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Hook, Line, and Sinker: How Congress Swallowed the Domestic Catfish Industry’s Narrow Definition of this Ubiquitous Bottomfeeder

by

Kerrilee E. Kobbeman

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I. INTRODUCTION*

As economic globalization accelerates, Congress is forced to balance the economic benefits of free trade and open markets with domestic industry’s demands for protection from foreign competition.

There are a number of concerns the American catfish industry faces as it struggles to create and maintain a niche in an expanding global market under real or perceived unfair trading practices. This article specifically examines the legislation developed in response to the recent crisis of the United States’ catfish industry. After developing a burgeoning industry, catfish producers were confronted with increasing pressure from foreign competitors, particularly producers from Vietnam. In response to falling prices, the declining American industry fought back. Much of the controversy centers on the correct name of the competing fish, and whether the labeling and sales practices used by the foreign competitors were designed to deceive the consumer.

Congress came to the aid of the domestic industry in their battle to preclude the Vietnamese producers from using the label “catfish” in association with their imported product. Congress, in a controversial move, legislatively determined that the only fish worthy of the label “catfish” were those native to North America. As a result, some argue that trade agreements have

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been violated. Such legislative efforts highlight the complexity and increasing controversy over naming rights and the labeling of agricultural products.

Although the issues addressed here will focus on the catfish industry, the challenges discussed are not unique to this industry or to agriculture generally. In fact, this dilemma is indicative of the broader issue of whether legislative intervention of this type amounts to blatant protectionism, or is instead a reasonable remedy for unfair trading practices.

Regardless of how favorable the current legislation may appear to be to the United States’ catfish industry, it may offer only a transitory solution to the domestic industry’s economic concerns. Some argue that the domestic industry should take advantage of the present legislative relief and pursue measures to distinguish itself from the foreign competition. In the interim, the implementation of the Country of Origin Labeling Act will require more accurate labeling of agricultural commodities and reduce consumer confusion. This should satisfy the catfish industry’s concerns regarding deceptive marketing of the foreign catfish and likewise address the argument that the United States has engaged in protectionist trading practices.

II. THE AMERICAN CATFISH INDUSTRY: ITS ORIGINS AND DEVELOPMENT

The catfish, although once much maligned, has developed into a burgeoning agricultural commodity. As early as the 19th century, Mark Twain, in his novel *Life on the Mississippi*, wrote, “the catfish is plenty good enough fish for anyone.” Until recently, not all agreed. Although the “ugly, whiskered riverbed feeder” has long been a favorite for those who grew up along the Mississippi River Delta, for others, only recently has catfish become desirable or readily available for consumption. It was only after the catfish industry in the southern United States

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invested a significant amount of money in aquaculture and the development of a clever marketing scheme that catfish became a national staple.

Aquaculture supplies consumers with an increased selection of seafood at affordable prices. Clearly, this has been a significant factor in the rapid growth of seafood consumption, and this growth is expected to continue. Currently, channel catfish production comprises the largest portion of the United States' aquaculture.

Americans today are eating more seafood than ever, making the United States the third largest consumer of seafood on the globe, expending $26.7 billion annually. The overall increase in the popularity of seafood can be attributed to a combination of factors, ranging from aquaculture to advertising.

The U.S. catfish farmers ascribe much of their initial success to innovation and investment in the creation of an industry that had not previously existed. In the mid-1980s, farmers were having a difficult time making a living as many agricultural commodities were unprofitable. Many of these growers decided to convert their fields to ponds to capitalize on the aquaculture industry. In turning away from more traditional cotton and rice production, they bet the farm on what was once called a “river rat.”

Although these resourceful farmers recognized the potential

5. Aquaculture involves the managed reproduction and cultivation of aquatic animals (such as fish or shellfish) under controlled conditions. Sustainable Aquaculture. (June 3, 2003). available at http://www.fishfarming.com (last visited Apr. 6, 2004).
6. See Alden, supra note 3, at 8.
8. Id.
11. See Pierce, supra note 7, at 17.
to make money in the production of pond-raised catfish, the industry also realized that in order to be successful, it would be necessary to convince more Americans to incorporate catfish into their diets. Accomplishing this objective required educating the public about the nutritional attributes of catfish. In this effort, the U.S. catfish industry invested over $50 million in an advertising campaign to inform the American consumer of the quality and characteristics of the farm-raised domestic catfish.

This campaign successfully erased the former negative image of the catfish and many Americans, who were previously unfamiliar with catfish and reluctant to incorporate it into their diets, began doing so. As a result, catfish has become increasingly popular, particularly in new markets such as the Midwest. Catfish fillets can now be easily found across the country at supermarkets and often on restaurant menus. This familiarity has led American consumers to expect a certain product; namely grain-fed, farm-raised catfish, produced in environmentally controlled conditions.

III. THE ECONOMIC IMPACT OF THE U.S. CATFISH INDUSTRY

The total economic impact of the catfish industry is estimated to exceed $4 billion annually. Some argue that the catfish industry has been one of the few bright spots in one of the country’s poorest regions. The catfish industry employs thousands of individuals and annually adds millions of dollars to an economically depressed region. Nationwide, over

18. 147 Cong. Rec. H5432 (Sept. 6, 2001) (statement of Rep. Everett). The campaign adopted slogans such as “Catfish: The Cultured Fish,” and informed consumers that scientists have formulated a feed mixture that makes catfish nutritionally competitive with other fish. See Gettleman, supra note 15, at A1O.
19. See Gettleman, supra note 15, at A1O.
21. See Toedtman, supra note 4, at F2.
22. Id.
26. 147 Cong. Rec. H5432 (Sept. 6, 2001) (statement of Rep. Everett). In 2000, the catfish industry in the U.S. had total sales of $501.4 million; the state of Mississippi led
189,000\textsuperscript{27} acres are devoted to raising catfish with production exceeding 593 million pounds annually.\textsuperscript{28} This accounts for over fifty percent of the total volume and value of all United States aquaculture.\textsuperscript{29} Although at least thirty-six states either produce or process farm-raised catfish, the vast majority are raised on farms in four southern states: Mississippi, Alabama, Arkansas, and Louisiana.\textsuperscript{30} These four states presently account for ninety-six percent of the nation’s total catfish production.\textsuperscript{31}

IV. THE VIETNAMESE “CATFISH” ENTERS THE U.S. MARKET

The Vietnamese fish, \textit{Pangasius bocourti}, initially entered the U.S. market labeled as “basa,” “tra,” or “bocourti.”\textsuperscript{32} When offered under these names, sales of the Vietnamese fish were minimal.\textsuperscript{33} In an attempt to stimulate sales, marketers first tried


\textsuperscript{27} See \textit{Catfish Production} Feb. 6, 2003, supra note 26.


\textsuperscript{29} 147 CONG. REC. E1610 (Sept. 10, 2001) (statement of Rep. Wicker).


In 2001, of 189,700 water acres devoted to catfish production in the U.S., 113,500 acres were located in Mississippi, 26,000 in Alabama, 37,000 in Arkansas, and 13,200 in Louisiana. In 2002, of 196,760 acres in production of catfish in the U.S. these four states accounted for 111,500, 25,900, 38,000, and 12,100 acres respectively. In 2003, of 186,745 acres these four states accounted for 109,000, 25,500, 34,000, and 9,900 acres respectively. \textit{Id.}

\textsuperscript{31} \textit{See Catfish Production} Feb. 6, 2003, supra note 26.

\textsuperscript{32} 147 CONG. REC. $13,428 (Dec. 18, 2001) (statement of Sen. Hutchinson).

\textsuperscript{33} \textit{Id.}
labeling the basa fish as a white grouper; however, they continued to have little success in the market.\textsuperscript{34}

In another attempt to increase the sales of their product, the importers requested that the Food and Drug Administration (FDA) allow them to label the Vietnamese fish as “basa catfish.”\textsuperscript{35} The U.S. catfish industry strongly opposed this suggestion.\textsuperscript{36} They argued that basa was not catfish and could not be labeled as such since it belonged to a different scientific family than the U.S. channel catfish, with which the American consumer had become familiar.\textsuperscript{37} The FDA, however, had not previously restricted the use of the term catfish based on the scientific differences\textsuperscript{38} and had allowed the Vietnamese fish to be labeled as catfish consistently with Federal Food, Drug, and Cosmetic Act naming provisions.\textsuperscript{39} The FDA had agreed to allow the term “catfish” to be used with the Vietnamese fish in combination with previously approved names,\textsuperscript{40} notwithstanding the fact that the Vietnamese basa fish belonged to a different genetic family.\textsuperscript{41}

Remarkably, the labeling change made a significant difference. Once the basa fish was described as “catfish,” both sales and imports increased dramatically.\textsuperscript{42} In 2001, basa

\begin{footnotesize}
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\item \textsuperscript{34} Id.
\item \textsuperscript{37} Id. The Vietnamese basa fish is of the family Schilbidae, while the channel catfish native to North America is in the family Ictaluridae. See FDA Letter to Various Seafood Trade Associations Regarding the Labeling of Catfish, available at http: www.cfsan.fda.gov/~frf/slcf2003.html (last visited Apr. 8, 2004) [hereinafter FDA letter]. Both varieties belong to the order Siluriformes which consists of over 31 families and over 2,000 different species. See World Trade: A Tale of U.S. Protectionism, STAR TRIB. (Minneapolis, MN), Jan. 22, 2002, at 10A.
\item \textsuperscript{38} See FDA letter, supra note 37. The FDA’s approach has now been overruled by recently passed legislation. Id.
\item \textsuperscript{39} Id.; see also 21 C.F.R. § 102.5 (2003).
\item \textsuperscript{40} 147 Cong. Rec. S11,337-38 (Nov. 1, 2001) (statement of Sen. McCain). Senator McCain introduced a memorandum from the United States Department of Health and Human Services, which stated that the National Fisheries Institute initially approved the names “basa,” “bocourti,” or “bocourti fish” as market names and the FDA had received a number of requests that they allow the term “catfish” to be used for the Vietnamese fish. Id. After the American Fisheries Society declared the Schilbidae were freshwater catfish of Africa and South Asia, the FDA did not object to the use of the term “catfish” in the labeling of the Vietnamese fish. Id.
\item \textsuperscript{41} See FDA Letter, supra note 37.
\item \textsuperscript{42} 147 Cong. Rec. S13,429 (Dec. 18, 2001) (statement of Sen. Hutchinson).
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imports from Vietnam were in excess of 8.2 million pounds, more than twice the almost 3.5 million pounds imported in 1999 and more than eight times the 0.9 million pounds imported in 1997.\textsuperscript{43} By 2002, basa “catfish” imports into the U.S. exceeded eighteen million pounds.\textsuperscript{44} Thus, in four years, market penetration of the Vietnamese fish increased from seven percent of the U.S. “catfish” market to twenty-three percent, nearly a quarter of the total market.\textsuperscript{45} Vietnam has consistently accounted for approximately ninety percent of all catfish imports entering the United States.\textsuperscript{46}

The dramatic increase in Vietnamese basa imports entering the U.S. market strongly impacted the domestic industry by pushing down sales and lowering prices paid to domestic producers.\textsuperscript{47} The U.S. catfish industry was forced to react. The domestic industry, and its advocates in Congress, contended that the Vietnamese were attempting to substitute a cheaper, inferior product for the American farm-raised catfish.\textsuperscript{48} In response, these congressional advocates (primarily from southeastern states), asserted that the FDA neglected its responsibilities in allowing the Vietnamese basa fish to be labeled as “catfish.”\textsuperscript{49} Senator Jeff Sessions of Alabama emphasized that species substitution is a form of “economic adulteration” of food products.\textsuperscript{50} He contended this was fraudulent misbranding and therefore, the FDA had a duty to prevent its occurrence.\textsuperscript{51}

V. THE CONTROVERSY ENSUES

The FDA’s approval of the “catfish” label for Vietnamese basa fish led to an unforeseeable chain of events and caused a great deal of controversy both domestically and abroad.\textsuperscript{52} After

\textsuperscript{43} See Catfish Production Feb. 28, 2001, supra note 26, at 15.
\textsuperscript{44} See Catfish Production Feb. 6, 2003, supra note 26, at 18.
\textsuperscript{47} See Harvey, Aquaculture Production, supra note 9, at 5.
\textsuperscript{50} Id. at S13,439.
\textsuperscript{51} Id.
\textsuperscript{52} See infra notes 65-197 and accompanying text.
FDA approval, the Vietnamese were allowed to sell their product to the consumer as "catfish." The Vietnamese producers were able to offer their product to consumers at a much lower retail price than the U.S. producers. Consequently, they began increasing their market share as imports of frozen fillets went up thirty-four percent between 2000 and 2001. During this same time period, gross sales of channel catfish in the thirteen leading producing states dropped twelve percent, from sales of $501.4 million in 2000 to $443.7 million in 2001. As the imports continued to enter the United States at incredibly high rates, prices became further depressed, and the domestic industry became increasingly concerned.

United States catfish farmers began experiencing significant losses and questioned the viability of their industry. The price that processors were willing to pay to producers for catfish was falling. For example, in January 2000, the average price paid to farmers was 74.4 cents per pound. By 2001, prices had already begun to drop, and by 2003, catfish producers were receiving only 64.5 cents per pound, and prices continued to fall throughout the year to levels as low as 57.6 cents per pound. This rate is well below the cost of production which varies from 60 to 70 cents per pound.

The falling prices threatened the domestic industry, which had no intention of going down without a fight. The U.S. growers' allies in Congress demanded that action be taken to level the playing field with the foreign competition. The catfish industry premised their argument against the Vietnamese on the claim that consumers were being "misinformed and

53. See supra notes 35-41 and accompanying text.
57. See Harvey, Aquaculture Production, supra note 9, at 1.
61. See Harvey, Aquaculture Production, supra note 9, at 2.
defrauded” by allowing the Vietnamese to import an entirely different product and label it as “catfish.”

VI. HISTORY OF THE CATFISH LABELING LEGISLATION

A. The United States and Vietnam Normalize Trade Relations Through the Enactment of a Bilateral Trade Agreement

After much debate, in late 2001, Congress voted in favor of normalizing trade relations by enacting a bilateral trade agreement with Vietnam. The goal in implementing this trade agreement with Vietnam was to open new markets for goods and services. In addition to the reciprocal lowering of tariffs, the agreement established requirements for adherence to intellectual property rights.

In an initially futile effort to support the domestic catfish industry, senators and representatives from the southeast argued against this trade agreement. On behalf of the catfish industry, they maintained that the U.S. producers were being subjected to unfair competition. The industry supporters claimed the imported fish were an inferior product that gained acceptance by inappropriately adopting the name of a successful product with an established market. Meanwhile, the Vietnamese realized the agreement provided them with an even greater potential to expand their share of the U.S. catfish market given the competitive advantage associated with the region’s more

64. 147 CONG. REC. S13,436 (Dec. 18, 2001) (statement of Sen. Hutchinson).
67. 19 U.S.C. § 2435 (2000). The trade agreement between the United States and Vietnam is subject to this provision which requires among other things, that the reduction in tariffs be reciprocated, and that the nation provide rights for U.S. products with respect to patents, trademarks, and copyrights. 19 U.S.C. § 2435.
69. Id.
favorable environmental conditions and cheaper labor.  

The domestic catfish industry was ultimately unsuccessful in preventing the trade agreement from going into effect. Despite the domestic catfish industry’s reaction, most considered the trade agreement to be a mutually beneficial step toward establishing good commercial relations between the two countries.  

Although the domestic catfish industry lost the battle with the enactment of the bilateral trade agreement, the war was only beginning. To address the growing sales of Vietnamese basa fish, the U.S. catfish industry initiated an aggressive advertising campaign. The Catfish Farmers of America depicted the Vietnamese basa fish as a “slippery catfish wannabe which floats around in third world rivers nibbling on who knows what.”

Only months after the enactment of the bilateral trade agreement with Vietnam, the catfish industry convinced its congressional allies to take extraordinary steps to help their industry. Congress passed legislation that redefined what merited the label “catfish” within the United States. Specifically, the legislation provided “the term ‘catfish’ may only be considered to be a common or usual name (or part thereof) for fish classified within the family Ictaluridae; and only labeling or advertising for fish classified within that family may include the term ‘catfish.’” Additionally, the Federal Food, Drug, and Cosmetic Act was amended to provide that a food shall be deemed to be misbranded “if it purports to be or is represented as catfish, unless it is fish classified within the family Ictaluridae.”

73. See *Fighting Dirty*, supra note 71, at *1.
74. Id.
75. See 147 CONG. REC. S13,426-27 (Dec. 18, 2001) (statement of Sen. McCain) (observing that all other acceptable market names for fish are determined by the FDA and that no other animal or plant has been defined by statute in this way).
77. 21 U.S.C.A. § 321d.
78. 21 U.S.C.A. § 343(t).
Considering the potential ramifications of violating a trade agreement, it is astonishing how the legislation restricting the labeling of catfish was passed. The legislation materialized as part of a last minute amendment that was incorporated in a critical agriculture appropriations bill. A set of manager’s amendments were adopted into law without discussion or debate, thereby circumventing the typical processes. As a result, this law was passed before its existence was known to the majority of the Senate.

The enactment of this legislation suggests that the catfish industry persuaded Congress to disregard science. Although the FDA and the American Fisheries Society (AFS) considered the Vietnamese basa fish to be freshwater catfish of South Asia, Congress, resolved that even if this were the case, basa fish could no longer be labeled as a “catfish” within the U.S.

Consequently, the FDA was forced to abandon its previous position and issued new guidelines that conformed with the recently enacted legislation. The FDA advised those who had previously used the term “catfish” in labeling, that they could no longer use the term “catfish” for import, distribution, and sale of

80. See 147 Cong. Rec. S11,337 (Nov. 1, 2001) (statement of Sen. McCain). The agricultural appropriations bill is fundamental to the agricultural economy in the United States. The legislation in question was included in a manager’s package of thirty-five amendments, fifteen of which McCain classified as objectionable legislative riders that involved direct expenditures of federal funds which should have been subjected to a higher degree of scrutiny. 147 Cong. Rec. S11,876 (Nov. 15, 2001) (statement of Sen. McCain).
85. See Fighting Dirty, supra note 71.
their product within the United States. Because other FDA regulations require the fish to be labeled with the common or usual name, it became necessary to outline alternative acceptable marketing names for fish other than those from the family Ictaluridae that previously used the term "catfish." To assist in the development of an acceptable common name, the FDA requires that the term identify or describe, in simple and direct terms, "the basic nature of the food or its characterizing properties or ingredients." This name may be a "coined" name developed for the purpose of naming the product. The name may not, however, be confusingly similar to the name of another food. In a later advisory letter the FDA defined specific market names for *Pangasius bocourtii*, including "basa," "bocourtii," "bocourtii fish," or "basa fish" that were deemed acceptable.

By enacting this legislation, Congress forbade in the United States the sale, under the name "catfish", of any fish not indigenous to North America. Therefore, the Vietnamese were effectively prohibited from calling the basa fish "catfish" and can now only market the fish in America as "tra" or "basa." Consequently, critics of the legislation, including Senator John McCain of Arizona, argued the United States was in violation of its bilateral trade agreement only months after its ratification.

89. Id.
90. Id.
91. Id.
92. Id.; see also 21 C.F.R. § 102.5 (2003).
94. 21 C.F.R. § 102.5. The FDA specifically advised that "names may be close to pre-existing common usage as long as they are adequately identifying or distinguishing so that a consumer is not likely to confuse it with another fish." See FDA Guidance for Industry. supra note 88. Therefore, "flat whiskered fish" would be acceptable. They noted that unusual spellings (Katfish) or splitting of syllables (Cat Fish) should be avoided because the name bears too close a resemblance to the name of another food. Id.
95. See FDA Letter. supra note 37.
96. See supra notes 76-78 and accompanying text.
97. See Fighting Dirty. supra note 71. at *1.
B. The Congressional Debate Intensifies as Members of Congress Realize the Implications of the Restrictive Labeling Legislation

Some members of the Senate became outraged upon realizing that they had passed divisive legislation, which included a provision banning the FDA from allowing fish to be labeled as "catfish" unless it belonged to a specific scientific family.99 Calling the Act egregious and offensive to trade policy, Senator McCain and Senator Phill Gramm of Texas sought to have the amendment repealed and the previous FDA procedures reinstated.100 They asserted that the legislation fundamentally affected the recently approved bilateral trade agreement.101 While the legislation did not specifically mention Vietnam, it was undoubtedly the intended target. It was the country most affected considering that it accounted for ninety-nine percent of the imports into the United States in the lucrative frozen fillet market.102

Although Senators McCain and Gramm failed in their attempt to reverse the catfish labeling restriction,103 their effort brought to the forefront concerns about the hypocrisy inherent in U.S. trade policy, namely, preaching fair trade when it benefits domestic industries, while frequently yielding to special interests and instituting protectionist measures to shield domestic industries from foreign competition.104

C. The Argument From the Domestic Industry's Viewpoint—Factors Amounting to Unfair Competition

The Catfish Farmers of America, in their advertising campaign against their Vietnamese competitors, adopted the slogan, "never trust a catfish with a foreign accent."105 As part of their campaign to discredit the Vietnamese fish, the industry focused on three principal differences between the U.S. and

99. Id.
100. 147 CONG. REC. S13,427 (Dec. 18, 2001).
101. Id.
102. See Martin, supra note 55, at 11.
104. See Fighting Dirty, supra note 71, at *1.
Vietnamese products: the cost, the quality of the product as affected by environmental conditions, and the genetic dissimilarity.106

The Vietnamese had obviously experienced success in selling their product as "catfish."107 Supporters of the legislation asserted the Vietnamese were only able to achieve such remarkable results by using the label catfish on the packaging, while selling this different species of fish for significantly less.108 Thus, prior to the passage of this legislation, the Vietnamese had a marketing vantage identical to that of U.S. producers because both fish were labeled and sold as "catfish."109 Given that consumer decisions often come down to cost, the Vietnamese had a distinct advantage over their U.S. competitors.110

Another concern of the U.S. industry related to environmental conditions.111 The industry asserted that while it was required to comply with costly federal and state environmental regulations, the Vietnamese producers were unencumbered with such restrictions.112 The U.S. product is highly controlled through agricultural inspections of the catfish ponds.113 Additionally, the catfish are routinely examined at the processing plants for traces of chemical contaminants.114

106. See infra notes 107-35.
108. Id.
109. Joseph S. Nelson et al., When is a Catfish Not a Catfish—U.S. Legislation Over a Name, FISHERIES, Feb. 2002, at 39-40. Joseph Nelson is the Chair of the Names of Fishes Committee a joint committee of the American Fisheries Society (AFS) and the American Society of Ichthyologists and Herpetologists (ASIH). Id.
111. See infra notes 112-21 and accompanying text.

Additionally, each processor of fish products is required to develop a Hazard
Therefore, supporters of the domestic industry contend the Vietnamese are able to produce fish at a lower cost because of the loose environmental regulations and cheap labor.\textsuperscript{115} On the one hand, the domestic industry claims that the strictly controlled conditions lead to favorable growing conditions for the catfish.\textsuperscript{116} On the other hand, industry supporters contend that the Vietnamese basa fish are exposed to unhealthy and unsafe conditions because they are raised in the polluted Mekong River.\textsuperscript{117}

Further, the domestic industry draws a distinction between the diets of the U.S. and Vietnamese catfish. The industry claims that diet is important as it affects the flavor that consumers have become familiar with in domestically raised catfish.\textsuperscript{118} The U.S. fish were grain-fed from soybeans, corn, and cotton seed which have been scientifically formulated to make catfish nutritionally competitive with other fish.\textsuperscript{119} However, the industry emphasizes that the Vietnamese basa fish, raised in cages along the Mekong River Delta, feed on whatever floats by.\textsuperscript{120} Again, they suggest this difference affects the quality of the product.\textsuperscript{121}

Analysis Critical Control Plan which requires it to identify potential hazards and take preventive measures to control their occurrence. 21 C.F.R. § 123.6 (2003). Specific consideration must be given to hazards such as natural toxins, microbiological contamination, chemical contamination, pesticides, drug residues, additives, and parasites. 21 C.F.R. § 123.6. The processors must define procedures that will be implemented to monitor and control such hazards to ensure they comply with critical limits. 21 C.F.R. § 123.6.


\textsuperscript{116} 147 CONG. REC. S10,114 (Oct. 3, 2001) (statement of Sen. Sessions): see also Becker, supra note 113.

\textsuperscript{117} 147 CONG. REC. D1265-01 (Dec. 18, 2001) (statement of Sen. Hutchinson).

\textsuperscript{118} Elizabeth Lee, Asian Import Has To Go Fishing For a Name, CHICAGO TRIB., Dec. 18, 2002, at 7 A.

\textsuperscript{119} 147 CONG. REC. S13,429 (Dec. 18, 2001) (statement of Sen. Hutchinson).

\textsuperscript{120} 147 CONG. REC. E1632 (Sept. 11, 2001) (statement of Rep. Ross).

\textsuperscript{121} 147 CONG. REC. S13,429 (Oct. 3, 2001) (statement of Sen. Hutchinson); 147 CONG. REC. E1632 (Sept. 11, 2001) (statement of Rep. Ross). Some members of Congress, in their efforts to distinguish the environmental condition in which the two fish are raised suggested that the Vietnamese basa fish have been exposed to Agent Orange. See Fighting Dirty, supra note 71, at *1 (citing Rep. Ross). Others declared that the Vietnamese basa were exposed to “foul and unhealthy elements, sometimes even feeding off raw sewage.” 147 CONG. REC. S13,429 (Dec. 18, 2001) (statement of Sen. Hutchinson). Others have argued that Vietnamese catfish are raised in “polluted rivers that sewer and waste are dumped into.” 147 CONG. REC. H5432 (Sept. 6, 2001) (statement of
Arguably the most significant justification for the passage of this legislation was that the fish belonged to different scientific families and, therefore, were not comparable products.\textsuperscript{122} According to the congressional supporters of the U.S. industry, the term "catfish" was being used deceptively and improperly to describe the Vietnamese imports since they were not closely related.\textsuperscript{123} Although the basa is in the same scientific order as the channel catfish they are of a different family, genus, and species.\textsuperscript{124}

Supporters of the legislation insist that the science shows "that the basa fish is not closely related to the North American channel catfish, and thus should be commercially and legally identified as a separate variety of fish so that American consumers are fully informed as to what they are buying."\textsuperscript{125} The industry claims that the Vietnamese imports are ruining the market by artificially boosting sales through the mislabeling of their product and blatantly misleading the consumer by improperly using the term "catfish."\textsuperscript{126} Indeed, evidence shows that importers have intended to mislead the American consumer.\textsuperscript{127} The Vietnamese fish has been packaged to mimic

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  \item Rep. Everett).
  \item \textsuperscript{122} 147 CONG. REC. E1610 (Sept. 10, 2001) (statement of Rep. Wicker).
  \item \textsuperscript{123} 147 CONG. REC. H6276 (Oct. 4, 2001) (statement of Rep. Pickering).
  \item \textsuperscript{124} 147 CONG. REC. S13,430 (Dec. 13, 2001) (statement of Sen. Hutchinson). In support of their arguments in favor of the legislation restricting the labeling of catfish, several of the southern legislators made comparisons to accentuate the degree of genetic dissimilarity between the North American and Vietnamese "catfish." See generally 147 CONG. REC. S13,365 (Dec. 13, 2001); 147 CONG. REC. H6263 (Oct. 4, 2001). Arkansas Senator Blanche Lincoln argued, "a cow and a yak are members of the same family, ... [and are] closer relatives than the channel catfish and the basa." 147 CONG. REC. S13,431 (Dec. 13, 2001) (statement of Sen. Lincoln). "So if we are prepared to say that the basa can be sold under the label "catfish," then we are more justified in saying that yak meat can be labeled and sold as New York strip steak." Id. Similarly, Senator Jeff Sessions of Alabama maintained "[t]hese two fish are only in the same order .... Humans are in the same order-primates-as gorillas and lemurs." 147 CONG. REC. S13,438 (Dec. 13, 2001) (statement of Sen. Sessions). Arkansas Senator Tim Hutchinson noted "the Atlantic Salmon and the lake trout are of the same family or more closely related to the channel catfish than the basa." 147 CONG. REC. S13,429 (Dec. 13, 2001) (statement of Sen. Tim Hutchinson). Mississippi Representative Charles Pickering argued that "calling basa fish catfish is the equivalent to allowing water buffalo to be imported under the label "beef."" 147 CONG. REC. H6267 (Oct. 4, 2001) (statement of Rep. Pickering).
  \item \textsuperscript{125} 147 CONG. REC. S13,435 (Dec. 13, 2001) (statement of Sen. Lott).
  \item \textsuperscript{126} 148 CONG. REC. S3989 (May 8, 2002) (statement of Sen. Hutchinson).
  \item \textsuperscript{127} 147 CONG. REC. S13,429 (Dec. 18, 2001) (statement of Sen. Hutchinson).
\end{itemize}
American brand names and brand emblems for catfish. For example, names such as “Cajun Delight,” “Delta Fresh,” and “Farm Select” are used to capitalize on the established market by leading consumers to believe the product is something that it is not. These names imply that the product originated in the Mississippi River Delta when in actuality it is from the Mekong River delta.

Further, the industry argues that in most cases the consumer purchases any product labeled “catfish,” and they are unaware that they are not buying the American variety, channel catfish. When the products are similarly labeled and thus indistinguishable, the consumer will naturally opt to buy the substantially cheaper Vietnamese fish, at the expense of the domestic industry. Furthermore, if in fact environmental conditions affect flavor, there is a risk that unwitting consumers who dislike the foreign fish will avoid purchasing catfish in the future and further damage the industry.

On behalf of the U.S. industry, some members of Congress argued that this information indicates that the Vietnamese intended to capitalize on consumer confusion by selling basa as catfish, usurp the domestic industry’s investment, and establish a market share and substitute its product for the domestic one. Supporters of the legislation assert that these factors effectively demonstrate that domestic producers have been subjected to unfair competition and that this legislation provides them with a reprieve, but does not violate trade agreements. Distinguishing the products becomes important to the U.S. industry because it maintains that it is willing to compete with Vietnam, provided importers are required to market the product as basa and not catfish. Proponents of the legislation claim to recognize the benefits of competition, and allege their only objective is to prevent the mislabeling and misleading of

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132. Id.
133. See Lee, supra note 118, at 7A.
136. Id.
consumers. The industry claims the legislation corrects these inaccuracies and informs consumers about what they are actually purchasing.

D. Opponents Argue the Protectionist Measures Violate the U.S.-Vietnamese Trade Agreement and Will Result in Retaliatory Actions from Other Countries

Opponents of the restrictive labeling legislation argue that it effectively bans catfish imports and consequently violates our trade agreement with Vietnam. In his attempt to overturn the restricted labeling legislation, Senator McCain characterized the catfish industry’s effort as a “campaign of misinformation.” The opponents agree that Vietnam has a competitive advantage and is able to produce a less expensive product because of the region’s natural conditions and cheap labor. They claim this legislation is an underhanded way for domestic catfish producers to eliminate competition.

Opponents also deny that the fish are raised in poor environmental conditions. The U.S. Embassy in Vietnam has denied the claim that the Vietnamese fish are of questionable quality and may pose health risks. Nor does it believe the Vietnamese fish have had an “injurious impact” on the U.S. market. Additionally, the Embassy notes that the quality of the Vietnamese catfish is obviously satisfactory or restaurants would not continue to purchase and serve it to their customers.

More significantly, the opponents allege that all “catfish” really are catfish, with common characteristics. They point out that the FDA and the AFS defined the Pangasius as

137. id.
141. See Fighting Dirty, supra note 71, at *1.
143. 147 CONG. REC. S13,427 (Dec. 18, 2001) (statement of Sen. McCain); see also Roy, supra note 105, at 6.
144. See Roy, supra note 105, at 6.
"freshwater catfishes of Africa and southern Asia." The FDA, in cooperation with the National Marine Fisheries Service, concluded there was no justification for limiting the term "catfish." Additionally, the FDA emphasizes that existing regulations already require another identifier such as "basa" or "striped" to accompany the term "catfish" so consumers can already differentiate them. They also mention that no other animal or plant name has been given a statutory definition. They assert the sole reason the proponents of the legislation oppose the use of the term "catfish" is protectionism.

Despite the industry's debate over the genetic similarities or differences, the argument is over a common name rather than the scientific classification. Both the public and the scientific communities use common names to describe particular species and larger plant and animal denominations. Common names are used for the sake of accurate communication, and it is desirable that the names have accepted and consistent usage. The word "catfish" is a common term that encompasses a number of fish. The AFS strongly opposed the labeling restrictions and the regulation of common names by the government. The AFS asserts that the common name "catfish" is recognized globally to refer to more than 2,400 species of fishes in the Siluriformes order. Further, AFS states that all 2,400 are accurately and properly identified as "catfish." Thus, the fact that basa are not taxonomically in the same family as the channel catfish is not significant because all fish in the order Siluriformes may be correctly called

148. Id.
149. See FDA Letter, supra note 37; see also Becker, supra note 113, at A1.
151. Id.
152. 147 CONG. REC. S13,436 (Dec. 18, 2001) (statement of Sen. McCain); 147 CONG. REC. S13,433 (Dec. 18, 2001) (statement of Sen. Gramm); see also Fighting Dirty, supra note 71, at *1.
154. See Nelson, supra note 109, at 38.
155. See Bennett, supra note 153.
156. See Nelson, supra note 109, at 40.
157. Id. at 39.
158. Id.
Accordingly, the use of the term catfish for the Vietnamese basa was not misleading because it is a member of the Siluriformes. Also, opponents of the legislation argue the protectionist agenda will have "global repercussions." They assert that the U.S. has "sadly implicated [itself] in the very sin [its] trade policy claims to reject." Moreover, opponents stress it is hypocritical to enter a free-trade agreement and encourage Vietnam to move away from a Marxist economy and then reciprocate with protectionist measures. Considering that the U.S. economy depends to a great extent, on the ability of U.S. producers to export products to other countries, if the United States employs protectionist measures which hinder trade, this is likely to provoke other countries to retaliate with protectionist measures of their own. Opponents of the act argue that this legislation amounts to "cheating" and "undercuts [the nation's] credibility when [it] tell[s] other nations to treat people fairly and to respect free trade."

One implication of this legislation is that it has forced the United States to alter its stance on other trade disputes to avoid taking a hypocritical position. Prior to the enactment of the labeling provisions, the United States had supported Peru in a claim against the European Union, which wanted exclusive use of the name "sardine" for trade purposes. Although the United States had agreed to support Peru before the World Trade Organization, the support was withdrawn after implicating itself in a similar protectionist agenda due to the restriction of the label "catfish." Similarly, the United States had opposed nomenclature restrictions proposed by the French for scallops.
The opposition argues that only the Mississippi Delta states benefit from this legislation, while others are injured, including the consumer who ultimately pays more for the product.\footnote{170} Furthermore it opens the door to retaliation through higher tariffs on U.S. exports and reduces market access for U.S. producers.\footnote{171} The opponents also make the argument that if this can be done to catfish, it can be done with many agricultural commodities.\footnote{172} Specifically, certain members of Congress point out that it is already being done to U.S. beef exports to Europe. For example, they contend that the objections of European countries to beef containing growth hormones is a mere pretext for protecting their own beef producers—and that this has harmed the American cattle industry.\footnote{173}

\textbf{VII. DESPITE WINNING THE LABELING LEGISLATION THE U.S. CATFISH INDUSTRY PURSUED ANTIDUMPING DUTIES AGAINST VIETNAM}

In addition to nomenclature concerns, the catfish industry also raised concerns about unfair trading practices.\footnote{174} Although the U.S. catfish industry had obtained the desired legislation that barred the Vietnamese imports from being labeled as catfish, they nevertheless pursued a lawsuit against the Vietnamese government charging them with “dumping”\footnote{175} catfish on the U.S. market.\footnote{176} This action has become increasingly common

\footnote{171. & 147 CONG. REC. S13,420 (Dec. 18, 2001) (statement of Sen. Hutchinson).}
\footnote{172. & 147 CONG. REC. S13,433-34 (Dec. 18, 2001) (statement of Sen. Gramm).}
\footnote{173. & 147 CONG. REC. S13,435 (Dec. 18, 2001) (statement of Sen. Gramm).}
\footnote{174. & See supra notes 123-33 and accompanying text.}
\footnote{175. & The anti-dumping provision of the Global Agreement on Tariffs and Trade (GATT) is designed to protect against foreign producers charging unfairly low prices that result from selling the product at less than production value or at subsidized prices. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 806, cmt. a (1987). After a determination that an export price is lower than the comparable domestic price an injured party may seek countervailing duties equal to the amount of the subsidy. \textit{Id}.}
among industries seeking relief from foreign competition.\textsuperscript{177} The recent popularity of such lawsuits is not surprising however, considering the benefits conferred by the Byrd Amendment to the Tariff Act of 1930.\textsuperscript{178} The Byrd Amendment provides that duties collected pursuant to an antidumping order are to be paid to the injured domestic industry rather than to the government.\textsuperscript{179} Thus, there is a strong incentive for industries to bring such suits.

To find the Vietnamese guilty of "dumping," it was necessary that the United State Department of Commerce (DOC) determine that the U.S. industry was materially injured or threatened with material injury.\textsuperscript{180} This meant that the domestic industry had to prove that the Vietnamese product was being unfairly traded or sold in the U.S. market at less than fair value or subsidized by the foreign government.\textsuperscript{181} The United States International Trade Commission (ITC), monitors the effect of imports on U.S. industries and determines what remedies to apply to deter the unfair competition.\textsuperscript{182}

In January 2002, the DOC handed another victory to the U.S. catfish industry when it ruled that the Vietnamese fish were being sold below fair value.\textsuperscript{183} This determination entitled the United States to impose duties on the imports which would assist the domestic producers by leveling competitive conditions.\textsuperscript{184} Although the U.S. industry requested tariffs as high as 190 percent, the DOC actually specified duties ranging from 44.6 to 63.88 percent.\textsuperscript{185} In August 2003, the ITC ruled that the imports materially injured the domestic industry, thus

\textsuperscript{177} 149 CONG. REC. S10,510 (July 31, 2003) (statement of Sen. Murkowski).
\textsuperscript{179} 19 U.S.C. § 1675c.
\textsuperscript{181} 19 U.S.C. § 1671.
\textsuperscript{182} See ITC Investigation, supra note 176.
\textsuperscript{183} \textit{id}
\textsuperscript{184} 19 U.S.C. § 1675c.
clearing the way for the imposition of the duties ruled on by the DOC.186

The Vietnamese maintain that they have not “dumped” catfish.187 The Vietnamese Association of Seafood Exporters and Processors assert that the United States is being unfair and that the ruling was not objective.188 Others claim that the process is biased towards finding dumping.189 They point out that in 2001, dumping was found in ninety-four percent of the cases examined.190 Following this ruling, Vietnam anticipates it will no longer be able to compete in the U.S. market, which previously had accounted for more than a third Vietnam’s catfish exports.191 It has already begun to have an impact. For example, imports of catfish during September of 2002 were fifty-six percent below the amount imported during the same period the previous year.192 Over the first seven months of 2003, catfish imports were down thirty-six percent compared with the same period a year earlier.193 The Vietnamese predicted that their basa exports to the United States would amount to only $20 million in 2003, in sharp contrast to the $55 million reached in 2002.194

One observer determined that the imposition of tariffs had added a minimum of $21 to $55 million in the amount importers paid for the Vietnamese fish in the year 2002.195 Although the Catfish Farmers of America were pleased with this measure, others worried that the tariffs will have negative consequences for American consumers who will ultimately pay more for the

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186. See ITC Investigation, supra note 176.
187. See Roy, supra note 105, at 6. Their position is supported by the U.S. Embassy which claims that “there’s no evidence that the Vietnamese government provides direct subsidies to the catfish industry;” or evidence “to suggest that Vietnam is deliberately directing catfish exports to the U.S. to establish market share.” Id.
190. Id.
193. See Harvey, *Aquaculture Production*, supra note 9, at 3.
194. See Lam, supra note 188, at *3.
product. 196 Despite the increased price for consumers, it is not clear that producers will reap the benefit. For example, in 2003 the average price received by the producer was 58.1 cents per pound, up only slightly from 2002 when producers received 56.8 cents per pound. 197

VIII. WILL THESE MEASURES WORK?

The U.S. catfish industry successfully persuaded Congress to implement restrictive legislation that limited the use of the catfish label 198 and obtained tariffs on Vietnamese basa imports; 199 however, these solutions may only be temporary. First, the industry asserts that it is willing to compete with foreign countries on a “level playing field.” 200 The legislation, however, does not provide for a level playing field. 201 In fact, the current legislation does not prohibit the Vietnamese from importing fish into the United States. 202 The legislation merely bans importers from labeling and advertising fish as catfish unless they belong to the family Ictaluridae. 203 Therefore, if the Vietnamese, or anyone else, produce fish belonging to the family Ictaluridae, they could import, advertise, and sell it under the label “catfish” without being in violation of the restrictive labeling law. 204 Although it may require time to find particular strains that are suitable for that country’s natural conditions, there is no indication that this could not be done. 205 Once this obstacle is overcome, countries such as Vietnam would regain the competitive advantage associated with cheaper labor and less stringent environmental regulations. 206 Despite the fact that environmental conditions in which the fish are raised will not

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196. See Freking, supra note 170, at A1.
197. See Harvey, Aquaculture Production, supra note 9, at 4.
198. See supra notes 75-78 and accompanying text.
199. See supra notes 183-86 and accompanying text.
204. 21 U.S.C.A. §§ 321d, 343(t).
206. See supra notes 111-17 and accompanying text.
have changed, it will then be legal to label the foreign fish as “catfish.”

In fact, this very scenario may already be underway. Since winning the battle with Vietnam, the U.S. producers have seen China enter the market with its own catfish. Although the channel catfish is not native to China, the climate in southern China is similar to that of the Mississippi Delta. In fact, aquaculture is well established and existing ponds could easily be converted to raise catfish. This leads some to speculate that China will, in fact, import channel catfish.

Another concern is that the FDA says that enforcement of the legislation is not a high priority when compared to larger food safety issues. Southern catfish farmers have responded to this by hiring their own inspectors to assist regulatory agencies in enforcing the new catfish labeling law. Furthermore, the FDA guidelines apply only to products sold in interstate commerce. Therefore, while the legislation could be used in conjunction with processed fillets, it is possible that the legislation would be unenforceable as to restaurants or supermarkets. In order to regulate labeling requirements of the direct marketers, it is necessary for the states to establish their own labeling laws.

Mississippi, for instance, has enacted and enforced legislation similar to that developed by Congress, restricting the use of the term “catfish” to fish belonging to the North American families. This restriction applies to all fish offered for direct retail sale for human consumption by a processor, distributor, wholesaler, or retailer. The statute prohibits the

207. 21 U.S.C.A. §§ 321d; 343(t).
209. Id.
210. Id.
211. Id.
213. See Brown, supra note 59, at A6.
214. See Lee, supra note 118, at 7A.
215. Id.
216. Id.
advertising, distributing, labeling, or selling of the Vietnamese *Pangasius*, as “catfish.” Misrepresentation of a “catfish” constitutes a felony and is punishable by fine up to $1000 or by imprisonment for up to two years.

Mississippi, unlike other states with comparable provisions, has enforced its catfish labeling laws. As part of an aggressive campaign to deter importers, restaurants, and grocery stores from engaging in illegal labeling practices, authorities fined a Jackson County grocery store $1800 for selling Vietnamese basa labeled as catfish.

Arkansas recently passed stricter laws, similar to those of Mississippi, which impose steep fines for violations of catfish labeling laws. In so doing, they delegated authority to the State Plant Board to enforce and fine distributors, processors, wholesalers, retailers, or eating establishments who do not correctly identify imported catfish. The penalty for mislabeling violations in Arkansas increases from a minimum $500 fine for a first violation up to a potential $2500 fine for a third violation.

Other states have similar penalties for violating catfish labeling laws. Alabama sanctions include issuance of a temporary restraining order, permanent injunction, or fines of up to $500. Similarly, in the event of violation, Tennessee provides for injunctive relief or the imposition of a penalty up to $1000 for each violation. Noticeably, many catfish producing states have passed legislation specifically designed to limit the use of the term “catfish.” However, this has not been a...
priority for legislatures of states that do not produce an abundance of catfish.

Both Mississippi and Kentucky have taken further actions to specifically support their states' local catfish industry. Mississippi requires that a catfish product be specifically labeled "Farm Raised Catfish, A Product of Mississippi" but provides that the appropriate state name or "USA" may be inserted to accommodate the catfish products produced in any of the other states of the United States. Kentucky requires that state facilities purchase only Kentucky farm-raised catfish, if available.

Beyond the increasing competition from foreign catfish, some have asserted that U.S. overproduction is a bigger issue. According to United States Department of Agriculture statistics, water surface acreage devoted to catfish production in the United States increased by over twenty percent, nearly 40,000 acres, between 1995 and 2002. While increases in domestic production may be partially responsible for the falling prices of catfish, recent data suggests this is no longer the situation.
Total acres devoted to catfish production increased only slightly from 2000 to 2001.\textsuperscript{235} Total water surface acres devoted to catfish production fell in 2003 by another 10,000 acres.\textsuperscript{236} Total catfish sales climbed steadily from 1994 until 2000, at which point sales plunged by nearly $100 million and returned to levels similar to those seen in 1994.\textsuperscript{237} Further, catfish sales were expected to increase in 2003 due to the depressed prices since 2001 and the decrease in overall inventories of catfish.\textsuperscript{238}

Like the legislation, the tariffs imposed offer only temporary relief. For example, domestic growers of Atlantic Salmon mounted an extensive, and expensive, lobbying effort to convince the government to impose duties on Norwegian producers.\textsuperscript{239} When they were successful, other competitors emerged and the prices never rebounded.\textsuperscript{240} Since the tariffs imposed by the DOC and ITC apply only to Vietnamese catfish imports, they do not affect other foreign competitors who are capable of supplying lower priced imports to the domestic market.\textsuperscript{241} Although Vietnam has been the predominant supplier of foreign catfish, other competitors include Mexico, Costa Rica, and China, all of which have lower production costs than the United States.\textsuperscript{242} Therefore, it would not be surprising to see prices remain low as an influx of other foreign competitors enter the domestic market in an attempt to replace the Vietnamese market share.

Additionally, tariffs on foreign products can negatively impact consumers within the United States. Since tariffs increase the price of the imports, they allow the domestic
industry to raise its prices as well.\textsuperscript{243} This price increase means the consumer will pay more for the same product.\textsuperscript{244}

Therefore, while the legislation restricting the use of the term catfish and the tariffs being enforced on the Vietnamese will offer some relief to U.S. catfish growers, the effectiveness remains to be seen. Although the actions taken by the industry have been successful in slowing the Vietnamese imports, the prices paid to U.S. producers have not yet increased.\textsuperscript{245}

\section*{IX. ALTERNATIVES}

The domestic industry may be wise to pursue alternative methods of distinguishing its product. The domestic catfish industry’s goal of preventing consumer confusion is also a goal of trademark law. Although under trademark law a generic term such as “catfish” cannot be afforded protection, the industry could develop a certification mark.\textsuperscript{246} Certification marks can be “used by trade associations or other commercial groups to identify a particular type of good.”\textsuperscript{247} These marks are used in commerce by a person other than the owner of the mark, and serve to certify “regional or other origin material, . . . quality, . . . or other characteristics of a person’s goods or services . . . .”\textsuperscript{248} There are, however, limitations on the discriminatory use of the mark in that once the established standard is met, anyone who qualifies may use the mark.\textsuperscript{249} The mark acts as a seal of approval and certifies conformity with centralized standards.\textsuperscript{250}

The use of such methods to restrict the use of a name to products from a particular region is not a novel suggestion. In fact, many industries that have developed a successful product have made use of such marks. Beginning in 1920, French winemakers in the Bordeaux region limited the term “Bordeaux”\textsuperscript{244} See Freking, supra note 170, at A1.
\textsuperscript{245} Harvey, Aquaculture Production, supra note 9, at 3.
\textsuperscript{247} ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 544 (3d ed. 2003).
\textsuperscript{249} See MERGES, supra note 247, at 544.
\textsuperscript{250} Id.
to wines actually produced in that region.\textsuperscript{251} For years, the French have maintained that taste is inherently linked to the geographic region where it is produced.\textsuperscript{252} They are also notorious for the steps they have taken to restrict the use of the "champagne" label.\textsuperscript{253} Recently the idea has become a popular global method of protecting a region's agriculture from competition.\textsuperscript{254}

The U.S. catfish industry could take advantage of such an opportunity and develop both regional and quality characteristics to use in the marketing of its product. Through this method, they could limit the use of their certification mark to fish raised in the Mississippi Delta region that meet particular standards. Unfortunately for the catfish industry, this would require another extensive advertising campaign to establish the Mississippi Delta Catfish as unique and to publicize the qualities attributable to their product. There is, of course, a risk that it is too late to convince consumers to develop a preference for their catfish. If the industry were successful, however, the intellectual property provisions of the bilateral trade agreement would require Vietnam to acknowledge and respect the mark.\textsuperscript{255}

Alternatively, one step Congress could take to minimize problems involved would be to implement the Country of Origin Labeling Act (COOL).\textsuperscript{256} This provision establishes a system to inform consumers as to the country where a covered product originated.\textsuperscript{257} The 2002 Farm Bill contained a provision mandating that meats, fruits, vegetables, peanuts, and perishable commodities be labeled by their country of origin.\textsuperscript{258} Most significantly, farm-raised fish are included under the Act.\textsuperscript{259}

\begin{footnotesize}
\textsuperscript{252} Id.
\textsuperscript{253} Id.
\textsuperscript{254} Id. Other examples include the State of Georgia defining where Vidalia Onions must originate. Id. India has asked that the use of the label basmati rice be restricted to rice produced in the foothills of the Himalayas. Philadelphia, supra note 251, at B14. Thailand is also seeking protection for its variety of jasmine rice. Id.
\textsuperscript{259} 7 U.S.C. § 1638.
\end{footnotesize}
The Act requires that fish products be "hatched, raised, harvested, and processed in the United States" to be eligible to bear the U.S. label.\textsuperscript{260} Under this Act, retailers would be required to inform the consumer of the product's origin at the final point of sale.\textsuperscript{261} Unfortunately, after passing the bill, members of Congress resumed debating the issue. In 2004 Congress officially postponed the implementation of this provision for two years.\textsuperscript{262}

If COOL were to come into effect, arguments about protectionism could end. First, the industry would be provided with the ability to distinguish its products from those of its competitors.\textsuperscript{263} The time, effort, and money invested to improve, promote, and advertise the products would be attributable to the domestic industry. Additionally, this would add value to domestic commodities.\textsuperscript{264} Another purpose of the Act was to assure that consumers were provided with accurate information.\textsuperscript{265} A country of origin label would guarantee that consumers were given the tools to make well-informed choices between U.S. and imported products.\textsuperscript{266} Consumers would know if the meat they were buying was produced in the United States or if it was imported from a country having fewer environmental, health, and safety regulations.\textsuperscript{267} The industry could inform Americans as to the environmental controls that are used in the production of U.S. grown products and would be rewarded for their efforts. Such a system would give Americans the option to buy American products and support domestic industries.

Under this regimen the arguments made by all sides would be weakened. The accusations of unfair trading practices made

\footnotesize{260. 7 U.S.C. § 1638a (Supp. 2003).} 
\footnotesize{261. 7 U.S.C. § 1638a. If a retailer does not comply with the Act, a warning would be issued and the retailer would be given a thirty day period to comply. If the retailer fails to bring itself into compliance during this time period, it would constitute a willful violation and result in a fine of up to $10,000. 7 U.S.C. § 1638b (Supp. 2003).} 
\footnotesize{263. 149 CONG. REC. S14,117 (Nov. 3, 2003) (statement of Sen. Johnson).} 
\footnotesize{264. Id.} 
\footnotesize{265. Id.} 
\footnotesize{266. 149 CONG. REC. S14,120 (Nov. 3, 2003) (statement of Sen. Enzi).} 
\footnotesize{267. Id.}
by the domestic industry would not have the same credibility. For instance, proponents could no longer argue that the unsuspecting consumer was being defrauded into buying an inferior product. Similarly, critics of the domestic catfish industry who assert that protectionist measures increase the price of fish for the consumer, would lose one of their best arguments, as consumers would then have the opportunity to buy the lower priced foreign product, if they so desired. Considering that a significant number of our foreign competitors already require country of origin labeling on produce or meat, the argument made by our trade partners, that the United States is guilty of protectionism would be undermined. The European Commission Labeling Decision for Seafoods requires that information such as country of origin and processing be included on the label and emphasize that such information is necessary to provide consumers with at least the minimum amount of information on the characteristics of products. Given that the European Union and the majority of U.S. trade partners have already enacted provisions similar to COOL, it would be difficult for our trading partners to argue that COOL violates trade agreements, and it seems like a reasonable solution despite the additional costs associated with it and logistical problems of developing the precise regulations.

X. CONCLUSION

To sustain domestic industry, it is necessary to balance the nation’s desire for labor, safety, and environmental, regulations with costs imposed as a consequence. Since some foreign competitors seem to lack equivalent regulations, we must in some way account for the inherent advantages which are derived from the lack of such measures. In taking steps to balance the scales, however, Congress must be wary of negative repercussions that may result. In the case of the catfish labeling restrictions, the motives were admirable, the methods were not.

268. 150 CONG. REC. S129 (Jan. 22, 2004) (statement of Sen. Daschle) (stating that forty-three other countries already have such a policy in place).
270. 149 CONG. REC. S14,125 (Nov. 6, 2003) (statement of Sen. Baucus).
The U.S. economy relies on free and open markets for the distribution of goods. In enacting this protectionist measure, Congress jeopardized the integrity of U.S. trade relations. Moreover, they have potentially subjected domestic exporters to retaliatory actions. The reward for such a risk is a temporary solution to the U.S. catfish industry's long-term economic problems.

Granted, foreign competitors should not be allowed to benefit at the expense of the misled American consumer. Congress, however, would be wise to act with less hostility when it attempts to "level the playing field" with legislation. More impartial measures could produce an equally effective result. The Country of Origin Labeling Act would ensure that consumers are informed and are capable of making a knowledgeable decision in buying meats and produce. Further, the industry could adequately distinguish their product and reap the reward of their investment. Yet, the Act does not go so far as to blatantly exclude foreign competition or violate trade agreements and thus, would be a more amicable solution.

Kerrilee E. Kobbeman