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

by

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LEGISLATIVE NOTE

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

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 produces 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 Act¹ 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."² 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,³ for others, only recently has catfish become desirable or readily available for consumption.⁴ It was only after the catfish industry in the southern United States

1. 7 U.S.C.A. §§ 1638-1638a (Supp. 2003). Hereinafter, where statutes are not yet printed in the U.S.C. the citations will reference the U.S.C.A.

2. MARK TWAIN, *LIFE ON THE MISSISSIPPI* 187 (Oxford Univ. Press 1962) (1883).

3. Edward Alden, *Catfish Blues Cast Doubt on U.S.-Vietnam Trade*, THE FIN. TIMES LIMITED, Dec. 20, 2001, at 8.

4. James Toedtman, *Fighting Like Cats and Dogs Over Fish. It's U.S. vs. Vietnamese as Trade Battle Goes Global*, NEWSDAY, Mar. 10, 2002, at F2.

invested a significant amount of money in aquaculture⁵ and the development of a clever marketing scheme that catfish became a national staple.⁶

Aquaculture supplies consumers with an increased selection of seafood at affordable prices.⁷ Clearly, this has been a significant factor in the rapid growth of seafood consumption,⁸ and this growth is expected to continue.⁹ Currently, channel catfish production comprises the largest portion of the United States' aquaculture.¹⁰

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.¹¹ 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.¹² In the mid-1980s, farmers were having a difficult time making a living as many agricultural commodities were unprofitable.¹³ Many of these growers decided to convert their fields to ponds to capitalize on the aquaculture industry.¹⁴ In turning away from more traditional cotton and rice production, they bet the farm on what was once called a "river rat."¹⁵

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.

7. Kenneth Pierce et al., *Fishy Taxes on Trade*, METROPOLITAN CORP. COUNS., Aug. 2003, at 17.

8. *Id.*

9. David J. Harvey, *Aquaculture Production Forecast to Grow, But Many Uncertainties Loom*, USDA AQUACULTURE UPDATE, Oct. 9, 2003, at 1, available at <http://www.ers.usda.gov> [hereinafter Harvey, *Aquaculture Production*].

10. David J. Harvey, *In 2002, Aquaculture Volumes Higher, But Prices Depressed*, USDA AQUACULTURE UPDATE, Oct. 10, 2002, at 1, available at <http://www.ers.usda.gov>.

11. See Pierce, *supra* note 7, at 17.

12. 147 CONG. REC. E1610-11 (Sept. 17, 2001) (statement of Rep. Wicker, extension of remarks made on Sept. 6, 2001).

13. Dan Chapman, *Catfish Tangle U.S., Vietnam Fight Trade War Over Down-Home Delicacy*, ATLANTA J. & CONST., Dec. 11, 2002, at F1.

14. 147 CONG. REC. S13,430-31 (Dec. 11, 2001) (statement of Sen. Lincoln).

15. Jeffery Gettleman, *U.S. Catfish Is In Troubled Water As Asian Catch Seizes the Market*, L.A. TIMES, July 16, 2002, at A10.

to make money in the production of pond-raised catfish,¹⁶ 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.¹⁷ 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.¹⁸

This campaign successfully erased the former negative image of the catfish¹⁹ and many Americans, who were previously unfamiliar with catfish and reluctant to incorporate it into their diets, began doing so.²⁰ As a result, catfish has become increasingly popular, particularly in new markets such as the Midwest.²¹ Catfish fillets can now be easily found across the country at supermarkets and often on restaurant menus.²² This familiarity has led American consumers to expect a certain product; namely grain-fed, farm-raised catfish, produced in environmentally controlled conditions.²³

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.²⁴ Some argue that the catfish industry has been one of the few bright spots in one of the country's poorest regions.²⁵ The catfish industry employs thousands of individuals and annually adds millions of dollars to an economically depressed region.²⁶ Nationwide, over

16. See Chapman, *supra* note 13, at F1.

17. 147 CONG. REC. S10,111 (Oct. 3, 2001) (statement of Sen. Hutchinson).

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 A10.

19. See Gettleman, *supra* note 15, at A10.

20. 147 CONG. REC. S10,114 (Oct. 3, 2001) (statement of Sen. Sessions).

21. See Toedtman, *supra* note 4, at F2.

22. *Id.*

23. 147 CONG. REC. S10,111 (Oct. 3, 2001) (statement of Sen. Hutchinson).

24. 147 CONG. REC. S13,429 (Dec. 18, 2001) (statement of Sen. Hutchinson).

25. 147 CONG. REC. S13,428 (Dec. 18, 2001) (statement of Sen. Hutchinson).

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

189,000²⁷ acres are devoted to raising catfish with production exceeding 593 million pounds annually.²⁸ This accounts for over fifty percent of the total volume and value of all United States aquaculture.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.³⁰ These four states presently account for ninety-six percent of the nation's total catfish production.³¹

IV. THE VIETNAMESE "CATFISH" ENTERS THE U.S. MARKET

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

total sales with sales of \$300.3 million, Alabama \$81.6 million, Arkansas \$65.7 million, and Louisiana with \$33 million. *Catfish Production*, available at <http://usda.mannlib.cornell.edu/reports/nassr/other/pcf-bbc/2001/> (Feb. 28, 2001) [hereinafter *Catfish Production* Feb. 28, 2001]. In 2001 the catfish industry in the United States had total sales of \$443.7 million. *Id.* Mississippi again led the nation with \$260.9 million sales. *Id.* Alabama, Arkansas, and Louisiana had sales of \$76.1, \$56.4, and \$15.8 million respectively. *Id.* Numbers were similar in 2002. *Catfish Production*, available at <http://usda.mannlib.cornell.edu/reports/nassr/other/pcf-bbc/2003/> (Feb. 6, 2003) [hereinafter *Catfish Production* Feb. 6, 2003].

27. See *Catfish Production* Feb. 6, 2003, *supra* note 26.

28. See *Catfish Production* Feb. 28, 2001, *supra* note 26. Catfish sales are forecast to reach 650-670 million pounds in 2003. See Harvey, *Aquaculture Production*, *supra* note 9, at 3.

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

30. In 2001, of 933 total catfish production operations in the U.S., Mississippi accounted for 400, Alabama for 270, Arkansas for 185, and Louisiana for 78 operations. In 2002, of 1236 operations these states respectively accounted for 395, 240, 195, and 70 operations. In 2003, of 1155 operations these four states accounted for 405, 231, 155, and 57 of all operations in the U.S. See *Catfish Production* Feb. 6, 2003, *supra* note 26; *Catfish Production*, available at <http://usda.mannlib.cornell.edu/reports/nassr/other/pcf-bbc/2002/> (July 29, 2002) [hereinafter *Catfish Production* July 29, 2002].

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. *Id.*

31. See *Catfish Production* Feb. 6, 2003, *supra* note 26.

32. 147 CONG. REC. S13,428 (Dec. 18, 2001) (statement of Sen. Hutchinson).

33. *Id.*

labeling the basa fish as a white grouper; however, they continued to have little success in the market.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.”³⁵ The U.S. catfish industry strongly opposed this suggestion.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.³⁷ The FDA, however, had not previously restricted the use of the term catfish based on the scientific differences³⁸ and had allowed the Vietnamese fish to be labeled as catfish consistently with Federal Food, Drug, and Cosmetic Act naming provisions.³⁹ The FDA had agreed to allow the term “catfish” to be used with the Vietnamese fish in combination with previously approved names,⁴⁰ notwithstanding the fact that the Vietnamese basa fish belonged to a different genetic family.⁴¹

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

34. *Id.*

35. 147 CONG. REC. S13,438-39 (Dec. 18, 2001) (statement of Sen. Sessions).

36. 147 CONG. REC. E1610 (Sept. 10, 2001) (statement of Rep. Wicker, extension of remarks made on Sept. 6, 2001).

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.

38. See *FDA letter*, *supra* note 37. The FDA’s approach has now been overruled by recently passed legislation. *Id.*

39. *Id.*; see also 21 C.F.R. § 102.5 (2003).

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.*

41. See *FDA Letter*, *supra* note 37.

42. 147 CONG. REC. S13,429 (Dec. 18, 2001) (statement of Sen. Hutchinson).

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 1997.⁴³ By 2002, basa “catfish” imports into the U.S. exceeded eighteen million pounds.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.⁴⁵ Vietnam has consistently accounted for approximately ninety percent of all catfish imports entering the United States.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.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.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.”⁴⁹ Senator Jeff Sessions of Alabama emphasized that species substitution is a form of “economic adulteration” of food products.⁵⁰ He contended this was fraudulent misbranding and therefore, the FDA had a duty to prevent its occurrence.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.⁵² After

43. See *Catfish Production* Feb. 28, 2001, *supra* note 26, at 15.

44. See *Catfish Production* Feb. 6, 2003, *supra* note 26, at 18.

45. 147 CONG. REC. S10,111 (Oct. 3, 2001) (statement of Sen. Hutchinson).

46. See *Catfish Processing*, May 22, 2003, at <http://usda.mannlib.cornell.edu/reports/nassr/other/pcf-bb/2003/>; *Catfish Processing*, Nov. 22, 2002, at <http://usda.mannlib.cornell.edu/reports/nassr/other/pcf-bb/2002/>; *Catfish Processing*, available at <http://usda.mannlib.cornell.edu/reports/nassr/other/pcf-bb/2001/> (last visited Apr. 8, 2004).

47. See Harvey, *Aquaculture Production*, *supra* note 9, at 5.

48. 147 CONG. REC. S10,114 (Oct. 3, 2001) (statement of Sen. Sessions).

49. 147 CONG. REC. S13,438-39 (Dec. 18, 2001) (statement of Sen. Sessions).

50. *Id.* at S13,439.

51. *Id.*

52. See *infra* notes 65-197 and accompanying text.

FDA approval, the Vietnamese were allowed to sell their product to the consumer as “catfish.”⁵³ The Vietnamese producers were able to offer their product to consumers at a much lower retail price than the U.S. producers.⁵⁴ Consequently, they began increasing their market share as imports of frozen fillets went up thirty-four percent between 2000 and 2001.⁵⁵ 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 2001.⁵⁶ As the imports continued to enter the United States at incredibly high rates, prices became further depressed, and the domestic industry became increasingly concerned.⁵⁷

United States catfish farmers began experiencing significant losses and questioned the viability of their industry.⁵⁸ The price that processors were willing to pay to producers for catfish was falling.⁵⁹ For example, in January 2000, the average price paid to farmers was 74.4 cents per pound.⁶⁰ 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.⁶¹ This rate is well below the cost of production which varies from 60 to 70 cents per pound.⁶²

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.⁶³ 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.

54. 147 CONG. REC. S10,113 (Oct. 3, 2001) (statement of Sen. Sessions).

55. James D. Martin, *Catfish Sales Decline Despite Increased Water Acres*, FEEDSTUFFS, Apr. 29, 2002, at 11.

56. See *Catfish Production* Feb. 6, 2003, *supra* note 26, at 4; *Catfish Production* Feb. 28, 2002, *supra* note 26, at 9.

57. See Harvey, *Aquaculture Production*, *supra* note 9, at 1.

58. 147 CONG. REC. E1611 (Sept. 10, 2001) (statement of Rep. Wicker).

59. Timothy R. Brown, *Imports Take Bite Out of U.S. Market for Catfish: Producers Weighing Anti-Dumping Drive*, THE WASHINGTON POST, May 12, 2002, at A6.

60. See *Catfish Production* Feb. 28, 2001, *supra* note 26.

61. See Harvey, *Aquaculture Production*, *supra* note 9, at 2.

62. David Mercer, *Cheap Vietnam Catfish Merit Tariff, Agency Says*, ARK. DEMOCRAT-GAZETTE, Jan. 28, 2003, at A1.

63. See 147 CONG. REC. S10,113-14 (Oct. 3, 2001) (statement of Sen. Sessions).

defrauded” by allowing the Vietnamese to import an entirely different product and label it as “catfish.”⁶⁴

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.⁶⁵ The goal in implementing this trade agreement with Vietnam was to open new markets for goods and services.⁶⁶ In addition to the reciprocal lowering of tariffs, the agreement established requirements for adherence to intellectual property rights.⁶⁷

In an initially futile effort to support the domestic catfish industry, senators and representatives from the southeast argued against this trade agreement.⁶⁸ On behalf of the catfish industry, they maintained that the U.S. producers were being subjected to unfair competition.⁶⁹ 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.⁷⁰ 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).

65. 19 U.S.C. § 2434 (Supp. 2003). The agreement, signed by President George W. Bush, provides that nondiscriminatory treatment shall be extended to the products of Vietnam. 19 U.S.C.A. § 2434.

66. 147 CONG. REC. S10,108 (Oct. 3, 2001) (statement of Sen. Baucus).

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.

68. See 147 CONG. REC. S10,111-14 (Oct. 3, 2001) (statements of Sen. Hutchinson and Senator Sessions).

69. *Id.*

70. 147 CONG. REC. S13,428-29 (Dec. 18, 2001) (statement of Sen. Hutchinson).

favorable environmental conditions and cheaper labor.⁷¹

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.⁷²

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.⁷³ 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."⁷⁴

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.⁷⁵ Congress passed legislation that redefined what merited the label "catfish" within the United States.⁷⁶ 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.'"⁷⁷ 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."⁷⁸

71. *Fighting Dirty Over Catfish*, INT'L HERALD TRIB., July 23, 2003, available at 2003 WL 59125583, at *1 [hereinafter *Fighting Dirty*].

72. See 147 CONG. REC. S10,107-08 (Oct. 3, 2001) (statement of Sen. Baucus).

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).

76. Federal Food, Drug, and Cosmetic Act, Pub. L. No. 107-171, 116 Stat. 526 (codified at 21 U.S.C.A. § 321d (Supp. 2003)); Federal Food, Drug, and Cosmetic Act, Pub. L. No. 107-171, 116 Stat. 134 (codified at 21 U.S.C.A. § 343(t) (Supp. 2003)).

77. 21 U.S.C.A. § 321d.

78. 21 U.S.C.A. § 343(t).

Considering the potential ramifications of violating a trade agreement,⁷⁹ 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.⁸⁰ A set of manager's amendments⁸¹ were adopted into law without discussion or debate,⁸² thereby circumventing the typical processes.⁸³ As a result, this law was passed before its existence was known to the majority of the Senate.⁸⁴

The enactment of this legislation suggests that the catfish industry persuaded Congress to disregard science.⁸⁵ Although the FDA and the American Fisheries Society (AFS) considered the Vietnamese basa fish to be freshwater catfish of South Asia,⁸⁶ Congress, resolved that even if this were the case, basa fish could no longer be labeled as a "catfish" within the U.S.⁸⁷

Consequently, the FDA was forced to abandon its previous position and issued new guidelines that conformed with the recently enacted legislation.⁸⁸ 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

79. If the World Trade Organization were to find the United States in violation of its trade agreement, it would enable Vietnam to impose economic sanctions. Lori M. Wallach, *Accountable Governance in the Era of Globalization: The WTO, NAFTA and International Harmonization of Standards*, 50 U. KAN. L. REV. 823, 825 (2002).

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).

81. A manager's amendment is intended to contain only technical corrections to the overall bill. 147 CONG. REC. S11,337-01 (Nov. 1, 2001) (statement of Sen. McCain).

82. 147 CONG. REC. S13,110 (Dec. 13, 2001) (statement of Sen. McCain).

83. 147 CONG. REC. S11,337 (Nov. 1, 2001) (statement of Sen. McCain).

84. 147 CONG. REC. S11,876 (Nov. 15, 2001) (statement of Sen. McCain).

85. See *Fighting Dirty*, *supra* note 71.

86. 147 CONG. REC. S11,337 (Nov. 1, 2001) (statement of Sen. McCain); see *FDA Letter*, *supra* note 37.

87. 21 U.S.C.A. § 321d; 21 U.S.C.A. § 343(t); 147 CONG. REC. S13,110 (Dec. 13, 2001) (statement of Sen. McCain).

88. *FDA Guidance for Industry, Implementation of Section 403(t) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343(t)) Regarding the Use of the Term "Catfish,"* (Dec. 2002) [hereinafter *FDA Guidance for Industry*], available at <http://www.cfsan.fda.gov/~frf/catfui2.html> (last visited May 6, 2004).

their product within the United States.⁸⁹ Because other FDA regulations require the fish to be labeled with the common or usual name,⁹⁰ it became necessary to outline alternative acceptable marketing names for fish other than those from the family Ictaluridae that previously used the term “catfish.”⁹¹ 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.”⁹² This name may be a “coined” name developed for the purpose of naming the product.⁹³ The name may not, however, be confusingly similar to the name of another food.⁹⁴ In a later advisory letter the FDA defined specific market names for *Pangasius bocourti*, including “basa,” “bocourti,” “bocourti fish,” or “basa fish” that were deemed acceptable.⁹⁵

By enacting this legislation, Congress forbade in the United States, the sale, under the name “catfish”, of any fish not indigenous to North America.⁹⁶ 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.”⁹⁷ 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.⁹⁸

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*; see also 21 C.F.R. § 102.5 (2003).

93. See *FDA Guidance for Industry*, *supra* note 88.

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.

98. 147 CONG. REC. S13,426 (Dec. 18, 2001) (statement of Sen. McCain).

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.

103. See 147 CONG. REC. S13,440 (Dec. 13, 2001).

104. See *Fighting Dirty*, *supra* note 71, at *1.

105. Barun Roy, *The Great American Catfish War*, BUS. STANDARD, Jan. 24, 2003, at 6.

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.

107. Edward Alden, *US and Vietnam in Catfish Spat*, FIN. TIMES LTD., Jan. 28, 2003, at 7.

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.*

110. 147 CONG. REC. S13,428 (Dec. 18, 2001) (statement of Sen. Hutchinson).

111. See *infra* notes 112-21 and accompanying text.

112. 147 CONG. REC. S13,429 (Dec. 18, 2001) (statement of Sen. Hutchinson).

113. Elizabeth Becker, *Delta Farmers Want Copyright on Catfish*, N.Y. TIMES, Jan. 16, 2002, at A1; see also 21 C.F.R. § 529.1030 (2003) (specifying acceptable usage of formalin in catfish production).

114. 21 C.F.R. § 556.1 (2003) (establishing tolerances for chemical residues in food producing animals). Some FDA regulations are specifically applicable to the catfish industry: 21 C.F.R. § 558.575 (2003) (limiting exposure to sulfadimethoxine and ormetoprim); 21 C.F.R. § 556.490 (2003) (establishing tolerance levels for ormetoprim); and 21 C.F.R. § 556.640 (2003) (establishing tolerance levels for sulfadimethoxine). The FDA also limits the exposure to drugs and additives that may be introduced in animal feeds. 21 C.F.R. §§ 558.570 (2003).

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.¹¹⁵ On the one hand, the domestic industry claims that the strictly controlled conditions lead to favorable growing conditions for the catfish.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.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.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.¹¹⁹ However, the industry emphasizes that the Vietnamese basa fish, raised in cages along the Mekong River Delta, feed on whatever floats by.¹²⁰ Again, they suggest this difference affects the quality of the product.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.

115. 147 CONG. REC. S13,429 (Dec. 18, 2001) (statement of Sen. Hutchinson); 147 CONG. REC. S10,114 (Oct. 3, 2001) (statement of Sen. Sessions).

116. 147 CONG. REC. S10,114 (Oct. 3, 2001) (statement of Sen. Sessions); *see also* Becker, *supra* note 113.

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

118. Elizabeth Lee, *Asian Import Has To Go Fishing For a New Name*, CHICAGO TRIB., Dec. 18, 2002, at 7A.

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

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

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.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.¹²³ Although the basa is in the same scientific order as the channel catfish they are of a different family, genus, and species.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.”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.”¹²⁶ Indeed, evidence shows that importers have intended to mislead the American consumer.¹²⁷ The Vietnamese fish has been packaged to mimic

Rep. Everett).

122. 147 CONG. REC. E1610 (Sept. 10, 2001) (statement of Rep. Wicker).

123. 147 CONG. REC. H6276 (Oct. 4, 2001) (statement of Rep. Pickering).

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).

125. 147 CONG. REC. S13,435 (Dec. 13, 2001) (statement of Sen. Lott).

126. 148 CONG. REC. S3989 (May 8, 2002) (statement of Sen. Hutchinson).

127. 147 CONG. REC. S13,429 (Dec. 18, 2001) (statement of Sen. Hutchinson).

American brand names and brand emblems for catfish.¹²⁸ 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.¹²⁹ These names imply that the product originated in the Mississippi River Delta when in actuality it is from the Mekong River delta.¹³⁰

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.¹³¹ 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.¹³² 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.¹³³

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.¹³⁴ 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.¹³⁵

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.¹³⁶ Proponents of the legislation claim to recognize the benefits of competition, and allege their only objective is to prevent the mislabeling and misleading of

128. 147 CONG. REC. S13,431 (Dec. 18, 2001) (statement of Sen. Lincoln).

129. 147 CONG. REC. D1265-01 (Dec. 13, 2001) (statement of Sen. Hutchinson).

130. 147 CONG. REC. S10,111 (Oct. 3, 2001) (statement of Sen. Hutchinson).

131. 147 CONG. REC. S13,428 (Dec. 18, 2001) (statement of Sen. Hutchinson).

132. *Id.*

133. *See Lee, supra* note 118, at 7A..

134. 147 CONG. REC. S13,429 (Dec. 18, 2001) (statement of Sen. Hutchinson).

135. 147 CONG. REC. S13,428 (Dec. 18, 2001) (statement of Sen. Hutchinson).

136. *Id.*

consumers.¹³⁷ The industry claims the legislation corrects these inaccuracies and informs consumers about what they are actually purchasing.¹³⁸

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.¹³⁹ In his attempt to overturn the restricted labeling legislation, Senator McCain characterized the catfish industry's effort as a "campaign of misinformation."¹⁴⁰ 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.¹⁴¹ They claim this legislation is an underhanded way for domestic catfish producers to eliminate competition.¹⁴²

Opponents also deny that the fish are raised in poor environmental conditions.¹⁴³ The U.S. Embassy in Vietnam has denied the claim that the Vietnamese fish are of questionable quality and may pose health risks.¹⁴⁴ Nor does it believe the Vietnamese fish have had an "injurious impact" on the U.S. market.¹⁴⁵ 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.¹⁴⁶

More significantly, the opponents allege that all "catfish" really are catfish, with common characteristics.¹⁴⁷ They point out that the FDA and the AFS defined the *Pangasius* as

137. *Id.*

138. 147 CONG. REC. H6269 (Oct. 4, 2001) (statement of Rep. Wicker).

139. 147 CONG. REC. S11,337 (Nov. 1, 2001) (statement of Sen. McCain).

140. 147 CONG. REC. S13,427 (Dec. 18, 2001) (statement of Sen. McCain).

141. *See Fighting Dirty*, *supra* note 71, at *1.

142. 147 CONG. REC. S13,429 (Dec. 18, 2001) (statement of Sen. McCain).

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.

145. 147 CONG. REC. S13,427 (Dec. 18, 2001) (statement of Sen. McCain).

146. 147 CONG. REC. S13,433 (Dec. 18, 2001) (statement of Sen. Gramm).

147. 147 CONG. REC. S13,426 (Dec. 18, 2001) (statement of Sen. McCain).

“freshwater catfishes of Africa and southern Asia.”¹⁴⁸ The FDA, in cooperation with the National Marine Fisheries Service, concluded there was no justification for limiting the term “catfish.”¹⁴⁹ 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.¹⁵⁰ They also mention that no other animal or plant name has been given a statutory definition.¹⁵¹ They assert the sole reason the proponents of the legislation oppose the use of the term “catfish” is protectionism.¹⁵²

Despite the industry’s debate over the genetic similarities or differences, the argument is over a common name rather than the scientific classification.¹⁵³ Both the public and the scientific communities use common names to describe particular species and larger plant and animal denominations.¹⁵⁴ 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.¹⁵⁵ The AFS strongly opposed the labeling restrictions and the regulation of common names by the government.¹⁵⁶ 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.¹⁵⁷ Further, AFS states that all 2,400 are accurately and properly identified as “catfish.”¹⁵⁸ 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.

150. 147 CONG. REC. S13,436 (Dec. 18, 2001) (statement of Sen. McCain).

151. *Id.*

152. 147 CONG. REC. S13,110 (Dec. 13, 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.

153. David Bennett, *U.S., Vietnam in Word Battle Over Catfish*, DELTA FARM PRESS, June 14, 2002, available at http://www.deltafarmpress.com/ar/farming_us_vietnam_word.com (last visited May 1, 2004).

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.*

catfish.¹⁵⁹ Accordingly, the use of the term catfish for the Vietnamese basa was not misleading because it is a member of the Siluriformes.¹⁶⁰

Also, opponents of the legislation argue the protectionist agenda will have “global repercussions.”¹⁶¹ They assert that the U.S. has “sadly implicated [itself] in the very sin [its] trade policy claims to reject.”¹⁶² 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.¹⁶³ 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.¹⁶⁴ 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.”¹⁶⁵

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.¹⁶⁶ 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.¹⁶⁷ 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.”¹⁶⁸ Similarly, the United States had opposed nomenclature restrictions proposed by the French for scallops.¹⁶⁹

159. *Id.*

160. *Id.*

161. 147 CONG. REC. S13,427 (Dec. 18, 2001) (statement of Sen. McCain).

162. See Lam, *infra* note 188, at *1.

163. See Chapman, *supra* note 13, at F1.

164. 147 CONG. REC. S13,434-51 (Dec. 18, 2001) (statement of Sens. Gramm and Kerry).

165. 147 CONG. REC. S13,435 (Dec. 18, 2001) (statement of Sen. Gramm).

166. See Toedtman, *supra* note 4, at F2.

167. 147 CONG. REC. S13,437 (Dec. 18, 2001) (statement of Sen. McCain).

168. *Id.*

169. 147 CONG. REC. S13,434 (Dec. 18, 2001) (statement of Sen. Gramm).
Proponents of the catfish legislation admit the Europeans were acting unfairly in these

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.¹⁷⁰ Furthermore it opens the door to retaliation through higher tariffs on U.S. exports and reduces market access for U.S. producers.¹⁷¹ The opponents also make the argument that if this can be done to catfish, it can be done with many agricultural commodities.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.¹⁷³

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.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”¹⁷⁵ catfish on the U.S. market.¹⁷⁶ This action has become increasingly common

incidence but distinguish them on the grounds that in those cases the products were taxonomically more similar, involving species within the same scientific families. 147 CONG. REC. S13,430 (Dec. 18, 2001) (statement of Sen. Hutchinson).

170. 147 CONG. REC. S13,427 (Dec. 18, 2001) (statement of Sen. McCain); Kevin Freking, *Tariffs: Costly Control Tax on Imports, Meant to Protect U.S. Industry, Often Drives up Expenses for Arkansas Businesses*, ARK. DEMOCRAT-GAZETTE, Aug. 31, 2003, at A1.

171. 147 CONG. REC. S13,110-11 (Dec. 13, 2001) (statement of Sen. McCain).

172. 147 CONG. REC. S13,433-34 (Dec. 18, 2001) (statement of Sen. Gramm).

173. 147 CONG. REC. S13,435 (Dec. 18, 2001) (statement of Sen. Gramm).

174. See *supra* notes 123-33 and accompanying text.

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. *Id.*

176. Certain Frozen Fish Fillets From Vietnam, Investigation No. 731-TA-1012, Publ'n 3612 (Int'l Trade Comm'n Aug. 2003) at <http://www.usitc.gov/wais/reports/arc/>

among industries seeking relief from foreign competition.¹⁷⁷ The recent popularity of such lawsuits is not surprising however, considering the benefits conferred by the Byrd Amendment to the Tariff Act of 1930.¹⁷⁸ 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.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.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.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.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.¹⁸³ This determination entitled the United States to impose duties on the imports which would assist the domestic producers by leveling competitive conditions.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.¹⁸⁵ In August 2003, the ITC ruled that the imports materially injured the domestic industry, thus

w.3617.htm [hereinafter ITC Investigation]; see also Chapman, *supra* note 13, at F1: Mercer, *supra* note 62, at A1.

177. 149 CONG. REC. S10,510 (July 31, 2003) (statement of Sen. Murkowski).

178. 19 U.S.C. § 1675c (2000).

179. 19 U.S.C. § 1675c.

180. 19 U.S.C. § 1671 (2000).

181. 19 U.S.C. § 1671.

182. See ITC Investigation, *supra* note 176.

183. *Id.*

184. 19 U.S.C. § 1675c.

185. See ITC Investigation, *supra* note 176; Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. 37,116 (Int. Trade Commission June 23, 2003) (Notice of Final Antidumping Duty Determination).

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

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.*

188. Tran Dinh Tanhn Lam, *Vietnam: ‘Catfish War’ Loss to U.S. Stirs Strong Protests*, INTER PRESS SERVICE, July 29, 2003, at 2, available at 2003 WL 6916939.

189. See Huyen Pham & Van Pham, *Fishy: Business on Vietnamese Trade*, THE SAN DIEGO UNION TRIB., Feb. 25, 2003, at B9.

190. *Id.*

191. See Mercer, *supra* note 62, at A1.

192. National Agricultural Statistics Service, *Catfish Processing*, available at <http://usda.mannlib.cornell.edu/reports/nassr/other/pcf-bb 2002> (Nov. 22, 2002).

193. See Harvey, *Aquaculture Production*, *supra* note 9, at 3.

194. See Lam, *supra* note 188, at *3.

195. See Mercer, *supra* note 62, at A1.

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 label¹⁹⁸ 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

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.

200. 147 CONG. REC. E1632 (Sept. 11, 2001) (statement of Rep. Ross, extension of remarks made on Sep. 6, 2001).

201. See 21 U.S.C.A. §§ 321d, 343(t) (Supp. 2003).

202. 21 U.S.C.A. §§ 321d, 343(t).

203. 21 U.S.C.A. §§ 321d, 343(t).

204. 21 U.S.C.A. §§ 321d, 343(t).

205. 147 CONG. REC. S13,433 (Dec. 18, 2001) (statement of Sen. Gramm).

206. See *supra* notes 111-17 and accompanying text.

have changed, it will then be legal to label the foreign fish as “catfish.”²⁰⁷

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.²⁰⁸ Although the channel catfish is not native to China, the climate in southern China is similar to that of the Mississippi Delta.²⁰⁹ In fact, aquaculture is well established and existing ponds could easily be converted to raise catfish.²¹⁰ This leads some to speculate that China will, in fact, import channel catfish.²¹¹

Another concern is that the FDA says that enforcement of the legislation is not a high priority when compared to larger food safety issues.²¹² Southern catfish farmers have responded to this by hiring their own inspectors to assist regulatory agencies in enforcing the new catfish labeling law.²¹³ Furthermore, the FDA guidelines apply only to products sold in interstate commerce.²¹⁴ 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.²¹⁵ In order to regulate labeling requirements of the direct marketers, it is necessary for the states to establish their own labeling laws.²¹⁶

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.²¹⁷ This restriction applies to all fish offered for direct retail sale for human consumption by a processor, distributor, wholesaler, or retailer.²¹⁸ The statute prohibits the

207. 21 U.S.C.A. §§ 321d; 343(t).

208. David Mercer, *Chinese Suppliers Enter Catfish Fray*, ARK. DEMOCRAT-GAZETTE, Oct. 4, 2003, at D1.

209. *Id.*

210. *Id.*

211. *Id.*

212. David Mercer, *Labeling Bill Would Make Outlets Mark Foreign Fish*, ARK. DEMOCRAT-GAZETTE, Feb. 25, 2003, at D1.

213. See Brown, *supra* note 59, at A6.

214. See Lee, *supra* note 118, at 7A.

215. *Id.*

216. *Id.*

217. MISS. CODE ANN. § 69-7-608 (Supp. 2003).

218. MISS. CODE ANN. § 69-7-607 (Supp. 2003).

advertising, distributing, labeling, or selling of the Vietnamese *Pangasius*, as “catfish.”²¹⁹ Misrepresentation of a “catfish” constitutes a felony and is punishable by fine up to \$1000 or by imprisonment for up to two years.²²⁰

Mississippi, unlike other states with comparable provisions, has enforced its catfish labeling laws.²²¹ 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.²²²

Arkansas recently passed stricter laws, similar to those of Mississippi, which impose steep fines for violations of catfish labeling laws.²²³ 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.²²⁴ 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.²²⁵

Other states have similar penalties for violating catfish labeling laws. Alabama sanctions include issuance of a temporary restraining order,²²⁶ permanent injunction,²²⁷ or fines of up to \$500.²²⁸ Similarly, in the event of violation, Tennessee provides for injunctive relief or the imposition of a penalty up to \$1000 for each violation.²²⁹ Noticeably, many catfish producing states have passed legislation specifically designed to limit the use of the term “catfish.”²³⁰ However, this has not been a

219. MISS. CODE ANN. § 69-7-608.

220. MISS. CODE ANN. § 69-7-608.

221. Timothy R. Brown, *Coast Grocer Fined for Mislabeling Fish*, THE SUN HERALD, July 25, 2002, at A10.

222. *Id.*

223. ARK. CODE ANN. §§ 20-61-203 to -302 (Supp. 2003).

224. ARK. CODE ANN. § 20-61-203.

225. ARK. CODE ANN. § 20-61-203.

226. ALA. CODE § 2-11-38 (Repl. 1999).

227. ALA. CODE § 2-11-38.

228. ALA. CODE § 2-11-40 (Repl. 1999).

229. TENN. CODE ANN. § 53-1-115 (Supp. 1999).

230. See ARK. CODE ANN. § 20-61-202(2) (Supp. 2003) (“Catfish means any species of the scientific family Ictaluridae.”). A number of other states have enacted similar statutes: Mississippi has defined a “catfish” as “any species within the family Ictaluridae of the family Anarhichadidae.” MISS. CODE ANN. § 69-7-605(b) (Supp. 2003). The statute

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.²³¹ Kentucky requires that state facilities purchase only Kentucky farm-raised catfish, if available.²³²

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 2002.²³³ While increases in domestic production may be partially responsible for the falling prices of catfish, recent data suggests this is no longer the situation.²³⁴

further provides that "the term 'catfish' shall not be used as a common name or to advertise, distribute or label any fish . . . except for those species within the definition of catfish in Section 67-7-605." MISS. CODE ANN. § 69-7-607. Similarly, Alabama has defined catfish as "any species of the scientific order Siluriforms or family Anarhichadidae." ALA. CODE § 2-11-31 (Repl. 1999). Alabama requires that any catfish from a country other than the United States, offered for direct or retail sale be specifically labeled "imported catfish." ALA. CODE § 2-11-33 (Repl. 1999). Kansas law provides that catfish cannot be sold in the state "unless clearly labeled in letters not less than one fourth inch in height as having been imported." KAN. STAT. ANN. § 65-6a53 (2002). Louisiana law states that any catfish sold in the state, whether wholesale or retail, shall be labeled as "farm raised" "naturally produced" and shall denote the country of origin of the catfish which shall be preceded by the words "Product of." LA. REV. STAT. ANN. § 56-578.11 (West Supp. 2003). Such labels must be easily identifiable and affixed to every package sold. LA. REV. STAT. ANN. § 56-578.11. Further, Louisiana provides that catfish produced in natural streams or rivers cannot be labeled as farm-raised. LA. REV. STAT. ANN. § 56-578.11. Tennessee forbids the use of the term "catfish" as the common name or brand name used in advertising, distributing, or labeling any fish or fish product unless they belong to the family Ictaluridae or Anarhichadidae. TENN. CODE ANN. §§ 53-1-102, -115 (Supp. 2003).

231. MISS. CODE ANN. § 69-7-607.

232. KY. REV. STAT. ANN. § 148.835 (Supp. 2003).

233. See *Catfish Production* Feb. 6, 2003, *supra* note 26; *Catfish Production*, available at <http://usda.mannlib.cornell.edu/reports/nassr/other/pcf-bbc/1996> (Apr. 29, 1996) [hereinafter *Catfish Production* Apr. 29, 1996].

234. See *Catfish Production* Feb. 6, 2003, *supra* note 26; *Catfish Production*, available at <http://usda.mannlib.cornell.edu/reports/nassr/other/pcf-bbc/1997> (Apr. 29, 1997).

Total acres devoted to catfish production increased only slightly from 2000 to 2001.²³⁵ Total water surface acres devoted to catfish production fell in 2003 by another 10,000 acres.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 1994.²³⁷ Further, catfish sales were expected to increase in 2003 due to the depressed prices since 2001 and the decrease in overall inventories of catfish.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.²³⁹ When they were successful, other competitors emerged and the prices never rebounded.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.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.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

[hereinafter *Catfish Production* Apr. 29, 1997].

235. See *Catfish Production* Feb. 6, 2003, *supra* note 26; *Catfish Production* July 29, 2002, *supra* note 30. Acreage devoted to catfish production increased in 2001 to 187,700 acres. This was just slightly more than the 187,330 acres devoted to catfish production in 2000. *Id.*

236. See *Catfish Production* Feb. 6, 2003, *supra* note 26.

237. See *Catfish Production* Feb. 6, 2003, *supra* note 26; *Catfish Production* Feb. 28, 2002, *supra* note 26; *Catfish Production*, available at <http://usda.mannlib.cornell.edu/reports/nassr/other/pcf-bbc/2000/> (Feb. 14, 2000); see *Catfish Production* Apr. 29, 1997, *supra* note 234; *Catfish Production* Apr. 29, 1996, *supra* note 233.

238. Harvey, *Aquaculture Production*, *supra* note 9, at 3.

239. David Mercer, *Catfish Broil Expected to Heat up Tariffs Can't Keep Competition at Bay for Long*, *Experts Say*, ARK. DEMOCRAT-GAZETTE, Mar. 30, 2003, at G1.

240. *Id.*

241. See *supra* notes 208-11 and accompanying text.

242. See Mercer, *supra* note 239, at G1.

industry to raise its prices as well.²⁴³ This price increase means the consumer will pay more for the same product.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.²⁴⁵

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.²⁴⁶ Certification marks can be "used by trade associations or other commercial groups to identify a particular type of good."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 . . ."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.²⁴⁹ The mark acts as a seal of approval and certifies conformity with centralized standards.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"

243. 147 CONG. REC. S13,436 (Dec. 18, 2001) (statement of Sen. McCain).

244. See Freking, *supra* note 170, at A1.

245. Harvey, *Aquaculture Production*, *supra* note 9, at 3.

246. 15 U.S.C. § 1064 (2000).

247. ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 544 (3d ed. 2003).

248. 15 U.S.C. § 1127 (2000).

249. See MERGES, *supra* note 247, at 544.

250. *Id.*

to wines actually produced in that region.²⁵¹ For years, the French have maintained that taste is inherently linked to the geographic region where it is produced.²⁵² They are also notorious for the steps they have taken to restrict the use of the “champagne” label.²⁵³ Recently the idea has become a popular global method of protecting a region’s agriculture from competition.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.²⁵⁵

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

251. Desa Philadelphia, *Catfish by Any Other Name: Chauvinism Turns to Protectionism, as Regions Claim Right to the Names of Common Foods*, TIME, Feb. 25, 2002, at B14.

252. *Id.*

253. *Id.*

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.*

255. See 19 U.S.C.A. § 2434 (Supp. 2003); see also 19 U.S.C. § 2435 (2000).

256. Agricultural Marketing Act. Pub. L. No. 107-171, 116 Stat. 533 (codified at 7 U.S.C.A. §§ 1638, -1638a (Supp. 2003)).

257. 149 CONG. REC. S14,110 (Nov. 3, 2003) (statement of Sen. Grassley).

258. 7 U.S.C. § 1638 (Supp. 2003).

259. 7 U.S.C. § 1638.

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.²⁶⁰ Under this Act, retailers would be required to inform the consumer of the product’s origin at the final point of sale.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.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.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.²⁶⁴ Another purpose of the Act was to assure that consumers were provided with accurate information.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.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.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

260. 7 U.S.C. § 1638a (Supp. 2003).

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).

262. H.R. Con. Res. 2673, 108th Cong. (2004)(enacted); *see generally* 150 CONG. REC. S129 (Jan. 22, 2004) (voting to approve H.R. 2673, making appropriations for Agriculture, Rural Development, Food and Drug Administration for the fiscal year).

263. 149 CONG. REC. S14,117 (Nov. 3, 2003) (statement of Sen. Johnson).

264. *Id.*

265. *Id.*

266. 149 CONG. REC. S14,120 (Nov. 3, 2003) (statement of Sen. Enzi).

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,²⁶⁸ 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.²⁶⁹ 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.²⁷⁰

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).

269. *Country of Origin Labeling: Hearing Before the House Committee on Agriculture, the Subcommittee on Livestock and Horticulture*, 104 CONG. TEST. (2003) (statement of Hugh Warren, Executive Vice President, Catfish Farmers of America).

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.

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