Accelerated Tariff Eliminations Under Provisions of the North American Free Trade Agreement, 62 Fed. Reg. 25,989 (May 25, 2007).

⁷¹ See Implementation of the Accelerated Tariff Elimination Provision in the United States-Canada Free Trade Agreement, 55 Fed. Reg. 4501 (Feb. 8, 1990), and Implementation of the Accelerated Tariff Elimination Provision of the North American Free Trade Agreement, 58 Fed. Reg. 68,186 (Dec. 23, 1993).

specifying the classification of the petitioned product.⁷² Following procedure adhered to under the CUS FTA, all countries reserved the right during negotiations to refuse to provide accelerated tariff elimination for those products protested by their domestic interested parties.⁷³ The request for petitions under the USC FTA renegotiations contained the added element that interested parties in the United States should include whether they have discussed their proposals with their industrial counterparts in Chile and, if so, include what the results of those discussions were.⁷⁴ Additionally, the USTR broadened the scope of petitions much further than NAFTA's one item per petition limit to cover "the broadest appropriate range of items," so that multiple tariff lines could be covered under a single petition.⁷⁵

One might reasonably expect that these procedures will be similar when the USTR decides to implement the KORUS FTA accelerated tariff elimination clause. However, the timing of when the USTR may release a request for petitions is still unclear. Under the NAFTA, the request came before the NAFTA itself was even ratified.⁷⁶ Conversely, under the USC FTA the request did not come until three years after its ratification.⁷⁷ Regardless, Oregon producers may benefit from taking early steps towards petitioning the USTR. During this interim period, producers could begin coordinating with producers of similar products so that their petitions cover the "broadest appropriate range of items." For example, under the Korean Harmonized Tariff Schedule, blueberries fall under the same tariff line as cranberries, bilberries, and other fruits of the same genus. Further still, products such as gooseberries and currants fall under a different tariff line but are still in the same "staging category," that is, they are subject to the same tariff phase-out treatment. Additionally, Oregon producers could make headway in alleviating Korean producers' concerns of foreign competition by reaching out and

⁷² Implementation of the Accelerated Tariff Elimination Provision of the North American Free Trade Agreement, 58 Fed. Reg. 68,186, 68,187 (Dec. 23, 1993).

⁷³ 62 Fed. Reg. 25,989, 25,990 (May 12, 1997).

⁷⁴ Request for Petitions to Accelerate Tariff Elimination and Modify the Rules of Origin Under the United States-Chile Free Trade Agreement, 72 Fed. Reg. 29,355 (May 25, 2007).

⁷⁵ *Id.*

⁷⁶ Implementation of the Accelerated Tariff Elimination Provision of the North American Free Trade Agreement, 58 Fed. Reg. 68,186, 68,187 (Dec. 23, 1993).

⁷⁷ Request for Petitions To Accelerate Tariff Elimination and Modify the Rules of Origin Under the U.S.-Chile Free Trade Agreement, 72 Fed. Reg. 29,355 (May 25, 2007).

discussing with them the benefits of cooperation in opening up a new market. If successful, reports of these discussions could then be used to petition for the accelerated tariff elimination with the USTR.

As an alternative to lowering the rate on the blueberry tariff line, Oregon producers may want to consider petitioning government officials to push for a reclassification of blueberries into a different or new tariff line altogether. While each country is generally free to classify products in its tariff schedule as it sees fit, the United States may be able to petition the Joint Committee, established by Article 22.2 of the KORUS FTA, for a reclassification of blueberries. The Joint Committee is cochaired by the USTR and the Minister for Trade of Korea, and its purpose is to oversee the implementation and application of the provisions and commitments of the FTA—meeting on an annual basis or within thirty days by request of a party to address any issues arising under the FTA.⁷⁸ Among its powers, the Joint Committee may “consider amendments to [the FTA] or make modifications to the commitments therein,” as well as “take such other action in the exercise of its function as the Parties may agree.”⁷⁹ This seems to put tariff classification well within the purview of the Joint Committee, and may be an effective forum for addressing this issue.

Blueberries are currently included in the broad tariff line covering all berries of the genus *Vaccinium*. Among the more common berries of that genus are cranberries, bilberries, and, of course, blueberries. While all of these have many characteristics that make them alike, there are strong arguments for why these berries should be treated differently for trade purposes. The most glaring difference is the fact that these berries are not substitutes for one another. Each has a unique flavor and texture, and each have very different markets in which they are sold. Cranberries are generally considered too bitter to eat raw, and the vast majority of cranberries are processed into other products such as juices and sauces. Bilberries are soft and juicy, and their fragility makes transporting them difficult; consequently bilberries are typically sold frozen. Both cranberries and bilberries also ripen later in the year than blueberries. Given these differences, the United States should have a case as to why fresh blueberries should be afforded their own tariff line under the FTA.

⁷⁸ KORUS FTA, *supra* note 38, art. 22.4.

⁷⁹ *Id.* art. 22.3(c), (f).

Even if South Korea intentionally imposed the high tariff as a form of protectionism, both countries may find room for compromise in the reclassification approach. There are several, more preferable alternatives to a flat tariff that do not provide the apparent threat of foreign competition while still benefiting blueberry exporters. For example, a tariff-rate quote that allows the United States to export a certain, nonthreatening amount of blueberries to South Korea duty free before imposing higher rates would certainly be an improvement. Alternatively, a tariff that has higher rates for the short amount of time both countries' industries are in competition and duty free treatment for the parts of the year when the two are not in conflict may also be a desirable solution. Due to slight climate differences, Korea's blueberry season starts and ends slightly earlier than Oregon's blueberry season, and such a tariff would grant Korean producers the protection they desire while still granting duty free treatment to Oregon producers later in the year.

B. South Korea's SPS Measures Affecting Exported Blueberries

Oregon blueberry producers could also petition the government to challenge the onerous compliance measures imposed by South Korea under Article XXIII of the GATT. Although diplomatic resolution to these issues would be preferable and actually required to be sought by Article 22.3 of the KORUS FTA, the United States could still resort to using the Dispute Settlement Body (DSB) within the WTO to challenge Korea's SPS measures. Article XXIII provides a mechanism through which a WTO member may challenge another member's measures or regulations as impairing or nullifying any benefit accruing under the GATT.⁸⁰ While the United States and South Korea's status as free trade areas exempts them from many provisions of the GATT, Article XXIV:12 requires that members take reasonable measures to ensure observance of other measures of the GATT to the greatest extent possible.⁸¹ Furthermore, the WTO Understanding on the Interpretation of Article XXIV specifically states that Article XXIV:12 allows a country to challenge another's domestic measures or regulations under Article XXIII,⁸² and the KORUS FTA contains language that allows for disputes arising under

⁸⁰ GATT, *supra* note 19, art. XXIII:1.

⁸¹ *Id.* art. XXIV:12.

⁸² Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, ¶¶ 13–14, 33 I.L.M. 1153, 1163.

the FTA to be brought before the DSB if the dispute also arises under a WTO agreement.⁸³

Although South Korea may argue that its onerous compliance measures for shipping blueberries are necessary under Article XX(b) of the GATT and allowed by Article 3.3 of the SPS Agreement, the United States may still have a case that those measures are impairing its ability to export blueberries to South Korea.⁸⁴ A member may only impose GATT noncompliant SPS measures only so long as those measures are not “a disguised restriction on international trade.”⁸⁵ Furthermore, Article 5.6 of the SPS Agreement requires members to ensure that SPS measures implemented are not more trade-restrictive than required to achieve the desired level of protection.⁸⁶ The SPS Agreement also states that a measure is not more trade-restrictive than necessary only if there is no other reasonable, less restrictive alternative that achieves the same level of protection.⁸⁷

The United States may be able to argue that South Korea’s measures are not necessary because there are reasonable, less restrictive means of addressing Korea’s phytosanitary concerns. Oregon exports blueberries to many of South Korea’s neighbors, including Japan, the Philippines, and Hong Kong, yet none of these countries impose additional intensive monitoring and shipping measures like those required by South Korea; rather they adhere to standard practices used in the international blueberry trade. To succeed in such an argument, the United States would need to prove either that current international standards for SPS measures affecting the trade of blueberries are a reasonable, less restrictive alternative to South Korea’s measures and achieves the same level of protection, or, alternatively, it would need to prove that the current level of protection South Korea’s SPS measures are designed to achieve is not justified by any sort of scientific explanation, but rather is a disguised restriction on international trade. The United States may have a strong case for such an argument, especially considering that Korea’s neighbors have nowhere near the heightened SPS concerns that the

⁸³ KORUS FTA, *supra* note 38, art. 22.6.

⁸⁴ See GATT, *supra* note 19, art. XX(b), and SPS Agreement, *supra* note 21, art. 3.3 (when read together, these provisions allow WTO members to implement non-GATT-compliant SPS measures to protect human, animal, and plant life or health above and beyond international standards only if accompanied by a scientific justification).

⁸⁵ SPS Agreement, *supra* note 21, art. 2.3.

⁸⁶ *Id.* art. 5.6.

⁸⁷ SPS Agreement, *supra* note 21, art. 5 n.3.

country purports to have; however, further inquiry would need to be made into the exact scientific justifications South Korea is using to support its current SPS regime.

It bears repeating that although the United States may have a strong case against South Korea through invocation of Article XXIII of the GATT, turning to the DSB to resolve these issues should be a last resort. The KORUS FTA was a great boon to the political relationship between the United States and South Korea, and bringing a claim against Korea in front of the WTO would certainly be a step backwards in that regard. The establishment of the Joint Committee and the SPS Committee, as well as the requirement that each country seek diplomatic resolutions for issues arising under the FTA, could very well open the legal avenues needed to increase blueberries' market access in South Korea.

Regardless of any hypothetical success in resolving the SPS measures implemented by South Korea in the market-access agreement, the tariff on blueberries remains the largest obstacle impeding the Oregon blueberry from thriving in Korea. With the rapid pace at which business is conducted in the modern age, these instruments and procedures set in place to obtain greater market access can seem sluggish and onerous. While Oregon blueberries may still explore other avenues of market penetration within South Korea, such as joint ventures with Korean importers to try and lower costs, it seems that if growers want to see trade barriers eliminated for their product their best option at this point is to prepare and be patient. If South Korea is as vast a market as producers believe it to be, it will be well worth the wait.

CONCLUSION

South Korea is still a promising market, despite the current tariff and SPS measures weighing Oregon producers down. I recently had the opportunity and privilege of accompanying Oregon Department of Agriculture delegates and industry members representing the Oregon blueberry private sector on a trip to Seoul to discuss the impact of the first year of importing fresh blueberries with South Korean importers and distributors. While all agreed the tariff on blueberries is a significant hurdle to increasing demand, most companies were eager to discuss alternative ventures such as joint promotional activities to at least help increase consumer awareness.

If members of the Oregon blueberry industry reach out to these South Korean companies and form cooperative efforts towards market

penetration, the high demand for the product may be enough to increase blueberry exports despite the tariff. At the same time, the USTR is working towards accelerating tariff elimination and the Committee on Sanitary and Phytosanitary Matters continues to resolve SPS issues. Successful efforts in all these endeavors would be monumental for Oregon blueberries, but even still, after taking ten years of negotiations just to be able to enter the market, any success in increasing market-access into Korea will be great progress.

