The United States Measures with Respect to Importation of Catfish from Vietnam are not Consistent with the SPS, TBT and AD Agreement

Mr. Vang Phu Tran

A Thesis Submitted in Partial Fulfillment of the Requirements
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ความไม่สอดคล้องกันของมาตรการของประเทศสหรัฐอเมริกาที่เกี่ยวข้องกับการนำเข้าปลาดุกจากประเทศเวียดนาม กับ ความตกลงว่าด้วยการใช้บังคับมาตรการสุขอนามัยและสุขอนามัยพืช ความตกลงว่าด้วยอุปสรรคเทคนิคต่อการค้า และ ความตกลงว่าด้วยการตอบโต้การทุ่มตลาด

นายวัง พู ตรัน

วิทยานิพนธ์นี้เป็นส่วนหนึ่งของการศึกษาตามหลักสูตรปริญญานิติศาสตรมหาบัณฑิต
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วังพูตรัน : ความไม่สอดคล้องกันของมาตรการของประเทศสหรัฐอเมริกาที่เกี่ยวข้องกับการนำเข้าปลาดุกจากประเทศเวียดนาม กับ ความตกลงว่าด้วยการใช้บังคับมาตรการสุขอนามัยและสุขอนามัยพืช ความตกลงว่าด้วยอุปสรรคเทคนิคต่อการค้า และ ความตกลงว่าด้วยการตอบโต้การทุ่มตลาด (The United States Measures with Respect to Importation of Catfish from Vietnam are not Consistent with the SPS, TBT and AD Agreement) อ.ที่ปรึกษาวิทยานิพนธ์หลัก: ศักดา ธนิตกุล, 157 หน้า.

งานวิจัยนี้ประกอบด้วยห้าบท ในบทนำจะกล่าวถึงความเป็นมาและเหตุผลที่ดำเนินการวิจัย รวมทั้งวัตถุประสงค์และผลการวิจัยที่คาดว่าจะได้รับ บทที่สองจะให้ข้อมูลเกี่ยวกับอุตสาหกรรมปลาดุกในเวียดนาม กำลังการผลิตและส่งออกปลกดุกของเวียดนาม นอกจากนี้บทนี้ยังกล่าวถึงเหตุการสำคัญในคดีตอบโต้การทุ่มตลาดสำหรับปลา Tra and Basa เพื่อเป็นพื้นหลังให้เข้าใจข้อพิพาท บทที่สามจะกล่าวถึงข้อพิพาทโดยเน้นมาตรการกีดกันการค้าทางเทคนิค ส่วนแรกของบทนี้จะแนะนำและวิเคราะห์ข้อกำหนดสำคัญของข้อตกลง TBT Agreement ส่วนต่อไปจะวิเคราะห์กฎระเบียบของสหรัฐเกี่ยวกับสิทธิการใช้คำว่า “ปลาดุก” ในฉลากสินค้าและเพื่อการโฆษณา หลังจากนั้นจะวิเคราะห์ข้อโต้แย้งระหว่างสหรัฐฯ และเวียดนามบนพื้นฐานของ TBT Agreement และระเบียบสากลอื่นๆ ที่เกี่ยวข้อง ส่วนสุดท้ายของบทนี้จะสรุปว่ากฎหมายสหรัฐฯ มีความสอดคล้องกับ TBT Agreement หรือไม่

บทที่สี่มีโครงสร้างคล้ายกับบทที่สาม กล่าวคือจะพูดถึงข้อกำหนดสำคัญของข้อตกลง AD Agreement ต่อด้วยกฎหมายฉบับ Tariff Act ปี 1930 ของสหรัฐ และสุดท้ายวิเคราะห์ปัจจัยสำคัญในข้อพิพาท และข้อโต้แย้งของสองฝ่ายเกี่ยวกับ determination of normal value and calculation of dumping margin สำหรับปลกดุกแช่แข็งจากเวียดนาม จากข้อโต้แย้งดังกล่าวจะสามารถตีความได้ว่ามาตรการตอบโต้การทุ่มตลาดของสหรัฐที่ใช้กับปลาดุกแช่แข็งของเวียดนามมีความสมเหตุสมผลหรือไม่

บทสุดท้ายจะกล่าวถึงโปรแกรมการตรวจสอบปลาดุกของสหรัฐ และมีโครงสร้างเช่นเดียวกับบทที่สามและบทที่สี่ โดยเริ่มจากการวิเคราะห์ข้อกำหนดสำคัญในข้อตกลง SPS Agreement และกฎหมายที่เกี่ยวข้องของสหรัฐฯ ต่อไปจะเป็นการวิเคราะห์ข้อโต้แย้งของสองฝ่าย และสุดท้ายจะสรุปว่าโปรแกรมการตรวจสอบปลา *Siluriformes* ของสหรัฐเป็นไปตามข้อตกลง SPS Agreement และมาตรฐานสากลที่เกี่ยวข้องหรือไม่

สรุปแล้ว งานวิจัยชิ้นนี้ศึกษาสามประเด็นหลัก ได้แก่: (i) การกีดกันทางการค้าด้านเทคนิค (ระเบียบการใช้ชื่อ catfish); (ii) การตอบโต้การทุ่มตลาดสำหรับปลาแช่แข็งบางประเภทจากเวียดนาม (มาตรการตอบโต้การทุ่มตลาด); และ (iii) sanitary and phytosanitary (มาตรการด้านสิ่งแวดล้อมและอนามัย). จากการอภิปรายและวิเคราะห์ทั้งสามประเด็นดังกล่าวโดยศึกษากฎหมายของ WTO, ของสหรัฐฯ, หลักฐานทางวิทยาศาสตร์ และข้อมูลชั้นหนึ่ง (first-hand data) ผลการวิจัยชี้ให้เห็นว่า ระเบียบของสหรัฐฯ ในข้อพิพาทนี้ไม่สอดคล้องกับข้อตกลง TBT, AD และ SPS Agreement

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KEYWORDS: CATFISH - SILURIFORMES, SPS CATFISH INSPECTION PROGRAM, SPS MEASURES, TBT MEASURES, AD DUTY, WTO LAWS

VANG PHU TRAN: The United States Measures with Respect to Importation of Catfish from Vietnam are not Consistent with the SPS, TBT and AD Agreement. ADVISOR: SAKDA THANITCUL, 157 pp.

ABSTRACT

The "catfish war" between the United States and Vietnam arose when Vietnam started to export a large volume of *Tra* and *Bas*a fish to the U.S, and labeled and sold such fish as "catfish" at prices lower the domestic product's prices. To protect Channel catfish market, the CFA conducted an advertisement campaign against Vietnamese catfish on environmental and sanitary grounds. Accordingly, the CFA lobbied for a ban on imports of catfish from Vietnam, it alleged that Vietnamese catfish was unsafe for consumption because such fish was grown in unhygienic conditions and containing poisons, pesticides residue and so on. Based on such arguments, the CFA and its supporters claimed that it is necessary to impose a stringent inspection program on imported catfish (all fish of the order *Siluriformes*). As predicted outcome, the U.S 2008 Farm Bill and currently the 2014 U.S Farm Bill states that all fish of the order *Siluriformes* are inspected by the *Food Safety and Inspection Service (FSIS)*, a subdivision of the United States Department of Agriculture (USDA) rather than the U.S Food, Drug and Administration (FDA), by March 1, 2016. Another aspect of this dispute which relates to technical barriers to trade, was so-called "*catfish trade name*". The CFA argued that *Tra* and *Basa* fish were not "catfish", thus, these fish could not be allowed to use term "catfish" for labeling and advertising. The CFA continued to allege that the term "catfish" should be permitted to solely use to genus *Ictaluridae (Channel catfish)* which is raised in the Southern States of the U.S. In response, the U.S Congress passed a law which regulates that Vietnamese catfish is not catfish and not allowed to employ the term "catfish" for *Tra* and *Basa* fish for advertising as well as labeling in the U.S jurisdiction (this regulations are still in effect), in 2003. Because the sanitary measures and catfish trade name campaign did not have anticipated outcome, the CFA launched dumping allegations, and the U.S. Department of Commerce (DOC) ruled in favor of the dumping claim of the CFA and established tariffs ranging from 37 to 64 percent on imports of frozen catfish fillets from Vietnam. After that, the U.S. International Trade Commission (ITC) ratified the DOC ruling, in July 2003. To date, the antidumping duty on certain frozen fish fillets from Vietnam has passed the eleventh Administration review, and the last Administration review concluded that such antidumping duty shall remain in effect until further notice.

The outcomes of this research are clearly point out that (i) the U.S regulations relating to the using of the term "catfish" are inconsistent with the Article 2.3 and 2.4 of the TBT Agreement; (ii) the anti-dumping measures on certain frozen fish fillets from Vietnam are criticized as protectionist policy and violate the Article 3.1, 3.2, 3.4, 3.5 and 3.7 of the AD Agreement as well as not consistent with the Article 2.6 of the U.S – Vietnam Bilateral Trade Agreement; and (iii) the U.S inspection program on *Siluriformes* fish is illustrated to create a discrimination among seafood products, and such regulations are inconsistent with the Article I of the GATT 1994, and Articles 2.3, 5.1 and 5.6 of the SPS Agreement.

Field of Study: Business Law Student's Signature .....

Academic Year: 2015 Advisor's Signature .....

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TABLE OF ABBRIVIATIONS

9 CFR	Title 9 - Animals and Animal Products of Code of Federal Regulations
80 FR 75589	The final rule of FSIS on Mandatory Inspection of Fish of the Order *Siluriformes* and Products Derived from such Fish. December 2, 2015.
2002 Farm Bill	The U.S. Farm Security and Rural Investment Act of 2002
2008 Farm Bill	The U.S. Food, Conservation, and Energy Act of 2008
2014 Farm Bill	The U.S. Agricultural Act of 2014
AD Agreement	Agreement on Implementation of Article VI of the GATT 1994 (Anti-dumping Agreement)
GATT 1994	General Agreement Tariffs and Trade 1994
SPS Agreement	**The WTO Agreement on the Application of Sanitary and Phytosanitary Measures**
TBT Agreement	Agreement on Technical Barriers to Trade
BTA	Bilateral Trade Agreement
CFA	The U.S. Catfish Farmers Association
DOC	The U.S. Department of Commerce
DSB	Dispute Settlement Body of the WTO
DSM	Dispute Settlement Mechanism of the WTO
FDA	The U.S. Food, Drug and Administration

FMIA	The U.S. Federal Meat Inspection Act
FSIS	The *Food Safety and Inspection Service*, a subdivision of the United States Department of Agriculture (USDA)
GAPs	Good Agricultural Practices
GMP	Good Manufacturing Practices
HACCP	Hazard Analysis, Critical Control Points
ITC	The U.S. International Trade Commission
Kg/lbs.	Kilogram/pounds
MT	Metric Tons
NASS	The U.S. National Agricultural Statistics Service
NMFS	The U.S. National Marine Fisheries Service
SSOPs	Sanitation Standard Operating Procedures
VASEP	Vietnam Association of Seafood Exporters and Producers
U.S.	United States
USDA	The U.S. Department of Agriculture
WTO	The World Trade Organization

CHAPTER 1.

INTRODUCTION

1.1. Background of the research

In 1986, Vietnam turned into a new chapter with the renovation (*Doi Moi*)[1] in economy as well as policy. By doing that, Vietnam was from a food importer into one of the largest rice exporter in the world.[2] In February 1994, The U.S President Clinton lifted its trade embargo against Vietnam.[3] Following this event, Vietnam joined the Association of Southeast Asian Nations (ASEAN) in 1995[4] and Asia-Pacific Economic Cooperation (APEC) in 1998[5] and so on. In addition, in December 2001, the U.S. and Vietnam signed a bilateral trade agreement (BTA),[6] which granted Vietnam the Most-Favored Nation (MFN) status.[7] The signing of this BTA opened a new door for Vietnamese agriculture and aquaculture products begun to access the U.S. market. However, there are still many barriers to market access of Vietnamese exports into this market,[8] especially technical barriers to trade and protectionist policy of the U.S. government.

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[1] "Doi Moi" means "change to new", a renovation in both policy and economy.

[2] Daniel Workman. *Rice Export by Country. Available at* http://www.worldstopexports.com/rice-exports-country/3311, accessed December 11, 2015.

[3] Vietnam.usembassy. *Chronology of Key Events in U.S. – Vietnam Relations*. *Available at* http://vietnam.usembassy.gov/chronology.html, accessed on July 21, 2015.

[4] ASEAN. *Vietnam in ASEAN: Toward Cooperation for Mutual Benefits*. *Available at* http://www.asean.org/communities/asean-economic-community/item/vietnam-in-asean-toward-cooperation-for-mutual-benefits, accessed December 11, 2015.

[5] APEC. *Member Economies*. *Available at* http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx, accessed December 11, 2015.

[6] *The U.S.-Vietnam Bilateral Trade Agreement (BTA) - Resources for Understanding. Available at* http://vietnam.usembassy.gov/econ12.html, accessed December 11, 2015.

[7] Irene Brambilla, G. P., Alessandro Tarozzi. (2012). *Adjusting to trade policy: Evidence from U.S antiduping duites on Vietnamese catfish.* The Review of Economics and Statistics, *MIT Press*. Vol. 94(1). *Available at* http://www.nber.org/papers/w14495, accessed September 7, 2015.

[8] Nam, T. V. (2005). *U.S. Technical barriers to trade and Vietnamese seafood exports. Available at* http://www.vdf.org.vn/tvnam4e.pdf, accessed September 20, 2015.

Farming of catfish is a vital activity in Vietnam, reared in ponds and floating cases. Tra and Basa fish farming[9] is a traditional career and a means of livelihood for farmers in the Mekong Delta River in Vietnam. Thanks to the Government's trade liberalization reforms catfish production increased substantially in recent years to catering to increased international demand and market opportunities. Vietnamese catfish have become a popular product in the U.S market by its quality, taste and competitive price.[10] Additionally, there are many American who emigrated from Asian countries and although they are living in the U.S, they still keep their traditional favorite food and taste. Therefore, there are not only Vietnamese catfish, but also other catfish from Asian countries such as Thailand, Bangladesh, and Indonesia etc. are not hard to be popular in the U.S. As a consequence, the volume of Vietnamese frozen catfish fillets exported to the U.S. market increased from 54.5 tons in 1997 to 7,765 tons in 2001, reached the peak at 101,726 tons in 2013 and 87,753 tons in 2015 (90% of which was the *Tra* species).[11] However, farming of catfish is also an important industry in the Southern United States i.e, Mississippi, Arkansas, Alabama, and Louisiana. The Association of Catfish Farmers of America (CFA) faced with an increasing competition from cheaper Vietnamese catfish, and deemed such competition was unfair and caused material injury to their business and of course, they acted to halt catfish imports.

The sharp increase in quantity of Vietnamese catfish in the U.S. market took attention of the U.S. catfish industry, therefore, the CFA acted to protect their market as well as interests. Firstly, the CFA conducted an advertisement campaign against

[9] "*Tra*" is *Pangasius hypophthalmus*, and "*Basa*" is *Pangasius bocourti. See* Fishonline. *Basa, Tra, Catfish or Vietnamese River Cobbler*. *Available at* **http://www.fishonline.org/fish/basa-tra-catfish-or-vietnamese-river-cobbler-424**, accessed on July 27, 2015.

[10] Tuoitrenews. *Vietnamese pangasius industry – ups, and downs. Available at* **http://www.vietnambreakingnews.com/2013/03/vietnamese-pangasius-industry-ups-and-downs/**, accessed on October 11, 2015.

[11] U.S National Marine Fisheries *Statistics. Fisheries Statistics and Economics Division. Available at* **https://www.st.nmfs.noaa.gov/pls/webpls/trade_prdct_cntry_ind.results?qtype=IMP&qyearfrom=1997&qyearto=2015&qprod_name=CATFISH&qcountry=5520&qsort=COUNTRY&qoutput=TABLE**, accessed December 6, 2015.

Vietnamese catfish on environmental and sanitary ground.[12] In 2001, the CFA lobbied for a ban on imports of catfish from Vietnam and alleged that Vietnamese catfish was raised in unhygienic conditions in the Mekong River with the water containing poisons, wastes, dirty feeds and so on. In order to gathering evidence for their arguments, a delegation of U.S. catfish farmers and processors went to Vietnam on a fact-finding mission.[13] Yet, the trip's outcome was not as expected, the U.S. delegation who could not find any evidence that Vietnamese catfish were growing in polluted water and processing them in crude plants.[14]

The CFA moved into the second campaign was so-called "catfish trade name". The CFA alleged that *Tra* and *Basa* fish were not "catfish", thus, these fish could not be sold with the labeling as "catfish",[15] and the term "catfish" should solely be permitted to use for fish of the family *Ictaluridae* which is mainly raised in the Southern States of the U.S.[16] In response, in 2001, the U.S. Congress passed a law which regulated Vietnamese catfish was not catfish and had to label under the name of "Tra", "*Basa*".[17] The passing of the 2002 Farm Bill, however, did not lead to a significant recovery in prices, but lead to increase public awareness on the Vietnamese catfish in the U.S. and other markets.[18]

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[12] Aya Suzuki, V. H. N. (2013). *Status and Constraints of Costly Port Rejection: A Case from the Vietnamese Frozen Seafood Export Industry* (Discussion paper No. 395). *Available at* http://www.ide.go.jp/English/Publish/Download/Dp/395.html, accessed October 11, 2015

[13] Seafoodbusiness. *Basa catfish – real trip of U.S. catfish farmer and producers*. *Available at* http:/www.seafoodbusiness.com/buyguide/issue_basa.htm, accessed July 28, 2015.

[14] *Ibid*.

[15] Section 755 of the 2002 Farm Bill regulates that "none of the funds appropriated or otherwise made available by this Act to the Food and Drug Administration shall be used to allow admission of fish or fish products labelled wholly or in part as "catfish" unless the products are taxonomically from the *Ictaluridae* family".

[16] Section 10806 of the 2002 Farm Bill.

[17] Phan, A. (2003). *The New "Catfish" War: United States v. Vietnam implications of U.S. Trade Policy in Vietnam. Available at* www.cid.harvard.edu/cidtrade/Papers/catfishfinal1.doc, accessed August 20, 2015.

[18] Kehar Singh, M. M. D. (2011). *International Competitiveness of Catfish in the U.S. Market: a Constant Market Share Analysis*. *Aquaculture Economics & Management. Vol. 15, 2011*, p.17.

Because the sanitary and phytosanitary measures and catfish trade name campaign did not have anticipated outcome, the CFA launched dumping allegations, and the U.S. Department of Commerce (DOC) ruled in favor of the dumping claim of the CFA and established tariffs ranging from 37 to 64 percent on imports of frozen catfish fillets from Vietnam in 2003.[19] Next, the U.S. International Trade Commission (ITC) ratified the DOC ruling, in July 2003. As a result, Vietnamese exports of catfish to the U.S. fail to the point of being almost completely shut down.[20] It should be noted that, there was an unexpected outcome was that the winner in the economic concept was not the U.S. catfish industry. Indeed, Vietnamese catfish was get free advertisement by the CFA's campaign and when the Vietnamese catfish shifted its products away from the U.S., Thailand, China and also some other catfish exporting countries derived the largest advantages.[21]

To date, the antidumping duty on certain frozen *Tra* and *Basa* fillets from Vietnam has passed eleven Administration reviews, and the latest Administration review concluded that such antidumping duty still remains in effect until further notice (see Figure 1.1).[22]

Figure 1.1. Current anti-dumping margin on certain frozen catfish fillets from Vietnam (dollars/kilogram)

Exporter	**Weighted-average margin (dollars/kilogram)**

[19] U.S. International Trade Commission. *Certain Frozen Fish Fillets from Vietnam, Investigation No. 731-TA-1012, Publication 3617, Appendix A (August 2003). Available at* https://www.usitc.gov/publications/701_731/pub3617.pdf, accessed August 5, 2015.

[20] *Ibid*., *supra* note 8.

[21] *Ibid*., *supra* note 19.

[22] U.S. Federal Register. *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results and Partial Rescission of the Antidumping Duty Administrative Review; 2013-2014. Available at* **https://www.federalregister.gov/articles/2015/09/14/2015-22858/certain-frozen-fish-fillets-from-the-socialist-republic-of-vietnam-preliminary-results-and-partial**, accessed October 14, 2015.

Hung Vuong Group	0.36
Thuan An Co., Ltd	0.84
Basa JSC	0.60
Cafatex Corporation	0.60
Can Tho Import-Export JSC	0.60
C.P. Vietnam Corporation	0.60
Nam Viet Corporation	0.60
Viet Phu Foods and Fish Corporation	0.60

Source: The U.S. Federal Register[23]

The catfish dispute has strongly adverse effect on Vietnamese economy, especially in catfish farmers and processors, as well as the U.S.'s customers and importers. It also affects the trade normalization between the two countries. Moreover, some of the U.S's measures that imposed on Vietnamese catfish may not consistent with the WTO rules. By these reasons, this author conducts a deeply study on this dispute and focuses on almost all aspects of the dispute in order to could truly understand the facts, laws as well as arguments of both sides and then make recommendations for Vietnam as well as other developing countries in the extent of international trade disputes.

1.2. Literature review

As this dispute was a landmark case for international trade dispute between developing and developed countries in imbalance relations. Therefore, many scholars have studied this subject and there are some researches can be listed as following:

Nam (2005)[24] analyzed the technical barriers to trade (TBT) of the U.S. and

[23] *Ibid.*

the effect of such TBT measures on Vietnamese seafood exported to the U.S. market. This article focused on TBT measures in general and have deeply analyzed in Vietnamese seafood, not catfish. More specific than Nam (2005), Binh (2003)[25] given an overview of catfish dispute and then had strong emphasized on economic aspect of the dispute, especially on Vietnam – U.S.'s BTA and WTO regime. In similar approach way, Thanh (2010)[26] focused on challenges of Vietnamese exporters in Anti-dumping case, which was investigated by the DOC, and analyzed the issue in question base on anti-dumping regulations of WTO.

Toohey (2012)[27] approached the dispute in the new aspect - legal culture, her research indicated the important of legal culture on international trade and disadvantages of Vietnam when engagement in trade dispute with Western countries such as Common law versus Civil law, Western culture versus Eastern culture. Besides, she also mentioned the dispute on trade description of Sardines between European Communities and Peru[28] and suggested that Vietnam might use the dispute settlement mechanism of the WTO.

In the aspect of catfish labeling, according to Kobbeman (2004)[29] and many U.S. Congressmen who argued in favor of the legislation restricting the labeling of

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[24] *Ibid*., *supra* note 8.

[25] Binh, P. A. (2003). *The New "Catfish" War: United States v. Vietnam implications of U.S. Trade Policy in Vietnam. Available at* www.cid.harvard.edu/cidtrade/Papers/catfishfinal1.doc, accessed August 20, 2015.

[26] Thanh, D. C. (2010). *Catfish, Shrimp, and the WTO: Vietnam loose its innocence.* Vanderbilt Journal of Translational Law, Vol. 43:1235. *Available at* https://wp0.its.vanderbilt.edu/wp-content/uploads/sites/78/cong-pdf.pdf, accessed August 20, 2015.

[27] Lisa Toohey, C. P. (2012). *Legal Culture and Trade Disputes: Vietnam's Increasing Capacity to Engage with the WTO.* Jurisprudence Journal, Special issue October 2012. *Available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2389942, accessed September 12, 2015.

[28] WTO. *European Communities — Trade Description of* Sardines (2001*)-DS231*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds231_e.htm, accessed October 12, 2015.

[29] Kobbeman, K. E. Hook. (2004). *Line and Sinker: How the Congress Swallowed the Domestic Catfish Industry's Narrow Definition of This Ubiquitous Bottomfeeder*. Arkansas Law Review Journal. Vol. 57:407. *Available at* https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=57+Ark.+L.+Rev.+407&srctype=smi&srcid=3B15&key=07fda7656ac36e692b645c5debbe8ad1, accessed September 2, 2015.

catfish i.e. "*calling Basa fish is catfish is the equivalent to allowing water buffalo to be imported under the label "beef*".[30] However, some other U.S. Congressmen and Senators such as John McCain and Phill Gramm argued, "*not only does it look like a catfish, but it acts like a catfish*".[31] In addition, many of scientists (i.e. Jondeung (2007)[32], Lundberg (2003)[33] etc.) argued that although *Pangasiidae* fish (Southeast Asia freshwater catfish) is different with the *Ictaluridae* fish (North American freshwater catfish), they have the same common name "catfish" and belong to the order *Siluriformes*. Kobbeman (2004)[34] also supposed that if Vietnam or any other countries that produce fish of the family *Ictaluridae*, such countries could export, advertise, and sell their *Ictaluirdae* fish with the label "catfish" without violation of the U.S. catfish labeling rules. Moreover, she suggested a solution for the U.S. catfish industry in the extent that its campaign did not get effective outcome. In 2011, Singh (2011)[35] illustrated that Thailand, China and other catfish export countries derived the biggest benefits from this dispute, not the U.S. catfish industry.

Regarding antidumping measures which have been imposed on certain frozen catfish fillets from Vietnam, Kobbeman (2004)[36] indicated that most of the U.S. Congressmen and U.S. catfish industry considered such measures are necessary method to protect interest of domestic industry as well as catfish consumers. However, many other scholars argued that the action of the U.S. government is

[30] *Ibid.*

[31] Philip Brasher. *When is a catfish not a catfish? Available at* http://www.usvtc.org/httpdocs%202/General_Info/Catfish/washpost_dec_27.htm, published on December 27, 2001; page A21, accessed on October 12, 2015.

[32] Amnuay Jondeung, P. S., Rafael Zardoya. (2007). *The Complete Mitochondrial DNA Sequence of the Mekong Giant Catfish (Pangasianodon Gigas), and the Phylogenetic Relationships among Siluriformes.* Sicence Direct – Gene Journal. Vol. 387. *Available at* http://www.ncbi.nlm.nih.gov/pubmed/17067766, accessed November 2, 2015.

[33] Lundberg, John G. and John P. Friel. 2003. *Siluriformes. Catfishes*. Version 20 January 2003. *Available at* http://tolweb.org/Siluriformes/15065/2003.01.20, accessed September 24, 2015.

[34] *Ibid*., *supra* note 30.

[35] *Ibid*., *supra* note 19.

[36] *Ibid*., *supra* note 30.

actually a protectionist policy and such anti-dumping measures violate WTO Agreements as well as Vietnam-U.S BTA.[37]

Adam McCarty (2003)[38] concluded that the term "non-market economy" has become a non-tariff barrier, and it creates restrictions on exports from low-cost countries to developed country markets. This study also discussed that the definition of "non-market economy" of the U.S. Department of State is just fix to the North Korea because only North Korea in which the vital decisions affecting demand and supply are controlled by the public sector.

Irene Brambilla et al. (2012)[39] had a deeply research on the impact of the U.S. antidumping duty imposed on Vietnamese catfish. They indicated the adverse impact of such antidumping measures on Vietnamese catfish industry, and emphasized on the loss of income and standard life of affected people. Finally, they evaluated the effect of the dispute on social-economy in Vietnam, particularly in the Southern Vietnam.

Approached on the practical view of a lawyer, Anh (2005)[40] analyzed practical obstacles for Vietnamese catfish exporters in question such as answering questionnaire in English, limitation of answering time, fees for hiring layers, financial resources and finally he concluded lessons for Vietnam from such case as well as discussed the role of Vietnamese authority in such case.

1.3. Objectives of the research

- Understanding the fact of the dispute
- Analyzing the facts and arguments of both sides

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[37] *Ibid*., *supra* note 27.

[38] Adam McCarty, C. K. (2003). *The Economics of the "Non-Market Economy" Issue: Vietnam Catfish Case Study*. *Available at* www.eldis.org/fulltext/vietnam.pdf, accessed November 3, 2015.

[39] *Ibid*., *supra* note 7.

[40] Bao Anh Thai. *An Analysis of* "*Lessons Learned*" *from* "*Catfish*" *and "Shrimp". Available at* http://www.baolawfirm.com.vn/dmdocuments/an_anylysis_of_lessons_learned_from_antidumping_case.pdf, accessed October 15, 2015.

- Analyzing and discussing the decision of the U.S. Department of Commerce whether or not their decisions consistent with WTO rules.

- Determining whether the U.S measures of concerned are inconsistent with the WTO laws.

1.4. Hypothesis of the research

The United States has imposed three measures on imported catfish from Vietnam as well as other catfish exporting countries: (i) SPS measures on inspection of *Siluriformes* fish; (ii) TBT measure on labeling of catfish; and (iii) antidumping measure on certain frozen fish fillets from Vietnam. None of those measures is consistent with the WTO laws namely SPS, TBT, AD Agreement, respectively.

1.5. Scope of the research

The research consists of three parts of the "catfish war" between the United States and Vietnam: (i) sanitary and phytosanitary measures (environmental and sanitary measures and inspection regulations on catfish); (ii) technical barriers to trade (catfish labeling); and (iii) antidumping duty on certain frozen fish fillets from Vietnam (anti-dumping measures).

The arguments of this research are based on the WTO Agreements, the U.S. laws, pertinent scientific evidence and the first-hand data gathered at Thot Not District, Can Tho City, Vietnam (see Figure 1.2).

1.6. Methodologies of the research

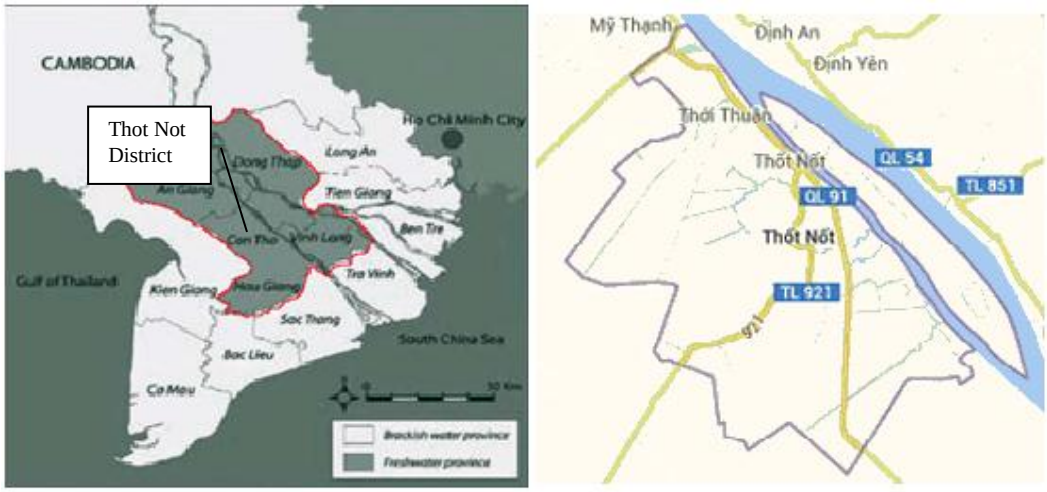
There are two main methodologies that are employed to conduct this research: documentary research and in-depth interview and survey questionnaires.

With the first methodology, this author analyzes relevant laws of the U.S. as well as WTO rules. Moreover, some of relevant articles, books, cases, and studies in this topic are also cited and analyzed to provide a wide range of opinions to readers.

In order to carry on the second methodology, a survey is conducted with

twenty-five samples[41] (i.e. catfish farmers (twenty samples), processors (three samples) and local authorities (two samples)) at Thot Not District, Can Tho City, Vietnam (see Figure 1.2) since Thot Not District is one of the regions which produces the highest volume of *Tra* and *Basa* fish in Vietnam. Therefore, a survey is conducted at that District in order to examine and evaluate the catfish farming technique, feeds, fingerlings, the knowledge of farmers, processors and local authorities about the U.S. laws, and the impact of the dispute on their live.[42] Besides, another major aim of this survey is to verify the data that is cited in this research but gathered by other scholars.

Figure 1.2. Main catfish farming areas (shaded with red line) in the Mekong Delta



Source: Success Stories in Asian Aquaculture[43]

The SPSS program (Statistic Package Social Science) is used to analyze the data surveyed. The analyzed data on catfish farmers is useful for examining the farmers' knowledge and methods on raising catfish (*Tra* and *Basa*) e.g. feeds, fingerlings,

[41] Although twenty-five samples will not be able to show the representative information for whole catfish industry in Vietnam, this survey will provide accurate information on catfish industry in the southern Vietnam and verify the data that is obtained from other scholars.

[42] See Appendix 1, 2 and 3 Questionnaire for catfish farmers, processors and local authorities, respectively.

[43] International Development Research Center -Canada. *Success Stories in Asian Aquaculture*. *Available at* http://www.idrc.ca/EN/Resources/Publications/openebooks/461-1/index.html, accessed July 21, 2015

cultivation methods, environment conditions and whether or not they have received any supports from the Vietnamese government. Additionally, the data on the catfish processors helps to know the catfish processing, their strategies to deal with the antidumping duty and what kind of subsidy they have received from the government (if any). Last but not least, local authorities' data provides the pertinent information on the management of the catfish industry and verifies that whether they have provided any support to the catfish farmers as well as processors or not.

1.7. Benefits of the research

- Understanding the fact of the dispute
- Understanding more detail the international trade law, especially in the Sanitary and Phytosanitary Agreement, the Agreement on Technical Barriers to Trade, the Anti-dumping Agreement and so on.
- Understanding the Dispute Settlement Mechanism of the WTO
- Understanding the pertinent U.S laws
- Understanding the current circumstance of the Vietnamese catfish in the U.S. market.
- Having conclusion on the issue whether or not the U.S. regulations are consistent with the WTO laws.

CHAPTER 2.

OVERVIEW ON THE CATFISH DISPUTE BETWEEN THE UNITED STATES AND VIETNAM

The aim of this chapter is to provide general information which relates to the thesis's topic such as information on catfish farming in Vietnam, the major events of the catfish dispute, the U.S and international catfish market.

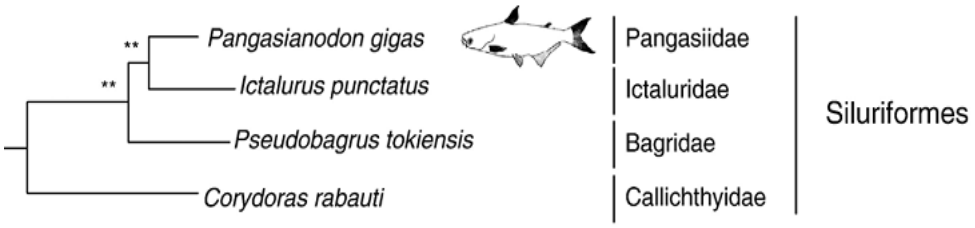
2.1. In brief on catfish farming at the Mekong Delta in Vietnam

2.1.1. Definition of catfish

Catfish is a common name of 34-38 families[44] of fish of the order *Siluriformes*, including the family *Ictaluridae* (North American freshwater catfish) and the family *Pangasiidae* (Southeast Asia freshwater catfish). In addition, "catfish" is also named for a diverse group of fish that has similar shapes and characteristics such as barbells, slender, whisker-like tactile organs near the mouth, which give the image of cat-like whiskers. Catfish are very diverse, ranking second or third in diversity among orders of vertebrates with nearly 3,000 known species.[45]

This research will only consider two families of the order *Siluriformes* fish; they are the family *Ictaluridae* and *Pangasiidae*, (see Figure 2.1 and 2.2).

Figure 2.1. Taxonomy of *Siluriformes* order by the DNA

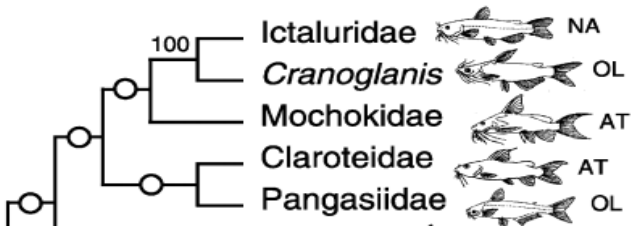


[44] According to the data from Encyclopedia.com, there are 34 families of the order *Siluriformes*, while there are 36 and 38 families in data of the USDA and the study of Lundberg (2003), respectively.

[45] *Ibid*., *supra* note 34.

Source: John G. Lundberg (2003)[46]

Figure 2.2. Taxonomy of the order *Siluriformes* by the cytochrome b sequences



Source: M. Hardman (2005)[47]

2.1.2. The catfish farming at Mekong Delta in Vietnam

Pangasius hypophthalmus (hereafter *Tra*) is one of the major fish species in the Mekong River.[48] The Mekong Delta River at Vietnam covers around 39,600 km^2, accounts for about one eighth of the area of Vietnam. It has a population of about 17 million or 21 percent of the total population of Vietnam. It includes thirteen provinces: Long An, Tien Giang, Ben Tre, Dong Thap, Vinh Long, Tra Vinh, An Giang, Kien Giang, Can Tho, Hau Giang, Soc Trang, Bac Lieu and Ca Mau.[49]

Catfish farming in Vietnam has a history of more than 50 years and has been a traditional means of livelihood for farmers in the Mekong Delta for many generations. The catfish in the Mekong Delta mainly belongs to genus *Pangasius*, in which the most valuable is *Pangasius bocourti* (hereafter *Basa*) and *Tra*. The genus *Pangasius* (and related species) includes several species that are referred to in ordinary English

[46] *Ibid*., *supra* note 33.

[47] M. Hardman. (2005). *The phylogenetic relationships among non-diplomystid catfishes as inferred from mitochondrial cytochrome b sequences - the search for the Ictalurid sister taxon (Otophysi: Siluriformes)*. Science Direct – Molecular Phytogenetics and Evolution, Vol. 37 (2005), p.709. Available at http://www.ncbi.nlm.nih.gov/pubmed/16054398, accessed September 24, 2015.

[48] FAO. *Pangasius Hypophthalmus*. *Available at,* http://www.fao.org/fishery/culturedspecies/Pangasius_hypophthalmus/en, accessed December 4, 2015

[49] Canthotourist. *Vi tri dia ly vung Dong bang song Cuu Long*. *Available at* http://www.canthotourist.vn/vi-tri-dia-ly-187/b, accessed September 27, 2015.

as “catfish”.[50]

Tra and *Basa* fish are mainly raised in the provinces along of Tien and Hau River. This region accounts for over 95 percent of the country's catfish.[51]

2.1.3. Cultivation methods

Vietnamese catfish are raised in ponds (see Figure 2.3), floating cages (wood, bamboos), and net pens and cages. The ponds are usually located near river tributaries because farmers could be easy to exchange water for several hours daily during the farming period by tidal exchange and pumping. In addition, as located near rivers tributaries, it is convenient for harvesting (see Figure 2.4) and transferring to processing plants live in well boats.

Figure 2.3. Catfish ponds in Mekong Delta Vietnam

Source: Viet Linh[52]

[50] MJ. Phillips. (2002). *Freshwater Aquaculture in the Lower Mekong Basin*. MRC Technical Paper No. 7. Mekong River Commission, Phnom Penh. 62 pp. ISSN: 1683-1489. *Available at* www.ais.unwater.org/ais/aiscm/getprojectdoc.php, accessed November 3, 2015.

[51] VASEP. *Tong quan nganh thuy san Viet Nam*, [Overview on Vietnam’s fishery]. *Available at* http://vasep.com.vn/1192/OneContent/tong-quan-nganh.htm, accessed November 20, 2015

[52] Do Van Thong. *Trien khai ap dung VietGAP voi ca Tra: kho dat muc tieu*. *Available at* http://www.vietlinh.vn/tin-tuc/2015/nuoi-trong-thuy-san-2015-s.asp?ID=1336, accessed December 6, 2015.

Figure 2.4. Catfish harvesting

Source: Dai Doan Ket[53]

Floating cages, net cages and pens are sited on Tien River and Hau River (the two main branch rivers of the Mekong River in the South of Vietnam) and other major river tributaries. However, the quantity of catfish raised by these methods tend to decline sharply, especially in recent years due to pond culture of high productivity, while cage high production costs, low production efficiency and bear high environmental taxes and fees.[54]

2.1.4. Farming areas

Tra and *Basa* fish are widely farming in the South of Vietnam, especially in four provinces: An Giang, Can Tho, Dong Thap and Tra Vinh. Based on the data of Ministry of Agriculture and Rural Development of Vietnam, in 2013, the Mekong Delta has achieved around 5,200 ha farmed catfish, increased appropriate eight times

[53] Le Quoc Khanh. *DBSCL: Tim giai phap de nganh nuoi ca tra phat trien ben vung*. *Available at* http://daidoanket.vn/kt-xh/dbscl-tim-giai-phap-de-nganh-ca-tra-phat-trien-ben-vung/58479, accessed December 6, 20015.

[54] According to the survey's outcome of this author, the main reason which causes the volume of catfish raised in floating cages tends to decline significantly because if catfish is raised in the floating cages it will not fulfill to get VietGAP/GlobalGAP (Vietnamese Good Agriculture Practices) certificate, and without such certificate, these catfish can just be sold in domestic market with low price and volume.

in comparison with 2000.[55] In comparison with the year 2012, farming area fell 2.6 percent and catfish production declined 14.9 percent, however, the productivity of catfish farming is increasing rapidly, in 2013 the average yield was about 200 - 250 tons/ha, especially in Dong Thap the yield was from 300-320 tons/ha.[56]

2.1.5. Fingerlings

Seeds are provided from the Aquatic Center in the Southern provinces. The seeds are tested for quality and negative result for Enteric Septicaemia of Catfish (ESC) disease and other infectious diseases before providing to the farmers. However, fingerlings can also be produced in private farms and hatcheries in ponds, floating cages, cages mesh. Although there are many regulations which control the quality of fingerlings (i.e., Circular No. 26/2013/TT-BNN on the management of fisheries and Circular No. 23/2013/TT-BNN has specified the manufacturing facility management, business-like catfish), the quality of catfish fingerlings are various and not easy to test the origin. The catfish fingerlings are being provided from various sources including hatcheries, enterprises, free producers, self-production and buy from other farmers with the proportion 38.9%, 0.8%, 33.6%, 16% and 10.7%, respectively.[57]

2.1.6. Feeds supply

In the 1990s, most Vietnamese catfish farmers who employed farm-made feeds which are made from various ingredients, including trash fish, rice bran, soybean meal, blood meal, broken rice, cottonseed flour, milk, eggs and vegetables.[58]

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[55] Worldbank. *Ministry of Agriculture and Rural Development - Project: Investment in aquaculture and fisheries in the Mekong Delta, 2014. Available at* http://siteresources.worldbank.org/INTVIETNAM/Resources/vn_fisheries, accessed October 7, 2015.

[56] VASEP. *Tong quan nganh thuy san Viet Nam* [Overview on the fishery of Vietnam]. Available at http://vasep.com.vn/1192/OneContent/tong-quan-nganh.htm, accessed November 20, 2015

[57] Thuan, N. V. (2015). *Giai Phap Phat Trien Thi Truong Ca Tra O Dong Bang Song Cuu Long [Solutions for Development of Catfish Market at the Mekong Delta of Vietnam.* PhD Desertation, School of Economic Can Tho University, 2015. *Available at* https://ambn.vn/product/17992/Giai-phap-phat-trien-thi-truong-ca-tra-o-d%C3%B4ng-bang-song-cuu-long.html, accessed November 7, 2015.

[58] *Ibid*., *supra* note 49.

Basing on this author's survey, as almost all catfish farmers with suffer of the safety and quality of food, especially after the claim of the U.S. catfish industry on SPS issues,[59] who have been using commercial compound feeds for whole rearing period.

2.1.7. Processing Plants

As of December 2012, there are about 136 enterprises involved in exporting fish. The processing plants mainly concentrate in the provinces like An Giang, Dong Thap, Can Tho, Vinh Long, and Tien Giang. Most of the fish processing plants' equipment are been upgrading with modern technology in order to ensure that they meet the international standards. It should be noted that almost all catfish processing plants in such four provinces which have been certified to meet relevant international standards such as ISO, HACCP[60] etc., (see Figure 2.5).[61]

Figure 2.5. Catfish processing in a plant at Can Tho city, Vietnam

[59] See Section 3.3.2 of Chapter 3.

[60] HACCP (Hazard Analysis and Critical Control Point) is a systematic approach in identifying, evaluating and controlling food safety hazards. Food safety hazards are biological, chemical or physical agents that are reasonably likely to cause illness or injury int he absence of their control. *Available at* http://www.fda.gov/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/ucm089302.htm, accessed February 12, 2016.

[61] Nguyen Manh Cuong. *Hien trang chuoi cung ung nganh hang ca da tron tai Dong bang song Cuu Long* [The current circumstance of the catfish supply chain in the Mekong Delta region]. *Available at* http://www.vifep.com.vn/hoat-dong-nghien-cuu/1024/Hien-trang-chuoi-cung-ung-nganh-hang-ca-tra-tai-vung-D%C3%B4ng-bang-song-Cuu-Long.html, accessed November 20, 2015.

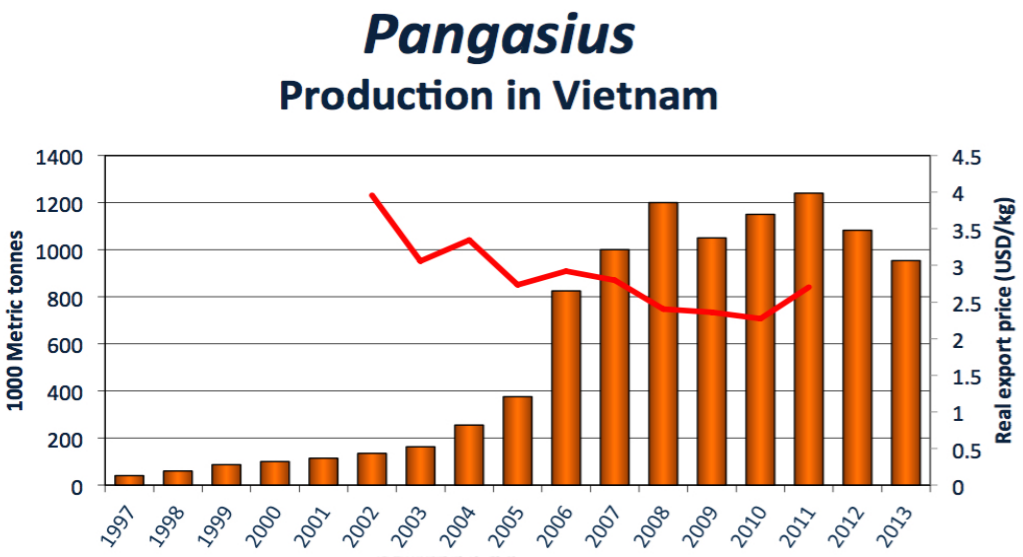
Source: Doanh nghiep va Thuong mai Journal[62]

2.2. Vietnam's catfish export to the U.S. market

As earlier mentioned, Vietnam began to export its catfish products to the U.S. by 1996, however just in a minor volume. The volume of Vietnamese catfish exported to the U.S jumped to nearly 120,000 tons in 2001. In that circumstance, The U.S. catfish industry had a strongly concern on the imported catfish, especially from Vietnam (Figure 2.6 and 2.7).

Figure 2.6. The production and export price of Vietnamese *Pangasius* 1997 – 2013

[62] Thom Nguyen. *Sua doi quy dinh ve nuoi, che bien va xuất khau ca Tra* [amended regulations on raising, processing and exporting of Tra fish]. Available at http://doanhnghiepvathuongmai.vn/index.php/news/bien-dao-kinh-te-bien/Sua-doi-quy-dinh-nuoi-che-bien-va-xuat-khau-ca-tra-11196/, accessed December 6, 2015.



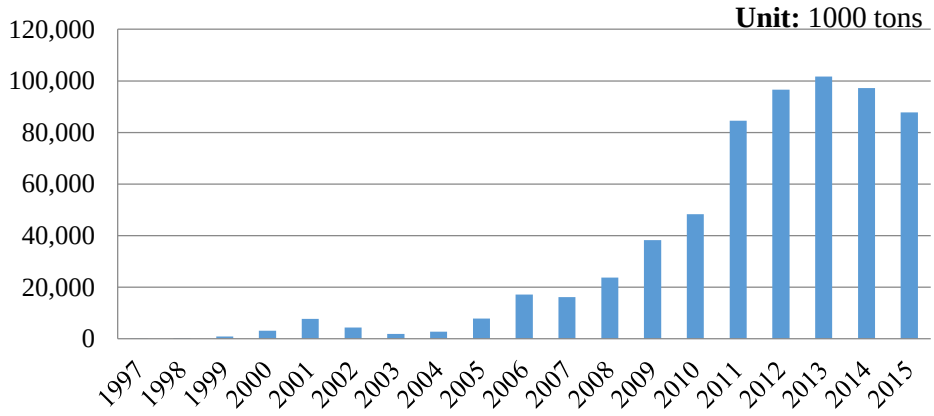
Source: Ragnar, N and Tverteras, 2013[63]

As we can see in the bar chart that the production of *Pangasius* fish grew gradually in the period 1997 – 2005, and then jumped three times from nearly 400,000 tons in 2005 to 1,2 million tons in 2008, and slight fail in 2008 - 2009. The next three years 2009 – 2011, the volume rose again and reached the peak at appropriately 1,230 million tons. There was a downward trend in the last period 2011 – 2003, in which sharply declined to around 950,000 tons in 2013. There was a differ trend between the volume of Vietnamese catfish production and its export prices. The export prices of Vietnamese catfish increased gradually in the first five years 1997 - 2001, and failed significantly from $4.2/kg in 2002 to $2.7/kg. The period 2006 – 2010 also witnessed a downward trend on the export prices; it decreased to $2.3/kg in 2010. In the last three years, there saw a growth of the *Pangasius* export price.

Figure 2.7. Quantity of Vietnamese catfish exported to the U.S. 1997-2015

[63] Ragnar, N and Tverteras. *Fish production estimates and trends 2012-2013*. Available at http://gaalliance.org/wp-content/uploads/2015/04/goal12-tveteras.pdf, *accessed December 4, 2015*.

The volume of Vietnamese Pangasius frozen fillets exported to the U.S 1997-2015



Source: National Marine Fisheries Statistics[64]

It is clearly from the above bar chart that there was a fluctuated trend on the volume of the Vietnamese catfish exported to the U.S. market from 1997 to 2015. The first three years 1997 – 1999 witnessed a slight increase of the Vietnamese catfish quantity in the U.S. market and sharply rose in 2000 – 2001, and was followed by a dramatically decreased between 2002 and 2004. Vietnamese catfish began to appear in the U.S. with huge volume from 2005 and grew significantly in the period 2008 – 2013 and it reached the peak at more than 1,1 million tons in 2013. Vietnamese catfish products witnessed a downward trend in the last two years 2014 and 2015.

2.3. Overview on the major events of the catfish dispute from 2001 present

2.3.1. Interested parties

2.3.1.1. Petitioners

- Akin Gump Strauss Hauer & Feld LLP was on behalf of the Catfish Farmers of American and its individual members:[65]

[64] *Ibid., supra* note 11.

+ Danny Walker, CEO, Heartland Catfish Co.

+ Randy Rhodes, Senior Vice-President and Chief Sales and Marketing Officer, American Pride Seafood LLC.

+ Jack Perkins, Vice President, Sales and marketing, Consolidated Catfish Cos., LLC.

+ Bill Allen, Senior Vice President, Bank Plus.

+ Jeff Davis, COO, American Seafood Group LLC.

+ David Pearce, Owner, Pearce Catfish Farm, Inc.

+ Seymour Johnson, Owner, Marie Planting Co.

+ Daniel W. Klett, Economist, Capital Trade, Inc.

+ Thomas L. Rogers, Economist, Capital Trade, Inc.

2.3.1.2. Defendants

- White and Case LLP was on behalf of the Vietnam Association of Seafood Exporters and Producers (VASEP) and its individual members:[66]

+ Nguyen Huu Dung, General Secretary, VASEP.

+ Vo Dong Duc, Director, Can Tho Agricultural and Animal Products (CATACO) (a member of VASEP).

+ Virginia B. Foote, President and Co-founder, U.S. – Vietnam Trade Council.

+ Matthew Fass, Vice President, Maritime Products International.

+ Howard M. Johnson, President, H.M. Johnson and Associates.

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[65] U.S. International Trade Commission. Certain Frozen Fish Fillets from Vietnam (Appendix C Calendar of Hearing), Investigation No. 731-TA-1012 (Final) - USIT Pub. 3617 (August 2003). Available at https://www.usitc.gov/publications/701_731/pub4083.pdf, accessed September 7, 2015.

[66] *Ibid.*

+ Wally Stevens, President, and COO, Slade Gorton & Co., and President, American Seafood Distributors Association.

+ Sal DiMauro, Head Buyer, Porky Products.

+ Ron McCartney, President, Black Tiger Company, Inc.

+ Mike Sabolyk, Chief Financial Officer, Piazza Seafood World L.L.C.

+ Brian C. Becker, President, Precision Economics, LLC

2.3.2. The major events of the dispute occurred from 2000 to 2003

On May 6, 2001, President of CFA sent a demand letter to President Bush requested the U.S. government to negotiate with Vietnam under a separate agreement on the issue of catfish, while they were hiring lawyers, gathering information, and promoting propaganda to discredit Vietnamese catfish. Not stopping there, the CFA sought to attract members of Congress, especially in States which mainly raise catfish to provide information in a way to create a bad public image for the catfish products from Vietnam and the injury that the U.S. catfish farmers could incur if not tightened import regulations.[67]

In July, 2001, eight Senators and four Congressmen represented for four mainly catfish farming States (i.e. Mississippi, Alabama, Arkansas, Louisiana) had jointly signed a letter sent to the head of the U.S. Trade Representative (USTR), such letter argued that Vietnamese imports caused damage to the U.S catfish industry and requested the Government to take measures to handle. To respond that requested, the U.S. House of Representatives passed the 2002 Farm Bill allowed only fish within the family *Ictaluridae* has right to label and advertise as "catfish".[68]

In early 2002 the Ministry of Fisheries of Vietnam proposed to Management Agency Food and Drug Administration (FDA) approved three new trade names of

[67] Tailieu. *Vu kien chong ban pha gia ca ba sa*. *Available at* http://tailieu.vn/doc/vu-kien-chong-ban-pha-gia-ca-ba-sa-562546.html, accessed December 7, 2015.

[68] Section 10806 of the 2002 Farm Bill.

Vietnamese catfish as *Tra* and *Basa hypo*, *Basa* and *Tra sutchi*. This action was to remove the immediate condition called restrictive fish part or raw fish on the American market. In fact, from January 2001, Vietnam stopped to label its *Basa* and *Tra* fish with the term "catfish".

2.3.2.1. The U.S. Catfish Farmers Association filed the petition

On June 28, 2002, the CFA filed a petition to the ITC and the DOC with the claim that Vietnamese catfish fillets dumped in the U.S. market. They also proposed anti-dumping tax rate with: (i) 144 percent and 190 percent in case Vietnam is market economy and non-market economy, respectively.[69]

On July 3, 2002 (6 days after CFA filed a lawsuit), ITC began to conduct the investigation and determined whether the U.S. industry had suffered material injury or threat of material injury caused by Vietnam's products or not, and sent the questionnaire to Vietnamese enterprises.

2.3.2.2. The preliminary investigation of ITC

The Petitioners and Defendants attended the first hearing in front of the ITC, on July 19, 2002. On August 6, 2002 (39 days after filing the CFA's petition), the ITC met, voted and made preliminary conclusion that the catfish products from Vietnam were threatening to cause material damage to the U.S. industry. Finally, the ITC transferred this case to the DOC for conducting a dumping investigation.[70]

2.3.2.3. The preliminary investigation of the DOC

On August 12, 2002, the DOC received this case, proceeded to the next survey and asked fifty-three Vietnamese enterprises to prepare a report on the situation of the processing and export sales of *Basa* and *Tra* fish to the U.S. market.

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[69] *Ibid.*

[70] *Ibid.*

On August 22, 2002, the ITC announced its view on the case. Accordingly, the ITC did not consider Chanel catfish (*Ictaluridae*) was directly competitive products with *Tra* and *Basa* fish from Vietnam and removed five hundred U.S. catfish farmers from the plaintiffs list.[71]

On August 30, 2002, the DOC conducted a referendum on considering whether or not Vietnam is a market economy country, and assessed the pertinent factors to considered sufficient time to make a preliminary decision.

On September 4, 2002, the DOC officially announced the list of Vietnam enterprises were mandatory respondents (i.e. AGF, Vinh Hoan, South Vietnam and CATACO) to conduct investigation. The DOC also requested the parties to report on the physical characteristics of *Basa* and *Tra* frozen fish.

From October 02-04, 2002, a delegation of the DOC went to Hanoi and had a meeting with the Ministry of Trade of Vietnam on this lawsuit. The U.S. DOC delegation to Vietnam was seen as the beginning phase 3 (phase of DOC preliminarily determined) in the process of dumping lawsuit *Tra* and *Basa* in the U.S.[72]

On November 8, 2002, Policy Division of the DOC submitted a proposal to consider Vietnam is a non-market economy. On November 11, 2002, the DOC approved the proposal that considered Vietnam as a non-market economy and selected India as the surrogate country for Vietnam. This decision was announced on the Internet without informing directly to Vietnam's Trade Ministry of Commerce partners in bilateral relations. As a defendant, VASEP issued a statement that totally disagreed with the conclusion of the DOC and they argued that Vietnam economy

[71] *Ibid.*

[72] Chongbanphagia. *Tom tat vu kien ca Tra, ca Ba sa [Summary of Tra, Basa dispute]*. *Available at* https://www.google.co.th/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#newwindow=1&q=chongbanphagia.vn%2C+di%E1%BB%85n+bi%E1%BA%BFn+v%E1%BB%A5+ki%E1%BB%87n+c%C3%A1+tra-basa, accessed December 7, 2015.

was not inferior to many other countries that have been recognized by the U.S. as market economy.[73]

On January 27, 2003, the DOC ruled the Vietnamese catfish which dumped at the U.S. market and suggested dumping tariffs on certain frozen fish fillets from Vietnam was vary from 37.94% to 63.88%. The tax rate was given by the DOC would be applied immediately after the announcement. After that, the DOC revised their dumping tariffs on Vietnam catfish from 31.45% to 63.88%, on March 1, 2003, (see Figure 2.8).

On March 17, 2003, the DOC directly investigated the real situation of Vietnamese catfish and suggested to negotiate the agreement to suspend the case and replaced by the application of quotas and export prices for concerned exports. Despite the repeated claims that there were no dumping products in the U.S. market, Vietnam still accepted overtures and sent its experts to Washington for the negotiation.[74]

On May 20, 2003, an agreement on the lawsuit suspension was not reached.

On June 17, 2003, the DOC had declared that Vietnam dumped *Tra* and *Basa* products and intended to apply a very high tax rate to catfish of Vietnam from 36.84% to 63.88%, instead of 31.45% - 63.88% as previously.[75]

On July 24, 2003, the ITC made a final judgment to confirm Vietnam's products were dumping below "normal value" and caused injury to the U.S. manufacturing sector, and set the tax rate from 36.84% to 63.88%. This tax rate effective started from mid-May to August 2003. Thus, this tax was not applied to imports into the U.S. catfish before 90 days from January 31, 2003.

[73] This issue is analyzed on Section 5.3.1 Chapter 5.

[74] *Ibid., supra* note 72.

[75] *Ibid*.

Ultimately, on August 7, 2003, the DOC officially imposed anti-dumping tax on eleven Vietnamese enterprises and such tax came into enforce on August 12, 2003 (see Figure 2.9).

Figure 2.9. Weighted – Average Margin on Vietnamese catfish enterprises

Producer/Manufacturer /Exporter	**Weighted-Average Margin (amended) in the preliminary decision (%)**	**Weighted-Average Margin (amended) in the final decision (%)**
AGIFISH	31.45	47.05
CATACO	41.06	45.81
VINH HOAN	37.94	36.84
NAM VIET	38.09	53.68
AFIEX	36.76	45.55
CAFATEX	36.76	45.55
QVD	36.76	45.55
VINH LONG	36.76	45.55
Vietnam wide rate	63.88	63.88

Source: chongbanphagia[76]

2.3.3. The final results of some Administrative Reviews on certain frozen fish fillets from Vietnam

As mentioned, the DOC imposed the anti-dumping duty on Vietnamese catfish fillets in 2003 and such tax rate was temporary, therefore, based on the request of

[76] *Ibid.*

interested parties or if the DOC themselves deem necessary to do it, the DOC conduct "Administrative Review" on the concerned product. This section makes a summary on the final result of major Administrative Reviews (AR), which was conducted by the DOC on certain Vietnamese frozen catfish fillets, from the first to the tenth AR.

Because the U.S does not recognize Vietnam as a market economy country, thus, the DOC has gathered surrogate value (i.e. production costs, overhead costs and so on) from other countries[77] which are evaluated as being at *the same level of economic development as Vietnam*, in order to calculate the production costs and normal value for Vietnamese frozen catfish fillets.

During the first five Administrative reviews, because Bangladesh has similarly production level and economy status with Vietnam, therefore, it was chosen as the most appropriate surrogate country for gathering surrogate value for Vietnam. However, the CFA (the petitioner) always requested the DOC to change surrogate country from Bangladesh to Indonesia or the Philippines in order to increase production costs of Vietnamese products. Accordingly, the anti-dumping margins in the preliminary results were usually higher than in the final results. For example, in the preliminary results of the sixth AR, the DOC chosen the Philippines as the surrogate country for Vietnam other than Bangladesh and, thus, the tax rate imposed on Vinh Hoan and Agifish were $2.44/kg and $4.22/kg, respectively. Yet, the dumping margin for Vinh Hoan in the final result of the sixth AR was $0.00/kg (Figure 2.12). Furthermore, in the preliminary results of the eighth AR, the DOC selected Bangladesh for calculating dumping margin for Vietnam, however, in the final results they had chosen Indonesia and thus the dumping margin increased to $0.19/kg to $1.34/kg for mandatory respondents and $2.11/kg for Vietnam-wide entity.[78]

[77] They are Bangladesh, India, Nigeria, Nicaragua, Indonesia, Pakistan, and the Philippines. It should be noted that in the POR of the tenth AR, Indonesia did not included in the list of surrogate countries to compare to Vietnam.

[78] U.S. Federal Register. *Final Results of Antidumping Duty Administrative Review and New Shipper Reviews*; 2010-2011, 78 FR 17350 March 21, 2013. *Available at* http://enforcement.trade.gov/frn/summary/vietnam/2013-06550.txt, accessed January 4, 2016.

2.3.3.1. The final result of the first administrative review of certain frozen fish fillets from Vietnam

On March 21, 2006, the DOC issued the final result of the first AR on certain frozen fish fillets from Vietnam and made revision to the anti-dumping margin for Vinh Hoan Corporation as well as applied "Adverse Fact Available" (AFA) to CATACO.

- The period of this review was from January 31, 2003 to July 31, 2004.
- Surrogate country was Bangladesh.
- The weighted-average dumping margins of this period of review (POR) were as follow (Figure 2.10).

Figure 2.10 The final result of the 1st AR on Vietnamese catfish fillets

Manufacturer/Exporter	**Weighted-Average Margin (percent)**
Vinh Hoan	6.81[79]
CATACO	80.88[80]
Vietnam-wide entity	63.88

Source: U.S. Federal Register[81]

[79] The previous rate for Vinh Hoan was 36.84%.

[80] The previous rate for CATACO was 45.81%.

[81] U.S. Federal Register. *Final Results of the First Administrative Review*, 71 FR 14170, March 21, 2006. *Available at* http://enforcement.trade.gov/frn/summary/vietnam/E6-4070.txt, accessed January 4, 2015.

2.3.3.2. The final result of the second administrative review on certain frozen fish fillets from Vietnam

On March 21, 2007, the DOC issued the final result of the second AR, and made change the antidumping margin to the QVD Corporation and continued to apply the total AFA to CATACO.

- Production costs and other pertinent data were gathered from Bangladesh.
- The period of this review was from August 1, 2004 to July 31, 2005.
- The weighted-average dumping margins of this POR were as follow (Figure 2.10)

Figure 2.10 The final result of the 2nd AR on Vietnamese catfish fillets

Manufacturer/Exporter	**Weighted-Average Margin (percent)**
QVD	21.23[82]
CATACO	80.88
Vietnam-wide entity	63.88

Source: U.S. Federal Register[83]

Because the DOC did not receive any comments regarding the Vietnam-wide entity, these enterprises was continued to apply this antidumping margin (i.e. Cafatex, Mokonimex, Navico, Phan Quan, Afiex, Antesco, Anhaco, Binh Dinh and Vinh Long).

[82] The previous rate for QVD was 45.55%.

[83] U.S. Federal Register. *Final Results of the Second Administrative Review*, 72 FR 13242, March 21, 2007. *Available at* http://enforcement.trade.gov/frn/summary/vietnam/E7-5178.txt, accessed January 4, 2015.

2.3.3.3. The final results of the sixth anti-dumping duty AR and sixth new shipper review

On March 22, 2011, after considered the comments of the interested parties, the DOC issued the final results of the sixth AR and sixth new shipper review with the major change in the anti-dumping margin.

- The DOC changed the surrogate country from the Philippines in the preliminary result to Bangladesh in the final result.
- The period of this review was from August 1, 2008 to July 31, 2009.
- The weighted-average dumping margins of this POR were as follow (Figure 2.11)

Figure 2.11 The final result of the 6th AR on Vietnamese catfish fillets

Exporter	**Weighted-Average Margin (dollars per kilogram)**
Vinh Hoan	$ 0.00
Vinh Quang	0.00
Agifish	0.02
ESS LLC	0.02
South Vina	0.02
CL-Fish	0.00

Source: U.S. Federal Register[84]

[84] U.S. Federal Register. *Final Results of the 6th Administrative Review*, 76 FR 15941, March 22, 2011. *Available at* http://enforcement.trade.gov/frn/summary/vietnam/2011-6564.txt, accessed January 4, 2015.

2.3.3.5. The final results of the tenth Administrative Review on certain frozen fish fillets from Vietnam

Based on the records and comments of the interested parties, the DOC has revised the dumping margin for Hung Vuong Corporation and decided to impose separate tax rates for CASEAMEX.[85]

- The DOC has continued to select Indonesia as surrogate country for Vietnam.
- The period of this review is August 1, 2012, through July 31, 2013.
- The final results of the tenth POR 10 were as follows in Figure 2.12:

Figure 2.12 The final result of the tenth AD on the period 2012 – 2013

Exporter	**Weighted-average Margins (dollars/kilogram)** [14]
Hung Vuong Group[15]	0.97
An Giang JSC	(*)
Golden Quality Seafood Corporation	(*)
Hoa Phat JSC	(*)
To Chau JSC	(*)
C.P. Vietnam Corporation	0.97
TG Fishery Holdings Corporation	0.97
Thien Ma Seafood Co., Ltd.	0.97

[85] Vnpangasius. *Ket qua cuoi cung cua ky ra soat hanh chinh lan thu 10 doi voi ca da tron Vietnam* [the final results of the 10th AR on certain frozen catfish fillets from Vietnam]. *Available at* http://vnpangasius.com.vn/thong-tin/chi-tiet/259/ket-qua-cuoi-cung-cua-ky-ra-soat-hanh-chinh-lan-thu-10-por10-doi-voi-san-pham-phile-ca-tra-basa-dong-lanh-nhap-khau-tu-viet-nam/, accessed January 12, 2016.

Vietnam-Wide Rate[17]	2.39

Source: U.S. Federal Register[86]

Note: * No Shipments or sales in this review, and the firm had an individual rate from a prior segment of the proceeding in which the firm had shipments or sales.

Currently, the DOC is conducting the eleventh AR on Vietnamese catfish and they had issued the preliminary results of this AR.

2.4. The catfish market in the United States

According to information on the "*Pangasius market report*" of the FAO in March 2015, the total volume of frozen catfish imports (included *Pangasius* and *Ictalurus*) in the U.S. market in 2014 decreased by 4.8% compared with 2013. Vietnam is the largest supplier of frozen *Pangasius* fillets in the U.S. market, which contributed 94 percent of the total frozen catfish imports to the U.S in 2014. Besides that, Indonesia, Bangladesh, Myanmar, Thailand and China also make up the catfish market share in the U.S. market.[87] It should be noted that in four consecutive years 2011-2014, the consumption of *Pangasius* was always ranked sixth in the top consumed seafood list and often followed by Channel catfish (*Ictalurus).*[88]

A research was conducted by Ganesh et al. (2008) with 1,192 U.S. consumers,[89] which indicated that the U.S. is the third largest seafood market in the

[86] U.S. Federal Register. *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Results of Antidumping Duty Administrative Review*; 2012-2013, 80 FR 2394, January 16, 2015. *Available at* **https://www.federalregister.gov/articles/2015/01/16/2015-00649/certain-frozen-fish-fillets-from-the-socialist-republic-of-vietnam-final-results-of-antidumping-duty#page-2396**, accessed January 4, 2015.

[87] FAO. *Pangasius Market Report-March 2015. Available at* http://www.fao.org/in-action/globefish/market-reports/resource-detail/en/c/336904/, accessed January 28, 2016.

[88] Aboutseafood. *Top 10 Consumed Seafoods*. *Available at* **http://www.aboutseafood.com/about/about-seafood/top-10-consumed-seafoods**, accessed January 28, 2016.

[89] Ganesh Kumar et al. (2008). *Household Preferences and Consumption Patterns for Farm-Raised Catfish in the U.S. Available at* https://www.uaex.edu/publications/PDF/ETB-258.pdf, January 24, 2016.

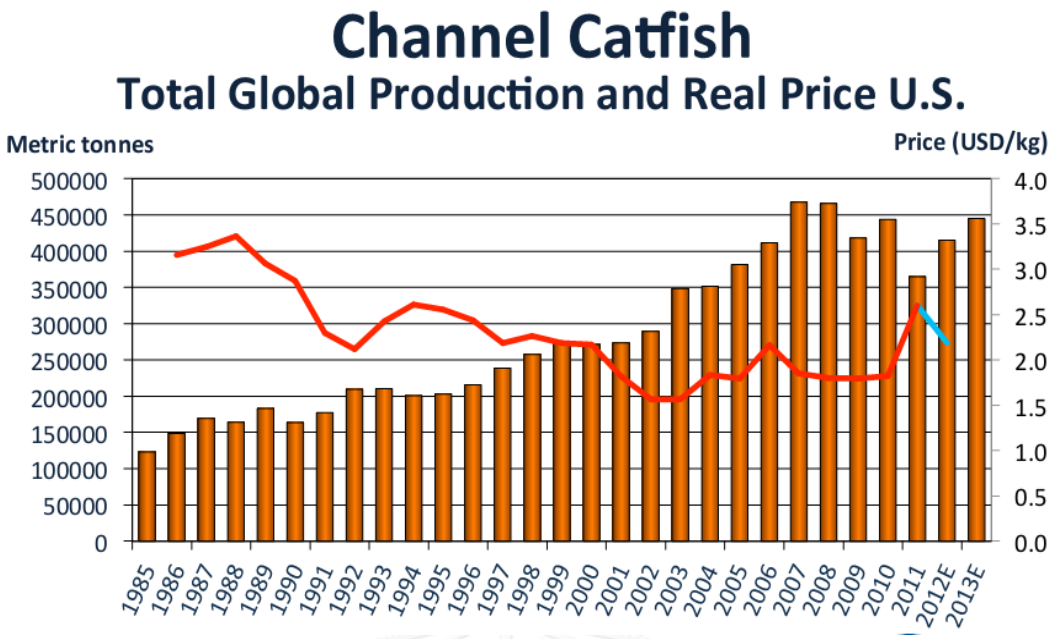
world, and among interviewees, 85 percent of them purchased catfish. Among catfish buyers, the frequencies of buying catfish were 58 percent "at least twice a month", 37 percent "at least once a week" and 13 percent "less than once a month". This study also showed that African Americans, Asians and Caucasians were three peoples who consumed highest volume of fish in the U.S. Moreover, there was a big gap of catfish consumption regarding to the ethnic groups. Accordingly, African Americans and Caucasians contributed 40 percent and 28 percent, respectively, whereas the Native Americans were only 1 percent. Asians and Hispanics shared the similar position with appropriate 10 percent.[90]

2.4.1. The production and price of Channel catfish in global

As can see from the Figure 2.13, there was an upward trend of the volume of Channel catfish (*Ictalurus)* production on the world, except the periods 2008-2009 and 2010-2011, while the price of such fish fluctuated and tend to a downward trend. The quantities of this fish strongly increased from nearly 280,000 tons in 2001 to over 460,000 tons in 2007, and followed by a slight decrease in 2009 and sharply fall in 2011. The price of *Ictalurus* fluctuated around $3.25/kg in the 1980s, and fail dramatically from $3.3/kg in 1988 to $2.1/kg in 1992. The catfish's price just grew sharply in the two periods i.e. 1992-1994 and 2010-2011, and these periods had the same peak at $2.6/kg. The last years witnessed a significant drop of the Channel catfish's price in global.

Figure 2.13. The global production and real price of channel catfish

[90] *Ibid.*, p. 13.



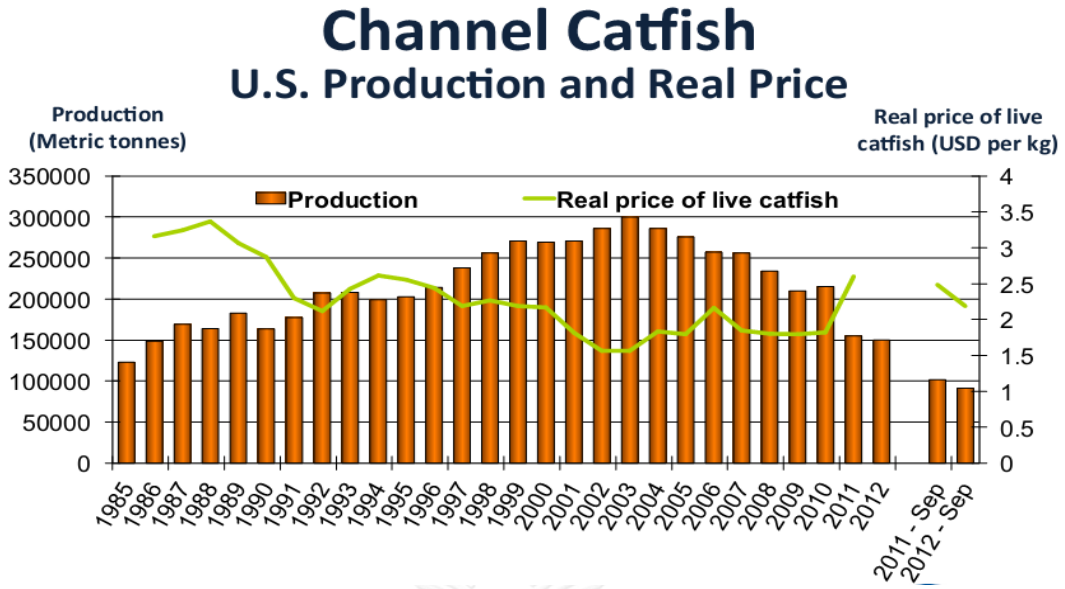
Source: Ragnar, N and Tverteras, 2013[91]

2.4.2. The production and price of the U.S. catfish

There was an opposite trend between the production and price of the U.S. Channel catfish in the period 1985-2012. From 1985 to 2003, the production volume of the U.S. catfish increased gradually and reached the peak at 300,000 tons in 2003, whereas the price dropped grammatically from the peak at $3.4/kg to the bottom at around $1.6/kg in 2002-2003. The channel catfish in the U.S. witnessed a grammatical decrease between 2003 and 2009; fail from 300,000 tons to 210,000 tons, while the price fluctuated around $2/kg and followed by a sharp growth in 2010-2011. The production and real price of the U.S. catfish had the same downward trend in the last two years 2011-2012 (Figure 2.14).

Figure 2.14. The production of the U.S. Catfish and its real price in 1985-2012

[91] Ragnar, N and Tverteras. *Fish production estimates and trends 2012-2013*. *Available at* http://gaalliance.org/wp-content/uploads/2015/04/goal12-tveteras.pdf, *accessed December 4, 2015*.



Source: Ragnar, N and Tverteras, 2013[92]

Currently, the retail price in the U.S market of U.S. frozen catfish fillets and Vietnamese frozen fish fillets (*Tra* and *Basa* fish) are averaging $ 7.2/pound,[93] and $3.5/pound (updated February 28, 2016),[94] respectively.

[92] *Ibid.*

[93] Fishermanscoveseafood. *Catfish fillet (Price per Pound). Available at* http://www.fishermanscoveseafood.com/catfish-fillets-price-per-pound/, accessed February 28, 2016.

[94] Samsclub. **Daily Shef Swai Fillets. Available at** http://www.samsclub.com/sams/swai-fillet-daily-chef/prod16810352.ip?navAction=push, accessed February 28, 2016.

CHAPTER 3

THE CATFISH DISPUTE ON TECHNICAL BARRIERS TO TRADE

This chapter focuses on the regulations of the U.S. on labeling of catfish under Section 10108 of the 2002 Farm Bill and relevant provisions. By doing that, such regulations will be examined to determine whether they are consistent with the TBT Agreement or not.

3.1. In brief on technical barriers to trade

When a country wants to export its products to other countries, such products are not only required to meet regulations and standards in the home market, but must also have to conform to the regulations and standards of importing countries. The requirement of conformity with the regulations, standards of the importing country is the main key to decide whether such products are fulfilled for exporting or not. This circumstance requires the conformity and equivalence of the regulations and technical standards of the exporting and importing countries. To achieve this goal, the exporting countries have to spend huge expenses such as cost of translation of foreign laws and standards, costs of hiring foreign experts to explain regulations as well as standard in concerned, costs that domestic producers spend to adjust their production system to conform to the requirements of importing countries...[95] All the costs and procedures require producers to spend a lot of time and money, and these costs are greatly increased in case merchandises are exported to vary countries because each country which has its own rules and standards. The Agreement on Technical Barriers to Trade (TBT Agreement) was passed by the WTO Members in order to resolve this issue and facilitate international trade.

[95] J.H.H. Weiler, S. Cho and I. Feichtner. *International and Regional Trade Law: The Law of the World Trade Organization-Unit VIII: Technical Barriers to Trade*. *Available at* http://jeanmonnetprogram.org/wp-content/uploads/Unit_VIII.-TBT.pdf, accessed February 15, 2016.

3.1.1. Overview on the TBT Agreement

The overriding objective of the TBT Agreement is to govern technical measures, which affect the international trade. This Agreement consists of three groups namely:[96]

(i) *The technical regulations*. That is the mandatory rules on the parties involved. It means that if an imported product which does not meet the technical regulations, such product will not be permitted to sell in the market.

(ii) *The technical standards*. In contrast to the technical regulations, technical standards are largely made recommendations, thus, the imported products is allowed to sell in the market even if it does not meet the technical standards required.

(iii) *The conformity assessment procedures.* The procedure of assessment conformity is the technical procedures such as testing, verification, inspection and certification of conformity of products with the regulations and technical standards.

3.1.2. Substantial provisions of the TBT Agreement

3.1.2.1. Most-Favoured Nation treatment and National Treatment obligations of Members

Article 2.1 of the TBT Agreement, Article I and III of the GATT 1994 requires all exporting Members with the same or "like" products will be treat in the same way by importing Members, and there is not any discrimination between imported products and "like" products of national origin. The MFN and NT principles are applied to technical regulations, technical standards and conformity assessment procedures.

In order to determine the term "like products" under the context of Article 2.1 of the TBT Agreement, the Panel in *US — Tuna II (Mexico) (2012)* stated that the meaning of the term "like products" could be interpreted more broadly or narrowly depending on certain circumstance and should be interpreted in case-by-case.

[96] *Ibid.*

Additionally, the meaning of this term may refer to "*the nature and extent of a competitive relationship*" between and among products.[97]

With respect to the National Treatment principle, the Appellate Body in *U.S. – Cigarettes (2012)* held that the National Treatment obligation is deemed to be violated under Article 2.1 of the TBT Agreement if all of three elements are met as follows: (i) the measure in question must be a technical regulation; (ii) the domestic and imported product concerned must be "like product"; and (iii) the imported product in question is treated less favorable than the like product of national origin.[98]

3.1.2.2. Obligation to not make unnecessary obstacles to international trade.

Article 2.2 of the TBT Agreement permits its Members have right to set out any technical regulations in order to reach their legitimate objectives such as national security requirements, prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment, and so on. However, this Article also requires the Members to ensure that their technical rules are not prepared, adopted or applied to create any unnecessary obstacles to international trade. In other words, WTO Members' technical regulations shall not be more trade-restrictive than required to fulfill these legitimate objective abovementioned. Furthermore, legitimate purposes in which may be aimed at protecting consumers, national security or environmental protection. Besides that, importing country Members must also take into account the differences in tastes, income, geographical or climatic conditions and other factors between and among countries when making their technical regulations.

3.1.2.3. Obligation to base technical barriers to trade on international standards

The clearly objective of the TBT Agreement is to eliminate technical barriers that create obstacles to international trade. In order to reach this goal, Article 2.4,

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[97] WTO. *Analytical Index: Technical Barriers. Available at* https://www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_01_e.htm#p, accessed February 5, 2016.

[98] Peter Van De Bossche and Werner Zdouc (2013). *The law and policy of the World Trade Organization* (3rd ed.), Cambridge University Press, p. 864.

Article 5.4 and Annex 3.F of the TBT Agreement require its contracting Members have to base their technical regulations, standards and conformity assessment procedures on international standards, where they currently exist or whose completion is imminent with regarding the technical regulations at issue. However, WTO Members are not forced to base their technical regulations on international standards if Members assume that such international standards or relevant parts are not an effective or appropriate means for fulfillment of the legitimate objectives intended.

The Panel in *US — Tuna II (Mexico) (2012)* concluded that in order to determine whether or not Members' technical regulations are consistent with its obligation under the Article 2.4 of the TBT Agreement, all of three following elements must be examined and met: (i) there is an *existence* or imminent completion of a pertinent international standard; (ii) whether or not the relevant international standard has been *used as a basis* for the technical regulation; and (iii) whether the international standard in question is an "*ineffective or inappropriate means*" for the fulfillment of the legitimate objectives targeted.[99]

With regarding the *first issue*, the Appellate Body in *U.S. – Tuna II (2012)* explained that if a standard is made or approved by an international standardizing body and available to the public, such standard will be deemed as an international standard.[100] Besides that, in *EC – Sardines (2002)*, the Panel interpreted that the terms "*exist or their completion is imminent*" in the context of Article 2.4 of the TBT Agreement should be understood that Members have to use relevant international standards, where they *currently exist* or whose completion is imminent. The term '*imminen*t' means that WTO Members must take into account a relevant international standard whose completion is imminent with respect to the technical regulations those are already in existence.[101]

[99] *Ibid., supra* note 97, para. 48.

[100] *Ibid., supra* note 97, para. 54.

[101] *Ibid., supra* note 97, para. 49.

It is necessary to determine two intermediate issues in the *second element*: (i) whether there is an international standard which *relevant* to the technical regulation in concerned; and (ii) if a pertinent international standards exists, whether such international standard is *used as a basis* for the technical regulation in question. The Appellate Body upheld the opinion of the Panel in *EC – Sardines (2002)* and stated that an international standard is considered as relating to the technical regulation at issue, if such international standard pertinent "*the matter in hand*", in the sense of Article 2.4 of the TBT Agreement.[102] Additionally, the Panel in *EC – Sardines (2002)* also explained that the term "*used as a basis*" means the TBT Agreement requires its Members shall employ the existing relevant international standard as "*the fundamental principle for the purpose of enacting the technical regulation*".[103] In other words, if an existing international standard could be used to address the "matter in hand", such international standard is deemed as a relevant international standard for the technical regulations in concerned.

In order to conclude whether or not an international standard is an "*ineffective or inappropriate means*" under the sense of Article 2.4 of the TBT Agreement, the Appellate Body agreed with the interpretation of the Panel in *EC – Sardines (2002)* on the term "ineffective" an "inappropriate". Accordingly, the term "ineffective" refers to "the *result* of the mean used" that does not have "the function of accomplishing", and the term "inappropriate" refers to the *nature* of the mean adopted which is not specially fitting to the technical regulation in question.[104]

3.1.2.4. Mutual recognition and Harmonization obligation

To facilitate international trade and eliminate technical barriers to trade, Article 2.7 of the TBT Agreement requires WTO Members shall positively consider to accept technical regulations of other Members as equivalence with their own rules, if Members determine that technical rules of other Members adequately fulfill the

[102] *Ibid., supra* note 97, para. 59.

[103] *Ibid., supra* note 97, para. 62.

[104] *Ibid., supra* note 97, para. 67.

legitimate objectives pursued of their own regulations, even if these foreign technical regulations are not similar with their domestic regulations. Additionally, WTO Members are also required to make sure that the outcome of conformity assessment procedures in other Members are accepted, even if these conformity assessment procedures are not similar with their own, if they are satisfied that those foreign procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own domestic procedures, pursuant to Article 6.1 of the TBT Agreement.[105]

With respect to harmonization obligation, Article 2.6 of the TBT Agreement encourages its Members to participate, within the limits of their resources, in the preparation of international standards by international standardizing bodies for products for which they either have adopted, or expect to adopt, technical regulations. Furthermore, Article 12 of the TBT Agreement also requires its Members shall provide differential and more favorable treatment to developing country Members. For example, *Article 12.3* of the TBT Agreement regulates that, in the preparation and application of technical regulations, standards and conformity assessment procedures, Members shall take into account of the special development, financial and trade needs of developing countries Members;[106] and subject to *Article 12.4* of the TBT Agreement, developing country Members shall not be required to apply international standards as a basis for their technical regulations or standards, including test methods, if such international standards are deemed inappropriate to their development, financial and trade needs.

3.2. The U.S. technical regulations on using the term "catfish"

According to the Preamble and Annex 1.1 of the TBT Agreement if a document of WTO Members that requires *applying terminology, symbols, packaging, marking or labeling requirements to a product, process or production method*, such document will be a technical regulation. In this situation, therefore, the U.S.

[105] *Ibid., supra* note 98, pp. 883-884.

[106] Article 12.3 of the TBT Agreement.

regulations on employing the term “catfish” for labeling and advertising of catfish product are technical regulations, and as these measures directly affect to imported catfish, thus, such TBT measures are governed by the TBT Agreement.

As earlier analyzed, Section *10806(a)* of the 2002 Farm Bill regulates that the term “catfish” may *only be considered* to be a common or usual name for fish of the family *Ictaluridae*; and *only labeling or advertising* for fish of *that family* may include the term “catfish”. In addition, Section 403(t) of the Federal Food, Drug and Cosmetic Act (amended 2004) also regulates that “*if it purports to be or is represented as catfish, unless it is fish classified within the family Ictaluridae*”. This regulation of employing the term “catfish” is being detailed by *Section 541.7d (1 and 2) of Title 9 of U.S. Code of Federal Regulations (9 CFR 541.7d (1, 2)*). Accordingly, the *9 CFR part 541.7d (1, 2)* regulates that fish of the order *Siluriformes* and the products of these fish must use the appropriate “*common or usual names*” of the fish for advertising and labeling. For example, term “*Basa*” and “*Tra*” or “*Swa*i” must be bearded for the species *Pangasius bocourti* and the species *Pangasius hypophthalmus* of the family *Pangasiidae,* respectively; and only of fish and fish products within the family *Icataluridae* may be allowed to use the term ``catfish'' for labeling or advertising in the U.S. market. In other words, only 51 fish species of the family *Ictaluridae*[107] are permitted to use the term “catfish” for selling, labeling and advertising within the U.S. jurisdiction.

According to the FDA, the term “*acceptable market name*” is understood that the name which represents the “*identity of the species to U.S. consumers*”, and the “*common or usual name*” is the *English version* of the name established and widely employed by ichthyologists and other fishery experts to “*describe a specific species, and is distinct from the scientific name*”.[108] It is worth noting that under the States

[107] According to the database of the website fishbase.org, the family *Ictaluridae* which consists of 51 fish species. *Available at* http://www.fishbase.org/identification/SpeciesList.php?famcode=129&areacode=, accessed February 18, 2016.

[108] U.S Food, Drug Administration. *Guidance for Industry: The Seafood List - FDA's Guide to Acceptable Market Names for Seafood Sold in Interstate Commerce. Available at* http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/ucm113260.htm, accessed February 17, 2016.

laws of Alabama,[109] Arkansas,[110] Louisiana,[111] and Mississippi[112] also regulate the term "catfish" which is solely used for fish within the family *Ictaluridae* and such States' laws also verify that "Chanel catfish" is a common name of the fish of the family *Ictaluridae*.[113]

3.3. The arguments of the parties on the dispute on TBT measures

3.3.1. The arguments of the CFA on the catfish labelling regulations

After the advertising campaign on SPS measures got unexpected outcome. The United States Trade Representative (USTR) official went to the FDA for advice, but the FDA officer said that they could not revoke Vietnam's right to label their *Tra* and *Basa* fish with a modifier such as "Vietnamese catfish", because the Vietnamese *Tra* and *Basa* products were actually a kind of catfish. Moreover, the FDA's *Seafood list in 1993* listed twenty different types of fish consists of the Vietnamese *Tra* and *Basa* fish as eligible for marketing with a label including the term "catfish".[114] The CFA claimed that they invested huge money to advertise their catfish products to the U.S consumers; therefore, it was unfair for them if the foreign fish was permitted to label as catfish products; and if the imported catfish did so, it might cause confusing and misleading to the U.S consumers. By this reason, the CFA claimed that Vietnamese catfish (*Tra* and *Basa* species - *Pangasiidae* genus) was not catfish, and only the Chanel catfish (*Ictaluridae*), which are widely raised in the South of the U.S, was allowed to call catfish. Finally, the Congress passed the law requiring the name of

[109] Section 2-11-31 of Alabama Code.

[110] Section 20-61-202 of Arkansas Code.

[111] Section 56-578.11 of Louisiana House Bill 439, enacted as Act 506.

[112] Section 69-7-605 of Mississippi Code, enacted as Chapter Two of Catfish Marketing Law Labeling Regulation.

[113] Elizabeth R. Springsteen. *State-Level Catfish Labelling Laws. Available at* http://nationalaglawcenter.org/publication/view/springsteen-state-level-catfish-labeling-laws-national-aglaw-center-publications-10-2008/, accessed February 17, 2016.

[114] Davis, C. L. (2006). Do WTO Rules Create a Level Playing Field? Lessons from the Experience of Peru and Vietnam. In J. S. Odell (Ed.), *Negotiating Trde - Developing Countries in the WTO and NAFTA* (pp. 219-256). New York: Cambridge University Press, p. 241.

catfish be used for fish in the family Ictaluridae, in November 2001.[115] As a consequence, Vietnamese catfish had to choose another name and labeled with *Tra* or *Basa*, or *Striped* fish when exporting to the U.S. market.

There arises a question of whether or not other countries are accepted to label their fish by using the usual name of their fish such as Vietnamese catfish or *Basa* catfish, Thai catfish, Indonesian catfish, and so on. It is widely accepted that the term "catfish" is a common "*tag name*" which is popular used for all fish of the order *Siluriformes* by international organizations and fishery scholars. For example, the fish database (fishbase.org) which was developed by the World Fish Center, in collaboration with the Food and Agriculture Organization of the United Nations (FAO)[116] lists nearly two hundred fish species with "catfish" in name.[117] Furthermore, some other international-recognized fishery websites (i.e. theaquariumwiki.com,[118] encyclopedia.com,[119] tolweb.org[120] etc.), are also consider the term "catfish" is a common name for all fish of the order *Siluriformes*, and the term catfish is defined by the Columbia Encyclopedia (6th ed., 2015) as "*common name applied to members of the fish families constituting the order Siluriformes*".[121]

[115] *Ibid., supra* note 15.

[116] Fishbase. *A Global Information System on Fishes. Available at* http://www.fishbase.org/home.htm, accessed February 23, 2016.

[117] Fishbase. *List of Common Names for Catfish*. Available at http://www.fishbase.org/ComNames/CommonNameSearchList.php, accessed February 19, 2016. It is worth noting that, Davis (2006) indicated that when he accessed this website July 28, 2003, there was over seven hundred species of fish were accepted to use the name "catfish".

[118] Theaquariumwiki. *Category:Catfish - Common names. Available at* **http://www.theaquariumwiki.com/Category:Catfish_-_Common_names**, accessed February 19, 2016.

[119] Encyclopedia.com. *Catfish*. *Available at* http://www.encyclopedia.com/topic/catfish.aspx, accessed February 19, 2016.

[120] Tolweb.org. *Siluriformes – Catfish. Available at* http://tolweb.org/Siluriformes/15065, accessed February 19, 2016.

[121] *Ibid., supra* note 119.

3.3.2. The arguments on the side of the VASEP on the U.S. catfish labelling rules

As mentioned, there is a fact that catfish is a common name for a diverse group of fish that belongs to the order *Siluriformes.* Therefore, of course, catfish is also the common name for both *Ictaluridae* and *Pangasiidae*, two families of the order *Siluriformes* (see Figure 2.1 and 2.2).[122] Besides that, the FDA's seafood list in 1993 allowed Vietnamese catfish to label its *Basa* and *Tra* fish with the word catfish and when the 2002 Farm Bill came into enforced, FDA removed Vietnamese catfish out of the list without any scientific ground. The Section 10806 of the 2002 Farm Bill is still in effect. According to the FDA's Seafood list was updated on February 18, 2016, there are only six fish species of *Siluriformes* fish (see Figure 3.1), which are considered appropriate to label and market with the term "catfish". They are *White Catfish, Blue Catfish, Yaqui Catfish, Brown Bullhead, Flathead Catfish and Chanel Catfish*. Nevertheless, there are many other fish species of the order *Siluriformes* which are also recognized by the FDA that they have the common name with the term catfish like the six fish species abovementioned, but these species do not accept to use the market name with the term "catfish" such as *Hardhead Catfish, Bagrid Catfish, Sutchi Catfish, Mekong Giant Catfish,* etc.

Figure 3.1. FDA's Seafood list - Acceptable Market names of fish of the order *Siluriformes*

Acceptable Market Name(s)	**Common Name**	**Scientific Name**
Catfish	White Catfish	Ameiurus catus
Catfish	Blue Catfish	Ictalurus furcatus
Catfish	Yaqui Catfish	Ictalurus pricei

[122] B. Marion. (2014). *Vietnam in Post-WTO – Current Situation and Future Challenges for the Agro-Industry Sector. Available at* https://www.unido.org/fileadmin/user_media_upgrade/Worldwide/Offices/ASIA_and_PACIFIC/VN_2014_-_Vietnam_in_WTO__Report_FINAL_PAPER__2_.pdf, accessed November 10, 2015.

Catfish	Channel Catfish	Ictalurus punctatus
Catfish	Flathead Catfish	Pylodictis olivaris
Bullhead or *Catfish*	*Brown Bullhead*	Ameiurus nebulosus
Pabdah Fish	Pabdah Catfish	Ompok pabda
Whiskered Fish	Hardhead Catfish	Ariopsis felis
Gafftopsail Fish *or* Gafftopsail Whiskered Fish	Gafftopsail Catfish	Bagre marinus
Swai *or* Sutchi *or* Striped Pangasius *or* Tra	Sutchi Catfish	Pangasianodon hypophthalmus
Mekong Giant Pangasius	Mekong Giant Catfish	Pangasius gigas
Baga Ayre	Giant River Catfish	Sperata seenghala
Gilded Fish *or* Zungaro	Gilded Catfish	Zungaro zungaro
…	…	…

Source: FDA (2016)[123]

It is explicitly from the FDA's Seafood list of 2016 that the FDA's arguments on employing the term "catfish" which is groundless because both six U.S. fish species and other fishes of the order *Siluriformes* that they have the similar common name. Hence, there is discrimination between domestic and imported products in labeling with the term "catfish" for *Siluriformes* fish and products from these fishes.

[123] U.S Food, Drug and Administration. *The Seafood List – Catfish* (updated February 18, 2016). *Available at* http://www.accessdata.fda.gov/scripts/fdcc/?set=seafoodlist&sort=SLSN&order=ASC&startrow=1&type=basic&search=catfish, accessed February 23, 2016.

It is interesting to note that, the regulation of catfish labeling which does not help the U.S. catfish farmers and producers increase their catfish market share in the U.S. market, indeed. The U.S. lawmakers who did not predict that *Ictaluridae* fish could be raised in other countries that have the similar climatic conditions as Southern States of the U.S. and catfish from such countries are legally labeled with the term "catfish" when they are sold in the U.S. market. In fact, China and some other countries are deriving advantages from this regulation.[124] Currently, Vietnamese catfish producers who refer to use local name/Vietnamese name to label fish of the family *Pangasidae* because the advertising campaign of the CFA against imported catfish, especially from Vietnam, which help Vietnamese products to be popular not only in the U.S., but also in other markets such as E.U, Japan, Australia etc. During the last time, Vietnamese catfish producers are always willing to adjust their products trade name to comply with the U.S. rules, and now Vietnamese catfish proud to use their own name *Tra* and *Basa* and the U.S. catfish consumer who like to do so.[125]

3.4. Are the U.S. technical measures consistent with the TBT Agreement?

To answer the question whether or not the U.S. technical measures are consistent with the TBT Agreement, it is necessary to re-analyze the relevant U.S. regulations and similar cases that had been resolved by the Dispute Settlement Body of the WTO.

First of all, as mentioned (Figure 3.1), the FDA's Seafood list lists 43 fish species of *Siluriformes* fish that have similar recognized common name, but there are only six fish species, which are allowed to use market name as catfish in the U.S. It should be noted that the common name of the *Ictaluridae* fish is Channel Catfish, and other fish species of the order *Siluriformes* also have the common tag name with the term "catfish". Besides that, the U.S. catfish labeling rules are not based on any scientific evidence and relevant international standards. For example, *Section 4.1* of the General Standard for the Labeling of Prepackaged Foods (*Codex Stan 1 – 1985*, amended

[124] Paul Greenberg. *A Catfish by Any Other Name - Is There Such a Thing as a Vietnamese Catfish. Available at* http://www.nytimes.com/2008/10/12/magazine/12catfish-t.html?_r=0, accessed February 17, 2016.

[125] *Ibid.*

2010) states that "the name of the food shall indicate the *true nature name* of the food and normally be specific and *not generic*… and *a common name or usual name existing by common usage* as an appropriate descriptive term without causes confusing or misleading to the consumer shall be used." In addition, *Section 6.1* of the Codex Stan 190-1995[126] and *Section 6.1* of the Codex Stan 119-1981[127] which allow a product to *be labeled by its existing common or usual name if such name is not lead to the consumer's misleading or confusing*. It means that a product can be labeled with its common name if such name can help the consumer identify the product among like products. Additionally, Article 2.4 of the TBT Agreement which regulates that WTO Members have obligation to employ the relevant international standards as a basis for their technical regulations. In this circumstance, it could be stated that these Codex Standards which could be used to address the U.S technical regulation in question; and Section 10806 of the 2002 Farm Bill, Section 403(t) of the Federal Food, Drug and Cosmetic Act (amended in 2004) and Section 541.7(d) of the 9 CRF as well as some U.S. States' laws, as abovementioned, which are not based on pertinent international standards, groundless and violate the Article 2.4 of the TBT Agreement.

Last but not least, it is important to consider other similar cases that were resolved by the WTO's Dispute Settlement Body, especially the *EU – Sardines (2002)* case.[128] Accordingly, in 1989, the European Community issued the Regulation (EEC) 2136/89 which established common marketing standards for preserved sardines, including a specification that only products prepared from *Sardina pichardus* could be marketed or labeled as preserved sardines. It means that the EU did not accept imported Peruvian fish as "Sardine", and limited the use of the word "sardine" to only one species, *sardina pilchardus,* found close to Europe. Additionally, the EC officials proposed that the Sardines species from Peru (*Sardinops sagax)* should be marketed as "Pilchards" or "Sprats" in order to avoid consumer's misleading and confusing.[129]

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[126] Codex General Standard for Quick Frozen Fish Fillets (Codex Stan 190-1995)

[127] Codex Standard for Canned Fish (Codex Stan 119-1981)

[128] WTO. *European Communities — Trade Description of Sardines*. *Available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds231_e.htm, accessed December 13, 2015.

[129] *Ibid., supra* note 114, p. 232.

On 20 March 2001, Peru requested consultations with the EC on the EC technical regulations in question. Peru argued that the EC technical regulations in concerned which did not conform to the relevant international standard e.g. the Standard for Canned Sardines and Sardine-Type Products (Codex Stan 94-1981, amended 2013). Section 2.1.1 and 6.1 of the Codex Stan 94-1981 (amended 2013), which indicate that there are *21 Sardines species*, which could be labeled "Sardines" or "X sardines".[130] Finally, the Appellate Body upheld the Panel Report that the EC Regulation was inconsistent with Article 2.4 of the TBT Agreement, and two sides got mutual agreed solution in July 2003.[131]

Similarly, in the catfish labeling issue, the FDA accepted *Tra and Basa* fish from Vietnam to be labeled as catfish in the FDA's Seafood list in 1993, but the 2002 Farm Bill which saves the term "catfish" only for fish of the family *Ictaluridae*. As mentioned, the FDA's Seafood list in 2016 that lists 43 fish species that have common name with the "tag name" catfish, but the term "catfish" is solely permitted as acceptable market name for only six fish species of the family *Ictaluridae*. Besides that, the relevant Codex Standards also permits a product to use its common or usual name if such name which does not cause confusing to the consumer. There may be no doubt that if *Tra* and *Basa* fish are labeled as "Vietnamese catfish" – "made in Vietnam" and sold in the U.S market, such market name will not lead to confusion for the U.S. consumer.

Besides that, the Article 2.2 of the TBT Agreement regulates that WTO Members are required to ensure that their technical rules shall not be more trade-restrictive than necessary to fulfill a legitimate objective. In this case, the legitimate objective of the U.S. is to prevent the deceptive practices regarding to catfish products. Furthermore, Article 2.3 of the TBT Agreement requires that if the legitimate objective can be addressed in a less trade-restrictive manner, the technical regulation in concerned must not be maintained.

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[130] "X" is the name of a country, a geographic area (Section 6.1.1(ii) of the Codex Stan 94-1981, amended 2013.

[131] European Commission. *Trade-WTO Cases: Cases Involving in the EU*. *Available at* http://trade.ec.europa.eu/wtodispute/show.cfm?id=242&code=2, accessed December 21, 2015.

In this circumstance, there is a simple alternative way that may help to reach the U.S. legitimate objective on prevention of deceptive practices and also help the U.S. consumer avoid confusing and misleading when purchasing catfish products. The alternative method is that the U.S just needs to require that all imported catfish must clearly be labeled with the country name and geographical indication where such product is produced such as U.S catfish or Channel catfish, Vietnamese catfish, Thai catfish, Chinese catfish, etc. However, the U.S is still not accepting other countries to label their *Siluriformes* fish as the method abovementioned, except the fish of the family *Ictaluridae*. By this reason, it could be concluded that the U.S. catfish labeling regulations are also inconsistent with the Article 2.3 of the TBT Agreement.

Based on analyzed and discussed arguments, the viewpoint of this author assumes that the U.S. TBT measures in respect to *Siluriformes* fish that are inconsistent with the Article 2.3 and Article 2.4 of the TBT Agreement. It is worth noting that such the U.S TBT measures in question are also in consistent with Article 2.6(B) of the U.S-Vietnam BTA, this Article states that "the Parties shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective…"

CHAPTER 4

THE CATFISH DISPUTE ON ANTI-DUMPING MEASURES

The first section of this chapter concentrates on the vital provisions of the AD Agreement, and t moves to the U.S Tariff Act of 1930. The final section of this chapter is to analyze the key factors of the dispute and the arguments of both parties on issues which regarding the determination of normal value and calculation of dumping margin for certain frozen fish fillets from Vietnam. The result of this chapter is to point out whether the U.S AD measures on certain frozen fish fillets from Vietnam consistent with the AD Agreement.

4.1. Major contents of the Anti-dumping Agreement

4.1.1. Three requirements of Anti-dumping investigation

Subject to Article 2, 3 and 4 of the AD Agreement, there are three conditions that an importing country must fulfill in order to impose anti-dumping measures on imports. Accordingly, the importing Member has to determine: (i) whether imported product is dumping in its market; (ii) whether there are any injury for the domestic industry in result of dumped import; and (iii) whether there is a casual link between "dumping" and "injury" with respect to the imported product in question.

4.1.1.1. Determination of dumping

Dumping occurs when a product of country X that is sold in X's market with A price, and such product is also sold in market of country Y with B price, and B lower than A in the ordinary course of trade. In other words, a product is to be deemed as being dumped if such product is sold under its normal value in the importing country in comparison with normal price of such product in the exporting country market.[132]

[132] Article 2.1 of the AD Agreement.

4.1.1.1.1. Determination of "normal price"

Price of a product is to be considered as a "normal price" if such product is sold in the home market in the ordinary course of trade. In other words, subject to Article 2.1 of the AD Agreement, the "normal value" could be defined as the "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". The Article 2.1 of the AD Agreement was interpreted by the Appellate Body in *US — Hot-Rolled Steel (2001),* that there are four conditions which may be employed to calculate the normal value: (i) the sale must be "in the ordinary course of trade"; (ii) it must be of the "like product"; (iii) the product must be "destined for consumption in the exporting country"; and (iv) the price must be "comparable".[133] The difference between export price and normal price is the dumping margin.[134]

The first condition requires that the like product's sales must be conducted in the ordinary course of trade. There arises a question is that whether sales in the exporting market are made "in the ordinary course of trade", and the AD Agreement in which does not contain any provisions to define the term "in the ordinary course of trade". However, in practice, if the transactions in the exporting country that failed under one of three following circumstances, such transaction may be determined by the investigating authorities that the transactions were not made "in the ordinary course of trade", i.e. sales to affiliate parties; abnormally low-priced sales, or aberrationally high-priced sales; and or sale below costs (production costs, overhead costs etc.).[135] It is worth noting that although the like product is sold in the domestic market or sold to a third country at price that is not sufficient to recover its production costs, such sales transaction may be treated as not being in the ordinary course of trade if the authorities determine that:[136] (i) such sales are made within an extended

[133] WTO. *Analytical Index – Anti-dumping Agreement. Available at* https://www.wto.org/english/res_e/booksp_e/analytic_index_e/anti_dumping_01_e.htm#general, accessed February 5, 2016.

[134] Article VI(2) of the GATT 1994.

[135] *Ibid., supra* note 98, p. 684.

[136] Article 2.2.1 of the AD Agreement.

period of time in substantial quantities, such extended time period shall usually be one year, and not be less than six months in any case; (ii) and such product is sold at prices that lower than its production costs plus operational expenses, costs of goods sold within a reasonable period of time. However, if the like product is sold at the prices less than costs of production, but these prices are still higher than the weighted-average costs during the period of investigation, such prices shall still be considered to provide for offset of costs within a reasonable period of time.[137]

The sales must be of the "*like product"* is the second of the four conditions. Subject to Article 2.6 of the AD Agreement, the term "like product" is defined as a product which is identical, i.e. alike in all respects to the product in question, or another product which has characteristics closely resembling of the product in issue. The third condition requires that the "like product" in issue that has been selling in the exporting market with a sufficient quantity for the determination of the normal value, normally the like product contributes around 5 percent or more of the sales of the product under consideration to the importing country.[138]

The fourth important condition is that the price must be comparable. It could be understood that the "comparable price" is the sale price that could be used to make a "fair comparison" between export price and normal price. Subject to Article 2.2 of the AD Agreement, there are three situations that the domestic price in the exporting country market may not constitute an appropriate normal value for the purposes of comparison with the export price: (i) there are no sales or low volume of sales of the like product in the ordinary course of trade in the domestic market of the exporting country; (ii) there may be a "particular market situation", i.e. the like product is sold under its production costs in the exporting market;[139] and (iii) where the exporting country is not recognized as a market economy country, subject to Ad Article VI of the GATT 1994. In other words, in the circumstances that imports from a country

[137] *Ibid.*

[138] See Footnote 2 to Article 2.2 of the AD Agreement.

[139] Lowenfeld, A. F. (2002). *International Economic Law Series - International Economic Law* (2nd ed.). New York: Oxford University Press, p. 252.

which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State in other words, the domestic price of such product under consideration may not be considered as 'normal value", and thus, could not make a fair comparison with the export price.

In these circumstances the Article 2.2 of the AD Agreement provides two methods that an importing country may choose one of the two alternative methods for calculating normal value for comparison with the export price: (i) employing price of the like product in a third country as the normal value; or (ii) constructing the normal value basing on the production costs in the exporting country and add a reasonable amount for administrative, selling and general costs and for profits (Figure 5.1). It is worth noting that, although the Article 2.2 of the AD Agreement allows importing country may use price of the like product when exported to an appropriate third country as normal value for a fair comparison purposes with the export price, the AD Agreement does not mention any criteria for determining whether or not a third country is an appropriate country.[140]

"Constructed value" is made up of three main elements: (i) production costs; (ii) operational expenses and costs of goods sold; and (iii) an amount for profits.

Figure 4.1. Description of production costs, operational expenses and costs of goods sold

Letter	**Description**	**Note**
A	Beginning direct material	
B	Purchased direct material	
C	Ending direct material	
D	Direct material cost	= A + B - C

[140] *Ibid., supra* note 98. p. 686.

E	Direct labor cost	
F	Overhead	
G	**Sub Total Cost of Production**	**= D + E +F**
H	Beginning Work in Process	
I	Purchased Work in Process	
J	Ending Work in Process	
K	Beginning Finished Goods	
L	Purchased Finished Goods	
M	Ending Finished Goods	
N	**Sub Total Cost of Goods Sold**	**= G + H + I - J + K + L - M**
O	Selling / Revenue expenses	
P	General and Administrative Expenses	
Q	Other Expenses	
R	**Sub Total Operational Expenses**	**= O + P + Q**
S	Total Cost of Goods Sold and Operational Expenses (COGSOE)	= N + R
T	Total Cost of production and operational expenses *(Accounting currency)*	= G + R

Source: Appendix I of Anti-dumping Questionnaire of Thailand (non-confidential version)

It is should be noted that Ad Article VI of the GATT 1994 regulates that in the circumstances that there exist special difficulties in determining price for calculating normal value in exporting country, the investigating authorities may apply an appropriate method to determine the normal value of the subject merchandise.

In short, if the normal value of the like product under consideration may not be determined in the circumstances of the Article 2.2 of the AD Agreement, an appropriate third country price of the like product or a constructed price based on product costs and a reasonable expenses, profits etc. will be used to calculate dumping margin of the like product in question.

4.1.1.1.2. Determination of "export price"

The export price is supposed to be the actually price of the like product that paid by an independent buyer in the importing country market. Yet, Article 2.3 of the AD Agreement regulates that the transaction price may not be considered as the export price in the extent that there is no export price where the transaction involves an internal transfer, or the export price is unreliable since the transaction price is affected by an association or a compensatory arrangement between the exporters and the importers or a third party. In these circumstances, the Article 2.3 of the AD Agreement provides an alternative method for the investigating authorities of the importing country to calculate or construct the export price. Accordingly, a constructed export price is the price at which the imported products are first sold to an unrelated purchaser. If there is no resale to an unrelated purchaser or not resold in the condition as imported, the AD Agreement permits the investigating authorities may determine a reasonable basis to calculate the export price.

4.1.1.1.3. Comparison between "normal value" and "export price"

Article 2.4 of the AD Agreement requires that the investigating authorities have to make a "fair comparison" between the "normal value" and "export price", and determine the margin of dumping on the basis of the difference between "export price" and "normal value". Additionally, the comparison is required to make at "the same level of trade" and as nearly as possible timing of sales. It means that a product

will be incurred different production costs and other expenses in different stage of trade, therefore, it is fair when the comparison of the two prices is made at the same level of trade and nearly same time of sales transaction. It is vital to note that the Article 2.4 of the AD Agreement also regulates that the investigating authorities when calculating the dumping margin must take into account differences which affect price comparability, i.e., differences in conditions and terms of sale, taxation, physical characteristics, and any other differences which also affect the fair comparison of prices.

Besides, in the circumstance that the export price is constructed, the Article 2.4 of the AD Agreement allows the investigating authorities to make an adjustment. Specifically, an allowance shall be made for costs, including duties and taxes, which incurred between product's importation and its resale to the first unrelated buyer, as well as for profits.

To calculate the dumping margin of the like product under consideration, Article 2.4.2 provides two methods that the investigating authorities may use one of two methods to determine the margin of dumping on the ground of comparison of: (i) a weighted average normal value with a weighted average of prices of all comparable export prices transaction; or (ii) normal value and export price on transaction-to-transaction. Furthermore, in the extend that there are a significant differences of export prices among different buyers, areas or period of times, and if the investigating authorities could explain the reason why they could not calculate the dumping margin by using such methods, a normal value which constructed on the basis of weighted average may be compared to price of individual export sales.[141]

The term "*margins"* in the Article 2.4.2, which is explained by the Panel in *EC – Bed Linen (2001)* means "a general statement" and refers to individual margins dumping which calculated for each producer or exporter under investigation.[142] Moreover, the Appellate Body in *US — Softwood Lumber VI (2005)* stated that the

[141] Article 2.4.2 of the AD Agreement.

[142] *Ibid., supra* note 133, para. 113.

investigating authority may undertake multiple averaging to establish margins of dumping for a product in issue, however, the results of the multiple comparisons at the sub-group level are not "margins of dumping" under the sense of the Article 2.4.2 of the AD Agreement.[143] Regarding the phrase "*a comparison of a weighted average normal value with a weighted average of price of all comparable transaction*", the Panel in *US — Zeroing (Japan) (2007)* considered that "the language used in the first sentence of Article 2.4.2 of the AD Agreement indicates the conclusion that model zeroing[144] is proscribed.[145] Additionally, this sentence provides a requirement is that the comparison between a weighted average normal value and a weighted average export price that reflects the prices of all comparable export transactions, and this sentence does not contain language that indicates that dumping margin can be determined in respect of individual models of a product.[146]

In short, the dumping margin is calculated by comparing the average net export price for each matched model or type of the product under consideration with the normal value, during the period of investigation. In addition, the calculation of margin of dumping exercise is conducted for every matched type or model, therefore, if there are 10 types or models of the subject product that match with the like product in the importing country, then 10 dumping margins will be calculated. It should be noted that the aggregated dumping margin is calculated and expressed to determine an

[143] *Ibid.*, para. 114.

[144] "Zeroing" means that all export sales at prices higher than normal (negative dumping) are assigned the value of zero, and are thus excluded from calculating the aggregated dumping margin. It should be noted that both "model zeroing" and "simple zeroing" practices are inconsistent with the Article 2.4.2 of the AD Agreement.

[145] According to the explanation of the Panel in *US — Zeroing (Japan) (2007)*, "*model zeroing*" which regards to an average-to-average comparison between export price and normal value within individual 'averaging groups' established on the basis of physical characteristics ('models'), and this calculation method which disregards any average export prices for particular models exceed normal value in aggregating the results of these multiple comparisons to calculate a weighted average margin of dumping. Meanwhile, "simple zeroing" means the dumping margin is made by comparisons of normal value and export price made on an average-to-transaction basis or on a transaction-to-transaction basis, and the weighted average margin of dumping only includes the results of those comparisons in which individual export prices are less than the normal value (See Panel Report, US – Zeroing (Japan) (2007), paras. 7.2-7.3).

[146] *Ibid.*, *supra* note 133, para. 115.

anti-dumping duty rate.[147] The dumping margin of a dumped import will be calculated as the basic formula as following:

Dumping margin = Normal value – Export price

Note:

- *Normal value* is the price of the product in concerned that is sold at the home market of the exporter under investigation or in an appropriate third country in the ordinary course of trade, or constructed in a reasonable method by the investigating authorities.
- *Export price* is the transaction price at which the producer or exporter sells the subject merchandise to an unaffiliated importer in the importing market. In the circumstance that the export price is unavailable or unbelievable, the investigating authorities may construct the export price on the basis of an appropriate method.

4.1.1.2. Determination of the domestic industry's injury

Although the product under consideration is being dumped, the importing country just has right to impose anti-dumping on such subject import when the dumped import that causes, or threatens to cause, injury to the domestic industry. Therefore, the investigating authorities have to prove: (i) the injurious of the domestic industry is mainly made by dumped import; and (ii) there is a casual link between "dumping" and "injury".

4.1.1.2.1. Determination of injury

One of the major conditions for imposition of anti-dumping measures on dumped imports is to determine whether dumped import causes injury to the domestic industry. The term "injury" in the scope of the AD Agreement means *material injury* to a domestic industry, *threat of material injury* to a domestic industry or material

[147] Sutham, A. J. (2004). *Essential Business Guide to the Law of International Trade and Commercial Transactions*. Hong Kong: Sweet and Maxwell Asia, p. 46.

retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of the Article 3 of the AD Agreement.[148]

4.1.1.2.1.1. Determination of material injury

Article 3.1 of the AD Agreement regulates obligations of investigating authorities when they determine the injury for purposes of Article VI of the GATT 1994. Accordingly, a determination of injury of dumped imports shall be based on positive evidence and involve an objective examination of: (i) the volume of the dumped imports in concerned; (ii) the effect of such imports on prices of the like products in the domestic market; and (iii) the resultant impact of the imports under investigation on domestic producers of such product.

It is necessary to define meaning of terms "*positive evidence*" and "*objective examination*" in the sense of Article 3.1 of the AD Agreement. Based on the view of the Appellate Body in *US – Hot-Rolled Steel (2001)*, the term "positive evidence" which mentions to the quality of the evidence that the investigating authorities may rely upon in making a determination, and the word "positive" means that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.[149] Furthermore, in *Thailand — H-Beams (2001)*, the Appellate Body reversed the Panel's view is that an injury determination which is conducted under the extent of the Article 3 of the AD Agreement must be based on both confidential and non-confidential information.[150] It means that the AD Agreement requires the investigating authorities must collect and evaluate all relevant evidence when determining the injury of dumped imports to the domestic industry. The term "objective examination" means to require that the investigating authorities must objectively assess the injury as well as whole relevant available evidence when

[148] See Footnote 9 to the Article 3 of the AD Agreement.

[149] WTO. *Analytical Index – Anti-dumping Agreement. Available at* https://www.wto.org/english/res_e/booksp_e/analytic_index_e/anti_dumping_02_e.htm, accessed February 5, 2016.

[150] *Ibid.*, para. 185.

determining the injury to the domestic industry.[151] In other words, the term "objective examination" in the circumstance of the Article 3.1 of the AD Agreement, which involves that the identification, investigation and examination of the relevant factors which respect to the determination of injury must be conducted in an unbiased manner, without preferring to any interested parties' interests.

It is worth noting that the Appellate Body in *EC – Bed Linen (2003)* held that a determination of injury must only be made on the ground of positive evidence and an objective examination of the quantities and impact of imports that are dumped, and there must be an exclusion of the volume and effect of imports that are not dumped in investigation.[152]

In term of the quantities of the imports in question, Article 3.2 of the AD Agreement requires that the investigating authorities shall examine whether there has been a *significant increase* in dumped imports, either in absolute terms or relative production and consumption in the importing market. Besides, respect to the impact of the imports under investigation on prices, this Article also obliges the investigating authorities must compare the price of dumped imports with the price of the domestic product and determine whether there has occurred a significant price undercutting[153] by the dumped imports, or whether the effect of such imports is otherwise to a significant degree of depress prices, or prevent price increases.[154] However, the last sentence of the Article 3.2 of the AD Agreement clearly regulates that "no one or

[151] *Ibid.*, paras. 194-195.

[152] *Ibid.*, para. 200.

[153] The Panel in *EC — Tube or Pipe Fittings (2003)* stated that the Article 3.2 of the AD Agreement which requires the investigating authorities to consider whether price undercutting is significant, yet, such regulation does not set out any specific requirement relating to the calculation of a margin of undercutting, or provide a particular methodology to be followed in this consideration. *See Ibid., supra* note 149, para. 231.

[154] *Price undercutting* occurs where the imported merchandise is sold bellow its normal price in the exporting market. Sales of the imported product must be compared with the sales transaction by domestic producers at the same level of trade. *Price depression* is the reduction in selling prices by the domestic producers in the importing market as a result of the downward pricing pressure from the imports concerned. *Price suppression* occurs when the margin of domestic producer between costs and selling prices is decreased as a result of the pricing pressure from the imports under investigation. *See Ibid., supra* note 147, pp. 53-54.

several of these factors can necessarily give decisive guidance". It means that the investigating authorities shall not be allowed to give decision that is based on one or some mentioned elements in the Article 3.2 of the AD Agreement.

It should be emphasized that the AD Agreement does not provide any guidance in order to determine what is a "significant increase" in quantity of the subject imports. Additionally, as the Panel in *Guatemala – Cement II (2000)* explained that there is no provision in the AD Agreement which specifies the precise duration of the period of data collection, and thus, it is hard to conclude whether there has been a significant increase in the volume of dumped imports in the circumstances of a particular case under the extent of the Article 3.2 of the AD Agreement. Moreover, the Panel in *Thailand — H-Beams (2001)*, considered that the Article 3.2 of the AD Agreement does not require the term "significant" be employed to characterize a subject increase in imports in the injury determination of an investigating authority, and this Article just requires the investigating authorities must pay attention and take into account whether there has been a significant increase in dumped imports, in absolute or relative terms.[155]

Besides, Article 3.4 of the AD Agreement regulates that the examination of the effect of the imports under investigation on the domestic industry affected is to include, *inter alia*, actual and potential decrease in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and other reasonable factors. Similarly to Article 3.2, the Article 3.4 of the AD Agreement also does not emphasize that "nor can one or several of these factors (mentioned above) necessarily give decisive guidance to conclude that whether the dumped import causes material injury to the domestic industry in concerned. Since the factors list in the Article 3.4 of the AD Agreement is not exhaustive, the investigating authorities must gather and analyze any other relevant

[155] *Ibid.*, *supra* note 149, paras. 222-224.

elements that may have a bearing on the state of a domestic industry in a particular case.[156]

4.1.1.2.1.2. Determination of threat of material injury

As mentioned earlier, the AD Agreement defines the term "injury" which refers not only to material injury but also to the threat of material injury. Accordingly, Article 3.7 of the AD Agreement sets out the rule is that when determining threat of injury of the subject imports to the domestic industry, the investigating authorities must base on facts and not merely on allegation, conjecture or remote possibility. It is vital to imply that the Article 3.7 of the AD Agreement requires that the threat of material injury must be *"clearly foreseen and imminent".* In other words, the investigating authorities must illustrate that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.[157] More specifically, the Article 3.7 of the AD Agreement also provides an unexhausted mandatory list of factors that the investigating authorities should evaluate when making a determination relating to the existence of a threat of material injury: (i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation; (ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports; (iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and (iv) inventories of the product being investigated. It is worth noting that the last paragraph of the Article 3.7 of the AD Agreement regulates that the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur must be based on the totality of the factors considered, and no one of these factors abovementioned by itself can necessarily give decisive guidance.

[156] *Ibid.*, para. 249.

[157] See Footnote 10 to the Article 3.7 of the AD Agreement.

In *Mexico – Corn Syrup (2000)* the Panel stated that the investigating authorities must conclude that the material injury would occur in the absence of an anti-dumping measure, in making a decision regarding the threat of material injury. In addition, this Panel also ruled that in order to make a conclusion whether there is a threat of material injury to the domestic industry, the investigating authorities cannot solely base their argument on the factors listed in the Article 3.7 of the AD Agreement. In other word, the conclusion must not only be made on the basis of the Article 3.7, but also have to consistent with the requirements of the Article 3.1 and 3.4 of the AD Agreement.[158]

4.1.1.2.2. Determination of domestic industry

Determination the scope and meaning of the term "domestic industry" that plays an important role in making an injury determination, as it may describe the boundary of the data to be evaluated in the injury determination, and it may also help to know who may file a petition requesting the initiation of an anti-dumping investigation.[159] For that reason, Article 4.1 of the AD Agreement stipulates that the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except in two specific cases which are mentioned in Article 4.1(i) and 4.1(ii) of the AD Agreement.[160]

Although the Article 4.1 of the AD Agreement employs the term "domestic producers" in plural, the Panel in *EC — Bed Linen (2001)* stated that a single domestic producer may constitute the domestic industry under the sense of the AD

[158] *Ibid., supra* note 149, paras. 297-298.

[159] *Ibid., supra* note 98, p. 696.

[160] The first exception case is when producers are related to the exporters or importers or are themselves importers of the alleged dumped imports. The last case is to the extent that the territory of the importing country may be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry… In such circumstances, injury may be found to exist even where a major proportion of the total domestic industry is not injured, provided there is a focus of the imports concerned on such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

Agreement.[161] Moreover, *in EC – Fasteners (China) (2011)* the Appellate Body remarked that the Article 4.1 uses the term "major proportion", however, this Article which does not specifies a specific percentage for determining whether a certain proportion constitutes a "major proportion".[162] By this reason, this Appellate Body explained that the term "a major proportion" should be understood as a proportion defined by reference to the total production of domestic producers as a whole; and "a major proportion" of such total production will basically be considered as a substantial reflection of the total domestic production. The Appellate Body also emphasized that the investigating authorities must ensure the accuracy of an injury determination, and not acts so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product. When there are no any producers who are excluded and the domestic industry is defined as "the domestic producers as a whole, the risk of introducing distortion will not be arisen.[163]

4.1.1.3. Causal link between "dumping" and "injury"

In order to ensure that anti-dumping duties shall be based on an appropriate examination, and the injury of the domestic industry must mainly be came from the dumped imports, Article 3.5 of the AD Agreement regulates that the investigating authorities must demonstrate a causal relationship between the dumped imports and the injury to the domestic industry. Besides, this Article also requires that *all relevant evidence* and *all known factors* must be analyzed at the same time when determining the causal link between "dumping" and "injury". Moreover, the investigating authorities must ensure that "*the injury caused by other factors imports must not be attributed to the dumped imports*".

The Article 3.5 of the AD Agreement provides an unexhausted relevant factors list that the investigating authorities must consider: (i) the volume and prices of

[161] *Ibid., supra* note 149, para. 327.

[162] *Ibid.,* para. 331

[163] *Ibid.*

imports not sold at dumping prices; (ii) contraction in demand or changes in the patterns of consumption; (iii) trade restrictive practices of and competition between the foreign and domestic producers; (iv) developments in technology; and (v) the export performance and productivity of the domestic industry.

The Appellate Body in *US – Hot Rolled Steel (2001)* ruled that in order to make sure that the injury caused by other "known factors" shall not be attributed to the dumped imports, the investigating authorities must make an appropriate assessment of the injury caused to the domestic industry by the other known factors, and they must separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors.[164]

It is worth noting that the AD Agreement which does not require that the dumped imports are the sole cause of the injury to the domestic industry, the AD Agreement specifies that the imports under investigation are substantial causes of material injury and other known factors that are not to be attributed to the dumped imports. Additionally, the Article 3.5 of the AD Agreement does not require an examination of any particular factors nor does not provide clear guidance provisions on the manner in which the investigating authorities may employ to evaluated all relevant information as well as all known factors in order to illustrate the causal relationship between dumped imports and the domestic industry's injury, and to ensure non-attribution to the imports at issue of injury being caused by other factors.[165] It should be emphasized that the Appellate Body in US – Hot Rolled Steel noted that the non-attribution language under the extent of the Article 3.5 of the AD Agreement will solely be applied in situations where dumped imports and other known factors are causing injury to the domestic industry *at the same time.*[166]

[164] *Ibid., supra* note 149, para. 281.

[165] *Ibid., supra* note 98, p. 709

[166] *Ibid., supra* note 149, para. 283.

4.1.2. Procedures of anti-dumping investigation

Article 5 of the AD Agreement provides basic rules that investigating authorities have to base upon when initiating an anti-dumping investigation.

4.1.2.1. Initiation of an anti-dumping investigation

Subject to Article 5.1 of the AD Agreement, in order to initiate an investigation to determine the existence, degree and effect of any alleged dumping, the investigating authorities must base upon a written application by or on behalf of the domestic industry.[167] However, pursuant to Article 5.6 of the AD Agreement, if the investigating authorities themselves decide to conduct an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of dumping, injury and a causal link to justify the initiation of an investigation. It should be emphasized that the application must include evidence of *(i)* dumping, *(ii)* injury within the meaning of Article VI of the GATT 1994 as interpreted by this Agreement and *(iii)* a causal link between the dumped imports and the alleged injury. In the extent that the applicants who cannot be able to provide such evidence in order to support their allegation, such application will be considered insufficient to meet requirements of the AD Agreement.[168] It is vital to note that the Panel in *US - Softwood Lumber V* (2004) concluded that if information on certain of the matters listed in sub-paragraphs (i) to (iv) of the Article 5.2 of the AD Agreement is not reasonably available to the applicant in any given case, then the applicant is not forced to include it in the application. Therefore, an application need only include

[167] According to Article 5.4 of the AD Agreement, an application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than *50 per cent* of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, if the domestic producers expressly supporting the application contribute less than *25 per cent* of total production of the like product produced by the domestic industry, no investigation shall be conducted. It should be emphasized that in the territory of certain Members employees of domestic producers of the like product or representatives of those workers may make or support an application for an investigation under Article 5.1 of the AD Agreement (see Footnote 14 to Article 5.4 of the AD Agreement).

[168] Article 5.2 of the AD Agreement.

reasonably available relevant information as the applicant deems appropriate to support its allegations of dumping, injury and causality.[169]

After received the application from the applicants, the investigating authorities shall firstly examine the accuracy and adequacy of the evidence provided in the application, and the authorities shall determine whether there is sufficient evidence to justify the initiation of an investigation based on such the examination.[170] More specifically, pursuant to Article 3.7 of the AD Agreement, an application shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. The investigation shall be immediate termination in cases where the investigating authorities determine that the margin of dumping is less than 2 per cent, expressed as a percentage of the export price, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The volume of the imports under consideration shall normally be deemed as negligible if the quantity of such imports in question from a particular country is found to make up below 3 per cent of imports of the like product in the importing country, unless countries which individually account for below 3 per cent of the imports of the like product in the importing country collectively account for higher 7 per cent of imports of the like product in the importing Member.[171] Normally, the period time for Investigations shall be concluded within one year and in no case more than 18 months, after their initiation, except in special circumstances.[172]

4.1.2.2. Conduct of the anti-dumping investigation

Although an anti-dumping investigation will be conducted and based on national laws, however, such national rules have to conform to the AD Agreement. The Appellate Body in *US — Oil Country Tubular Goods Sunset Reviews (2004)*

[169] *Ibid., supra* note 149, para. 351.

[170] Article 5.3 of the AD Agreement.

[171] Article 5.7 of the AD Agreement.

[172] Article 5.10 of the AD Agreement.

stated that Article 6 of the AD Agreement provides the fundamental due process rights to which interested parties are entitled in antidumping investigations and reviews, and the investigating authorities have to base upon these basic rules throughout their investigation.[173]

Article 6.1 of the AD Agreement regulates that the information which the investigating authorities required shall be noted to all interested parties in an anti-dumping investigation and such all interested parties shall be given an ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question. Additionally, Article 6.2 of the AD Agreement states that all interested parties shall have a full chance for the defense of their interests are provided chances to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered, based on request to the authorities.[174] In practical, the applicants may have more time to gather the evidence which necessary to support their claims in advance. Meanwhile, the responding parties normally receive no notice until the initiation of the investigation. Moreover, the "questionnaires" which mentioned in Article 6.1.1 of the AD Agreement are a type of document, usually sent to the interested parties before initiating the investigation, in which requires the interested parties provide vital information relating to the determination of dumping, injury and causation throughout the investigation of anti-dumping.[175] Besides, the Article 6.1.1 specifies that exporters or foreign producers will be given at least thirty days to reply the questionnaires, and extensions should be granted whenever practicable.

In order to ensure that the investigation shall transparently be initiated, Article 6.4 of the AD Agreement requires that the investigating authorities shall provide

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[173] WTO. Analytical Index: Anti-dumping Agreement, para. 424. Available at https://www.wto.org/english/res_e/booksp_e/analytic_index_e/anti_dumping_03_e.htm, accessed February 5, 2016.

[174] Pursuant to Article 6.3 of the AD Agreement, if interested parties provide information in oral, such information shall only be taken into account by the investigating authorities if it is subsequently reproduced in writing and made available to other interested parties.

[175] *Ibid.*, *supra* note 98, p. 716.

timely chances for all interested parties to approach all non-confidential information that is relevant to the presentation of their cases and employed by the authorities. It should be underscored that Article 6.5 of the AD Agreement regulates that the investigating authorities have a responsibility of preserving the confidential business information that pertinent to the exporters or foreign producers and the domestic industry involved in the investigation.

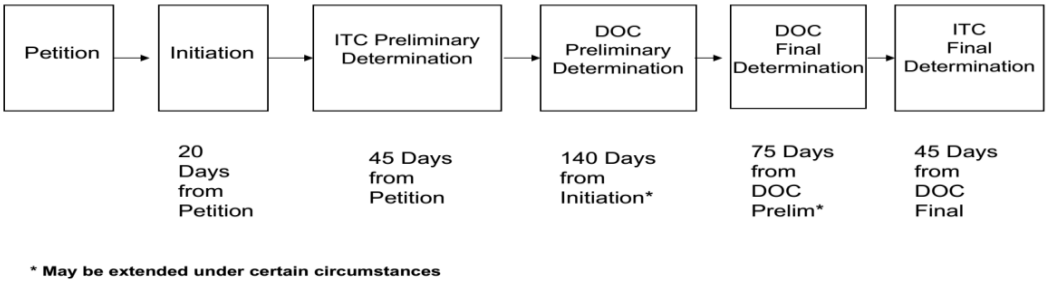
During the investigation, the authorities may require to conduct an investigation in the territory of the other country in concerned in order to verify the provided evidence or gather more detail information. In such circumstances, Article 6.7 of the AD Agreement regulates that the investigating authorities have to obtain the agreement of the firms concerned and notify the representatives of the government of the Member at issue, and unless such investigation claim is rejected by the country in question. If there are any interested parties refuses access to the investigation, or does not provide required information within a reasonable period or significantly impedes the investigation, Article 6.8 of the AD Agreement requires that in such cases, the investigating authorities may made preliminary and final determinations on the basis of the facts available. Moreover, before a final determination is made, all interested parties shall be informed the substantial facts under consideration which form the basis for the decision whether to apply definitive measures and the parties may have sufficient time for defending their interests.[176] Regarding the calculation of dumping margin, Article 6.10 of the AD Agreement set out rule that the investigating authorities shall determine an individual margin of dumping for each known exporter or producer under consideration of the product in concerned. To the extent that the authorities may not be able to calculate the dumping margin for each exporter or producer since the number of exporters, producers, importers or types of products involved too much for making such determination, the authorities may be permitted to limit their examination's scope.

[176] Article 6.9 of the AD Agreement.

4.2. Substantial provisions of the U.S. Anti-dumping Act

According to the U.S. Tariff Act of 1930, the ITC is responsible for determining whether a U.S. industry is "materially injured" or "threatened with material injury" or "the establishment of an industry in the United States is materially retarded" by reason of the subject imports,[177] and the DOC is responsible for determining whether the imported product in question is being, or likely to be, sold at prices less than fair value in the U.S market.[178] Only if both of the two determinations above are affirmative, the anti-dumping duties may be imposed on the dumped imports. Accordingly, an anti-dumping investigation could be divided into nine stages: (i) file a petition; (ii) initiation of the investigation by the DOC; (iii) the preliminary phase of the ITC's investigation; (iv) the preliminary phase of DOC's investigation, (v) the final phase of DOC's investigation, and (vi) the final phase of the ITC's investigation (see Figure 5.1 and 5.2); (vii) imposition of anti-dumping duties; (viii) administrative reviews; and (ix) sunset review.[179] The U.S anti-dumping law stipulates maximum period of time for each specific activity in each stage of the investigation of anti-dumping. In fact, such time-limits may vary depend on the nature and particular circumstances of each case objectively and subjectively capable of investigating authorities (within the limits allowed by law).

Figure 4.1. Timing events of an anti-dumping investigation



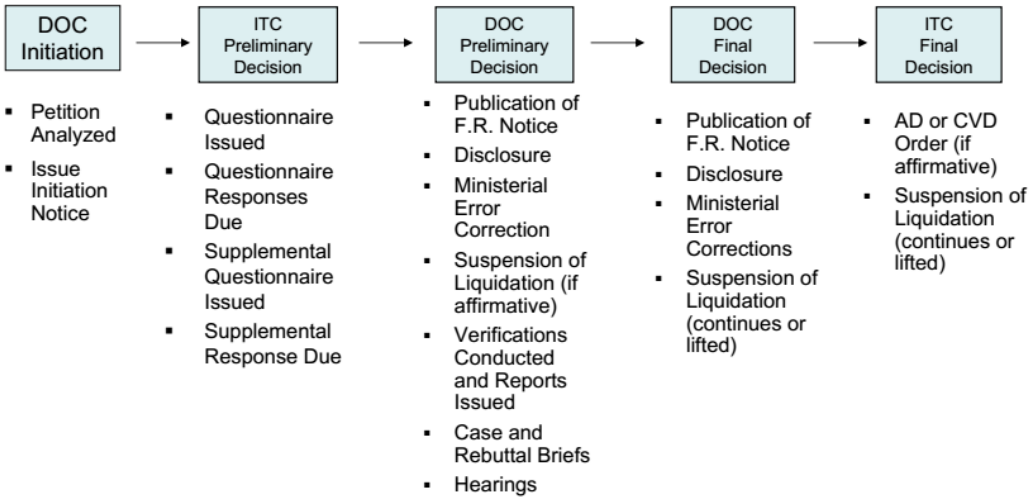
[177] 19 U.S.C §1673b(a)

[178] 19 U.S.C §1673b(b)

[179] Not all anti-dumping investigations are going all the stages mentioned above. According to the law as well as in practice, there are some certain circumstances that may cause to terminate the investigation at every such stage.

Source: US Department of Commerce (2008)[180]

Figure 4.2 Timing of DOC events in AD investigation



Source: US Department of Commerce (2008)[181]

4.2.1. Initiation of anti-dumping investigation by the DOC

Subject to Section 1673a(b) of the 19 U.S.C, an anti-dumping investigation shall be initiated whenever a petition is filed by or on behalf of the domestic industry concerned[182] or the U.S administering authority[183] determines that there exist necessary elements for imposition of an anti-dumping duty under the U.S law.[184] After received the petition file, the investigating authorities shall notify the

[180] U.S Department of Commerce. *Issues of procedure in U.S AD/CVD law*. *Available at* http://www.slideshare.net/SEIA/issues-of-procedure-in-adcvd-cases, accessed May 5, 2016.

[181] *Ibid.*

[182] 19 U.S.C §1673a(b). It should be noted that pursuant to Section 1673a(b) and Section 1677(9) of the 19 USC, there are five group of people who may file petition with the administering authority such as domestic manufacture, producers, a recognized union or group of workers, a trade or business association…

[183] According to Section 1677(1) of the 19 U.S.C, the term "*Administering authority*" means the Secretary of Commerce or any other officer of the U.S to whom have the responsibility for conducting the duties of the administering authority; and the term "*Commission*" means the U.S International Trade Commission.

[184] 19 U.S.C §1673a(a).

government of any exporting country which is named in the petition, and they will not accept any "unsolicited oral or written communication from any person, except such information made from the interested parties.[185] It is required that within 20 days after the date on which the petition is filed, the DOC determines whether the petition alleges the information necessary which support the petitioner's claim and whether it is necessary for imposition anti-dumping measure on the imports concerned. Besides, the investigating authorities shall also determine whether the petition has been filed by or on behalf of the domestic industry.[186] If the determination is affirmative, the investigation is initiated. If not, the DOC dismisses the petition and terminates the proceeding.[187]

Preliminary phase of the ITC's investigation. Subject to 19 U.S.C §1673b(a), within 45 days after the date on which the petition is filed, the ITC shall determines whether an American industry is (i) materially injured or (ii) threatened with material injury or (iii) the establishment of an industry in the U.S. is materially retarded by reason of dumped imports and such imports are not negligible.[188] The preliminary determination of the ITC's investigation may be divided into 6 stages: (1) institution of the investigation and scheduling of the preliminary phase; (2) questionnaires; (3) staff conference and briefs; (4) staff report and memoranda; (5) brief and vote; and (6) determination and view of DOC.[189]

In the first stage, an eight-person team including of an investigator, economist, accountant/auditor, industry analyst, attorney, statistician, statistical assistant, and supervisory investigator is set up to make a schedule for the preliminary phase of investigation. This team has also responsibility for preparing a notice of institution of

[185] 19 U.S.C §1673a(b)(3).

[186] 19 U.S.C. § 1673a(c)(1)(A).

[187] 19 U.S.C. § 1673a(c)(2).

[188] 19 U.S.C. § 1673b(a).

[189] U.S International Trade Commission. *"Antidumping and Countervailing Duty Handbook"*, 14th ed., Pub. 4540, II-5 (June 2015). *Available at* https://www.usitc.gov/trade_remedy/documents/handbook.pdf, accessed December 7, 2015.

investigation for publishing in the Federal Register in order to provide information for anyone concerning the issue in concerned.[190] *In the second stage*, questionnaires are sent to U.S. importers and producers, and foreign producers for information and data that the ITC needs for its determination. The U.S. producers and importers are required to respond to questionnaires; failure to reply as directed can result in a subpoena or other order to compel a response.[191] Meanwhile, foreign producers are not required to respond to the questionnaires. To extent that foreign producer(s) fail to respond, the ITC will base its determination on the existing record information or "facts available".[192] It should be noticed that if any foreign producers who fail to respond to the question as required without any reasonable reasons, such the foreign producers may be taken an adverse inference for their noncompliance.[193] Before preliminary determination, there is a conference which is held between the ITC and the attendance of concerned parties, such conference provides to the concerned parties a chance to present their arguments.[194] In the fourth stage, a staff report and memorandum, which consist of a presentation and analysis of all of the statistical data and other information collected through questionnaires, public documents, field visits, staff interviews, and other sources, are prepared by the team, are submitted to the ITC.[195] In the fifth stage, a public meeting between the ITC Commissioners and the investigation staff for questioning issues related to the staff report and memoranda is held and the ITC Commissioners will vote for the determination. In the final stage, the ITC is required to inform its determination in the preliminary phase of an investigation to the DOC within 45 days after the date of filing of the petition, or one business day after the public briefing and vote.[196] In the circumstance that the

[190] *Ibid.*

[191] 19 U.S.C. § 1333(a)

[192] *Ibid., supra* note 189, p. II-7.

[193] *Ibid.*

[194] *Ibid., supra* note 189, p. II-10.

[195] *Ibid.,* p. II-11.

[196] *Ibid.,* p. II-13.

determination is negative or imports are found negligible, the proceeding is terminated. If not, the DOC starts the preliminary phase of its investigation.[197]

Preliminary phase of the DOC's investigation: Section 1673b(b)(1)(A) regulates that within 140 days after the date on which the petition is filed, in normal cases, the DOC is required to determine whether there is a reasonable ground to believe or suspect that the imports in question is being sold, or is likely to be sold, at less than its normal value. In the event that the DOC's find is affirmative, the DOC shall calculate an estimated weighted average dumping margin for each exporter and producer individually investigated, and also determine an estimated all-others rate for all exporters and producers not individually investigated.[198] Besides, in order to suspend liquidation of all entries of the subject imports shall be is issued and the importers are required to post a cash deposit or bond for each entry of the imports under investigation in an amount based on the estimated weighted average dumping margin.[199]

Final phase of DOC's investigation: according to Section 1673d(a)(1) of the 19 U.S.C within 75 days after the date on which the DOC made its preliminary determination, in normal cases, the DOC shall makes final determination of whether the subject merchandise is being sold, or is likely to be sold at less than fair value.

Final phase of the ITC's investigation: Section 1673d(b) states that before the later of the 120th day after the day on which the DOC makes its affirmative preliminary or the 45th day after the day on which the DOC make its affirmative final determination, the ITC shall make its final determination of whether an American industry is materially injured or threatened with material injury or the establishment of an industry in the U.S. is materially retarded by reason of imports of subject merchandise. Similarly to the preliminary phase, this phase can be divided into eight stages with the contents of each stage are similar to the stage in the preliminary phase:

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[197] *Ibid.,* p. II-14.

[198] 19 U.S.C §1673b(d).

[199] *Ibid.*

(1) scheduling the final phase; (2) questionnaires; (3) pre-hearing staff report; (4) hearing and briefs; (5) final staff report and memoranda; (6) closing of the record and final comments by parties; (7) briefing and vote; and (8) determination and views of the ITC. If the ITC's determination is affirmative, within 7 days of the ITC's determination, the DOC is required to issue and publish an antidumping order.[200]

4.2.2. Determination of injury

4.2.2.1. Material Injury

Subject to Section 1677(7)) of the 19 U.S.C, the term "material injury" is defined as "harm which is not inconsequential, immaterial, or unimportant." In order to determine whether the imports in concerned which is caused or being caused material injury to the U.S industry, the ITC is required to evaluate (1) the volume of imports of the subject merchandise, (2) the impact of imports of that product on prices in the U.S domestic like products, and (3) the effect of the import in question on the producers of like products in the context of production operations within the U.S.[201]

In evaluating the volume of imports, the ITC must consider whether there is a significant increase in the volume of subject products, either in absolute terms or relative to production or consumption in the U.S. To determinate the effect of dumped imports on prices, the ITC is asked to examine (1) whether there has been significant price underselling by the imported products as compared with the price of the U.S like products, and (2) whether the impact of the importation of subject merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.[202]

In order to determine the effect of subject imports on producers of domestic like products, the ITC is required by law to examine all relevant economic factors which have a bearing on the state of the industry in the U.S, including, but not limited

[200] 19 U.S.C §1673e(a).

[201] 19 U.S.C §1677(7)(A) and (B).

[202] 19 U.S.C §1677(7)(C).

to (i) actual and potential declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity; (ii) factors affecting domestic prices; (iii) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment; (iv) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product; and (v) in antidumping investigations, the magnitude of the margin of dumping.[203] It should be underlined that the ITC shall evaluate all such relevant economic factors within the context of the business cycle and conditions of competition that are distinctive to the affected domestic industry.

4.2.2.2. Threat of Material Injury

According to Section 1677(7)(F) of the 19 U.S.C, in considering whether an American industry is threatened with material injury by reason of subject imports, the ITC is required to consider these relevant economic factors as follows:

(i) If a countervailable subsidy is involved, such information as may be presented to it by the DOC as to the nature of the subsidy, and whether imports of the subject merchandise are likely to increase;

(ii) Any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports;

(iii) A significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports;

(iv) Whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect

[203] 19 U.S.C. § 1677(35)(C)(iii).

on domestic prices, and are likely to increase demand for further imports;

(v) Inventories of the subject merchandise;

(vi) The potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.

(vii) In any investigation under this title which involves imports of both a raw agricultural product and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting, if there is an affirmative determination by the ITC with respect to either the raw agricultural product or the processed agricultural product (but not both);

(viii) The actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product; and

(ix) Any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).”[204]

It is worth noting that Section 1677(7)(F)(ii) of the 19 U.S.C states that the presence or absence of any factor abovementioned which the ITC is required to consider that shall not necessarily give decisive guidance with respect to the determination, and such a determination may not be made on the ground of mere conjecture or supposition.

4.2.3. Domestic like product and U.S. industry

In order to evaluate whether an American industry is materially injured or threatened with material injury, or the establishment of an industry is materially

[204] 19 U.S.C. § 1677(7)(F)(i).

retarded, by reason of the imports under consideration, the ITC must firstly define the "domestic like product" and the "industry".[205] Section 1677(4) of the 19 U.S.C defines the term "industry" as "the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product". The phrase "domestic like product" is defined as a "*product which is like, or* in the absence of like, *most similar in characteristics and uses* with, the article subject to an investigation."[206]

The 'domestic industry" and 'like product" shall factually be determined by the ITC on a case-by-case basis.[207] Although the DOC's determination on "domestic industry" and "like product" shall be accepted by the ITC as to the scope of the imported product that is subject to an anti-dumping investigation, the ITC shall also determine what domestic product is like the imported product that the DOC has identified.[208] It is vital to emphasize that in some certain circumstances, the ITC may be allowed to define the domestic like product to include products which are not included in the scope, or it may find two or more domestic like products regarding one class or kind of imported product.[209] In defining the domestic like product, the ITC generally considers a number of factors, including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) common manufacturing facilities, processes of production, and production workers; (5) customer and producer perceptions; and, when appropriate, (6) price.[210] It should be underscored that no single factor above is dispositive, and the ITC may be permitted

[205] *Ibid., supra* note 189, p. II-33.

[206] 19 U.S.C. § 1677(10).

[207] *Ibid., supra* note 189, p. II-34.

[208] *Ibid*.

[209] *Ibid*.

[210] *Ibid*.

to examine other factors it deems relevant on the ground of the facts of a particular investigation.[211]

4.2.4. Calculation of dumping margin

As already mentioned, an antidumping duty shall not be imposed on the imports concerned if there are lacks of three conditions: “dumping”, “injury” and “causal link”. Within the scope of this research, this author does not discuss methodologies which are used by the ITC to determine the material injury or the threatening of material injury to a U.S. industry. Moreover, this section just focuses on the general rule of dumping margin calculation in U.S law and how such calculation methods affect to the results of dumping margin.

4.2.4.1. Basic formula for calculation of dumping

To determine whether the subject product is being sold at less than fair value in the U.S market, the DOC makes a comparison between the “normal value” and the “export price” or “constructed export price”.[212] Accordingly, the normal value of the product under investigation is the foreign home market price of a "foreign like product" sold in the ordinary course of trade for consumption in the exporting country, at the same level of trade as the export price or constructed export price; or the price at which the subject product is sold for consumption in a third country.[213] “Export price” is defined in Section 1677a(a) of the 19 U.S.C as the price at which the dumped imports is first sold (or agreed to be sold) before the date of importation by the producer or exporter of such product concerned outside of the United States to an unrelated buyer in the U.S or to an unaffiliated purchaser for exportation to the U.S. A “constructed export price” is employed in the circumstance that the export price is unavailable or unreliable. The formula for the dumping margin calculation is:

Dumping margin = Normal value – Export price

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[211] *Ibid*.

[212] 19 U.S.C §1677b(a).

[213] 19 U.S.C §1677b(a)(1).

4.2.4.2. Identifying and adjusting the normal value

There are three ways that the DOC can use to determine the normal value of the import concerned: (i) the sales in the home market of the exporter, or (ii) the sales in a third country, or (iii) a constructed value. Besides, there are two elements which are taken into account by the DOC's determination if the home market, or the third country market or the constructed value to be employed: (i) the availability of the foreign like product, and (ii) the sufficient quantity of the sales of such product under consideration in the exporter's home market.

The home market is used when the exporter sells the "like products" in the exporting country with a sufficient quantity. The sufficient quantity in the home market is determined by a test comparing the quantity of home-market sales with the volume sold to the United States. More specifically, Section 1677b(a)(1) of the 19 U.S.C regulates that the "foreign like product" sold in the exporting market shall normally be deemed to be insufficient if such quality is below 5 percent of the total volume of sales of such imports to the U.S.

The sales of the subject merchandise in a country rather than the U.S can be used by the DOC to determine the normal value if: (i) the exporter does not sell the product concerned in the home market; or (ii) the sales of such product is not in a sufficient quantity; or (iii) the "particular market situation in the exporting country does not permit a proper comparison with the export price or constructed export price". In such circumstances, the normal value may be constructed for purpose of dumping margin calculation.

It should be noted that, in certain cases, although the DOC is allowed to disregard certain sales in the normal value calculation when it has "reasonable grounds to believe or suspect" that the sales in the exporting country or in third market at prices below production costs, it must illustrate that the sales (1) "have been made within an extended period of time in substantial quantities;" and (2) not "at

prices which permit recovery of all costs within a reasonable period of time".[214]

To make a fair comparison between normal value and export price, the investigating authority is required to adjust the normal value under the forms of subtractions and additions.

4.2.5. Non-market economy issues

This section concentrates on issues which pertinent to non-market economy countries in the sense of an anti-dumping investigation as well as dumping margin calculation under the U.S law.

4.2.5.1. Definition of non-market economy

Subject to Section 1677(18)(A) of the 19 U.S.C, the term 'non-market economy country" is defined as "*any country that the DOC determines does not operate on market principles of cost or pricing structures, so that sales of product in such country do not reflect the fair value of the product*." Moreover, there are six factors that the DOC is required by law to take into account when determining whether a country concerned is non-market economy country:[215]

(i) The extent to which the currency of the foreign country is convertible into the currency of other countries;

(ii) The extent to which wage rates in the foreign country are determined by free bargaining between labour and management;

(iii) The extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country;

(iv) The extent of government ownership or control of the means of production;

(v) The extent of government control over the allocation of resources and over the price and output decisions of enterprises; and

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[214] 19 U.S.C §1677b(b).

[215] 19 U.S.C §1677(18)(B).

(vi) Such other factors as the administering authority considers appropriate.

Although these six factors above are employed by the DOC to determine whether a country in question is a non-market economy for the purpose of an anti-dumping investigation, such these criteria tend to analyze from a macro perspective[216] and do not directly examine whether decisions which relating to import and export prices are made free of, or substantially free of, government control or intervention.[217] Besides, it has been criticized there is not any clear guidance on the importance of each factor and the last factor is too vague.[218] Furthermore, because there is no guidance and quantitative criteria on such these factors, the DOC could consider that a country in question is or is not a non-market economy by its interpretation the same source information in different ways.[219] It should be remarked that in order to request the DOC for conducting a review of a country's non-market economy status, the government of country in question must make a formal request for a review that the subject country has a market economy.[220]

4.2.5.2. Calculation of normal value

Subject to Section 1677b(c)(1) of the 19 U.S.C, if the imported product is exported from an non-market economy country and the available data does not permit

[216] Adam Mccarty and Carl Kalapesi. (2003). *The economics of the "non-market economy" issue: Vietnam catfish case study*. *Available at* http://www.eldis.org/fulltext/vietnam.pdf, accessed January 10, 2016.

[217] Wang, S. (1996). *U.S Trade Laws concerning nonmarket economics revisited for fairness and consistency*. Emory International Law Review, Vol. 10, No. 2. Available at http://heinonline.org/HOL/PDFsearchable?handle=hein.journals/emint10&collection=journals&section=32&id=&print=section&sectioncount=1&ext=.pdf&nocover=, accessed May 13, 2016.

[218] Joshua Startup.2005. *From Catfish to Shrimp: How Vietnam Learned to Navigate the Waters of "Free Trade" as a Non-Market Economy*. Iowa Law Review Journal, Vol. 90. Available at http://heinonline.org/HOL/Page?handle=hein.journals/ilr90&div=7&g_sent=1&collection=journals, accessed May 14, 2016.

[219] *Ibid., supra* note 217.

[220] U.S Department of Commerce. *Notice of Initiation of Inquiry Into the Status of Lithuania as a Non-Market Economy Country for Purposes of the Antidumping and Countervailing Duty Laws Under a Changed Circumstances Review of the Solid Urea Order Against Lithuania*, (67 FR 57393, September 10, 20020. Available at http://enforcement.trade.gov/frn/2002/0209frn/02-22998.txt, accessed May 13, 2016.

the calculation of normal value using home-market prices, third-country prices, or constructed value, the DOC will calculate the normal value of such product concerned based on the factors of production utilized in producing the subject product, plus an amount for general expenses and profit, plus the cost of containers, coverings, and other expenses. Factors of production include, but are not limited to, materials, labor, energy and other utilities, and representative capital cost, including depreciation.[221] The reasoning for basing the calculation of normal value on the factors of production because the non-market economy country which does not operate on market principles of cost or pricing structures, so that sales or costs of product in that country do not reflect the fair value of the subject product.[222] In short, the normal value of the product from a non-market economy country will be calculated by valuing the nonmarket economy producers' factors of production in a market economy country.[223]

4.2.5.2.1. Selection of surrogate country

Section 1677b(c)(1)(B) of the 19 U.S.C states that the evaluation of the factors of production shall be based on the best available information relating to the values of such elements in a market economy country or countries considered to be appropriate by the DOC. Additionally, Section 1677b(c)(4) of the 19 U.S.C regulates that the Department shall use the prices or costs of production's factors in one or more market economy countries that are at a level of economic development comparable to that of the nonmarket economy country, and a significant producer of comparable merchandise. It is vital to emphasized that the terms "*comparable level of economic development*", "*comparable merchandise*", and "*significant producer*" are not defined by the U.S law.

Pursuant to Section 351.408(b) of the 19 CFR, the DOC shall relies on per capita gross national income data as reported in the most current annual issue of

[221] 19 U.S.C § 1677b(c)(1).

[222] U.S Department of Commerce. *Anti-dumping manual – Non-market economies*, p. 11. *Available at* http://enforcement.trade.gov/admanual/2015/Chapter%2010%20NME.pdf, accessed May 13, 2016.

[223] 19 CFR 351.408(a).

World Development Report in order to examine which surrogate countries are at a level of economic development comparable to the subject non-market economy country. The DOC is usually to choose a primary surrogate country from a list of several potential surrogate countries. Because the surrogate countries on the list are not ranked and are considered equivalent in terms of economic comparability, the DOC are freely to select any country on the list that it deems appropriate even though if the gross nation income of the selected country is higher or lower than the gross income of the country in question.

As noted earlier, although the term "comparable merchandise" is not defined by the relevant regulations and the meaning of such term is determined on a case-by-case basis,[224] there are some basic rules that the DOC has to follow to determine the comparable product. Accordingly, if identical merchandise is produced, the country qualifies as a producer of comparable product. In the extent where none of the potential surrogate countries produces identical merchandise, the DOC will consider whether products have similar production processes, end uses, and physical characteristics with the subject "foreign like product" and determine whether the potential surrogate countries produce comparable merchandise.[225]

Regarding "significant producer", the DOC will determines whether there is any the country on the list which produces comparable merchandise are significant producers of that comparable product. Because the subject product may have specific characteristics, the scope for significant producer will vary from case to case.[226]

4.2.5.2.2. Calculation of normal value based on factors of production

Section 351.408(c)(1) of the 19 CFR states that the DOC will ordinary employ publicly available information to value the factors of production. Therefore, the DOC shall base its determination on publicly available information from the first

[224] *Ibid., supra* note 223, p. 12.

[225] *Ibid.*

[226] *Ibid.*

choice, or primary, surrogate country to evaluate all factors of production. It should be minded that if there is no reliable information from the primary surrogate country for a particular factor; the DOC is allowed to gather publicly available data from another surrogate country.[227] It is worth noting that when gathering a publicly available value from a possible surrogate values for use in an non-market economy proceeding, the DOC will take into account following data: (1) an average non-export value; (2) representative of a range of prices within the POI/POR[228] or most contemporaneous with the POI/POR; (3) product-specific; and (4) duty and tax-exclusive. Accordingly, the DOC normally refers to use official import prices rather than domestic prices to consider the respondent's reported inputs since import prices which do not include domestic taxes.[229] However, the DOC shall exclude all prices of imports from non-market economy countries and from countries that provide general export subsidies.[230]

According to Section 1677b(c)(3) of the 19 U.S.C, the scope of factors of production is to involve, *inter alia*, hours of labor required, quantities of raw materials used, amounts of energy and other utilities consumed, and representative capital cost, including depreciation. In the questionnaires for exporters or producers or both from non-market economy country, the DOC shall require them to provide data of such factors of production that actually used to produce the subject product. It should be underlined that the DOC may conduct its own research to find appropriate surrogate values.

In brief, there are two main steps that the DOC shall base on when constructing the normal value of the subject import from a non-market economy country: (i) gather the factors of production to produce a unit of the subject product from the exporting country; and (ii) such quantities are multiplied by their respective

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[227] *Ibid*., p. 13.

[228] Period of Investigation or Period of Review.

[229] *Ibid., supra* note 223, p. 14.

[230] *Ibid.*

prices which obtained from the surrogate country. It should be emphasized that Section 1677b(c)(1) regulates that the DOC shall calculate the normal value of the product in issue on the ground of the value of the factors of production used in producing the subject product, shall also add an amount for general expenses and profit plus the cost of containers, coverings, and other expenses to the subject product.

4.3. The arguments of the both sides on anti-dumping measures on frozen fish fillets from Vietnam

It is necessary to summarize the key facts of the case as follows:

(i) The "domestic like product" was defined as the U.S frozen catfish fillets, whether or not breaded or marinated.[231] The U.S catfish industry was determined as the affected domestic industry, excluding the U.S catfish farmers.[232] It should be underscored that although the domestic like product was only determined as the domestic frozen catfish fillets, the DOC stated that the scope of its investigation included not only "Frozen catfish fillets", but also three other products i.e., "Frozen fish fillets, NESOI", "Frozen freshwater fish fillets", and "Frozen sole fillets".[233]

(ii) In the notice of final anti-dumping duty determination of sales at less than fair value and affirmative critical circumstances, the DOC concluded that the imports of Tra and Basa fish from Vietnam were being sold at less than fair value in the U.S market.[234]

(iii) In the final phase of the ITC's investigation, it determined that the U.S catfish industry was material injured by reason of the Tra/Basa products from

[231] *Ibid., supra* note 19, p. 6.

[232] *Ibid.*, p. 9.

[233] U.S Department of Commerce. *Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*. 68 FR 37116, June 23, 2003. Available at http://enforcement.trade.gov/frn/summary/vietnam/03-15794.txt, accessed May 15, 2016.

[234] *Ibid.*

Vietnam as the subject products found to be sold in the U.S at less than fair value.[235]

(iv) The ITC stated that the imports of *Tra* and *Basa* products from Vietnam was the main reason which caused a significant decrease in prices and production of the domestic like product (Channel catfish).[236]

(v) Regarding "non-market economy status" of Vietnam, the DOC determined that "*Vietnam should be treated as a non-market economy country under the U.S anti-dumping law*",[237] and then, Bangladesh was chosen by the DOC as the appropriate primary surrogate country for Vietnam.[238]

4.3.1. Whether the subject Vietnamese products were sold at prices less than fair value

As noted earlier, in the final phase of the ITC's investigation, it indicated that Tra and Basa products from Vietnam were being dumped at the U.S because the Vietnamese catfish industry was subsidized by the Vietnamese government. However, the fact is that production costs of an unite catfish product[239] in Vietnam at that time and now are much cheaper than those in the U.S. Additionally, in the period 1997 – 2003, the volume of floating cages in Vietnam were very high and the catfish farmers did not have to pay high amount of environmental taxes and fees like their competitors in the U.S. Therefore, the production costs and other expenses were very low and of course, the prices of Tra and Basa fish were normally lower than the U.S like product. Accordingly, Tra production costs calculated by Thanh (2003) were

[235] *Ibid., supra* note 19, p. 22.

[236] *Ibid.*, pp. 14-19.

[237] U.S Federal Register, 68 FR *Vol. 68, No. 120*, June 23, 2003, p. 37119. *Available at* https://www.gpo.gov/fdsys/pkg/FR-2003-06-23/pdf/03-15794.pdf, accessed May 15, 2016.

[238] *Ibid.*, p. 31120.

[239] The wage for a worker at the period 1999 – 2003 was around $1.5 – $2 per day (included food, no insurance and other welfare). According to this author's survey, the wage is around $5 – $7 per day (included food, no insurance and other welfare). Please note that, such wage is applied for male workers, female workers may get lower.

around *10,398 VND per unit*.[240] Additionally, calculations made by ActionAid Vietnam, a UK-based non-profit organization, based on the data obtained from the Department of Agriculture and Rural Development of An Giang province in 2002, showed that the unit cost of *Tra* farming was only *8,600 VND per kilogram of fish*. Compared to *Tra*, *Basa* has higher production costs due to higher costs of fingerlings, longer growing time and higher level of feed consumption. On average, the unit cost of *Basa* was 1,000 VND to 2,000 VND higher than that of *Tra*. Before 1998, farmers mainly raised *Basa*, but are now switching more and more to *Tra*. It is worth noting that the above calculation was based on cage-fish farming, thus, the unit cost and market price of cage-fish were 1,000 VND higher than those of pond-fish.[241]

Figure 4.2. Summary on *Tra fillets production costs*

Costs	**Value (VND)**	**Share in net price**
Net price per kg of fillets (at factory gate, excluding selling costs)	***43,000** VND*	
Cost of live *Tra* (VND per kg of live fish)	12,000 VND	
Processing ratio (weight of live fish per kg of fillets)	3.2	
Cost of live *Tra* (VND per kg of fillets)	(3.2 * 12.000 VND) = 38,400 VND	
Waste recovery (skin, viscera, bone, head, fat) (VND per kg of fillets)	3,200 VND	

[240] Thanh X. Nguyen. 2003. *Catfish fight: Vietnam's Tra and Basa fish exports to the U.S. Available at* http://www.fetp.edu.vn/cache/MPP05-552-R5.3E-Catfish%20Fight--Nguyen%20Xuan%20Thanh_CE03-52-8.0-2013-08-29-16261373.pdf, accessed December 7, 2015.

[241] *Ibid.*

Cost structure (VND per kg of fillets)	(38,400 – 3,200) 35,200 VND	81.86%
Net cost of live *Tra* Labour	3,397 VND	7.90%
Electricity, water, chemicals, and packing materials	594 VND	1.38%
Rent	63 VND	0.15%
Depreciation	365 VND	0.85%
Interests	453 VND	1.05%
Taxes	1,088 VND	2.53%
Profits	*1,840* VND	*4.28%*

Source: Thanh X. Nguyen (2003)[242]

As can be seen from the Figure 4.2 above, the net price of Tra fillets per kilogram was *43,000 VND* (at factory gate, excluding selling costs), and the export price of such product in the U.S market was around *52,500 VND – 57,000 VND/kg* of fillets ($3.5-$3.8/kg of fillets).[243] While, the average price of the U.S frozen fish fillets sold by the domestic processors were $2.88 per pound (≈ $6.3/kg) in 2000. Although Vietnamese processors and exporters submitted their evidence to prove that their products which were not sold at prices less than fair value in the U.S market, because Vietnam is designed by the DOC as a non-market economy country, thus, the DOC obtained data of production in India and Bangladesh for calculating of normal value and dumping margin for Vietnamese frozen fish fillet. Consequently, the DOC concluded that Vietnamese frozen fish fillets were sold at less than its normal value and being dumped in the U.S.

[242] *Ibid.,* p .6.

[243] *Ibid., supra* note 19, p. IV-2.

4.3.2. Whether the Vietnamese product caused material injury to the U.S. catfish industry

In the final phase of the ITC investigation, it concluded that because *Tra* and *Basa* products and the U.S catfish are used interchangeable.[244] Therefore, the imports of Vietnamese catfish caused material injury to the U.S catfish industry. However, this argument is completely contradicted with the early statements made by members of Congress and the CFA when they lobbying to pass the 2002 Farm Bill with the regulations in favor of the CFA on using the term "catfish". It is important to noted that under the U.S antidumping law, if the *Basa* and *Tra* fish were not considered similar to catfish, not directly compete with the domestic product concerned, then it becomes more difficult to prove that increased imports of the subject fish are harming the US catfish industry.[245]

Furthermore, the ITC stated that there was a huge volume of the subject products imported to the U.S from 12.5 million pounds in 2000 to 26 million pounds in 2001 and 36 million pound in 2002. Besides, the ITC indicated that the market share of the subject imports grew from 8.4 percent in 2000 to 19.6 percent in 2002, while the domestic like product's market share dropped from 90.7 percent in 2000 to 80.1 percent in 2002.[246] Yet, as earlier noted, the DOC and ITC determined the subject products under their investigation not only frozen catfish fillets, but also other frozen fish fillets, thus, if only the frozen catfish fillets were to be investigated. By this reason, if the ITC counted the volume of only frozen catfish fillets, its conclusion were to be different, and thus, the actual volume and value of Vietnamese frozen catfish fillets exported to the U.S market were as follows:

Figure 4.3. Volume and value of Vietnamese frozen fish fillets exported to the U.S from 2000-2002

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[244] *Ibid.*, p. 12.

[245] Pho H. Huynh. 2002. *The catfish war: U.S, Vietnam and trade dispute over catfish. Available at* http://ibrarian.net/navon/paper/ho_H__Huynh_THE_CATFISH_WAR__US__VIETNAM_AND_TRAD.pdf?paperid=6027004, accessed May 16, 2016.

[246] *Ibid., supra* note 19, p. 12.

	1999	2000	2001	2002
Volume (million pounds)	1.99	7.03 (ITC = 12.5)	17.12 (ITC = 26)	9.61 (ITC = 36)
Value (US$)	4,052,524	10,695,974	21,509,704	12,395,859

Source: National Marine Fisheries Statistics[247]

It is worth underlining that, the decision of DOC did not distinguish the injury caused by the dumped imports from Vietnam and the injury was originated from the U.S. catfish industry itself. To support this argument, Singh (2011)[248] and Josupeit (2007)[249] illustrated that the main reason to cause the U.S. catfish industry to be weak was the decline of its enterprises profits and the decision of farmers to grow agricultural crops rather than catfish. The decreased income was mainly because of decreasing real price and the increase of production costs. The U.S. Embassy in Vietnam also concluded "*the Embassy does not believe there is evidence to support claims that Vietnamese catfish exporters to the U.S are subsidized, unhealthy, undermining or having an injurious impact on the catfish market in the U.S.*"[250]

4.3.3. Whether the determination of the DOC on Vietnam's economy status based on reasonable grounds

After examined the economy and policy at Vietnam, the DOC concluded that they would treat Vietnam as a non-market economy country based on these grounds:

[247] *Ibid., supra* note 11.

[248] *Ibid., supra* note 19.

[249] Helga Josupeit. 2007. *The USA is still the world's largest producer of catfish, but production is decreasing steadily. Available at* http://www.thefishsite.com/articles/373/catfish-market-report-december-2007/, accessed December 13, 2015.

[250] *Ibid.*

"*The Vietnamese currency, the dong, is not fully convertible, with significant restrictions on its use, transfer, and exchange rate. Foreign direct investment is encouraged, but the government still seeks to direct and control it through regulation. Likewise, although prices have been liberalized for the most part, the Government Pricing Committee continues to maintain discretionary control over prices in sectors that extend beyond those typically viewed as natural monopolies. Privatization of SOEs and the state dominated banking sector has been slow, thereby excluding the private sector from access to resources and insulating the state sector from competition. Finally, private land ownership is not allowed and the government is not initiating a land privatization program*."[251]

However, in the letter that the U.S Embassy at Vietnam sent to the ITC, dated July 16 and July 26, 2002, stated that "*a majority of exporters of the subject product from Vietnam are private enterprises, and are free to set prices and market production and trade decisions*".[252]

Moreover, on the side of Vietnam's supporters, they argued that[253] (i) the *dong* is freely to convert to other currencies like Kazakhstan's status which is recognized by the DOC as a market economy; (ii) Vietnam's labor code set out the principle of free bargaining between employees and employers at or above the minimum wage and guarantees labor mobility; (iii) the Foreign Investment Law[254] had been amended to continue to attract foreign investment and ensure that foreign investors shall be treated in the same ways with Vietnamese investors, and the government has reduced license requirements, sped up approvals and taken incremental steps to reduce land costs and leases, 100-percent foreign-owned operations are allowed in most industries; (iv)

[251] U.S Department of Commerce. *Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status*. Available at http://ia.ita.doc.gov/download/vietnam-nme-status/vietnam-market-status-determination.pdf, accessed May 16, 2016.

[252] *Ibid., supra* note 19, p. V-1.

[253] *Ibid., supra* note 252.

[254] By July 1, 2005, Vietnam National Assembly issued the Investment Law (amended in 2009, 2011), which regulates the basis rule that there is no discrimination between national and foreign investors.

Vietnam guarantees and protects private property rights, has recognized the equality of the private and state sectors, and has removed the leading role of State-Owned Enterprises ("SOEs"); (v) Land use rights are tradable commodity, the land-use rights' holders are permitted to use, transfer, convey, inherit, and lease the land, and may use the land as collateral for loans. The prices of land-use rights are controlled by the market rules.

It is worth emphasizing that the Vietnamese government fixes prices only in natural monopolies and regulates prices in other products i.e., gasoline, metals, cements, and paper, but these regulated prices are often adjusted to reflect costs. Besides, energy, water, and other factors of production are available at rates largely determined by supply and demand.[255]

To support Vietnam, Adam McCarty (2003)[256] argued that there is not the non-market economy country, except the South of Korea; he also indicated that the present DOC's definition lacks precision, measurable criteria, and explicit weighting of variables. His study also proved that Vietnam fulfills qualify for a market economy status when comparing with other recognized market economies countries such as Bangladesh, India, Russian Federation, France and so on.[257] Furthermore, U.S and other international companies operating in Vietnam also provided written comments in support of Vietnam's market economy status such as Citibank, Unilever, Cargill, American Standard, New York Life International, Vedan, to name but a few.

It should be noted that when Vietnam accessed the WTO in 2006,[258] Vietnam committed that it will be treated as a nonmarket economy country until December 31, 2018, if it could not establish as a market economy country before that due. In

[255] U.S Department of Commerce. *Comments on the Department's consideration of the market economy status of Vietnam. Available at* http://ia.ita.doc.gov/download/vietnam-nme-status/comments/wfg/wfg-vietnam-gov-nme-status-cmt.pdf, accessed May 16, 2016.

[256] *Ibid., supra* note 39.

[257] *Ibid.*

[258] WTO. *Accession of Vietnam - Report of the Working Party on the Accession of Viet Nam*. WT/ACC/VNM/48**,** October 27, 2006, para. 255. Available at https://docsonline.wto.org/dol2fe/Pages/SS/DirectDoc.aspx?filenamedoc&, accessed March 10, 2016.

addition, regarding anti-dumping and countervailing issue, in the Accession of Vietnam - Report of the Working Party on the Accession of Viet Nam regulates as follows:

"*…In determining price comparability under Article VI of the GATT 1994 and the Anti-dumping Agreement, the importing WTO Member shall use either Vietnamese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam based on the following rules: (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Vietnamese prices or costs for the industry under investigation in determining price comparability; (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product*."

Although the Vietnamese government and its supporters have proved a lot of evidence to argue that Vietnam should be treated as a market economy country, the U.S government is still designed Vietnam as a non-market economy country. To date, after the DOC issued the final results of the second sunset review and the tenth Administrative review on certain frozen fish fillets from Vietnam, the DOC concluded that such antidumping duty shall remain in effect until further notice (see Figure 1.2).

4.4. Are the U.S. anti-dumping measure on Vietnamese catfish consistent with the AD Agreement?

According to the Anti-dumping Agreement, there are three requirements that the investigation authorities have to prove in order to determine whether or not impose anti-dumping duties can be imposed on the subject imports:[259] (i) whether the imported product in question are being, or likely to be, sold at prices less that its

[259] Anti-dumping Agreement Article 2.2 and Article 3.

normal value; (ii) whether the subject merchandise caused or threaten to cause material injury to the domestic industry; and (iii) whether there is a causal link between the "dumping" and "material injury" regarding the imports under investigation.

First of all, because Vietnam is treated as a non-market economy country by the DOC; thus, the DOC does not use the prices of factors of production in Vietnam when it calculating the normal value of Vietnamese catfish, and as a result, the DOC conclude that *Tra* and *Basa* fish are sold at prices less than fair value. In other words, the first requirement is met. Secondly, the ITC stated that frozen fish fillets from Vietnam are being caused material injury to the U.S catfish industry. Although both the DOC and ITC indicated that the subject products are *Tra* and *Basa* frozen fillets, they determine that the scope of their investigation includes not only "frozen catfish fillet" but also three other frozen fish fillets. By doing that, the ITC added the volume of import of all three subject products above together with *Tra* and *Basa* products and concluded that the volume of the subject imports increased significantly and caused material to the U.S catfish industry. This determination of the ITC is inconsistent with the Article 3.1 and 3.2 of the AD Agreement. It is worth noting that the Appellate Body in *EC – Bed Linen (2003)* emphasized that "*there must be an exclusion of the volume and effect of imports that are not dumped in investigation*". Additionally, when determined the injury of the affected domestic industry, the ITC was not examined all other disadvantaged factors of the domestic industry and distinguished which adverse effect come from the domestic industry itself, which come from the subject imports. Lack of objective evaluation of the injury, the ITC investigation violates the Article 3.4 and 3.7 of the AD Agreement. Last but not least, based on earlier analyzed, the determination of the subject imports and the "material injury" were not objectively conducted, thus, the conclusion that frozen catfish fillets from Vietnam are being sold at price less that its normal value and caused material injury to the U.S catfish industry which is not based on convincible grounds, and the antidumping measures imposed on Vietnamese catfish are actually protectionist policy of the U.S.

In short, this case has passed the 11th Administrative Review, and the DOC held that such antidumping duties are still in effect until further notice. This case occurred when Vietnam was not a WTO member, and it is an invaluable lesson for Vietnam when it participates in international market.

CHAPTER 5

THE CATFISH DISPUTE ON SANITARY AND PHYTOSANITARY

Basing on the SPS Agreement, this chapter analyzes the arguments of both sides in this dispute as well as the U.S. Farm Bill in order to indicate that whether the Section 12106 of the U.S. 2014 Farm Bill is conformity with the SPS Agreement and the GATT 1994 or not.

5.1. Overview on the Sanitary and Phytosanitary Agreement

To protect life or health of human, animal and plant, the SPS Agreement encourages WTO Members to apply pertinent international standards, guidelines and recommendation, where they exist.[260] Besides that, this Agreement also permits Members to set their own SPS standards; yet, such measures shall be based on scientific principles[261] and not be applied in a manner that would cause discrimination and adverse effect on international trade among the WTO members.[262] Additionally, in the circumstance that a country member concludes that the pertinent existed international standards are not sufficient to protect the life or health of human, animal and plant in its territory, such member country can apply higher measures than the normal recognized international standards[263] if there is a scientific justification which based on an examination and evaluation of available scientific information.[264]

It should be noted that in the extent that there is lack of relevant scientific evidence, a member country, in an objective assessment of risk, may temporary apply SPS measures on the ground of available relevant information, including the existing measures from pertinent international organizations and other WTO members and

[260] WTO. **Understanding the WTO Agreement on Sanitary and Phytosanitary Measures. Available at** https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm, accessed November 30, 2015

[261] Article 2.2 of the SPS Agreement.

[262] Article 2.3 of the SPS Agreement.

[263] Article 3.3 of the SPS Agreement.

[264] See Footnote number 2 of the SPS Agreement.

such measures must be reviewed by the applied member within a reasonable period of time.[265]

5.1.2. Vital provisions of the SPS Agreement

5.1.2.1. The application scope of the SPS Agreement

It is important to note that the SPS Agreement, which governs only the SPS, measures that affect direct or indirect to international trade.[266] This Agreement's aim is to protect health and life of two objectives: (i) animal and plant; (ii) human.

Regarding to the first objective, the SPS Agreement is applied to govern any measures which are used by a Member to protect its animals or plants from the risks of entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms. In case of the later objective, this Agreement mentions to any measures which are applied by the Member to protect human or animal life or health from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs.[267] In short, the former objective focuses on the protection of health or life of animal and plant from pests or diseases risks, while the later objective aims to protect the health and life of human and animal from food-borne risks.[268]

Besides that, a SPS measure is deemed to directly or indirectly effect on international trade if such SPS measure is applied to imports. Moreover, the Panel in the *EC – Approval and Marketing of Biotech Products (2006)* pointed out that "*it is not necessary to demonstrate that an SPS measure has an actual effect on trade*".[269] It

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[265] Article 5.7 of the SPS Agreement.

[266] Article 1.1 of the SPS Agreement.

[267] Annex A.1 of the SPS Agreement.

[268] *Ibid., supra* note 98, p. 915.

[269] WTO. *Analytical Index: Sanitary and Phytosanitary Measures. Available at* https://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_01_e.htm, accessed January 20, 2016.

means that in order to eliminate the adverse impact on international trade, the SPS Agreement permits exporting Members may act to against certain SPS measures of importing Members, without requirement of actual impairs.

5.1.2.2. The right to take SPS measures

According to Article XX(b) of the GATT 1994 and Article 2.1 of the SPS Agreement, WTO Members have right to take any necessary SPS measures for protection of human, animal or plant life or health in their territories. Accordingly, in the circumstance that a Member determines that it needs to act to protect the health or life of human, animal or plant in its territory, such Member has autonomous right to apply appropriate SPS measures to imports in concerned, yet, these applied measures must be consistent with the regulations of the SPS Agreement and other WTO Agreements as well. Besides that, WTO Members have to ensure that their SPS measures are applied in an appropriate level of protection and do not create an unjustifiable discrimination between Members.

5.1.2.3. The obligation to comply with the Most-Favoured Nation treatment and National Treatment principles

In order to promote the development and fair competition of international trade, the WTO requires its Members to respect *Most-Favored Nation* treatment (MFN) and *National Treatment* (NT) principles. The Article I of the GATT 1994 regulates that its contracting parties shall ensure their regulations are consistent with the MFN principle. This principle requires if an importing Member grants any benefit, privilege or immunity to a product of a WTO member, the importing Member is required to apply immediate and unconditional such favors to the like product of other exporting Members in its territory.[270] Besides that, Article III of the GATT 1994 requires Members to implement the same treatment on the similar or like product between domestic and imported products. The National Treatment principle means that the imported and domestic product shall be treated in the same way. In other words, a Member shall not apply any measures in which could violate the MFN and NT

[270] Article I(1) of the GATT 1994.

principles, where the same conditions prevail, or create more trade-restrictive than necessary.

To consist with the GATT 1994, the Article 2.3 of the SPS Agreement states that when Members adopt or apply SPS measures in their territories, such "*Members shall ensure that their SPS measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, and not be applied in a manner which would constitute a disguised restriction on international trade*."

The Article 2.3 of the SPS Agreement should be understood that although subject to Article XX(b) of the GATT 1994 and Article 2.1 of the SPS Agreement Members have right to apply necessary SPS measures to protect human, animal or plant health or life in their territories, such measures shall confirm with the MFN and NT principles, not to create a manner in which causes an arbitrary or unjustifiable discrimination between Members, where "*identical or similar conditions prevail*". It is important to emphasize that the Panel in *Australia — Salmon (1998)* stated that the term "discrimination" in the context of the Article 2.3 of the SPS Agreement should be interpreted that it may not only mean the discrimination between *similar* products, but also between *different* products. In that case the Panel explained that the Article 2.3 of the SPS Agreement would be violated if there were a different treatment between Canadian salmon and New Zealand salmon, or Canadian salmon and Australian salmon; a favoritism between Canadian salmon and Australian fish including non-salmonids.[271] It is interesting to note that the "identical or similar conditions" in this sense refers to the *similarity of the risks*, not the products as under other WTO Agreements.[272] Besides that, these SPS measures must not be more trade-restrictive than required. In other words, when there occurs the similar situation that could potentially be harm for the life or health of human, animal or plant, the importing country may apply necessary SPS measures in its territory, but such SPS measures shall not violate the MFN and NT principle, be in an appropriate level of protection, and not create more barriers to trade than required.

[271] *Ibid.*, *supra* note 270, para. 59.

[272] *Ibid.*, *supra* note 98, p. 909.

5.1.2.4. The obligation to base on scientific evidence

The SPS Agreement permits Members to set out their SPS measure in order to protect human, animal or plant life or health in necessary circumstances, however, these SPS measures must be *based on scientific principles and not be maintained without sufficient scientific evidence*, except as regulated in Article 5.7 of the SPS Agreement.[273]

The Article 2.2 is a substantial provision of the SPS Agreement, and it should be emphasized that Members are only permitted to impose SPS measure on imports if their measures are based on scientific principles and such measures must be removed if there are absence of "*sufficient scientific evidence*", except in the circumstance of Article 5.7 of the SPS Agreement.[274]

It is crucial to consider the meaning of the terms "sufficient scientific evidence", and determine whether an evidence is based on scientific principle or not, in the context of the Article 2.2 of the SPS Agreement. To determine the meaning of the term "scientific evidence" the Panel in *Japan – Apples (2003)* concluded that, in the sense of Article 2.2 of the SPS Agreement, these SPS measures "*should be gathered through scientific methods*" and "*scientific evidence may include evidence that a particular risk may occur … as well as evidence that a particular requirement may reduce or eliminate that risk*…."[275] With regard to the term "evidence" the Panel stated "*negotiators could have used the term "information", as in Article 5.7 of the SPS Agreement*".[276] Moreover, the Appellate Body in the *Japan – Agricultural Product II (1999)* held that the "sufficient scientific evidence" must have a rational relationship with the applied SPS measures and the rational link is to be determined on case-by-case basis.[277] In other words, the SPS measures must be adequate supported by the pertinent scientific evidence, which based on risk assessment.

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[273] Article 2.2 of the SPS Agreement.

[274] Article 5.7 of the SPS Agreement deal with the circumstance that the SPS measure is applied without sufficient scientific evidence.

[275] *Ibid., supra* note 270, para. 29.

[276] *Ibid.*

[277] *Ibid.*, para. 30.

5.1.2.5. Harmonized target of the SPS Agreement

As mentioned, each WTO member has the right to set out its own SPS measures with taking account on itself conditions such as living standard, industry interests, geographic and climatic conditions and so on; thus, the SPS measures differ from country to country. In order to eliminate the differences of SPS measures in the international trade context, the Article 3 of the SPS Agreement requires its Members to harmonize SPS measures on "*as wide a basis as possible*", and encourage they base their SPS measures on international standards, guidelines or recommendations, where they exist.[278]

The Article 3 of the SPS Agreement provides three options that its Members may choose to set out their own SPS measures: (i) base their SPS measures on the international standards in terms of Article 3.1; (ii) conform their SPS measures to international standards according to Article 3.2; and (iii) impose SPS measure with higher level of protection than normal recognized international standards under Article 3.3.[279] According to the view of the Appellate Body in *EC — Hormones (1998)*, a measure of Member is considered "based on" international standard if such measure is derived from some, not necessarily all, of the elements of the international standard.[280] Regarding to the second option, if a member's SPS measures are conformed to international standards, such measures shall be deemed as an appropriate level of protection and presumed to be consistent with the SPS Agreement as well as the GATT 1994.[281] In the circumstance that a Member decides to adopt SPS measures that result in a higher level of protection, be deemed as an appropriate level of protection in its territory, there would be a scientific justification[282] that supports its

[278] Article 3.1 of the SPS Agreement.

[279] *Ibid., supra* note 98, p. 910.

[280] *Ibid., supra* note 270, para. 78.

[281] Article 3.2 of the SPS Agreement.

[282] According to the footnote 2 of the SPS Agreement, "there is a scientific justification, if on the basis of an examination and evaluation of available scientific information in conformity with the relevant provision of this Agreement and member concludes that the exist international standards, guidelines or recommendations are insufficient to adopt in its current circumstance."

decision. Additionally, these measures shall not be inconsistent with any other provision of the SPS Agreement. In other words, although, under the Article 3.3 of the SPS Agreement, Member has right to make its own SPS measures with higher standard than normal recognized international standards, its measures must be supported by scientific justification and consistent with other provisions of the SPS Agreement.

As analyzed, because each WTO Member has autonomous right to set out its own SPS measure, the SPS measure will differ from country to country. Hence, in order to encourage international trade as well as eliminate the difference in SPS measures among WTO Members, Article 4.1 of the SPS Agreement requires its Members that if exporting countries objectively demonstrate to the importing countries that their SPS measure achieve the appropriate level of protection of the importing countries, such importing Members shall accept the SPS measures of the exporting Members as equivalent, even if their SPS measures do not similar to those used by other Members, in the case of the same product.

5.1.2.6. Obligation on taking risk assessment

The Article 5.1 of the SPS Agreement which obliges its members to base their SPS measures on a risk assessment when apply such measures to protect human, animal or plant health or life from risks, as an appropriate level in certain circumstances.

Based on the definition of the "risk assessment",[283] there are two types of risk assessment: (i) assessment of risks from pests or diseases; and (ii) assessment of risk from food-borne.[284] Accordingly, the first kind of risk assessment is only conducted to *evaluation of the risk* of the "*entry, establishment or spread of a pest or disease within*

[283] According to paragraph 4 of Annex A of the SPS Agreement, the "*risk assessment*" is defined as "The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs."

[284] *Ibid., supra* note 98. p. 915.

the territory of the importing" country, and also take into account of the associated potential biological and economic consequences. Whiles the aim of the second type of risk assessment is to *evaluate the potential adverse effects* on human or animal health that arise from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.

It is vital to note that, in the context of Article 5.3 of the SPS Agreement, the requirement of *evaluation of economic factors* is only obliged if the SPS measures are applied to protect the importing country *from the risks of pests or diseases*. In contrast, in the extent to protect human or animal health or life from the food-borne risks, the economic factors are not required to examine.

Another issue should be concerned is that a SPS measure is to be deemed as based on a risk assessment in the context of the Article 5.1 of the SPS Agreement, if such SPS measure and the risk assessment have an "*objective relationship*" and that measure must reasonably be related to the risk assessment.[285] Moreover, the Panel in *EC — Approval and Marketing of Biotech Products (2006)* concluded that "in certain circumstances an SPS measure that *reflects a divergent opinion* from the risk assessment could still be considered to be "based on" that risk assessment".[286] It other words, the Appellate Body in *EC – Hormones (1998)* interpreted that a SPS measure could be considered as "based on" risk assessment even though such measure is based on a divergent or minority view rather than mainstream scientific opinion and the Article 5.1 of the SPS Agreement does not require the risk assessment must be obtained from "the view of a majority of the relevant scientific community".[287] Besides that, the Appellate Body in *EC – Hormones (1998)* also indicated that the divergent opinion has to "*come from qualified and respected sources*", of course.[288]

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[285] WTO. *Analytical Index: Sanitary and Phytosanitary Measures*. *Available at* https://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_02_e.htm, accessed January 20, 2016, para. 134.

[286] *Ibid*, para. 136.

[287] *Ibid*, para. 137.

[288] *Ibid.*

5.1.2.7. Determination of the appropriate level of SPS protection

In regards to the determination of the "appropriate level of protection" in the context of the SPS Agreement, the Appellate Body in *Australia – Salmon (1998)* indicated that although there is not any explicit provision of this Agreement that obliges Members to determine how is the appropriate level of the SPS measures, the Appellate Body noted that such obligation implicit in several provisions of this Agreement such as Article 4.1, Article 5.4, Article 5.6 and paragraph 3 of Annex B of the SPS Agreement.[289]

The Article 5.4 and 5.6 of the SPS Agreement, which require Members to take into account the "*appropriate level of SPS protection*", avoid arbitrary or unjustifiable distinctions in the level they consider to be appropriate, and also not create more trade restrictive than required, when they apply SPS measures in their territories. The Article 5.4 of SPS Agreement obliges the Members that they should take into account the overriding target of this Agreement is to eliminate the negative effects of the SPS measures on international trade when they determine the appropriate protection level of SPS measures. The word "*should*" means this provision does not create a mandatory obligation; it just provides a recommendation for the Members. The word "*should*" in this Article 5.4 of the SPS Agreement provision should be read together with other provisions of the SPS Agreement because if this provision were to use the word "*must*", this provision shall be inconsistent with the basis discipline of the SPS Agreement that permits its Members have autonomous right to set out appropriate SPS standards in their territories. Nevertheless, the Members have obligation to ensure that their SPS measures, as it deems to be at appropriate level of protection, shall not cause arbitrary or unjustifiable distinctions or discrimination on international trade as well as not be more trade-restrictive than required. In order to determine whether or not a SPS measure creates "more trade-restrictive than required", the SPS Agreement explains as follows:

[289] *Ibid.*, *supra* note 270, para. 103.

"*[A] measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade*".

It should be noted that the affected exporting Members, not the panel or the panel's scientific experts, will bear the burden to prove "*there is another measure*" and such alternative measure is "*reasonably available*" and "*significantly less restrictive to trade*" than the applied measure.[290]

5.1.2.8. Provisional measures and precautionary principle

It is obvious that there are varieties of novel risks from pests, diseases and food-borne that scientists cannot prove clear evidence to conclude the level of adverse effect of such risks on human, animal or plant health or life as well as on international trade. Therefore, in the circumstance that there is an existing of risk from pests, diseases and food-borne, the members are permitted to promptly apply temporary SPS measures to eliminate or reduce possible harm without waiting for the collection of sufficient scientific evidence.

Article 5.7 of the SPS Agreement states that "in cases where relevant *scientific evidence is insufficient*, a Member may *provisionally* adopt sanitary or phytosanitary measures on the *basis of available pertinent information* […] In such circumstances, Members *shall seek to obtain the additional information necessary* for more *objective assessment of risk* and *review* the sanitary or phytosanitary measures *within a reasonable period of time*."

Although the basic principle of the SPS Agreement requires its members must base their SPS measures on (sufficient) scientific evidence, in some circumstances, there is an exception for members to adopt SPS measures without the support of sufficient scientific information. It should be noted that, however, members are not freely permitted to apply any SPS measures, they just have right to adopt provisional

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[290] *Ibid., supra* note 98, pp. 923-924.

measures in such certain circumstances. Additionally, these SPS measures should be based on "*the basis of available pertinent information*" and "*a more objective assessment of risk*", which could gather from the relevant international organizations as well as other members.

When a Member fall into the circumstance in the Article 5.7 of the SPS Agreement, that Member is required to "*seek to obtain the additional information necessary"* in order to make sure that its risk assessment is objectively conducted. In this case, the member is also required to take risk assessment and there must also be a "*rational relationship*" between the SPS measures and risk assessment. The risk assessment may be based on divergent or minority opinion, yet, the "*pertinent information"* or "*additional information*" must be gathered from the "*qualified and respected sources*".[291]

To comply with the principle of the SPS Agreement is that the SPS measures shall only be applied in certain circumstances to protect the health or life of human, animal or plant from the risks of pests, diseases and food-borne, in an appropriate level of protection and not be "*more trade-restrictive than required*"; the Article 5.7 of the SPS Agreement also states that its Members, in such circumstances, shall review the SPS measures "*within a reasonable period of time*". There are two issues should be examined with this requirement: (i) the SPS Agreement does not and will not regulate a specific period that the member has to review its SPS measure, not like similar provisions in other WTO Agreements, because the risks and SPS measures which differs in case-by-case, thus, it is inappropriate to give certain period of review which will be applied for all situations; (ii) this provision has another important mean is that because the applied SPS measures are temporary adopted in the very specific circumstance, thus, "*within a reasonable period of time*" the member must review its measures in order to examine whether or not such SPS measures are still in "*appropriate level of protection*" and consistent with other provisions of the SPS Agreement.

[291] *Ibid., supra* note 286, para.137.

This issue may be more interesting in the extent that an importing country that could not collect sufficient scientific evidence of a risk on imports, but such importing State would like to apply SPS measure on the subject imports and based its argument on Article 5.7 of the SPS Agreement. Could such the importing country do it? There may be two conditions that a WTO Member has to fulfill if it wants to apply a SPS measure on imports in the extent of the Article 5.7 of the SPS Agreement. *First of all*, the SPS measure in concerned must not be a permanent measure and such measure must be based on "the basis of available pertinent information". It means that the SPS measure in question could only be applied in a certain period of time and there must be evidence in result of relevant scientific information that the applied SPS measure may have an efficient result in reducing or eliminating the risk from imports. *Lastly*, the Article 5.7 of the SPS Agreement requires that "within a reasonable period of time" the importing country in question must review its SPS measure in order to evaluate the effective of the measure and examine whether or not such SPS measure is still an appropriate measure.

In short, a WTO member shall only be permitted to apply a SPS measure on the import if the risk assessment concludes that there exists a risk from the imports and the SPS measure in concerned, which may effectively help to avoid or eliminate the risk, if not such importing country's SPS measure may be inconsistent with the SPS Agreement.

5.2. The U.S.'s SPS measures on catfish (*Siluriformes*)

Based on the claims of some U.S. Congressmen and Senators as well as lobby of the CFA, the U.S. House of Representatives passed some laws, especially the three versions of the U.S. Farm Bill, in which have strongly effect on the exporting of catfish from Vietnam and other countries such as Thailand, Bangladesh, Indonesia etc. to the U.S. market.

Subject to the Annex A.1(b) of the SPS Agreement, any measure is deemed as a SPS measure if such measure is applied to protect human or animal life or health from risk of arising from additives, contaminants, toxics or disease-causing organisms in

foods, beverages or feedstuffs. In this circumstance, the supporters of the inspection program on catfish (*Siluriformes*) argue that the aim of this program is to protect the U.S. consumer from the risk of Salmonella disease in *Siluriformes* fish. By this reason, it could be concluded that the inspection program on catfish is a SPS measure and governed by the SPS Agreement.

Before the enforcement date of the 2008 Farm Bill, both domestic and imported seafood were inspected by the FDA, and since the labeling campaign and anti-dumping measures could not help the CFA recover the catfish market share, it conducted an advertising campaign that imported catfish were not safe enough for eating because they contain pesticide residues, antibiotic, chemical etc.; and lobbied the Congressmen to adopt a stricter inspection program on imported catfish. On June 18, 2008, the 2008 Farm Bill was passed and *Section 11016(b)* of this Bill amended *Section 601(w)* of the Federal Meat Inspection Act shifted inspection of program of catfish (*Ictaluridae*) from the FDA to the USDA.[292] However, the inspection program of catfish under the 2008 Farm Bill was not come into enforce because the objective behind this Bill was to eliminate the volume of imported *Basa* and *Tra* fish from Vietnam had not reached. The reason was that the term "catfish" is only used for fish of the family *Ictaluridae*, not *Basa* and *Tra* fish from Vietnam. It means that the USDA just inspected fish of the family *Ictaluridae*, beside meat, poultry and eggs; other seafood and fish of the order *Siluriformes* were still inspected by the FDA, at that time. By this reason, the CFA continued to conduct a lobby campaign to amend the 2008 Farm Bill in order to shift all fish of the order *Siluriformes* to the inspection program of the FSIS – a subdivision of the USDA. As a predicted result, the 2014 Farm Bill was enacted on February 7, 2014 and *Section 12106* of this Bill amended Section 601(w) of the FMIA, which replaced the term "*catfish*" by "*fish of the order Siluriformes*". It means all *Siluriformes* fish are inspected by the FSIS by March 1, 2016, including *Basa* and *Tra* fish from Vietnam, of course.

[292] Inspection program of FDA is sporadic inspection which requires to inspect "o*nce per year or more*", while FSIS requires inspection "*once per shift*". It means that, the FSIS's inspection program is stricter than the FDA's.

It is vital to note that *Section 606(b)* of the U.S. Federal Meat Inspection Act of 1906 (FMIA) regulates that the USDA not only take examine, but also inspect on the quality of the *Siluriformes* fish. In doing so, it shall also "*take into account the conditions under which the fish is raised and transported to a processing establishment*". Section 606(b) of the FMIA is detailing by Chapter XII of the 80 FR 75589 and the 9 CFR *(9 CFR 532.1(b5) and 534).* Accordingly, Chapter XII of the 80 FR 75589, which instructs to conduct sampling and testing of *Siluriformes* fish and products from these fish to ensure that these products are not adulterated or misbranded.[293] Additionally, by March 1, 2016, establishments of other countries which are exporting fish and fish product of *Siluriformes* to the U.S. and wish to continue to do so, such exporting countries are required to provide written documents to identify which establishments currently export and will continue to export *Siluriformes* fish and products to the U.S. Besides, catfish exporting countries must also submit written documents to illustrate that their countries have regulations to govern the growing and processing of *Siluriformes* fish, and must ensure that these rules comply with the FDA's regulations.

It should be underlined, however, that these documents abovementioned will not be used to evaluate the equivalence of foreign inspection system with the U.S system, these foreign documents are just employed to prove such fish and products of *Siluriformes* of exporting countries which meet the U.S regulations.[294] It is vital to emphasize that if a catfish exporting country, during the 18-month transitional period by March 1, 2016, does not submit the required documents to the FSIS within a given time, fish and products of *Siluriformes* from such country will be refused to import into the U.S. Moreover, by March 1, 2016, all imported *Siluriformes* fish will be re-inspected by the FSIS[295] and *Section 533.5 of 9 CFR* regulates that *Siluriformes* fish and meat are applied the same processing establishments.

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[293] 80 FR 75589, p. 75607

[294] *Ibid.*

[295] 80 FR 75589, Chapter XII, p. 75608.

Another important regulation under the 80 FR 75589 is that if a catfish exporting country does not submit a request for evaluating the equivalency and provide evidence to illustrate that its system is equivalent with the U.S system after the end of the 18-month transitional period, by 1st September 2017, the FSIS will not permit to import fish and products of *Siluriformes* from such country. In other words, by September 1, 2017, in order to export *Siluriformes* fish to the U.S, exporting country has to get recognition of the FSIS that the inspection system and relevant requirements of such country are equivalent to FSIS's.[296]

In brief, there may be four vital regulations under the U.S laws which pertinent to trading of *Siluriformes* products: (i) only fish of the order *Siluriformes* are subject to the jurisdiction and inspection of the USDA, other seafood products are still inspected by the FDA; (ii) in order to continue to export *Siluriformes* fish and products to the U.S; catfish exporting countries must submit relevant documents as required by the FSIS in the given time and their inspection system must get the recognition of equivalency with the U.S.'s system by the FSIS; (iii) instead of controlling the quality and safety of food, the U.S. will control also farming and processing process in catfish exporting countries; and (iv) although exporting countries get recognition of equivalency of their inspection program with the U.S, their products will be re-inspected by the FSIS before selling in the U.S. market.

5.3. The arguments of both sides on the catfish dispute on SPS measures

5.3.1. The arguments on the side of the U.S Catfish Farmer Association (CFA)

The sharp increase in the quantity of Vietnamese catfish in the U.S. market got attention by the U.S. catfish industry; therefore, the CFA acted to protect its home market. The CFA argued that imported catfish was raised in polluted water and have been found to contain illegal antibiotics and harmful substances such as pesticides, fungicides, and risk from the Salmonella bacteria.[297] In addition, Representative

[296] *Ibid.*

[297] James Moreland. *Vietnamese Fish are Unsafe for American Consumption, but the WTO Won't Let Us Protect Ourselves. Available at* http://economyincrisis.org/content/vietnamese-fish-are-unsafe-for-american-consumption-but-the-wto-wont-let-us-protect-ourselves, accessed December 11, 2015.

Marion Berry from Arkansas even referred to the danger that Vietnamese catfish was contaminated by lingering Agent Orange sprayed by the U.S. during the Vietnam War.[298] By these reasons, the CFA and its supporters argue that it is necessary to apply a stricter inspection program on catfish (*Siluriformes*) in order to protect health of the U.S. consumer.

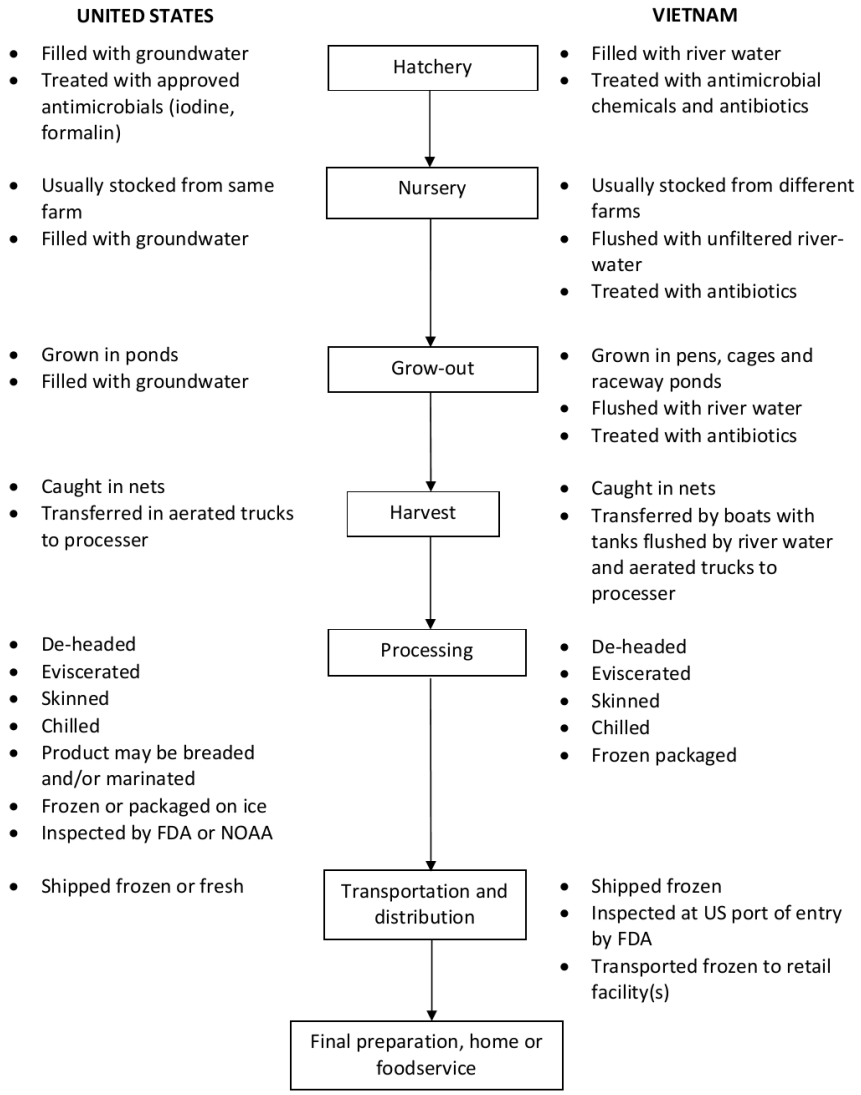
In short, there are three major aspects that the CFA and its supporters assume that it is necessary to apply a new inspection program on *Siluriformes* fish: (i) the difference of catfish production and processing between the U.S. and Vietnam; (ii) Vietnamese catfish was raised in polluted water and contaminated metals, chemical, antibiotics, pesticide residues, especially risk of Salmonella bacteria; and (iii) Vietnamese catfish was contaminated by lingering Agent Orange.

5.3.1.1. The argument of the CFA on the production and processing of catfish

The CFA argued that there was a big gap between the production and processing steps of catfish in the U.S. and Vietnam, and they showed the chart to support their argument as follows (Figure 3.1.)

Figure 5.1. Comparison on production and processing steps of catfish between the U.S. and Vietnam

[298] Ibid., supra note 114, pp. 219-256.



Source: Exponent-Center for Chemical Regulation and Food Safety (2010)[299]

According to the above chart, the CFA argued that their catfish are raised under qualified conditions. The catfish production begins with fertilized eggs and then hatching in tanks, after that such fingerlings are moved to nursery ponds. The ponds are filled with well water, which may minimizes ground infiltration and contamination. The U.S. catfish farmers use feeds in which consist of plant protein pellets. They assume that their processing which could minimize dioxin, heavy

[299] Safecatfish. *Exponent-Center for Chemical Regulation and Food Safety - Catfish Risk Profile. Available at* http//www.safecatfish.com/wp-content/uploads/.../Catfish_Risk-_Report.pdf, January 20, 2016

metals, pesticides and so on. The catfish are harvested after reached 18 to 36 months and average one to two pounds (appropriate 0.45kg – 0.9kg) live weight. Only approved chemical as well as antibiotics are employed during the growing of catfish. More than 50 percent of processed catfish are frozen and sold to both retail stocks and food service industries market.[300]

Based on the first-hand data on catfish processing that is gathered by this author at Thot Not district, Can Tho city and survey of Thuan (2015),[301] there are some issues from the above chart should be analyzed. In the "*hatchery step*", the only difference between the two countries is that the source of water. Accordingly, because the benefit of geography, the Vietnamese catfish growers who use river water to fill their ponds, while the U.S farmers who use groundwater, during the growing period. This difference also indicates that the U.S. farmers will bear more cost production than their competitors will. In the next step (*nursery*), although there are several of sources as well as quality of fingerlings in Vietnam, it may not true when the CFA concluded that in this step the seedlings were "*usually* stocked from different farms" and "flushed with *unfiltered* river water". Because of this stage, the fingerlings are still very small and easy to be affected by unsuitable external conditions such as quality of water or chemicals; therefore, the water is *usually filtered* in carefully. In the third step (*grow-out*), as mentioned, since the advantages of geographical and climatic conditions, catfish is mainly raised in ponds, which are located near main rivers in the Mekong Delta Vietnam. However, before using the river water, such water is prior treated to ensure that it fulfills qualify for farming, and the farmers are required to have at least three ponds with similar area, only one pond is used for rearing, at least two ponds are used for treating water before and after farming.[302] Since the differences in geographical and climatic conditions, the chemical as well as

[300] *Ibid.*

[301] *Ibid., supra* note 58, p. 25.

[302] If there are some farmers who do not have enough areca as required, they may incorporate with their neighbor, if not their products are only sold in domestic market, and in this circumstance, they may face with a very high environment tax and fee (personal communication).

antimicrobial agents are employed in Vietnam may not be similar in the U.S. employed, definitely.

In the *harvest and processing step*, there is an obvious difference between the two farming system is that, in the processing step, Vietnamese catfish was not inspected by the U.S. Food, Drug and Administration (FDA) or the U.S. *National Oceanic and Atmospheric Administration* (*NOAA*) as their competitors in the U.S. Yet, this difference is not still exist because the U.S. 2014 Farm bill has come into enforce by March 1, 2016, and this Act expands the power of the U.S. government to inspect the agriculture products at the farming and processing stages in exporting countries, if such exporting countries wish to continue export their products to the U.S. market. Last but not least, it is worth noting that the Vietnamese processing plants or exporters inspect not only the quality, chemical as well as pesticides residues in the finished catfish products, but they also send the samples to an institute or agency in charge for objective testing before exporting.[303] In brief, there are just some minor differences in two nations regarding to the production and processing system and such differences could not lead to a big gap between the qualities of Vietnamese and U.S. catfish.

5.3.1.2. The argument on the safety of Vietnamese catfish

The CFA usually claims that the Vietnamese catfish are unsafe for consumption and they lobbied to apply a more stricter regulation on inspection of Vietnam products and have try to prove as much evidence as possible to support their argument that domestic catfish are safer and better than imports.

Minh et al (2006)[304] concluded that they had detected 20 catfish samples in wild, 5 samples of pond-raised catfish, and 5 samples of commercial fish feeds, in Mekong Delta Vietnam, were contaminant, but in low levels. In 2007, Dr. Lumpkin, Deputy

[303] This information is gathered by personal communication between this author and people in charge of Binh An Seafood JSC (Bianfishco) in January 23, 2016.

[304] Minh et al. (2006). *Contamination by polybrominated diphenyl ethers and persistent organochlorines in catfish and feed from Mekong River Delta, Vietnam. Available at* http://onlinelibrary.wiley.com/doi/10.1897/05-600R.1/full, accessed January 26, 2016.

Commissioner of the FDA stated that the pesticides residues, overused of antibiotics or contaminants in catfish could cause potential harmful to human health.[305] In the same year, in 2007, the FDA had random tested forty-five samples of domestic fish/shellfish/other aquatic products. The result of this test concluded that 15.6 percent of domestic samples had been detected with high residues.[306] It is worth noting that the FDA had tested 98 samples of catfish from Vietnam and detected there were 12 samples, which contained unpermitted drugs (i.e. fluoroquinolones, malachite and crystal violet), in the period 2006 – 2007.[307]

Orban et al. (2008)[308] conducted a study for evaluation of the nutritional quality and safety aspects of Vietnamese catfish in Italy and finally indicated that there were "*the lower levels of moisture and the higher levels of nutrients were found in fillets purchased*" and "low cholesterol content".[309] However, as regards minerals, Vietnamese catfish contained "*variable but high sodium content, probably due to the polyphosphates added"* and "*magne-sium levels were found to be lower than in other fish species studied*".[310] Consequently, Orban (2008) also concluded that the quality of samples analyzed was *good at the residual levels* of mercury, organochlorine pesticides and polychlorinated biphenyls. However, he has a precautionary note that people should consider the quality of the aquatic environment because through his study the *contamination level of the fish is clearly linked to this factor*.[311]

[305] Lumpkin, M.M. *Safety of Chinese imports. Available at* http://www.fda.gov/NewsEvents/Testimony/ucm110728.htm, accessed January 26, 2016.

[306] *Ibid., supra* note 300, p. 14.

[307] *Ibid., supra* note 300, p. 16.

[308] Elena Orban et al. (2008). *New trends in the seafood market. Sutchi catfish (Pangasius hypophthalmus) fillets from Vietnam: Nutritional quality and safety aspects.* Food Chemistry Journal, Vol. 110 (2008), pp. 383-385. Available at http://www.sciencedirect.com/science/article/pii/S0308814608001787, accessed January 26, 2016.

[309] *Ibid,.* p.387.

[310] *Ibid.,* p.388.

[311] *Ibid.,* p.389.

It should be noted that, the delegation of the DOC and the CFA went to Vietnam with the finding-mission, and the trip's outcome was not as their expected "*we thought we would find them growing fish in polluted water and processing them in crude plants*," says one processor who went on the trip. "*But that's not what we found. We came back scared to death*".[312] If the U.S. government were to find real (sufficient) evidence that Vietnamese catfish were unsafe and could not fulfill qualify to sell in the U.S. market, did they permit to import Vietnamese catfish? The answer is explicitly that they would not be generous to do it.

With respect to the risk from Salmonella bacteria, the USDA and their supporters argue that they strongly concern on the risk of *Salmonella* bacteria, thus, it is necessary to put all fish of the order *Siluriformes* under the USDA's jurisdiction for inspection of such bacteria, while all other seafood are still inspected by the FDA. They also assume that the new inspection program under the jurisdiction of the USDA will help to protect the U.S consumers' health and prevent potential risk from such bacteria. By these arguments, the 2008 Farm Bill shifted the inspection program of catfish (*Ictaluridae*) to the USDA (FSIS), and later on the 2014 Farm Bill regulates that the USDA will inspect all fish of the order *Siluriformes* by March 1, 2016.[313]

However, it is important to note that *Salmonella* outbreaks are commonly associated with eggs, meats, poultry, fruits and vegetables etc. Additionally, there are several of foods that are most likely to contain *Salmonella* such as raw or undercooked eggs, raw milk, contaminated water, and raw or undercooked meats, not catfish.[314] Besides, in the Risk Assessment of Catfish in 2015 which was conducted by the FSIS indicated that "*Salmonella illnesses attributable to Siluriformes are rare*

[312] Chef's resources. *Is Vietnamese Swai and Basa safe*. Available at http://www.chefs-resources.com/seafood/finfish/swai-fish-information-recipes/is-vietnamese-swai-and-basa-safe/, accessed December 27, 2015.

[313] 80 FR 75589, p. 77590.

[314] Foodbornillness. *Salmonella. Available at* http://www.foodborneillness.com/salmonella_food_poisoning/, accessed February 24, 2016

and in the past 20 years there has been only one suspected outbreak reported."[315] Moreover, this Catfish Risk Assessment also concluded that it was impossible for the FSIS to illustrate the risk of *Salmonella* on imported catfish if their statement based on the prevalence data of *Salmonella* found on imported *Siluriformes* fish, thus, the FSIS decided to conclude that the potential risk of *Salmonella* disease on imported products are the same as the prevalence of Salmonella that has been found on domestic products.[316] Hence, there is an unfair and inappropriate treatment for fish and products of the order *Siluriformes*.

Moreover, catfish is definitely not poultry, therefore, there must be a different inspection program between catfish and poultry, but the FSIS applies the inspection program of poultry for *Siluriformes* fish in both risk assessment procedures[317] and inspection system.[318]

In short, although the FDA, USDA and their supporter have conducted a lot of studies and gathered pertinent scientific information in order to prove that Vietnamese catfish are unsafe, the outcome of those researches were not as their expected as abovementioned.

5.3.1.3. The argument on the issue whether Vietnamese catfish contaminate Agent Orange (Dioxin toxic)

As mentioned, the Congressman Marion Berry from Arkansas suggested that the Vietnamese catfish were not good enough to eat because of these fish were contaminated by lingering Agent Orange (Dioxin) sprayed by the U.S. during the

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[315] The *Food Safety and Inspection Service - DOC. Assessment of the Potential Change in Human Health Risk associated with Applying Inspection to Fish of the order Siluriformes,* January 2015, p. 70. *Available at* http://www.fsis.usda.gov/wps/wcm/connect/63387be5-ca8e-442d-b047-f031f29a8a47/Silurifomes-RA.pdf?MOD=AJPERES, accessed February 11, 2016.

[316] *Ibid.,* p. 54-55.

[317] *Ibid.,* p.10.

[318] Section 533.5 of the 9 CFR (*Ibid.,* 80 FR 75589, p. 77621)

Vietnam War.[319] Neither Congressman Berry nor his supporters could prove any evidence that the level of Dioxin in catfish from Vietnam exceeded the normal accepted level. By purchasing and analyzing twenty-two exported Vietnamese food samples,[320] Schecter et al. (2003) concluded that "*at this time… no current data exist on TCDD (Tetrachlorodibenxo-p-dioxin) levels from food in Vietnam*".[321] Moreover, this study also illustrated that all dioxins and other congener levels were low in the range of usual background contamination for developed countries like the United States, Germany and Canada. Additionally, two other studies also indicated that the dioxin levels in recent pooled and individual American fish samples were similar in range to those observed in exported Vietnamese food.[322]

It can be objectively concluded that the arguments of the CFA on the sanitary conditions of the production and processing of Vietnamese catfish may true in some aspects. The environment conditions of the catfish industry in Vietnam are rather low; yet, there is no reliable and clear scientific evidence show that catfish products from Vietnam are unsafe and "not good enough for American dinner". Moreover, the United States Embassy in Vietnam also rejected the sanitary claim of the CFA, a report of the U.S. Embassy in Vietnam reported that there was no clear evidence that the quality of Vietnamese catfish is lower than the U.S. catfish[323] and the U.S.

[319] New York Time. *The Great Catfish War*. *Available at* http://www.nytimes.com/2003/07/22/opinion/22TUE1.html, accessed January 27, 2016.

[320] Nineteen samples of Vietnamese catfish were purchased in the United States; three other samples (i.e. fish paste, chicken eggs and dried fish) were purchased in Lao PDR.

[321] Arnold Schecter, M. P., Rainer Malisch and John Jake Ryan. (2003). *Are Vietnamese Food Exports Contaminated with Dioxin from Agent Orange*. Journal of Toxicology and Environmental Health, Part A, 66:15-16, 1391-1404. doi:10.1080/15287390306416. *Available at* http://www.ncbi.nlm.nih.gov/pubmed/12857631, accessed November 2, 2015.

[322] Arnold Schecter, P. C., Kathy Boggess, John Stanley, Olaf Päpke, James Olson, Andrew Silver and Michael Schmitz. (2001). *Intake of dioxins and related compounds from food in the U.S. population*. Journal of Toxicology and Environmental Health, Part A, 63:1–18. *Available at* www.ejnet.org/dioxin/dioxininfood.pdf, accessed November 2, 2015.

[323] Washingtonpost. *When Is a Catfish Not a Catfish? Available at* https://www.washingtonpost.com/archive/politics/2001/12/27/when-is-a-catfish-not-a-catfish/bc4bef3a-36db-4c15-bf8d-a3446578e7e9/, accessed on October 12, 2015. See also John McCain. *Floor Statement of Senator John McCain on Agriculture, Conservation, and Rural Enhancement Act of 2001. Available at* http://www.mccain.senate.gov/public/index.cfm/floor-statements?ID=03298560-ea4e-30d8-d79d-cb2761909b33, accessed October 30, 2015.

customers like Vietnamese catfish by its taste, quality and competitive prices in comparison with the U.S domestic catfish.[324]

5.3.2. The arguments of the Vietnam Association Seafood Exporters and Producers (VASEP)

On the side of the VASEP, it had submitted a lot of their own documents and relevant scientific evidence to the U.S. government to prove that Vietnamese catfish are safe and fulfill qualify to sell in the U.S. market as well as other markets. Nevertheless, according to study of Thuan (2015)[325] with 262 samples and this author with 25 samples, there are some issues on the cultivation process and processing of catfish in Vietnam (Can Tho city and An Giang province).

First of all, the quality of fingerlings is various and not easy to check the origin. Although there are a lot of regulations that govern the quality of producing and trading of fingerlings,[326] such regulations do not work well in practical. Additionally, the farmers who cannot determine whether which fingerling is "clean' and fulfill standard for farming or not. In fact, almost all of them buy and evaluate the quality of fingerlings intuitively by looking at the physical characteristics and prices. The catfish fingerlings are provided from various sources such as hatcheries, seeds enterprises, free producers, self-production and buy from other farmers with the proportion 38.9%, 0.8%, 33.6%, 16% and 10.7% respectively.[327] As a result of the lack of control fingerlings quality, some diseases occurred during rearing and the farmers who overused of antibiotics, chemical and biological products to cure these diseases, consequently, such methods might affect to the quality and safety of catfish. Fortunately, the processing plants always test the drug residues in fish at least three times before harvesting, after that, the plants also send catfish samples to a public

[324] *Ibid., supra* note 10.

[325] *Ibid., supra* note 58, p. 24.

[326] Ministry of Agriculture and Rural Development of Vietnam issued Circular No. 26/2013/TT-BNNPTNT on the management of fisheries and Circular No. 23/2013/TT-BNNPTNT on the management of the manufacturing facility management, business-like catfish.

[327] *Ibid., supra* note 58. p. 24.

center or foreign center for testing the antibiotics, pesticide residues and so on, in order to check whether or not such fish fulfill qualify for selling in certain foreign markets.[328]

The ponds and wastewater are the second issue. Vietnamese catfish are raised in ponds, floating cages, pen nets and cages. However, the volume of floating cages and pen nets and cages decline significantly because only catfish which raised in the ponds may meet qualify to get the Viet GAP and Global GAP[329] certificates, such certificates verify that the fish are raised under good conditions on water, feeds, fingerlings and so on.[330] Catfish ponds sited near rivers and canals, because it is convenient to get and exchange water during the farming process and after harvested catfish are transferred to processing plants by boats.[331] However, such farming methods arise a concern from the public that the wastewater is sometimes discharged directly to the rivers without any prior treatment. It should be noted that, however, there is not any clear scientific evidence that the catfish raised in such conditions will be unsafe and contain more poison or drug residues.

The third concerned issue is feeds for catfish. Farm-made feeds and commercial compound feeds are two types of feed, which used for feeding catfish. Farm-made feeds are made from sub-products such as trash fish, rice bran, soybean meal, blood meal, broken rice, eggs and vegetables and so on. The expenses of producing farm-made feeds are not costly, so in the late 1990s and early 2000s, there was wide use

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[328] The quality tests are conducted a month, two weeks and a week, respectively, before harvesting (personal communication).

[329] **GLOBALGAP** is an internationally recognized set of farm standards dedicated to Good Agricultural Practices (GAP). EurepGAP was a common standard for farm management practice created in the late 1990s by several European supermarket chains and their major suppliers. In 2007, EurepGAP changed its name to GLOBALGAP. The GLOBALGAP certification helps the producers prove that their products meet the international levels of safety and quality. *Available at* http://www.globalgap.org/uk_en/who-we-are/about-us/, accessed February 12, 2016.

[330] VietGAP (Vietnam Good Agricultural Products) based on the ASEANGAP HACCP principles (ASEAN Good Agricultural Practices Hazard Analysis Critical Control Point), to assist farmers in producing, assessing and certifying agro-products' compliance to international standard. Viet GAP covers the following hazards: food safety, food quality, environmental impacts, health, safety and welfare of workers. See *Ibid.*, *supra* note 122.

[331] *Ibid.*, *supra* note 49.

those feeds. The benefits of farm-made feeds are easy to product and low cost because the Mekong Delta is the region that products more than sixty percent of rice and other agriculture products in Vietnam, therefore, the farmers may utilize the sub-agriculture products to produce feed for catfish. Yet, the quality of these feeds are not stable as it made by farmer's experience, consequently, it leads to the catfish quality are sometimes detected contaminants by both Vietnamese agencies and importing countries.[332] The manufactured feeds are stable quality but costly. Depending on rearing intensity feed contributes 65–85 percent of on-growing costs.[333] There are 79 percent of interviewed farmers who use commercial compound feeds, and the others use farm-made feeds or both.[334] The production costs of farm-made feeds are around 75 percent of manufactured feeds.

To conclude that, the sanitary and environment conditions of catfish farming and processing in Vietnam is not perfect, however, the fish are safe for consumption and not potentially cause harm to the consumers' health.

5.4. Are the U.S. measures consistent with the SPS Agreement?

As analyzed, if a WTO member would like to impose and maintain a SPS measure on imports, such SPS measure must be based on sufficient scientific evidence,[335] in the extent that there is lack of sufficient scientific information, the importing country just has right to adopt provisional SPS measures on the basis of available relevant information and on the support of an objective assessment of risk.[336] It is vital to

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[332] In 2013, there were four cases that Vietnamese catfish products had been detected with high level of pesticides residues and given back to Vietnam. See Hien et al. (2014). *USA Technical Barriers to Exported Shrimp and Catfish of Viet Nam.* Journal of Science and Development. Vol. 12, No. 6(2014), p.874. *Available at* https://www.vnua.edu.vn%3A85%2Ftc_khktnn%2Fdownload.asp%3FID%3D1383&usg=AFQjCNEmpJLUrjCFUlt9QiWIJSbFIy2KWA&sig2=jYb_nJfAyHGMOwOevanZDA, accessed March 10, 2016.

[333] *Ibid.*

[334] In order to get the VietGAP certificate, one of the conditions is that the catfish farmers have to feed by commercial compound feeds, because it is hard to control the quality of farm-made feeds and catfish meat.

[335] Article 2.2. of the SPS Agreement.

[336] Article 5.7 of the SPS Agreement.

underscore that the WTO member shall ensure that its SPS measures are applied in an appropriate level of protection[337] and do not constitute a disguised restriction on international trade.[338]

Despite the opposition of a group of 76 Congressmen who signed a letter calling for the repeal of the USDA program in the 2014 Farm Bill,[339] and the Government Accountability Office, in 2011, reported that they found little evidence to conclude Asian catfish were unsafe to eat,[340] the U.S. government with the lobby of the CFA, consequently, issued a lot of regulations that have generated the unjustifiable discrimination on imported catfish from Vietnam as well as other catfish exporting countries. The first concern issue is that the *Section 11016(b)* of the 2008 Farm Bill amended the Federal Meat Inspection Act (FMIA),[341] and regulated that the inspection program of catfish would be shifted from the FDA (Food and Drug Administration) to the USDA (the U.S Department of Agriculture)[342] because the CFA and *Senator Boozman* argued that the FDA *did a poor job* and it just inspected *2 percent* of imported catfish during the last period.[343] As a predicted result, the 2014 Farm Bill was passed and amended *Section 1(w)* of the Federal Meat Inspection Act (FMIA) to replace the phrase "*catfish, as defined by the Secretary*" by the phrase "*all fish of the order Siluriformes*". It means that, by March 1, 2016, all of fish and products of fish of the order *Siluriformes* are under the FSIS jurisdiction and

[337] Article 5.6 of the SPS Agreement.

[338] Article 5.5 of the SPS Agreement.

[339] Murray Hiebert. *The Senate Should Abandon Protectionist Inspections Aimed at Catfish from Vietnam*. Available at http://csis.org/publication/senate-should-abandon-protectionist-inspections-aimed-catfish-vietnam, accessed February 1, 2016.

[340] Peter Urban. *USDA takeover of catfish inspection underway. Available at* http://arkansasnews.com/news/arkansas/usda-takeover-catfish-inspection-underway, accessed January 27, 2016.

[341] 80 FR 75589, p. 75592.

[342] Dan Flynn. *U.S. Catfish Farmers Emerge As Big Winners in 2014 Farm Bill. Available at* http://www.foodsafetynews.com/2014/01/u-s-catfish-farmers-emerge-as-big-winners-in-2014-farm-bill/#.VqhfsvnR_IU, accessed January 27, 2016.

[343] *Ibid., supra* note 341.

inspection, including *Basa* and *Tra* fish from Vietnam and the U.S. catfish, of course.[344]

It is obviously to conclude that, the U.S. has autonomous right to set out its own SPS measures[345] that it deems appropriate to protect the health of its citizen. There would not be a case if the 2008 Farm Bill, and now is the 2014 Farm Bill were to shift the inspection of all seafood to the USDA, however, the 2014 Farm Bill transfers *only the fish of the* order *Siluriformes* to the USDA,[346] other kinds of fish/seafood will continuing be inspected by the FDA.[347] The USDA and their supporters argue that they have a great concern about the risk of *Salmonella* bacteria; thus, it is necessary to put all fish of the order *Siluriformes* under the USDA's jurisdiction for inspection of such bacteria. However, as earlier mentioned, it is vital to emphasize that *Salmonella* bacterium has been detected in *various sources* such as eggs, poultry, meat, fruits and vegetables, nuts, reptiles, amphibians (frogs), birds, pet food and treats and so on.[348] It is explicitly that the *Section 12106(a)* of the 2014 Farm Bill which violates the *Article 2.3* of the SPS Agreement as well as the Article I of the GATT 1994 because such regulation creates a discrimination between fish and seafood products where the same risk and conditions prevail. Accordingly, the Article 2.3 of the SPS Agreement and the Article I of the GATT 1994 which regulate that the obligation of WTO Members are to ensure that their SPS measures shall conform to the MFN and NT principles,

[344] Martin, M. F. 2014. *U.S-Vietnam economic and trade relations; issues for the 113th Congress. Available at* http://fpc.state.gov/documents/organization/224468.pdf, accessed October 15, 2015.

[345] According to Annex A.1 of the SPS Agreement, SPS measures include "all pertinent *laws, decrees, regulations, requirements and procedures* including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety".

[346] Ben Dipietro. *U.S. Lawmakers Squabble Over Farm Bill's Catfish Provision. Available at* http://blogs.wsj.com/riskandcompliance/2015/05/20/u-s-lawmakers-squabble-over-farm-bills-catfish-provision/, accessed January 27, 2016.

[347] *Ibid., supra* note 341.

[348] Foodsafety. *Salmonella. Available at* http://www.foodsafety.gov/poisoning/causes/bacteriaviruses/salmonella/, accessed February 28, 2016.

not to create a manner in which causes an arbitrary or unjustifiable discrimination between Members, where "*identical or similar conditions prevail*". As analyzed in section 3.1.2.3, the Panel in *Australia — Salmon (1998)* stated that the term "discrimination" in the context of the Article 2.3 of the SPS Agreement should be understood that it may not only mean the discrimination between *similar* products, but also between *different* products; and the "identical or similar conditions" in this sense refers to the *similarity of the risks*, not the products as under other WTO Agreements.[349] It could be concluded that the *Section 12106(a)* of the 2014 Farm Bill and the 80 FR 75589 create discrimination between *Siluriformes* fish and other foods, thus, these regulations violate Article 2.3 of the SPS Agreement and Article I of the GATT 1994.

It is necessary to emphasize that the *Section 12106(a)* of the 2014 Farm Bill and the 80 FR 75589 are also inconsistent with the Article 5.1 and Article 5.6 of the SPS Agreement. The Article 5.1 of the SPS Agreement regulates if a Member wants to adopt or apply a SPS measure on imports, such measure must be based on risk assessment and there must also be a rational relation between the assessment of risk and the SPS measure in concerned. Additionally, the Article 5.6 of the SPS Agreement requires that WTO Members shall ensure that their SPS measures which are not more trade restrictive than required. In this case, the "Assessment of Potential Change in Human Health Risk associated with Applying Inspection to Fish of the order S*iluriformes*" made by the FSIS of the USDA in January 2015, which stated that the FSIS could not make statements about the baseline risk of the *Siluriformes* fish because there are a "*limited information on the extent of microbial contamination and chemical residues on Siluriformes fish*".[350] In addition, the FSIS confirmed that it did not have any experience on implementing the inspection program of *Siluriformes* fish;[351] thus, they applied the same inspection program of poultry and other meats to

[349] *Ibid., supra* note 98, p. 909.

[350] *Ibid., supra* note 316, p. 9.

[351] *Ibid.*

Siluriformes fish.[352] Based on these arguments, it could be concluded that the inspection program on *Siluriformes* fish that creates more trade-restrictive than necessary and at an inappropriate level of protection in at least three reasons: (i) the risk assessment of *Siluriformes* fish indicated that there is no a potential risk of Salmonella disease from catfish basing on the current available data; (ii) Salmonella bacteria has been detected in many kinds of food such as fruits, vegetable, eggs, meats, water etc., but a stricter inspection program is only applied to *Siluriformes* fish, beside meat and eggs, while other types of food have been detected with Salmonella bacteria are still inspected by the FDA; and (iii) the USDA applies the inspection program of poultry for catfish (*Siluriformes*).

This issue may be more complicating and interesting in the extent that if the U.S were to argue that the Article 5.7 of the SPS Agreement allows the U.S has right to apply SPS measure in the circumstance that there is insufficient scientific evidence on the risk of Salmonella from catfish products, therefore, its SPS measure on catfish is consistent with the SPS Agreement. As analyzed, with the current data, the U.S could not have sufficient scientific information to support its arguments, thus, the U.S quotes Article 5.7 of the SPS Agreement as basis ground for its SPS measures. Yet, in the view of this author, the U.S may not be able to base its argument on the Article 5.7 of the SPS Agreement because the inspection program on catfish does not meet all the requirements of the Article 5.7, in this case, with at least two following reasons.

Firstly, the Article 5.7 of the SPS Agreement requires that in the circumstance of lack of sufficient scientific evidence, importing country may temporarily adopt SPS measure in order to protect the health or life of the human, animal or plant in its territory and such SPS measure must be supported by "*the basis of available pertinent information*". In this case, the catfish inspection program is applied and reviewed in the period of 5 years, thus, such program is a provisional SPS measure. However, the prevalence data that the FSIS has collected which showed that there was only one case of Salmonella illness had been detected in catfish during the last 20 years in the U.S, and the relevant available information also illustrates that there may not be a

[352] 80 FR 75589, p. 75608.

potential risk of Salmonella disease come from catfish products. By this reason, the U.S. catfish inspection program is not based on and supported by the relevant information. *Secondly*, this Article also requires that the importing Member must conduct a "more object assessment of risk" by seeking to obtain the available information. As mentioned, the Catfish Risk Assessment that conducted by the FSIS in 2015, which is not an objective assessment since such risk assessment could not prove any available data that there is a potential risk of Salmonella disease from *Siluriformes* fish products and the FSIS had to assume that the risk of Salmonella on catfish would be considered similar as in poultry products. Therefore, the U.S.'s SPS measure on catfish, which did not base on an objective risk assessment. In other words, there is no a rational relation between the SPS measure and the risk assessment. To conclude, the U.S may not quote the Article 5.7 of the SPS Agreement as a ground for its SPS measures.

Additionally, a letter sent to Senator Mitch McConnell and Senator Harry Reid by Sir James Bacchus, a former Congressman from Florida and Chairman of the Appellate Body of the WTO (in period 2001-2003) state that the catfish provision of the 2014 Farm Bill violate not only the terms of the GATT 1994, but also the SPS Agreement and such SPS measures may lead to a case against the U.S government in the WTO by affected countries; and other products of the U.S may face with retaliation from other countries.[353] Moreover, the U.S. Government Accountability Office reported that the U.S measures on catfish (*Siluriformes*), which are considered as a duplicative and protectionist policy, an unnecessary and wasteful program.[354] Additionally, Smith and Delong (2011) comments that the U.S. regulations which are relevant to *Siluriformes* fish have been creating unnecessary obstacles and disguised restriction on international trade, and may lead to retaliation from U.S.'s trade

[353] Ben Dipietro. U.S. Lawmakers Squabble Over Farm Bill's Catfish Provision. Available at http://blogs.wsj.com/riskandcompliance/2015/05/20/u-s-lawmakers-squabble-over-farm-bills-catfish-provision/, accessed January 27, 2016.

[354] U.S. Government Accountability Office. *High Risk Series: An Update, GAO-11-278*, p.112. *Available at* http://www.gao.gov/assets/320/315725.pdf, accessed February 26, 2016.

partners.[355] Indeed, Thailand and China also raised their concerns on the catfish inspection program of the U.S.[356]

Last but not least, it is necessary to analyze the case *EU-Hormones (1998)*,[357] also call "EC - Beef Hormones cases". On January 1989, the EU imposed a ban on U.S. imports of animals and meat from animals treated with hormones to promote rapid growth. The U.S. requested consultation with the EU in January 1996. The WTO Dispute Settlement Body established a panel to hear the case in response to a U.S. request in May 1996. It was explicitly to point out that the prohibition of the EU had not been based on any standards or recommendations of itself or any other international recognized standard.[358] The Panel's final report concluded that the EU's measures were inconsistent with the SPS Agreement, and the EU's ban was not based on risk assessment.[359] Similarly, the U.S. inspection program on catfish dose not based sufficient scientific evidence and not supported by the catfish risk assessment.

Based on the analyzed and discussed arguments above, this author is of opinion that the U.S. measures on inspection program of *Siluriformes* fish (i.e. Section 12106(a) of the 2014 Farm Bill, Section 606(b) of the Federal Meat Inspection Act, 9 CFR and 80 FR 75589) are inconsistent with its obligation under the Article I of the GATT 1994 and Article 2.3 of the SPS Agreement, as well as violate Article 5.1 and 5.6 of the SPS Agreement. Besides that, the U.S. catfish inspection program is also

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[355] Frances B. Smith and Nick DeLong. *Comments of the Competitive Enterprise Institute to the U.S. Department of Agriculture, Food Safety and Inspection Service Regarding the Agency's Proposed Rule Mandatory Inspection of Catfish and Catfish Products. Available at* https://cei.org/sites/default/files/USDA%20Mandatory%20Inspection%20of%20Catfish%20and%20Catfish%20Products--Public%20Interest%20Comment%20June%2024%202011.pdf, accessed February 17, 2016.

[356] Murray Hiebert. *The Senate Should Abandon Protectionist Inspections Aimed at Catfish from Vietnam*. Available at http://csis.org/publication/senate-should-abandon-protectionist-inspections-aimed-catfish-vietnam, accessed February 1, 2016.

[357] WTO. *Dispute Settlement: Dispute DS26,48*. *Available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm, accessed December 12, 2015.

[358] *Ibid., supra* note 139. p. 326.

[359] *Ibid., supra* note 147. pp. 31-32.

inconsistent with the Article 2.6(A) of the U.S-Vietnam Bilateral Trade Agreement.[360] Accordingly, Article 2.6(A) of the U.S-Vietnam BTA regulates that both parties of the Agreement shall "ensure that any sanitary or phytosanitary measure which is not inconsistent with the provisions of the GATT 1994, is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient evidence (*i.e.*, a risk assessment), taking into account the availability of relevant scientific information and regional conditions, such as pest free zones".

[360] Article 2.6(A) of the Vietnam-U.S. BTA regulates that "the Parties shall ensure that any SPS measures which is not inconsistent with the provisions of the GATT 1994… based on scientific principles and is not maintained without sufficient evidence".

CONCLUSION AND RECOMMENDATION

Conclusion

The catfish dispute between the U.S and Vietnam on sanitary and phytosantary measures, technical barriers to trade, and anti-dumping measures is one of the landmark cases of international trade dispute, especially between developed and developing countries. Based on analyzed and discussed arguments, it is clearly to conclude that (i) the U.S regulations relating to the using of the term "catfish" are inconsistent with the Article 2.3 and 2.4 of the TBT Agreement and violate Article 2.6(B) of the U.S – Vietnam Bilateral Trade Agreement; (ii) the anti-dumping measures on certain frozen fish fillets from Vietnam are criticized as protectionist policy and it goes back on the U.S slogan of "free trade", violate the Article 3.1, 3.2, 3.4 and 3.7 of the AD Agreement; and (iii) the U.S inspection program on *Siluriformes* fish is illustrated to create a discrimination among seafood products, and such regulations are inconsistent with the Article I of the GATT 1994, and Articles 2.3, 5.1 and 5.6 of the SPS Agreement as well as not consistent with the Article 2.6(A) of the U.S – Vietnam Bilateral Trade Agreement.

Recommendations

Through this study, there are some recommendations that Vietnamese government should pay more attentions on them in order to react more actively in the future trade dispute as well as may help it to adapt with the international market. First of all, regarding TBT issues (labeling of catfish), the Government should build up and support enterprises in the registration of trademarks, geographical indications, as well as other issues related to intellectual property on the basis of the TRIPS Agreement and other international regulations. By doing that, it may help the domestic exporters to eliminate technical barriers to trade in importing countries. Secondly, to reduce the anti-dumping lawsuits which may be taken against Vietnamese exports, the Government should develop an accounting system based on international standards of general accounting system. As such, in certain circumstances that exporters and manufacturers are being investigated for anti-dumping or anti-subsidy, they can be

able to demonstrate the costs of production to calculate the normal value and export price. Therefore, they may prove that their products are not dumped in the importing country market. Another important issue is that the Government should reform the legal and the economy system to ensure that the Vietnamese economy is operating under market rules, not governed by the Government force. Besides, in order to ensure that the markets are free and transparent, the Government should also reduce the number of state-owned enterprises as well as those areas where the state monopoly held. Thus, Vietnam can attract more investors, and soon to be recognized as a market economy. Then, dumping margin calculation can be lower since the U.S would not be able to use data from surrogate country. Last but not least, in respect to SPS issues, the most important issue is that Vietnam must actively build a system of hygiene and food safety which is compatible with the international standards. Thanks to this method, the quality of goods will be improved significantly and can compete well with similar products on the international market, especially in difficult markets such as U.S., EU, Japan and so on. It is worth noting that Thailand was rated as very successful country to build a national standards system on food safety, which is conformity with relevant international standards, in order to increase export capacity and competitiveness in the global market.[361]

[361] *Ibid.*, *supra* note 122.

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APPENDIX 1

QUESTIONAIRE FOR CATFISH FARMERS*

I. Basis information of interviewee

- Name:……..; Age:……..; Male/Female
- Address:……

II. Questions

Question 1. How long have you raise Tra/Basa fish?

……years; …….months

Question 2. Which is/are your catfish farming method? *(If fish are raised in ponds, answer questions No. 6 and 7)*

1. In ponds
2. In floating cages
3. Both in ponds and floating cages
4. Others

Question 3. What are types of feed for Tra/Basa fish? *(If fish are feed by vary types of feed, choose more than one answer)*

1. Commercial compound feed
2. Farm-made feed
3. Others…….

Question 4. What is the origin of fingerlings?

1. Catch from nature
2. Artificial reproduction
3. Others:……

Question 5. How often do you clean the water/pond/cage?

1. Weekly:……times/week
2. Monthly……times/month

Question 6. Which is the water source for catfish farming?

1. Nature water from rivers/canals
2. Water wells
3. Others:……..

Question 7. After cleaning the water (in ponds), how do you treat such wastewater?

1. Moving to another pond for treatment before discharging into rivers/canals

* We promise that this information will be kept confidential and only used for the purposes of scientific research.

2. Discharging directly into rivers/canals
3. Others:……

Question 8. Do you know environmental regulations and conditions which relevant to catfish farming?

1. Yes	2. No

Question 9. Are there any training courses for you (catfish farmers)? *(If yes, answer questions No. 11, 12, 13 and 14)*

1. Yes	2. No

Question 10. How could you know catfish farming technic?

1. Your own experience
2. Trained (continuing answers questions No. 11, 12, 13 and 14)
3. Hired aquatic engineer
4. Others:……

Question 11. Who are the organizer(s) of such training courses?

1. Local/governmental agencies (name:……)
2. Enterprises (name:……..)
3. Catfish (Pangasius) Association
4. Others:……

Question 12. Who are instructors/lecturers/speakers in such training courses?

1. Experts from local/governmental agency
2. Aquatic engineers/experts from the Company/Association
3. Others:……

Question 13. How often such training courses are organized?

1. Monthly
2. Quarterly
3. Annually
4. Others:……

Question 14. How do you evaluate the effective of such training courses?

1. Very effective	2. Rather effective	3. Effective	4. Less effective	5. Ineffective

Question 15. Did you hear any information on antidumping duties of the U.S against Vietnamese catfish?

1. If yes, from which information sources? a. Newspapers/Television b. Partner companies c. Local authorities	2. No

d. Catfish Association e. Others:……..	

Question 16. Were that antidumping duties, technical barrier trade and non-barriers to trade affect your life and production?

1. Extremely affected	2. Rather affected	3. Affected	4. Less affected	5. Unaffected

Question 17. Have you hire any employees?

2. If yes, how much you pay them? a. ……VND/day b. ……VND/week c. ……VND/month d. ……VND/year e. Others:……	2. No

Question 18. Do you have any connection/corporation to other farmers/companies?

1. If yes, giving examples: ……. ……. …….	2. No

Question 19. Do you sale whole live catfish directly to processing company or middlemen?

1. Sale directly to processing companies
2. Sale directly to middlemen
3. Both of them
4. Others:……

Question 20. Have you receive any special supports/subsidies/incentives from the government/local authority?

1. If yes, giving examples: ……. ……. …….	2. No

APPENDIX 2

QUESTIONAIRE FOR CATFISH PRODUCERS*

I. General information

- Name of interviewee:……..
- Name of company:…….
- Address:……..

II. Questions

Question 1. How long have your company start to process catfish?

……..years; ……months

Question 2. Were your company involved in the antidumping investigation of the DOC of the US? *(If yes, answer question No. 3)*

1. Yes	2. No

Question 3. What were the differences that you faced?

1. Limitation of time for answer the questionnaire
2. The language is used in English
3. The cost of hiring lawyers
4. Accounting records
5. Others:……..

Question 4. Does your company have any strategies to deal with the antidumping duties as well as other technical barriers to trade and non-technical barriers to trade?

2. If yes, giving examples: ……. …….	2. No

Question 5. What is the processing of your company? *(in brief on inputs/raw materials, processing, packaging…)*

……..

…….

…….

…….

* We promise that this information will be kept confidential and only used for the purposes of scientific research.

Question 6. Does your company have any standards to buy catfish from catfish farmers?

……..

…….

…….

…….

Question 7. Does your company organize any training courses/workshops to train catfish farming technic for catfish farmers? *(If yes, answer questions No. 8, 9, and 10)*

1. Yes	2. No

Question 8. Who are instructors/lecturers/speakers in such training courses?

1. Experts from local/governmental agency
2. Aquatic engineers/experts from the Company/Association
3. Others:……

Question 9. How often such training courses are organized?

1. Monthly
2. Quarterly
3. Annually
4. Others:……

Question 10. How does your company evaluate the effective of such training courses?

1. Very effective	2. Rather effective	3. Effective	4. Less effective	5. Ineffective

Question 11. Does your company actively research the relevant laws of the importing countries before exporting your products?

……..

…….

…….

Question 12. Has your company receive any special supports, subsidies, and incentives from the government/local authority

1. If yes, giving examples: ……. …….	2. No

Question 13. Does your company have any connection, corporation with other farmers, companies?

1. If yes, giving examples: ……. …….	2. No

APPENDIX 3

QUESTIONAIRE FOR LOCAL AUTHORITY*

I. General information

- Name of interviewee:……
- Name of agency:……...
- Position/Title:……

II. Questions:

Question 1. How long have you work on current position?

……..years; ……months

Question 2. Did your agency organize any training courses/workshops for farmers/producers on farming and processing of catfish? (*If yes, answer question No. 2, 3 and 4)*

1. Yes	2. No

Question 3. Who are instructors/lecturers/speakers in such training courses?

4. Experts from local/governmental agency
5. Aquatic engineers/experts from the Company/Association
6. Others:……

Question 4. How often such training courses are organized?

5. Monthly
6. Quarterly
7. Annually
8. Others:…….

Question 5. How do you evaluate the effective of such training courses?

1. Very effective	2. Rather effective	3. Effective	4. Less effective	5. Ineffective

Question 6. Does the government/local authority conduct any research on conditions and demand of importing countries in order to make guidance for catfish farming and processing?

2. If yes, giving examples: …….	2. No

* We promise that this information will be kept confidential and only used for the purposes of scientific research.

…… ……	

Question 7. Does the government/local authority have any special supports, subsidies or incentives for catfish farmers/producers?

1. If yes, giving examples: …… ……	2. No

REFERENCES

APPENDIX

VITA

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Education

- From August 2014 – precent: is studying LL.M (Business Law) at Faculty of Law, Chulalongkorn University, Thailand.
- From September 2007 – May 2011: Studied LL.B (Commercial Law) at Can Tho University in 2011.

Experiences

- From January 2016 – present: member of Review Boards of Can Tho Universiy Science Journal in Law.
- From October 2015 – January 2016: took an internship at Apisith and Alliance Law firm, Bangkok, Thailand.
- From April 2013 – present: Manager at Vam Xang Eco-orchard Company at Phong Dien District, Can Tho City, Vietnam.
- From November 2011 – present: Lecturer at Faculty of Law, Can Tho University, Vietnam. Subjects' teaching: Land law; Construction law; Land Compulsory Acquisition, Compensation and Resettlement; Investment Law, City planning Law.
- From February 2011 – August 2011: Worked part-time at Center of Land Fund Development of The People's Committee of Phong Dien District, Can Tho City, Vietnam.
- From 2010 – 2013: acted as an associate research member of project "Researching on solving the disadvantages when doing the construction investment projects at Can Tho City, Vietnam."

Publications

- 2016:

+ Article in Vietnamese: "Disadvantages of Determination of the Starting Prices