

# THE USDA CATFISH INSPECTION PROGRAM: SOUTHEAST ASIAN CHALLENGES AT THE WTO

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## I. INTRODUCTION

In 2008, Congress enacted a law that transferred responsibility for inspecting imported catfish from the Food and Drug Administration to the U.S. Department of Agriculture (USDA). Since the passage of this bill, the Government of Vietnam has alleged that the new inspection program would violate the United States' obligations to the World Trade Organization (WTO), as detailed by the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). In order to analyze the applicability of the SPS Agreement to the 2008 law, this paper will outline specific provisions of the Agreement that Vietnam may use to challenge the USDA catfish inspection program at the WTO. This paper will conclude that the United States has violated those obligations.

## II. OVERVIEW

### A. Background

The products at issue in this paper are two types of fish that are both commonly known as "catfish." Contrary to popular belief, catfish is not a single species of fish. Rather, catfishes in American supermarkets include a wide variety of species in the taxonomic order Siluriformes.<sup>1</sup> Almost all of these fish have distinctive long barbels, or "slender fleshy protrubances," on either side on their mouths.<sup>2</sup> These barbels appear similar to cats' whiskers and inspire the fishes' common name.<sup>3</sup>

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1. Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. 10,434, 10,435-36 (proposed Feb. 24, 2011) (to be codified in scattered sections of 9 C.F.R.); James Bacchus & Ira Shapiro, Greenberg Traurig LLP, Comment to the Proposed Rule Concerning Mandatory Inspection of Catfish and Catfish Products to the Nat'l Fisheries Inst. 1-2 (June 15, 2011), [http://www.agri-pulse.com/uploaded/Bacchus\\_Catfish.pdf](http://www.agri-pulse.com/uploaded/Bacchus_Catfish.pdf) [hereinafter Bacchus Memo]. For the purpose of this paper, the word "catfish" will refer to all fish in the order Siluriformes.

2. *Barbel (Fish Anatomy)*, ENCYC. BRITANNICA, <http://www.britannica.com/EBchecked/topic/52833/barbel> (last visited Feb. 29, 2016); Jonathan W. Armbruster, *Global Catfish Biodiversity*, 77 Am. Fisheries Soc'y Symp. 15, 15 (2011).

3. Armbruster, *supra* note 2, at 15; MICHAEL F. MARTIN, CONG. RESEARCH SERV., R41550, U.S.-VIETNAM ECONOMIC AND TRADE RELATIONS: ISSUES FOR THE 113TH CONGRESS 11 (2014), <https://www.fas.org/sgp/crs/row/R41550.pdf>.

Vietnam is one of the largest exporters of catfish species in the world.<sup>4</sup> Vietnam primarily produces two types of catfish, which are commonly known as “basa” (*pangasius bocourti*) and “tra” (*pangasianodon hypophthalmus*).<sup>5</sup> Both basa and tra are in the taxonomic family Pangasiidae.<sup>6</sup> Pangasiidae, along with all other catfish species, is in the taxonomic order Siluriformes and is sold as “catfish” in many foreign markets.<sup>7</sup>

However, a substantial catfish industry also operates in the Mississippi River Delta of the United States, which is especially concentrated in northwest Mississippi, southeast Arkansas, and northeast Louisiana.<sup>8</sup> The catfish industry in this region has always sold products in the Southern United States, but sales expanded nationally in the 1980s, coinciding with the rise of catfish as a staple of mainstream American cuisine.<sup>9</sup> Unlike their Vietnamese counterparts, American catfish farmers generally produce fish in the family Ictaluridae, which is also in the order Siluriformes.<sup>10</sup>

For many years after the Paris Peace Accords ended the Vietnam War, Vietnam did not export any catfish to the United

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4. MARTIN, *supra* note 3, at 10-11.

5. *Id.*

6. Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. 10,434, 10,436 (proposed Feb. 24, 2011) (to be codified in scattered sections of 9 C.F.R.).

7. *Id.* at 10, 435-36; MARTIN, *supra* note 3, at 10-11. One exception is in Europe, where basa is sometimes called “pangasius” or “panga”. Paul Greenberg, *A Catfish by Any Other Name*, N.Y. TIMES (Oct. 9, 2008), <http://www.nytimes.com/2008/10/12/magazine/12catfish-t.html?pagewanted=all>.

8. FOOD SAFETY & INSPECTION SERV., U.S. DEP’T OF AGRIC., EXECUTIVE ORDER 12866 – PRELIMINARY REGULATORY IMPACT ANALYSIS: APP. A, at 25 (2011), [http://www.fsis.usda.gov/wps/wcm/connect/1ff464d1-ae27-4d78-831d-b21ccce26ec5/Catfish\\_Impact\\_Analysis.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/1ff464d1-ae27-4d78-831d-b21ccce26ec5/Catfish_Impact_Analysis.pdf?MOD=AJPERES) [hereinafter USDA PRELIMINARY IMPACT ANALYSIS].

9. Jackie Northam, *Battle of the Bottom Feeder: U.S., Vietnam in Catfish Fight*, NAT’L PUB. RADIO (Dec. 16, 2013, 2:47 AM), <http://www.npr.org/sections/parallels/2013/12/16/250845123/battle-of-the-bottom-feeder-u-s-vietnam-in-catfish-fight>; Kerrilee E. Kobbeman, Legislative Note, *Hook, Line and Sinkers: How Congress Swallowed the Domestic Catfish Industry’s Narrow Definition of this Ubiquitous Bottomfeeder*, 57 ARK. L. REV. 407, 410 (2004).

10. USDA PRELIMINARY IMPACT ANALYSIS, *supra* note 8, at 19, 30.

States due to a trade embargo on Vietnamese products.<sup>11</sup> However, Vietnam and the United States resumed their trade relationship in 1995, when President Bill Clinton normalized diplomatic relations with Vietnam.<sup>12</sup> When Vietnamese producers began exporting cheap Pangasiidae to the United States in the late 1990s, American producers of Ictaluridae lost a substantial share of the American catfish market.<sup>13</sup>

In response to this loss of market share, U.S. congressmen from catfish-producing states and districts pushed for legislation limiting the definition of “catfish” to the family Ictaluridae.<sup>14</sup> They were successful, and Congress limited the use of the term “catfish” to Ictaluridae in the 2002 Farm Bill.<sup>15</sup> Since this definition affected American labeling laws among other regulatory provisions, Vietnamese exporters could not label their products as “catfish” in the United States.<sup>16</sup> However, this law did not substantially diminish Vietnam producers’ ability to sell Pangasiidae in the American market.<sup>17</sup> Vietnamese exporters remained highly competitive, even while labeling their fish simply as “basa” and “tra.”<sup>18</sup> The Department of Commerce then imposed anti-dumping duties on Pangasiidae from Vietnam

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11. Agreement on Ending the War and Restoring Peace in Vietnam, U.S.-Viet., Jan. 27, 1973, 24 U.S.T. 1; see 31 C.F.R. § 500.201 (1975) (prohibiting multiple forms of transactions with designated foreign countries, including Vietnam).

12. See Foreign Relations Authorization Act, Pub. L. No. 103-236, § 521, 108 Stat. 382, 472 (1994) (lifting the trade embargo against Vietnam based on the Government of Vietnam’s cooperation regarding U.S. POW/MIAs to help normalize the relationship between the United States and Vietnam).

13. Northam, *supra* note 9.

14. Bacchus Memo, *supra* note 1, at 1. For example, Senator Lincoln (D-Ark.) advocated for the passage of legislation restricting the definition of catfish to only U.S. catfish: “Let me be clear, the vast majority of this imported species of [cat]fish has never, and I repeat, never, reached American consumers under any legal name. It has reached the consumer in significant quantities only being misbranded as ‘catfish.’ 148 CONG. REC. 8,813 (2002).

15. Farm Security and Rural Investment Act (Farm Bill) of 2002, 21 U.S.C. § 321(d).

16. *Id.*; MARTIN, *supra* note 3, at 11.

17. MARTIN, *supra* note 3, at 11.

18. Bacchus Memo, *supra* note 1, at 19.

in 2003.<sup>19</sup> However, the U.S. catfish industry posted only modest gains in sales after the anti-dumping duties, and Vietnamese producers still dominated the American market.<sup>20</sup>

American catfish producers continue to face economic difficulties. Although the sales of the U.S. catfish industry peaked at 660 million pounds of fish per year, American farmers sold only 300 million pounds in 2013.<sup>21</sup> Overall, the United States bought \$339 million worth of Pangasiidae from Vietnam in 2013.<sup>22</sup> However, although Vietnam has continued to dominate the American market, a program debated for the past six years could potentially challenge Vietnam's economic dominance in the catfish market: the U.S. Department of Agriculture's catfish inspection program.<sup>23</sup>

#### B. *The 2008 Farm Bill*<sup>24</sup>

Prior to 2008, the U.S. government divided responsibility for inspecting imported foods between two federal agencies. The U.S. Department of Agriculture (USDA) oversaw the inspection of meat, poultry and eggs, while the Food and Drug Administration (FDA) oversaw the regulation of all other foods,

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19. Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. 47909 (proposed Aug. 12, 2003); Andrew Muhammad et al., *The Impact of Catfish Imports on the U.S. Wholesale and Farm Sectors*, 39 AGRIC. RESOURCE & ECON. REV. 429, 431 (2010).

20. Muhammad et al., *supra* note 19, at 439-40; FOREIGN AGRIC. SERV., U.S. DEP'T OF AGRIC., CATFISH AND BASA IMPORTS CONTINUE TO INCREASE DESPITE CONFIRMED ANTIDUMPING (2007), <http://usda.mannlib.cornell.edu/usda/fas/fishsea/2000s/2007/fishsea-05-25-2007.pdf>.

21. Northam, *supra* note 9.

22. MARTIN, *supra* note 3, at 11.

23. See discussion *infra* Sections III.C.2, III.D (discussing the restrictive and discriminatory nature of the USDA catfish inspection program, particularly towards Vietnamese Pangasiidae).

24. Congressional farm bills are far-reaching omnibus laws that are generally passed by the U.S. Congress every five years; these bills set a wide variety of policies that affect the American agricultural industry, ranging from subsidies to environmentalism to food safety. JAPSER WOMACH, CONG. RESEARCH SERV., Order Code 97-905, AGRICULTURE: A GLOSSARY OF TERMS, PROGRAMS AND LAWS, 2005 EDITION 95-96 (last updated June 16, 2005), [http://digital.library.unt.edu/ark:/67531/metacrs7246/m1/1/high\\_res\\_d/97-905\\_2005Jun16.pdf](http://digital.library.unt.edu/ark:/67531/metacrs7246/m1/1/high_res_d/97-905_2005Jun16.pdf).

including all seafood.<sup>25</sup> USDA's inspection programs are more stringent than those of FDA because meat, poultry and eggs have a high risk of foodborne illnesses.<sup>26</sup>

USDA relies on "mandatory and continuous inspection" of every animal before and after slaughter.<sup>27</sup> Domestically, USDA validates all of the inspection programs used by individual slaughterhouses to oversee the health of every animal that is slaughtered.<sup>28</sup> For imports, USDA requires the inspection programs of all exporting countries to have "equivalence" with USDA standards.<sup>29</sup> The process of determining "equivalence" is lengthy – USDA personnel must, among other requirements, audit foreign documents, conduct in-person visits to overseas facilities, and publish their initial findings in the Federal Register for public comment.<sup>30</sup> This process generally takes between four and six years.<sup>31</sup>

FDA, on the other hand, relies on "periodic checks and intermittent sampling" to ensure the safety of food.<sup>32</sup> FDA only checks food that has entered the processing and distribution supply.<sup>33</sup> FDA assumes that all food imported into the United States is safe unless these checks prove otherwise.<sup>34</sup>

The same group of Senators that supported definitional limitations for catfish in the 2002 Farm Bill added another

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25. See Food, Drug, and Administration Act, 21 U.S.C. § 341 (2012) (granting authority to the FDA to regulate "food" in its general definition, with a set of very specific exceptions listed, of which none are fish); Wholesome Meat Act, 21 U.S.C. § 601 *et seq.* (2012) (authorizing the USDA to regulate meat); Poultry Products Inspection Act, 21 U.S.C. § 451 *et seq.* (2012) (authorizing the USDA to regulate poultry).

26. MARTIN, *supra* note 3, at 12; see MICHAEL B. BATZ ET AL., RANKING THE RISKS: THE 10 PATHOGEN-FOOD COMBINATIONS WITH THE GREATEST BURDEN ON PUBLIC HEALTH 11 (2011) (looking at the number of illnesses caused by different categories of food, including poultry, eggs, and various kinds of meat).

27. 21 U.S.C. § 603 (2012); Bacchus memo, *supra* note 1, at 4.

28. 21 U.S.C. § 608 (2012).

29. 21 U.S.C. § 620(a) (2012).

30. 9 C.F.R. § 327.2 (2012).

31. Bacchus memo, *supra* note 1, at 5.

32. *Id.* at 4; see 21 U.S.C. § 350j (2012) (determining the frequency of government inspections for facilities).

33. See 21 U.S.C. §§ 341-43 (2012) (defining the foods that are to be regulated by the FDA which focuses on adulterated or misbranded products).

34. *Id.* § 305l.

provision affecting the sale of catfish to the 2008 Farm Bill.<sup>35</sup> This provision required USDA to begin inspecting catfish.<sup>36</sup> The bill does not give USDA added responsibility for inspecting any other product – seafood or otherwise.<sup>37</sup> Thus, in accordance with the 2008 Farm Bills, USDA would only be responsible for overseeing the inspection of meat, poultry, eggs and catfish.

Proponents of this provision argue that catfish poses a high risk of foodborne illnesses, and thus deserves special scrutiny.<sup>38</sup> They have argued that scientific evidence proves that imported catfish pose a risk from carcinogens, heavy metals and pesticides, unapproved anti-microbial drugs and *Salmonella*.<sup>39</sup> Proponents furthermore argue that this provision will require USDA to inspect both domestic and imported catfish, and that both domestic and foreign producers will be subject to the same

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35. Cong. Rec. S3018-19 (2015); Andy Frame, *Catfish Industry Flounders Despite Congressional Support*, FOOD SAFETY NEWS (Feb. 20, 2013), <http://www.foodsafetynews.com/2013/02/catfish-industry-flounders-despite-congressional-support/#.VtdfHfkrKUK>; Bacchus memo, *supra* note 1, at 1. The provision was included in the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 11016, 122 Stat. 1651, 2130-31 (2008) (codified as amended at 21 U.S.C. § 606).

36. 21 U.S.C. § 606 (2012).

37. 21 U.S.C. § 601(w)(2) (2012).

38. See CTR. FOR CHEM. REG. & FOOD SAFETY, EXPONENT, CATFISH RISK PROFILE 37-38 (2010), [http://www.safecatfish.com/wp-content/uploads/2010/07/Catfish\\_Risk\\_Report.pdf](http://www.safecatfish.com/wp-content/uploads/2010/07/Catfish_Risk_Report.pdf) [hereinafter CATFISH RISK PROFILE] (summarizing the results of an evaluation on the risks associated with catfish consumption sponsored by Catfish Farmers of America); David Bennett, *House Agriculture Committee Debates USDA Catfish Inspection Program*, DELTA FARM PRESS (July 12, 2012), <http://deltafarmpress.com/government/house-agriculture-committee-debates-usda-catfish-inspection-program> (arguing the USDA inspection program is “critical to food safety” and noting how “significant health concerns” are raised by unapproved chemicals and antibiotics in Vietnamese catfish); see also Murray Hiebert & Phoebe De Padua, *The Senate Should Abandon Protectionist Inspections Aimed at Catfish from Vietnam*, CTR. FOR STRATEGIC & INT’L STUDIES (Nov. 21, 2013), <http://csis.org/publication/senate-should-abandon-protectionist-inspections-aimed-catfish-vietnam> (noting that Catfish Farmers of America, the proponents of the bill seeking to ban Vietnamese catfish imports, claim that “foreign fish lower health and quality standards for American consumers”).

39. Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. 10,434, 10,438-40 (proposed Feb. 24, 2011) (to be codified in scattered sections of 9 C.F.R.).

strict regulations as American cattle ranchers and poultry producers.<sup>40</sup>

Critics of the 2008 Farm Bill however, argue that USDA generally takes four to six years to grant “equivalency” status to inspection programs in foreign countries.<sup>41</sup> During that time, USDA would ban all foreign catfish imports, while still permitting American producers to sell their products.<sup>42</sup> In addition, USDA will likely have difficulty creating new regulations for overseas catfish inspections because USDA has no institutional knowledge of fish or seafood.<sup>43</sup> USDA could

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40. See Ted Carter, *Thanks to Thad Cochran, U.S. Catfish Producers Get Long Awaited Win*, MISS. BUS. J. (Feb. 7, 2014), <http://msbusiness.com/blog/2014/02/07/thanks-thad-cochran-u-s-catfish-producers-get-long-awaited-win/> (stating that the USDA catfish inspections will “require foreign and domestically produced catfish to undergo the same health safety inspections”); Mary Johnson, *U.S. Sen. Jeff Sessions Vows to Fight for Catfish Farmers, American Industry*, ALA. FARMERS FED’N (May 3, 2012), <http://alfafarmers.org/stories/news-detail/u.s.-sen.-jeff-sessions-vows-to-fight-for-catfish-farmers-american-industry#.VhgPnYuyFUQ> (quoting Butch Wilson, president of Catfish Farmers of America, saying that “[t]he new farm bill should require imported species to be subject to the same food safety regulations as domestically produced catfish”); Letter from Jeff Sessions et al., Members of U.S. Senate, to Thad Cochran, Ranking Member, and Debbie Stabenow, Chairwoman, Senate Agriculture Committee (Nov. 6, 2013), [http://www.sessions.senate.gov/public/\\_cache/files/4019f852-2af0-4ac0-816f-aa9b4be570d2/sessionspryorletterfarmbillcatfishinspection.pdf](http://www.sessions.senate.gov/public/_cache/files/4019f852-2af0-4ac0-816f-aa9b4be570d2/sessionspryorletterfarmbillcatfishinspection.pdf) (explaining why the catfish inspection program should not be repealed as it “will require both domestic and international production to undergo the same rigorous health and safety standards” that the USDA requires of “a number of commodities and livestock sectors”).

41. Bacchus Memo, *supra* note 1, at 5; see John Connelly, *U.S. Risking Trade War with Vietnam over Catfish*, COGITASIA: A BLOG OF THE CSIS ASIA PROGRAM (June 13, 2011), <http://cogitasia.com/us-risks-trade-war-with-vietnam-over-catfish/> (noting that although no one knows how long gaining equivalence will take, “most estimates put it at between 3-5 years (for the products USDA already knows, and recall that USDA has no fish experience)”; see also James Wright, *US Exporters Briefed on New EU Regs, Catfish*, SEAFOOD SOURCE (Sept. 11, 2014), <http://www.seafoodsource.com/news/supply-trade/26826-us-exporters-briefed-on-new-eu-regs-catfish> (noting that “creating an equivalency program for the USDA standard could take up to five years”).

42. Connelly, *supra* note 41; see Bacchus Memo, *supra* note 1, at 19 (pointing out how protectionist the new regulations are because they require foreign countries exporting catfish to the United States to seek approval from the USDA, which involves a continuous inspection process equivalent to the USDA’s inspection process, something that domestic catfish producers do not have to worry about).

43. Connelly, *supra* note 41.

therefore easily take longer than four to six years to lift the ban on foreign catfish imports.<sup>44</sup>

The House of Representatives did not have a similar provision in its version of the 2008 Farm Bill.<sup>45</sup> However, the Conference Report included the Senate's USDA catfish inspection program, and Congress passed the requirement into law as part of the final bill.<sup>46</sup> The Senate overrode President Bush's veto of the bill on June 18, 2008 with a vote of 80-14, enacting the bill into law.<sup>47</sup>

After 2008, the process of implementing the USDA catfish inspection program stalled. Neither the outgoing Bush Administration nor the incoming Obama Administration took substantial steps to implement the program.<sup>48</sup> Among other issues, the Executive Branch struggled to interpret certain provisions of the law.<sup>49</sup>

First, the Executive Branch struggled to define "catfish." The 2008 Farm Bill required that USDA inspect catfish, but then explicitly stated that the term "catfish" would be "defined by the Secretary."<sup>50</sup> Since the 2002 Farm Bill had explicitly

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44. Bacchus Memo, *supra* note 1, at 5; Connelly, *supra* note 41.

45. Farm, Nutrition, and Bioenergy Act of 2007, H.R. 2419, 110th Cong. (2007).

46. H.R. REP. NO. 110-627, at 486-87 (2008) (Conf. Rep.).

47. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923, 1551 (2008); Deidre Walsh, *Congress Passes Farm Bill over Bush Veto*, CNN POLITICS (June 18, 2008), <http://www.cnn.com/2008/POLITICS/06/18/farm.bill/>.

48. See MARTIN, *supra* note 3, at 12 (discussing how the regulations for catfish inspection were delivered to the Office of Management and Budget in 2009, followed by the USDA publishing its proposed rule in 2011, which eventually resulted in the catfish controversy "reemerg[ing] after the passage of the Agricultural Act of 2014"); see also Dan Flynn, *Full Year Passes with No Action on Catfish*, FOOD SAFETY NEWS (Nov. 13, 2010), <http://www.foodsafetynews.com/2010/11/full-year-passes-with-no-action-by-obama-on-catfish/#.VifPMtaJndk> (noting that the Obama administration had not released the proposed regulations for public comment after they had been stalled at the Office of Management and Budget since November of 2009).

49. There are several indications that executive branch did not want responsibility for catfish inspection to move to USDA and was, thus, unwilling to implement the new program. For example, even after USDA created an Office of Catfish Inspection, there were only four people working in the office as of 2013. Helena Bottemiller, *House Ag Committee Votes to Repeal USDA Catfish Inspection*, FOOD SAFETY NEWS (May 17, 2013), <http://www.foodsafetynews.com/2013/05/usda-catfish-inspection-not-included-in-house-or-senate-farm-bills/#.VGaeZS5dWFY>.

50. Food, Conservation, and Energy Act of 2008 § 11016.

stated that Pangasiidae was *not* catfish, USDA considered that Vietnamese imports might not be subject to the new requirements.<sup>51</sup> When USDA proposed a rule on the new program in February 2011, the rule suggested that the definition of catfish could be one of two options: either “catfish” should include only Ictaluridae, or the designation should include all Siluriformes.<sup>52</sup>

USDA also considered that the new inspection program might be duplicative with FDA’s inspection program, since the 2008 Farm Bill never explicitly called for FDA to dismantle its preexisting inspection regime.<sup>53</sup> USDA held public meetings on the proposed rule for catfish inspection in May 2011, but never

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51. Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. at 10,435-36 (stating that the 2002 Farm Bill defined “catfish” as fish from the Ictaluridae family only, a classification the FDA used for its seafood program); *see* Pham Thai, *Vietnam Awaits USDA Definition of Catfish*, SAIGON TIMES (Feb. 23, 2011), <http://english.thesaigontimes.vn/15329/Vietnam-awaits-USDA-definition-of-catfish.html> (discussing how under the 2002 Farm Bill, Vietnamese companies were forced to label their fish as pangasius because only fish from the United States could be labeled catfish and that, therefore, depending on if the scope of the term catfish in the 2008 Farm Bill conforms with the 2002 Farm Bill’s definition, Vietnamese importers may not be subject to the new regulations).

52. 76 Fed. Reg. at 10,435-36. The USDA’s preliminary impact analysis, conducted in accordance with Executive Order 12,866, also suggests that USDA was struggling to define catfish for the purpose of the new regulation. *See* USDA PRELIMINARY IMPACT ANALYSIS, *supra* note 8, at 10-12.

53. *Cf.* Memorandum of Understanding between the Food Safety and Inspection Serv., U.S. Dep’t of Agric. and the Food and Drug Admin., U.S. Dep’t of Health and Human Servs. 1 (Apr. 30 2014), <http://www.fsis.usda.gov/wps/wcm/connect/8675a5cb-7bca-4a8f-a563-7788adceb583/MOU-FSIS-FDA-Fish-Products.pdf?MOD=AJPERES> [hereinafter Memorandum of Understanding] (noting the need to ensure that “inspections of shipments and processing facilities for fish of the order Siluriformes by the agencies are not duplicative”). *See* 113 CONG. REC. S4047 (daily ed. June 10, 2013) (statement of Sen. McCain) (denouncing the 2008 Farm Bill which “forces USDA to create a special catfish inspection office that will cost taxpayers \$15 million a year” even though the GAO has deemed the USDA catfish inspection program duplicative because it wastes FDA seafood inspection services).

formulated a final rule.<sup>54</sup> By 2013, the implementation of the program had stagnated.<sup>55</sup>

### C. *The 2014 Farm Bill*

Despite early setbacks, the USDA catfish inspection program made a roaring comeback in the 2014 Farm Bill. In a preliminary version of the 2014 Farm Bill, the House of Representatives voted to repeal the program altogether.<sup>56</sup> Many Congressmen voiced blistering critiques of the program, calling it “duplicative” and “wasteful.”<sup>57</sup>

Once again, however, the Senate voted to keep the program, clarifying that the FDA program would be dismantled entirely, and that sole jurisdiction for catfish would be shifted to USDA.<sup>58</sup> The Senate version also explicitly stated that catfish includes “all fish in the order of Siluriformes,” including Pangasiidae.<sup>59</sup> Finally, the Senate set a strict timeline for USDA to implement the program, in order to prevent further stalling.<sup>60</sup>

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54. Meeting Notice, Pub. 76 Fed. Reg. 90, 26,655, 26,655-56 (May 9, 2011); MARTIN, *supra* note 3, at 12.

55. See MARTIN, *supra* note 3, at 12 (noting that after the USDA requested comments on the proposed rule in June 2011, “the catfish controversy reemerged after the passage of the Agricultural Act of 2014”).

56. H.R. 1313, 113th Cong. § 1 (2013); Bottemiller, *supra* note 49.

57. See Letter from Vicky Hartzler et al., Members of U.S. Congress, to Frank Lucas, Chairman, and Collin Peterson, Ranking Member, House of Representatives Committee on Agriculture (Oct. 21, 2013), <http://farmpolicy.com/wp-content/uploads/2013/10/Catfish-Repeal-Letter-to-Conferees-October-21-2013.pdf> (explaining why seventy-six members of Congress believe that the catfish inspection program creates “duplication and wastes federal resources and taxpayer dollars”). Senator McCain, for example, argued that the Farm Bill of 2012 “will prove to be just as wasteful and costly as any farm bill we have seen to date.” 113 CONG. REC. S4047 (daily ed. June 10, 2013) (statement of Sen. McCain).

58. See H.R. REP. NO. 113-333, at 582 (2014) (Conf. Rep.) (noting that the USDA’s Food Safety and Inspection Service (FSIS) inspections should satisfy the FDA requirements, “thereby preventing duplicative inspection oversight”).

59. *Id.* at 382; see Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. 10,434, 10,436 (proposed Feb. 24, 2011) (to be codified in scattered sections of 9 C.F.R.) (“Another family of Siluriformes, the Pangasiidae, the so-called ‘giant catfishes,’ includes the aquaculture species basa (*Pangasius bocourti*), and tra or swai . . . raised principally in Southeast Asia for domestic consumption and export.”).

60. H.R. REP. NO. 113-333, at 382-84 (2014) (Conf. Rep.). The irony of Congress backtracking on its own definition of catfish in the 2002 Farm Bill has not been lost on

In opposition to many of their House colleagues, Senators in favor of the USDA catfish inspection program argued that the program was necessary.<sup>61</sup> They claimed that the United States must subject all catfish – foreign and domestic – to a more rigid inspection process in order to prevent foodborne illnesses.<sup>62</sup> Many proponents also cited research by Carole Engle at the University of Arkansas at Pine Bluff, and by the Alabama Department of Agriculture and Industry, which raised concerns about the quality of imported catfish from Vietnam.<sup>63</sup>

The USDA catfish inspection program was included in the Conference Report and passed the program as part of the final

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critics who believe that both bills were unjustifiable protectionist measures. Congress's flip-flopping on its own definition of "catfish" has been called "a linguistic backflip" that would be "funny if it weren't so serious." Connelly, *supra* note 41. Senator John McCain has also called the re-definition a "clever trick of Latin phraseology." Greenberg, *supra* note 7.

61. See Arlette Saenz, *Senators Fight Over Controversial Catfish Inspection Program*, ABC NEWS (May 19, 2015, 3:00 PM), <http://abcnews.go.com/Politics/senators-fight-controversial-catfish-inspection-program/story?id=31154848> (noting that support for this program comes from two senators from Mississippi, one of whom, Senator Wicker, defended the inspection program by saying, "[w]hat this is about is food safety for Americans in 50 states who deserve to know that the fish they are eating, that the product they are eating is unadulterated").

62. See Ron Nixon, *Catfish Farmers, Seeking Regulation to Fight Foreign Competition, Face Higher Bills*, N.Y. TIMES (Mar. 20, 2015), <http://www.nytimes.com/2015/03/21/us/catfish-farmers-seeking-regulation-to-fight-foreign-competition-face-higher-bills.html> (quoting Senator Cochran saying that "[o]nce the U.S.D.A. catfish inspection program is implemented, both domestic and foreign producers will be required to provide a product that has been certified as safe and unadulterated").

63. Bennett, *supra* note 38; Carole Engle, Dir., Aquaculture Fishery Ctr. at the Univ. of Ark. at Pine Bluff, Comments at USDA Proposed Rule for Mandatory Inspection of Catfish and Catfish Products Public Meeting 75-78 (May 24, 2011), [http://www.fsis.usda.gov/wps/wcm/connect/eefd3e0d-ea69-4c75-b1ac-ea4df9d133e4/Transcripts\\_05242011\\_Catfish\\_meeting.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/eefd3e0d-ea69-4c75-b1ac-ea4df9d133e4/Transcripts_05242011_Catfish_meeting.pdf?MOD=AJPERES); Marty Roney, *The Lure for Catfish Farmers Is Sinking*, USA TODAY (Oct. 20, 2010), [http://usatoday30.usatoday.com/news/nation/2010-10-20-catfish20\\_ST\\_N.htm](http://usatoday30.usatoday.com/news/nation/2010-10-20-catfish20_ST_N.htm). The program was not without critics in the Senate. The most blistering trade-specific critic was Senator John McCain, who argued on the Senate floor that the bill included "outrageous, porkbarrel spending on catfish" and "helps prop up domestic catfish farmers in southern States from having to compete with Asian catfish imports." 113 CONG. REC. S3791, S3799 (daily ed. May 23, 2013) (statement of Sen. McCain); 113 CONG. REC. S4027, S4047 (daily ed. June 10, 2013) (statement of Sen. McCain).

bill.<sup>64</sup> President Obama signed the 2014 Farm Bill on February 7, 2014.<sup>65</sup> In April, USDA and FDA signed Memorandum of Understanding, detailing how the new inspection program would be implemented.<sup>66</sup> USDA sent a proposed rule for catfish inspection to the Office of Management and Budget (OMB) on June 2, 2014 and promulgated a final rule in November 2015.<sup>67</sup> The rule became effective in March 2016.<sup>68</sup>

A number of observers have voiced their criticisms by highlighting concerns with the United States' commitments to the World Trade Organization (WTO).<sup>69</sup> The Government of Vietnam is the foremost among these critics.<sup>70</sup> The Pangasiidae industry makes up about 2% of the Vietnamese economy, and the United States accounts for 20% of all Pangasiidae exports from Vietnam.<sup>71</sup> During deliberations on the 2014 Farm Bill, Vietnam sent a letter of protest to Secretary of State John Kerry, hinting at a possible WTO dispute, should the bill be passed with the program intact.<sup>72</sup> Since the bill's passage,

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64. Agricultural Act of 2014, Pub. L. No. 113-79, H.R. 2642, 113th Cong. § 11022 (2014).

65. *Id.*

66. See Memorandum of Understanding, *supra* note 53 (noting that the memorandum is "intended to improve interagency cooperation on food safety and fraud prevention and to maximize the effectiveness of personnel and resources related to examination and inspection of Siluriformes fish and fish products").

67. MARTIN, *supra* note 3, at 12; Mandatory Inspection of Fish of the Order Siluriformes and Products Derived from Such Fish; Final Rule, 80 Fed. Reg. 75,590 (Dec. 2, 2015).

68. Mandatory Inspection of Fish of the Order Siluriformes and Products Derived from Such Fish; Final Rule, 80 Fed. Reg. 75,590 (Dec. 2, 2015).

69. See Bacchus Memo, *supra* note 1, at 3 ("In a WTO challenge, the United States would have to defend its measure as being consistent with the requirements of SPS Agreement Articles 2.2, 2.3, and 5.1. The possibility that the United States could do that strikes us as extremely remote."); see also Nixon, *supra* note 62 (noting that ten nations have already signed complaints claiming that the Farm Bill "violates the United States' obligations under the World Trade Organization agreements").

70. See Nixon, *supra* note 62 (reporting Vietnam's criticisms of the United States' commitment to WTO agreements due to the Agriculture Department's catfish inspection program, which threatens Vietnam's exports).

71. Connelly, *supra* note 41; Hiebert & De Padua, *supra* note 38.

72. Letter from Pham Binh Minh, Vietnam Minister of Foreign Affairs, and Vu Huy Hoang, Vietnam Minister of Industry and Trade, to the Honorable John Kerry,

Vietnam has retained James Bacchus, an international trade attorney at Greenberg Traurig.<sup>73</sup> Mr. Bacchus had previously submitted public comments to the 2011 proposed rule on behalf of the Vietnamese government.<sup>74</sup>

Other Southeast Asian countries have likewise joined Vietnam's criticisms.<sup>75</sup> Indonesia, Thailand and China have individually voiced opposition with the new program.<sup>76</sup> Ten Asian nations have also jointly sent a formal protest to the Office of the U.S. Trade Representative.<sup>77</sup>

The status of the USDA catfish inspection program threatens America's standing as a regional power among the ASEAN nations.<sup>78</sup> The Vietnamese market is one of the most vibrant emerging markets in Asia, and China and the United States have been competing for influence in Vietnam ever since 1995.<sup>79</sup> Companies and lobbying organizations that are eager to gain access to the Vietnamese market for American products have been affected by the inspection program.<sup>80</sup> Overall, the

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Secretary of State (Oct. 30, 2013), [http://thehill.com/sites/default/files/joint\\_ministers\\_letter\\_to\\_hon\\_john\\_kerry.pdf](http://thehill.com/sites/default/files/joint_ministers_letter_to_hon_john_kerry.pdf).

73. See Nixon, *supra* note 62; James Bacchus, GREENBERG TRAUIG, <http://www.gtlaw.com/People/James-Bacchus> (last visited Feb. 29, 2016).

74. For example, the Bacchus Memo, *supra* note 1, was submitted as a public comment.

75. Nixon, *supra* note 62.

76. *Id.*

77. *Id.*; see, e.g., Letter from Dato Usoff Abd Hamid et al., ASEAN Committee in Washington, D.C., to Michael Froman, United States Trade Representative (May 28, 2014); Zhenhu Bian, President of China Chamber of Commerce for Import and Export of Foodstuffs, Native Produce and Animal By-products, *America's Fish Trade Barriers*, WALL ST. J. (Aug. 29, 2013), <http://www.wsj.com/articles/SB1000142412788732400904579040741754600398>.

78. Northam, *supra* note 9; see e.g., Hiebert & De Padua, *supra* note 38 (arguing that the catfish inspection program will sour the United States' trade relationship with Vietnam and prompt retaliation against the United States from its Asian trading partners).

79. Hiebert & De Padua, *supra* note 38; see also Foreign Relations Authorization Act, Pub. L. No. 103-236, § 521, 108 Stat. 382, 472 (1994) (normalizing of relations between the United States and Vietnam in 1995); MARTIN, *supra* note 3, at 4 (discussing Vietnam's support of forming a trade association that could exclude the United States).

80. See MARTIN, *supra* note 3, at 1-2 (noting that trade relations between the United States and Vietnam have generally been on the rise since the bilateral trade agreement went into effect in 2001); The Observatory of Economic Complexity, *Vietnam*

program is a serious trade obstacle between the United States and Vietnam.<sup>81</sup>

### III. ANALYSIS

This section will analyze the 2008 and 2014 Farm Bills with respect to the United States' WTO obligations under the Agreement on Sanitary and Phytosanitary Measures. The SPS Agreement is applicable to the provisions of the 2008 and 2014 Farm Bills that affect catfish inspection. Both the United States and Vietnam are parties to the Agreement.<sup>82</sup> The Agreement specifically applies to any measure adopted by a member country that is a sanitary or phytosanitary measure affecting

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(VNM) *Exports, Imports, and Trade Partners*, MASS. INST. TECH. (2013) <http://atlas.media.mit.edu/en/profile/country/vnm/#Imports> (highlighting that “during the last five years, Vietnam’s imports have increased at an annualized rate of 10.7% from \$77.7B in 2008 to \$129B in 2013”); Gavin Gibbons, *What Do U.S. Catfish Farmers and Vietnam Have To Do With Soy From Iowa?*, NAT’L FISHERIES INST. BLOG, <http://www.aboutseafood.com/press/media-blog/what-do-us-catfish-farmers-and-vietnam-have-do-soy-iowa> (last visited Nov. 15, 2015) (explaining that imposing these inspection restrictions on Vietnamese pangasius will impact U.S. soybean exports to Vietnam).

81. Hiebert & De Padua, *supra* note 38.

82. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 U.N.T.S. 493 [hereinafter SPS Agreement]. As a precondition to Vietnam’s accession to the WTO, it was required to establish new regulations that had to “conform to SPS Agreement principles.” Technical Note on the Accession Process, *Note by the Secretariat: Checklist of Illustrative SPS and TBT Issues for Consideration in Accessions*, WTO Doc. WT/ACC/8 (Nov. 15, 1999), <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/ACC/8.DOC>. By 2007, Vietnam became a member country of the WTO, having satisfied its prerequisite obligations. *Viet Nam and the WTO*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/countries\\_e/vietnam\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/vietnam_e.htm) (last visited Nov. 14, 2015); see also Thi Lan Anh Tran, *Vietnam’s Membership of the WTO: An Analysis of the Transformation of a Socialist Economy Into an Open Economy with Special Reference to the TRIPS Regime and the Patent Law 125-26* (July, 2009) (unpublished Ph.D. thesis, University of Leeds), [http://etheses.whiterose.ac.uk/2688/1/uk\\_bl\\_ethos\\_509876.pdf](http://etheses.whiterose.ac.uk/2688/1/uk_bl_ethos_509876.pdf) (explaining that Vietnam committed to complying with WTO Agreements on SPS and presented plans to implement the provisions); United States-Panama Agreement Regarding Certain Sanitary and Phytosanitary Measures and Technical Standards Affecting Trade in Agricultural Products 2, Dec. 20, 2006, <https://ustr.gov/sites/default/files/2006%20US-Panama%20SPS%20letter%20exchange%20Text.pdf>.

international trade.<sup>83</sup> A sanitary measure is “any measure applied to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease causing organisms in foods, beverages or feedstuffs”.<sup>84</sup>

These Farm Bills are clearly sanitary measures. Although the United States might argue that the measure is not sanitary because it merely requires equivalency between Vietnamese and American catfish, the WTO Appellate Body has already found that even measures requiring “equivalence” between foreign and imported goods are sanitary measures.<sup>85</sup> The 2008 and 2014 Farm Bills also clearly affect international trade, as the bills would at least temporarily result in a total ban on catfish imports, and the WTO Appellate Body has held that “it cannot be contested” that a ban on imports affects international trade.<sup>86</sup> Therefore, the SPS Agreement applies to the measure at issue in this case.

The SPS Agreement has four elements: measures limiting international trade in order to protect public health and safety (1) must be based on and sustained by scientific evidence, (2) must only limit trade to the extent necessary, (3) must not arbitrarily and unjustifiably discriminate against the products of another country, and (4) must not serve as a disguised restriction on international trade.<sup>87</sup>

The obligations of the Agreement are described in Article 2 of the agreement. These obligations are encompassing,

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83. SPS Agreement, *supra* note 82, art. 1(1).

84. SPS Agreement, *supra* note 82, annex A(1)(b)

85. Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, ¶¶ 7.375-7.377, WTO Doc. WT/DS392/R (adopted Sept. 29, 2010) [hereinafter *US – Poultry from China*].

86. See Connelly, *supra* note 41 (noting that during the time that Vietnam is seeking equivalency Vietnamese fish will be blocked from coming into the United States); Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones) Complaint by Canada*, ¶ 8.26, WTO Doc. WT/DS48/R/CAN (adopted Aug. 18, 1997); Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones) Complaint by the United States*, ¶ 8.23, WTO Doc. WT/DS26/R/USA (adopted Aug. 18, 1997).

87. *US – Poultry from China*, *supra* note 85, ¶¶ 7.467-7.468, 8.1; SPS Agreement, *supra* note 82, art. 2(1)-(3).

informing all of the agreement.<sup>88</sup> Article 2.2 states that “Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence.”<sup>89</sup> Likewise, Article 2.3 states that “Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail,” and that “[s]anitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.”<sup>90</sup>

The Appellate Body does not frequently rely on the second half of Article 2.3, which refers to a “disguised restriction on international trade.”<sup>91</sup> However, *EC – Hormones* attempted to explain the relationship between the two parts of Article 2.3:

It is well to bear in mind that, after all, the difference in levels of protection that is characterizable as arbitrary or unjustifiable is only an element of (indirect) proof that a Member may actually be applying an SPS measure in a manner that discriminates between Members or constitutes a disguised restriction on international trade, prohibited by the basic obligations set out in Article 2.3 of the SPS Agreement.<sup>92</sup>

The Appellate Body has therefore implied that the interests of the two provisions of Article 2.3 are related and may implicate each other, but are still distinct.

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88. SPS Agreement, *supra* note 82, art. 2(1)-(4). Other similar provisions of SPS, including Articles 5, are viewed as “specific application[s] of the basic obligations” from Article 2. Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products*, ¶ 180, WTO Doc. WT/DS48/AB/R (adopted Jan. 16, 1998) [hereinafter *EC – Hormones*].

89. SPS Agreement, *supra* note 82, art. 2(2).

90. SPS Agreement, *supra* note 82, art. 2(3). Article 5.5 marks and elaborates a “route leading to the same destination set out in Article 2.3.” *EC – Hormones*, *supra* note 88, ¶ 212.

91. See *EC – Hormones*, *supra* note 88, ¶¶ 34-35 (citing SPS Agreement, *supra* note 82, art. 5.5).

92. *Id.* ¶ 240.

As shown in the analysis below, the 2008 and 2014 Farm Bills fail all four of these elements. These measures are therefore in violation of the United States' WTO obligations.

*A. The Measure Must Be Based on and Sustained by Scientific Evidence*

A measure adopted by a Member of the WTO that restricts free trade must be based on and sustained by scientific evidence.<sup>93</sup> This element has two sub-elements: (1) the alleged threat from which the measure is meant to protect must actually pose a risk of harm to the public, and (2) the measure must be proportional to the risk posed by the threat.<sup>94</sup> As discussed below, the measure adopted by the United States is not based on and sustained by scientific evidence.

This element was at issue in *EC – Hormones*, when the Appellate Body considered whether cattle treated with growth hormones posed a risk to consumers of beef.<sup>95</sup> The Appellate Body considered both whether growth hormones posed any possibility of harm to consumers and whether the harm was likely.<sup>96</sup> Ultimately, the Appellate Body concluded that consumers could not possibly become sick from eating beef treated with growth hormones and thus did not need to address whether the measure was proportional.<sup>97</sup>

The 2008 and 2014 Farm Bills satisfy the first sub-element but not the second. Therefore, these measures are in violation of this element.

1. The Alleged Threat from Which the Measure Is Meant to Protect Must Actually Pose a Risk of Harm to the Public.

Proponents of the USDA catfish inspection program have argued that Vietnamese catfish pose a risk from carcinogens, heavy metals and pesticides, unapproved anti-microbial drugs,

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93. SPS Agreement, *supra* note 82, art. 5(1)-(6).

94. *Id.*

95. *EC – Hormones*, *supra* note 88, ¶ 196.

96. *Id.* ¶¶ 182-83.

97. *Id.* ¶¶ 196, 222.

and *Salmonella*.<sup>98</sup> In *EC – Hormones*, the Panel considered whether growth hormones in beef could harm consumers or whether such hormones were innocuous and harmless.<sup>99</sup> However, unlike growth hormones in beef, carcinogens, heavy metals and pesticides, unapproved anti-microbial drugs and *Salmonella* undisputedly harm public health if consumed in large enough quantities.<sup>100</sup> The first issue in this element is therefore not contested in this case.

## 2. The Measure Must Be Proportional to the Risk Posed by the Alleged Threat

This element requires that the measure be adopted in response to a risk of harm from the product at issue, as proven by timely scientific evidence conforming to international standards.<sup>101</sup> As set forth below, the 2008 and 2014 Farm Bills are not proportional to the alleged risks.

In *Japan – Apples*, the Appellate Body found that there must be a rational relationship between the potential risk and the measure based on evidence derived from scientific

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98. Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. 10,434, 10,438-40 (proposed Feb. 24, 2011) (to be codified in scattered sections of 9 C.F.R.); see CATFISH RISK PROFILE, *supra* note 38, at ix-xi, 12-13, 16-18, 20-21, 23 (summarizing results of an analysis sponsored by Catfish Farmers of America, proponents of USDA catfish inspection program); Bennett, *supra* note 38 (reporting that banned drugs and chemicals have been found in fish imported from Vietnam).

99. *EC – Hormones*, *supra* note 88, ¶¶ 182-83.

100. See Letter from Ctr. for Foodborne Illness Research & Prevention, to the Honorable Shaun Donovan, Dir., Office of Mgmt. & Budget 1-2 (Oct. 7, 2014), [https://www.foodandwaterwatch.org/sites/default/files/omb\\_catfish\\_inspection\\_letter.pdf](https://www.foodandwaterwatch.org/sites/default/files/omb_catfish_inspection_letter.pdf) [hereinafter Letter to OMB] (discussing the FDA conclusion of long-range human health consequences from carcinogens, pesticides and unapproved anti-microbial drugs); Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. at 10,438-39 (noting that the consumption of heavy metals, pesticides, carcinogens, unapproved antimicrobials, and *Salmonella* in certain quantities can have adverse health consequences); *Tracking and Reporting Foodborne Disease Outbreaks*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/Features/dsFoodborneOutbreaks/?source=govdelivery> (last visited Nov. 11, 2015) (tracking 2009-2010 Foodborne Disease Outbreaks, and showing that *Salmonella* caused the most outbreak-related hospitalizations (49%)).

101. SPS Agreement, *supra* note 82, art. 5(1)-(2).

principles.<sup>102</sup> This element therefore also incorporates both the requirement for a risk assessment in SPS Article 5.1 and the requirement that the risk assessment be based on scientific evidence in SPS Article 5.2.<sup>103</sup> The Appellate Body has found that a country can violate this sub-element for three reasons: (1) because the risk assessment did not show a rational relationship based on the necessary evidence, (2) because the offending country did not conduct a risk assessment, or (3) because the offending country did not formulate the measure based on the risk assessment, such as if the risk assessment was an *ad hoc* rationalization of the measure.<sup>104</sup>

Furthermore, the Appellate Body found in *US – Poultry from China* that the risk assessment must be based on the product at issue, not on a similar product.<sup>105</sup> The Appellate Body has also relied on the Preamble to SPS to establish that the risk assessment must be based on “international standards, guidelines and recommendations,” not on the guidelines of the potentially offending country.<sup>106</sup>

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102. Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, ¶ 35, WTO Doc. WT/DS245/AB/R (adopted Nov. 26, 2003) [hereinafter *Japan – Apples*]. The Appellate Body reiterated the “rational relationship” requirement in *Japan – Agricultural Products II* by clarifying that “sufficient” means that there must be “a relational concept between the measure and the scientific evidence”. Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, ¶ 73, WTO Doc. WT/DS76/R (adopted Feb. 22 1999) [hereinafter *Japan – Agricultural Products II*]. Likewise, the Appellate Body has held that this evidence must “be sufficient to demonstrate the extent of the risk which the measure is supposed to address, and be of the kind necessary for a risk assessment.” *US – Poultry from China*, *supra* note 85, ¶ 5.48.

103. *Japan – Apples*, *supra* note 102, ¶ 195.

104. Bacchus Memo, *supra* note 1, at 11; see *US – Poultry from China*, *supra* note 85, ¶ 7.85 (holding that it is clear from the definition contained in Annex A(1) that one of the elements which determine whether a particular measure is an SPS measure is the purpose of the measure).

105. See *US – Poultry from China*, *supra* note 85, ¶ 7.179 (citing the Appellate Body’s requirement that the risk assessment must address the specific scientific issue with the product – a general discussion of the problem will not suffice); see also *id.* ¶¶ 7.198, 7.202, 7.204 (discussing the Appellate Body’s denial of the United States’ risk assessment for failure to address the product at issue, Chinese poultry).

106. *Id.* ¶ 7.135; Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, ¶ 692, WTO Doc. WT/DS321/AB/R (adopted Nov. 14, 2008) [hereinafter *Canada – Continued Suspension*]; see SPS Agreement, *supra* note 82, art. 3(1) (stating that “Members shall base their sanitary or phytosanitary

The United States probably violated this sub-element because it failed to conduct its risk assessment in a timely fashion.<sup>107</sup> USDA did not conduct a risk assessment until 2012, or four years after Congress passed the 2008 Farm Bill.<sup>108</sup> Although the risk assessment was still conducted before the passage of the 2014 Farm Bill, the untimely manner of the risk assessment strongly indicates that Congress did not consider the risk of catfish when considering and enacting the USDA catfish inspection program in 2008, as the Appellate Body has held is required by the Preamble to the SPS Agreement.<sup>109</sup>

Even assuming that the United States did not violate this element by failing to conduct a risk assessment in a timely fashion, the United States lacks evidence that the ultimate assessment was defensible. Proponents of the USDA catfish inspection program have argued that Vietnamese catfish pose a risk of carcinogens, heavy metals and pesticides, unapproved anti-microbial drugs and *Salmonella*.<sup>110</sup> In order to analyze the applicability of this element to the present case, this paper will address each of the alleged risks separately.

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measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement”).

107. See SPS Agreement, *supra* note 82, art. 5(7) (stating that Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable time).

108. See FOOD SAFETY AND INSPECTION SERV., U.S. DEPT OF AGRIC., RISK ASSESSMENT OF THE POTENTIAL HUMAN HEALTH EFFECT OF APPLYING CONTINUOUS INSPECTION TO CATFISH (July 2012), [http://www.fsis.usda.gov/wps/wcm/connect/80a428f3-43fb-4421-b97d-885909e5a228/Catfish\\_Risk\\_Assess\\_July2012.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/80a428f3-43fb-4421-b97d-885909e5a228/Catfish_Risk_Assess_July2012.pdf?MOD=AJPERES) [hereinafter FSIS RISK ASSESSMENT] (showing the FSIS Risk Assessment was conducted in 2012); Bacchus Memo, *supra* note 1, at 3 (claiming the risk assessment was not completed until 2012).

109. *Canada – Continued Suspension*, *supra* note 106, ¶ 7.135; Bacchus Memo, *supra* note 1, at 3.

110. Ben Dipietro, *U.S. Lawmakers Squabble over Farm Bill's Catfish Provision*, WALL ST. J. (May 20, 2015, 1:59 PM), <http://blogs.wsj.com/riskandcompliance/2015/05/20/u-s-lawmakers-squabble-over-farm-bills-catfish-provision/>; Press Release, Thad Cochran, Cochran & Wickers Use Cancer Risk Evidence to Defend Catfish Inspection Program (May 19, 2015), <http://www.cochran.senate.gov/public/index.cfm/2015/5/cochran-wicker-use-cancer-risk-evidence-to-defend-catfish-inspection-program>.

### *Carcinogens*

There is no justified risk from carcinogens in catfish in the United States. Of all of the alleged risks, the evidence for the risk of carcinogens is the weakest.<sup>111</sup> A letter from industry groups to the OMB claimed that the USDA catfish inspection program would reduce “roughly 175,000 cancers.”<sup>112</sup> However, that claim is wholly unsubstantiated, as the letter cited a study that actually showed that the ultimate effect of the program on cancer reduction is uncertain.<sup>113</sup>

The only other evidence related to carcinogens is a 2010 statement from the Vietnam Association of Seafood Exporters and Producers (VASEP) that warned of carcinogens in Vietnamese shrimp.<sup>114</sup> After VASEP issued this statement, Japan successfully tightened its inspections of Vietnamese shrimp.<sup>115</sup> However, the WTO requires that a risk assessment be based on the product at issue, not on a similar product.<sup>116</sup> Therefore, any evidence of carcinogens in Vietnamese shrimp would not be relevant to the present dispute. As such, there is no risk assessment for the carcinogens in catfish that would justify the measure.

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111. The FSIS RISK ASSESSMENT, *supra* note 108 is conspicuously silent as to the carcinogenic risks posed by catfish contamination.

112. Letter to OMB, *supra* note 100, at 3.

113. See FSIS RISK ASSESSMENT, *supra* note 108, at 44 (“[T]he relative estimated number of illnesses avoided across 10 years of an FSIS catfish inspection program is directly related to the assumption about the timing of peak effectiveness.”). See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-286, SEAFOOD SAFETY: FDA NEEDS TO IMPROVE OVERSIGHT OF IMPORTED SEAFOOD AND BETTER LEVERAGE LIMITED RESOURCES (2011) (describing the shortcomings of the implementation of the new program).

114. Sam Williford, *Imported Vietnamese Shrimp Contain Lethal Carcinogens*, ECON. IN CRISIS (Nov. 12, 2010), <http://economyincrisis.org/content/imported-vietnamese-shrimp-found-contain-lethal-carcinogens>.

115. Natalia Real, *Tighter Restrictions by Japanese Authorities Could Harm Shrimp Exporters*, FIS (July 3, 2012), <http://fis.com/fis/worldnews/worldnews.asp?l=e&id=53491&ndb=1>.

116. See *US – Poultry from China*, *supra* note 85, ¶¶ 7.201-7.204 (applying the principal that evidence “must . . . be sufficient to demonstrate the existence of the risk which the measure is supposed to address” to the United States’ attempt to regulate poultry from China based on scientific proof from the market generally, not on Chinese poultry specifically, and denying such attempt due to the lack of specific proof).

*Heavy Metals and Pesticides*

The United States will have difficulty establishing that there is a risk from heavy metals and pesticides that justifies the 2008 and 2014 Farm Bills. Trace amounts of these contaminants have been found in catfish.<sup>117</sup> The USDA Proposed Rule in 2011 contained information on numerous scientific studies that found trace amounts of heavy metals and pesticides in both foreign and domestic catfish.<sup>118</sup> For example, Food Safety Inspection Service (FSIS) tested 737 samples of retail catfish between 2008 and 2009, 17 of which tested positive for heavy metals.<sup>119</sup> These 17 samples included both domestic and imported catfish.<sup>120</sup> Another study in 2001 found that of 257 domestic catfish samples, lead residue was found in 11%, arsenic residue was found in 5%, and mercury residue was found in 83%.<sup>121</sup> All of the residues in these samples were below EPA's recommended safety limits.<sup>122</sup>

The only study in the USDA Proposed Rule that found significantly higher contamination in imported products than in domestic products was a study from 2008, which tested 552 catfish samples for pesticide residue.<sup>123</sup> Chlorpyrifos and Endosulfan were each found in less than 1% of domestic samples and 32% and 27% of imported samples, respectively.<sup>124</sup> However, these residues were not of regulatory concern, as there was no evidence that the residues posed a health risk.<sup>125</sup>

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117. CATFISH RISK PROFILE, *supra* note 38, at 14.

118. Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. 10,434, 10,438 (proposed Feb. 24, 2011) (to be codified in scattered sections of 9 C.F.R.).

119. U.S. DEP'T AGRIC. FOOD SAFETY INSPECTION SERVS., 2008-2009: ANALYSIS OF HEAVY METALS AND VETERINARY DRUGS IN 737 CATFISH SAMPLES FROM RETAIL MARKETS IN THE UNITED STATES 5 (2009), [http://www.fsis.usda.gov/wps/wcm/connect/0eff396a-f92a-44c2-a58c-bce8cdcc5d9c/2008\\_2009\\_Catfish\\_Heavy\\_Metals.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/0eff396a-f92a-44c2-a58c-bce8cdcc5d9c/2008_2009_Catfish_Heavy_Metals.pdf?MOD=AJPERES).

120. C.R. Santerre et al., *Metal Residues in Farm-Raised Channel Catfish, Rainbow Trout, and Red Swamp Crayfish from the Southern U.S.*, 66 J. FOOD SCI. 270, 272 (2001).

121. *Id.*

122. *Id.*

123. *See id.* (discussing findings that show there was about one-third more contamination in imported versus domestic products).

124. *Id.*

125. *See id.*

In fact, USDA itself conceded that catfish do not “frequently harbor residues of illegal drugs or other chemicals,” and that “[s]parse information on the distribution of . . . chemical residues on catfish limit our ability to make strong statements about the baseline risk.”<sup>126</sup> USDA has argued merely that “the potential exists for such contamination.”<sup>127</sup> Since even USDA has acknowledged that a potential for contamination differs from an actual risk of contamination and that such a risk does not exist, these studies do not justify a restriction on international trade as required by the WTO.<sup>128</sup> Likewise, there is ultimately no evidence that any of these contaminants have ever actually harmed consumers. Therefore, the WTO likely will not find that there is a justifiable risk assessment for heavy metals and pesticides in imported catfish.

#### *Unapproved Anti-Microbial Drugs*

The United States will likely not be able to establish a risk from unapproved anti-microbial drugs that justifies the 2008 and 2014 Farm Bills. Evidence for the risk from unapproved anti-microbial drugs include testimony from FDA Deputy Commissioner for International Special Programs before Congress in 2007, in which the Deputy Commissioner stated that unapproved antimicrobial drugs had been found in 25% of

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126. *Id.* at 10,437, 10,439.

127. *Id.* at 10,439.

128. *See id.* at 10,439-40 (indicating there is only the “potential” for contamination from illegal drugs and chemicals in catfish, that catfish was only accused of being a “possible” source of a *Salmonella* outbreak, and that the FSIS Risk Assessment only indicated the “potential risk” to human health posed by catfish); FSIS RISK ASSESSMENT, *supra* note 108, at 38, 40 (noting that USDA’s risk assessment of *Salmonella* in catfish assumes there will be a reduction in the number of illness and that the true effect of FSIS inspection is unknown). It is therefore unnecessary to conduct an analysis on whether domestic standards differ from international standards because, even under the domestic standards, the United States acknowledged that there is no risk here. *See Understanding the WTO Agreement on Sanitary and Phytosanitary Measures*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/sps\\_e/spsund\\_e.htm](https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm) (last visited Nov. 10, 2015) [hereinafter *Understanding the WTO Agreement*] (“[G]overnments which do not base their national requirements on international standards may be required to justify their higher standard . . . based on an analysis of scientific evidence and the risks involved”).

catfish samples imported from China.<sup>129</sup> Industry groups have further argued that the use of antimicrobial drugs in aquaculture is generally a significant concern.<sup>130</sup>

Proponents of the USDA have also focused on regulations in the European Union as evidence of a perceived risk.<sup>131</sup> According to industry groups, the European Union has a catfish inspection program that the Government Accountability Office (GAO) has said is more rigorous than the FDA inspection program. Industry groups also claim that GAO has faulted FDA for failing to test for certain drugs that are allowed in the European Union, but banned in the United States.<sup>132</sup> A 2011 GAO report found that shipments rejected from the European Union were being diverted, and FDA has suggested that the rejected shipments are arriving in the United States.<sup>133</sup>

However, no evidence supports the allegations that rejected shipments from Europe have been diverted to the United States.<sup>134</sup> Furthermore, no other WTO countries, including

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129. *Safety of Chinese Imports: Hearing Before the S. Comm. on Commerce, Science & Transportation* (2007) (statement by Murray Lumpkin, Deputy Comm'r for Int'l and Special Programs), <http://www.fda.gov/NewsEvents/Testimony/ucm110728.htm>; see *Mandatory Inspection of Catfish and Catfish Products*, 76 Fed. Reg. 10,434, 10,437 (proposed Feb. 24, 2011) (to be codified in scattered sections of 9 C.F.R.).

130. See Bennett, *supra* note 38 (quoting Representative Crawford, whose district contains many catfish producers, who argues the use of unapproved drugs in foreign aquaculture poses serious health risks justifying USDA inspection); Letter to OMB, *supra* note 100, at 1 (arguing in favor of USDA regulation because foreign seafood producers use chemicals and new animal drugs unapproved in the United States).

131. Michael Hansen, *CU Comments Regarding the FSIS Proposal to Require Inspection of Catfish*, CONSUMERS UNION (June 24, 2011), <http://consumersunion.org/news/cu-comments-regarding-the-fsis-proposal-to-require-inspection-of-catfish/>; Kate Fried, *After Six Years of Inaction, Consumer Organizations Urge Feds to Implement Catfish Inspection Program*, FOOD & WATER WATCH (Oct. 7, 2014), <https://www.foodandwaterwatch.org/news/after-six-years-inaction-consumer-organizations-urge-feds-implement-catfish-inspection-program>.

132. Letter to OMB, *supra* note 100, at 2; Hansen, *supra* note 131; Fried, *supra* note 131.

133. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 113, at 14 (2011); accord Hansen, *supra* note 131 (discussing how diverted European Union imports could potentially be imported to the United States).

134. Supporters of the claim that rejected shipments will be brought to the United States have cited no source beyond their own conjecture or assumptions to support their

countries in the European Union, have ever expressed concern over the safety of Vietnamese Pangasiidae.<sup>135</sup> Some countries, including Spain and Italy, specifically affirmed the safety of Pangasiidae imports after the passage of the 2008 Farm Bill.<sup>136</sup> And even though FDA found antimicrobial drugs in 25% of catfish imports from China in 2007, there is no evidence that those drugs caused any illnesses in the United States.<sup>137</sup> Even USDA has acknowledged that there is limited evidence of the risk of these drugs.<sup>138</sup> For these reasons, the United States will not be able to establish the antimicrobial drugs pose a justifiable risk under the WTO standard.

### *Salmonella*

The United States is unlikely to successfully argue that *Salmonella* from catfish poses a justifiable risk, but the evidence for this risk is stronger than that of the others. FSIS, which is a component of USDA, conducted its own risk assessment on catfish in 2012, four years after the passage of the original 2008 Farm Bill.<sup>139</sup> At the direction of OMB, the FSIS Risk Assessment focused solely on the risk posed by *Salmonella*.<sup>140</sup> FSIS chose to focus on *Salmonella* because “limited information on the

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belief. *E.g.* Taras Grescoe, *Catfish With a Side of Scromboid*, N.Y. TIMES (July 15, 2007), <http://www.nytimes.com/2007/07/15/opinion/15grescoe.html>; Hansen, *supra* note 131.

135. Bacchus Memo, *supra* note 1, at 10.

136. *Pangasius Market Report - May 2009*, THE FISH SITE (May 21, 2009), <http://www.thefishsite.com/articles/689/pangasius-market-report-may-2009/>; Neil Ray, *Italy Assures Safety of Vietnamese Pangasius*, SEAFOODSOURCE.COM (Apr. 27, 2009), <http://www.seafoodsource.com/news/food-safety-health/15033-italy-assures-safety-of-vietnamese-pangasius>; *US Congress Members Concerned Over Redefinition of “Catfish”*, VIETNAM (May 12, 2010 4:44 PM), <http://en.vietnamplus.vn/us-congress-members-concerned-over-redefinition-of-catfish/19129.vnp>.

137. *Safety of Chinese Imports: Hearing Before the S. Comm. on Commerce, Science & Transportation*, *supra* note 129.

138. See FSIS RISK ASSESSMENT, *supra* note 108, at 9 (conceding that the dearth of information regarding microbial and chemical adulteration in catfish limits the ability of the FSIS to make claims about their risks.”).

139. *Id.*

140. See *Transcript for: Issues with Federal Plans for Inspecting Catfish*, U.S. GOV'T ACCOUNTABILITY OFF., [www.gao.gov/assets/600/591476.txt](http://www.gao.gov/assets/600/591476.txt) (last visited Nov. 11, 2015) (interviewing Lisa Shames, Director of Natural Resources and Environment at the Government Accountability Office).

distribution of microbial contamination and chemical residues on catfish limit [the] ability to make strong statements about the baseline risk.”<sup>141</sup> FSIS seemingly believed that if USDA had to defend the catfish regulation at the WTO, its case should be based on the risk of *Salmonella*.

*Salmonella* is a major illness in the United States.<sup>142</sup> However, in order to justify its measure based on a risk assessment, the United States would have to argue that catfish specifically poses a high risk of *Salmonella* infection.<sup>143</sup> The FSIS Risk Assessment laid out the most persuasive arguments for the United States. FSIS essentially searched all of the records at the Center for Disease Control (CDC) and found that catfish has only been attributed to 1 of the 1158 outbreaks of *Salmonella* in the United States from 1990 through 2007.<sup>144</sup> The outbreak occurred in New Jersey in 1991 and resulted in ten illnesses and six hospitalizations but no deaths.<sup>145</sup> CDC was not able to conclusively determine that catfish caused this outbreak and merely suggested that catfish was a possible cause.<sup>146</sup>

FSIS then “assumed that the proportion of all *Salmonella* illnesses caused by [catfish] is equivalent to the proportion of outbreaks caused by [catfish].”<sup>147</sup> Essentially, since catfish possibly made up 0.17% of all outbreaks from 1990-2007, then catfish must be responsible for 0.17% of all of the 1.4 million *Salmonella*-related illnesses in the United States each year.<sup>148</sup>

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141. FSIS RISK ASSESSMENT, *supra* note 108, at 9.

142. See CTRS. FOR DISEASE CONTROL AND PREVENTION, AN ATLAS OF *SALMONELLA* IN THE UNITED STATES, 1968-2011 (2013) (estimating that *Salmonella* causes “more than 1.2 million illnesses each year in the United States.”).

143. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-411, SEAFOOD SAFETY: RESPONSIBILITY FOR INSPECTING CATFISH SHOULD NOT BE ASSIGNED TO USDA 10-13 (2012).

144. See FSIS RISK ASSESSMENT, *supra* note 108, at 36-38, 37 tbl.9 (discussing the number of *Salmonella* outbreaks and vehicles identified in the United States from 1990 to 2007).

145. Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. 10,434, 10,439 tbl. 2 (proposed Feb. 24, 2011) (to be codified in scattered sections of 9 C.F.R.).

146. See FSIS RISK ASSESSMENT, *supra* note 108, at 36 (discussing how catfish was “suspected” for this particular outbreak, but is generally not a factor in *Salmonella* outbreaks).

147. *Id.* at 37.

148. *Id.* at 36-38.

Under this logic, FSIS estimated that 2,400 cases of *Salmonella* were attributable to catfish each year in the United States.<sup>149</sup>

However, this study is problematic for numerous reasons.<sup>150</sup> GAO sent a report to Congress on May 2012, which specifically denounced the FSIS Risk Assessment.<sup>151</sup> The report, subtly named *Responsibility for Inspecting Catfish Should Not Be Assigned to USDA*, found that FSIS had used “outdated and limited information” when creating its risk assessment.<sup>152</sup> Specifically, since catfish was only a possible source of the 1991 New Jersey outbreak, the study offers no proof that catfish has ever caused an outbreak of *Salmonella* in the United States.<sup>153</sup> The New Jersey outbreak also occurred prior to 1997, when FDA created its Seafood Hazard Analysis and Critical Control Point regulations.<sup>154</sup> The study therefore also does not prove that catfish has ever caused an outbreak of *Salmonella* in the United States before the current seafood regulations were created, and there is absolutely no evidence that catfish has caused an outbreak since.

Likewise, the FSIS Risk Assessment relied on an assumed proportion model. Assumed proportion models are statistically useful for drawing inferences, but they are not definitive.<sup>155</sup> 2,400 illnesses per year is an estimate at best.<sup>156</sup> Considering that this estimate was based on a single outbreak, which may

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149. *Id.*

150. According to James Bacchus, the lawyer representing the Government of Vietnam, the FSIS Risk Assessment was created by scientific experts who were “plainly struggling in the effort to carry out Congress’ mandate . . . while being intellectually honest.” Bacchus Memo, *supra* note 1, at 15.

151. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 143, at 10-13 (stating how FSIS focused on *Salmonella* in its risk assessment at the direction of OMB because it was “the most practical hazard to evaluate;” however, “FSIS used outdated and limited information in its risk assessment as its scientific basis for a catfish inspection program that seeks to mitigate that hazard”).

152. *Id.* at 10.

153. Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. 10,434, 10439-40 (proposed Feb. 24, 2011) (to be codified in scattered sections of 9 C.F.R.); U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 143, at 10.

154. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 143, at 12.

155. See FSIS RISK ASSESSMENT, *supra* note 108, at 38-40 (admitting “substantial uncertainty” and reasonable assumptions incorporated into the risk assessment model).

156. *Id.* at 38.

not have even been caused by catfish, the number is highly dubious as “scientific evidence” as required by the WTO in *Japan – Apples*.<sup>157</sup>

Given the suspicious mathematical conclusions of the FSIS Risk Assessment, the United States has a very difficult case to make. FDA and CDC both disagree with FSIS’s conclusion that 2,400 *Salmonella* illnesses each year can be traced to catfish.<sup>158</sup> Rather, these agencies have found that an average of only two foodborne illnesses of any kind can be traced to catfish each year, out of the 1.8 billion total catfish consumed.<sup>159</sup> In fact, in one year, only ten cases of *E. Coli*, *Salmonella* or *Listeria* were traced to fish of any kind.<sup>160</sup> During that same year, however, 1,100 such illnesses were attributed to poultry.<sup>161</sup> Therefore, proponents of the rule will have difficulty explaining why USDA should apply the same level of scrutiny to catfish as to poultry. Both FDA and CDC specifically consider catfish to be a low-risk food.<sup>162</sup> CDC even found that FDA had been working successfully to ensure the safety of Vietnamese Pangasiidae imports prior to the passage of the 2008 Farm Bill.<sup>163</sup>

Finally, it is not even necessary to consider whether American scientific evidence conforms to “international standards and guidelines” as mandated by the WTO, because there is no evidence from any U.S. government agency that any such risk exists.<sup>164</sup> Not a single American government agency that is responsible for food inspection – including FDA, USDA, CDC, the National Oceanic and Atmospheric Administration (NOAA), and the House Committee on Energy and Commerce – has ever found conclusive evidence that catfish pose a risk to

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157. See *Japan – Apples*, *supra* note 102, ¶ 147 (explaining that “a measure is maintained ‘without sufficient scientific evidence’ within the meaning of Article 2.2 of the SPS Agreement if there is no “rational or objective relationship” between the measure and the relevant scientific evidence”).

158. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 143, at 12-13.

159. Hiebert & De Padua, *supra* note 38.

160. Bacchus Memo, *supra* note 1, at 9.

161. *Id.*

162. Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. 10,434, 10,438 (proposed Feb. 24, 2011) (to be codified in scattered sections of 9 C.F.R.).

163. Bacchus Memo, *supra* note 1, at 9.

164. SPS Agreement, *supra* note 82, art. 3(1)-(3).

public health or safety.<sup>165</sup> For these reasons, it is unlikely that the United States could successfully establish that *Salmonella* is a risk that justifies the USDA catfish inspection program.

*B. The measure must only limit trade to the extent necessary*

This measure fails to limit trade to the extent necessary. Since there is no justifiable risk assessment, this element is essentially moot. No limitation on trade is necessary for a non-existent risk, much less a total ban on imports for several years. Therefore, the 2008 and 2014 Farm Bills cannot meet the second element in light of its failure to meet the first element.<sup>166</sup>

*C. The measure must not arbitrarily and unjustifiably discriminate against the products of another country*

The 2008 and 2014 Farm Bills arbitrarily and unjustifiably discriminate against Vietnamese Pangasiidae.<sup>167</sup> A measure that treats two territories differently may not do so on arbitrary and

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165. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 143, Highlights ("Other federal agencies questioned if FSIS had adequately demonstrated a *Salmonella* problem in catfish."); Letter from Fred Upton, Chairman, Committee on Energy and Commerce of the House of Representatives et al., to Shaun Donovan, Dir., Office of Management and Budget 1 (Sept. 9, 2014), <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/letters/090814OMBCatfishLetter.pdf> ("Both USDA and GAO agree that there is no food safety justification for this regulatory divide."); JOHN MCCAIN, AMERICA'S MOST WASTED: TIME TO ARREST WASHINGTON'S OUT-OF-CONTROL SPENDING 13, [http://www.mccain.senate.gov/public/\\_cache/files/47c2a7c2-832f-4d35-91e9-bdddb5c819f6/americas-most-wasted-report.pdf](http://www.mccain.senate.gov/public/_cache/files/47c2a7c2-832f-4d35-91e9-bdddb5c819f6/americas-most-wasted-report.pdf) (noting the agreement between CDC, FDA, and USDA that eating foreign catfish is not a health risk, which undermines the claims made by southern catfish farmers); Bottemiller, *supra* note 49 (finding that NOAA has only found a *potential* for danger with *farm-raised* catfish).

166. Cf. *US – Poultry from China*, *supra* note 85, ¶ 4.23 (finding discrimination arbitrary or unjustifiable when there was "no scientific evidence, risk assessment, or other justification for treating Chinese poultry products differently from those of other WTO Members").

167. See Letter from John McCain, U.S. Senator, et al., to Debbie Stabenow, Chairwoman, Sen. Comm. on Agric., Nutrition & Forestry (May 7, 2013), <http://www.mccain.senate.gov/public/index.cfm/press-releases?ID=8621c208-04fd-fe24-c381-7c39f627939f> ("Trade experts state that the USDA catfish inspection program would create a discriminatory de facto ban on exports from key trading partners.").

unjustified grounds.<sup>168</sup> This element is derived from Article 2.3, which has language similar to Article 5.5.<sup>169</sup> The Appellate Body found in *Australia – Salmon* that a violation of Article 5.5 implies a violation of Article 2.3, based on the similar language between the two texts.<sup>170</sup> Article 2.3 is therefore closely related to Article 5.5.<sup>171</sup> Since the 2008 and 2014 Farm Bills fail all of these sub-elements, the measure does not meet this element.

#### 1. The Measure Discriminates Between One Territory and Another

In order to meet this sub-element, the measure must apply to foreign products in a similar manner as any comparable domestic products.<sup>172</sup> In *Australia – Salmon from Canada*, the Appellate Body held that discrimination between Canadian salmon and Australian non-salmon fish still constituted a violation of this sub-element.<sup>173</sup> The 2008 and 2014 Farm Bills

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168. WTO Analytical Index: Agreement on Sanitary and Phytosanitary Measures, WORLD TRADE ORG., [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/sps\\_01\\_e.htm#article2](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_01_e.htm#article2) (last visited Nov. 11, 2015) [hereinafter *WTO Analytical Index*]. Some commentators have argued that there is a third sub-element which requires that “similar or identical conditions prevail” in both countries. See *US – Poultry from China*, *supra* note 85, ¶¶ 4.23-4.24 (explaining that the third element of an Article 2.3 requires that “identical or similar conditions prevail in the territory of the Members compared”). However, this element is substantially the same as the second element. The WTO has never articulated a test for the third sub-element as an independent requirement.

169. The Appellate Body has found in the past that “[w]hen read together with Article 2.3, Article 5.5 may be seen to be marking out and elaborating a particular route leading to the same destination set out in Article 2.3.” *EC – Hormones*, *supra* note 88, ¶ 212.

170. Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, ¶¶ 250, 252, WTO Doc. WT/DS18/AB/R (adopted Nov. 6, 1998) [hereinafter *Australia – Salmon*].

171. See *WTO Analytical Index*, *supra* note 168, ¶ 50 (“Articles 5.4 to 5.6 may be viewed as specific applications of the basic obligations provided for in . . . Article 2.3 which provides that ‘Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail . . .’ and that ‘Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.’” (emphasis added)).

172. SPS Agreement, *supra* note 82, art. 5(3).

173. *Australia – Salmon*, *supra* note 170, ¶¶ 238-40.

discriminate between products from America and products from Vietnam.

Although senators in favor of the legislation have repeatedly stated the bill merely subjects imported catfish to the same standards as domestic catfish, this measure bans Vietnamese imports for a preliminary period while the program is set up and does not similarly ban American products.<sup>174</sup> The United States might alternatively argue that this measure does not discriminate between American and Vietnamese catfish because such fish are not biologically identical.<sup>175</sup> The United States might therefore posit that discrimination against Pangasiidae is not equivalent to discrimination against Ictaluridae.

However, this argument is also weak. First, even if Vietnam produced Ictaluridae, the product would still be banned from importation into the United States. Therefore, this argument does not negate the broad discrimination that specifically applies to the territory of Vietnam. Second, the WTO Appellate Body has already held *Australia - Salmon* that discrimination can apply to both similar and dissimilar products. Therefore, even if the United States successfully characterized this dispute as a distinction between Vietnamese Pangasiidae and American non-Pangasiidae catfish, this measure would still violate Article 2.3. For these reasons, the 2008 and 2014 Farm Bills likely discriminates between territories.

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174. See Bennett, *supra* note 38 (quoting Arkansas Representative Rick Crawford as stating the measure “simply requires our foreign trade partners to play on a level playing field”). The WTO Committee on Sanitary and Phytosanitary Measures has also adopted Decisions on the Implementation of Article 4, which “establishes that ‘a request by an exporting Member for recognition of the equivalence of its measure with regard to a specific product shall not be in itself a reason to disrupt or suspend ongoing imports from that Member of the product in question.’” Bacchus Memo, *supra* note 1, at 6. Although this decision is not binding on member states, Vietnam would certainly cite it as persuasive authority. See *id.* at 14 (explaining that “[t]his Decision on Equivalence would be relevant if Vietnam were required to request certification of equivalence as a consequence of a USDA rule expanding the definition of ‘catfish’ to include pangasius”).

175. Cf. *Australia - Salmon*, *supra* note 170, ¶ 22 (noting Australia’s argument that biological differences in Australia’s salmonid and other aquatic animals warranted special treatment).

## 2. The Measure Is Based on a Distinction That Is Arbitrary and Unjustifiable

The USDA catfish inspection program is almost certainly arbitrary and unjustifiable. In order to meet this element, a measure must only distinguish between domestic and foreign products based on the risk those products pose to public health.<sup>176</sup> The WTO has found that the phrase “arbitrary and unjustifiable” in this context is interpreted based on the Vienna Convention on the Law of Treaties (VCLT), as this language was originally derived from provisions on the General Agreement on Tariffs and Trade (GATT).<sup>177</sup> Panels have found that based on the requirement in the VCLT that terms be interpreted based on their “ordinary meaning,” this element stipulates that “a Member must demonstrate that there are differing levels of risk between the comparable situations.”<sup>178</sup>

The 2008 and 2014 Farm Bills probably fail to meet this element because there is no evidence that Vietnamese Pangasiidae pose a greater threat to public health than American Ictaluridae. No scientific studies, including all of the studies cited by USDA’s Proposed Rule from 2011, support the conclusion that Pangasiidae from Vietnam poses a higher risk of carcinogens, heavy metals and pesticides, unapproved antimicrobials or *Salmonella*.<sup>179</sup>

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176. *EC – Hormones*, *supra* note 88, ¶¶ 211, 214.

177. *US – Poultry from China*, *supra* note 85, ¶¶ 7.259-7.260. The General Agreement on Tariffs and Trade (GATT), signed in 1947, prohibited member countries from adopting protectionist measures limiting international trade. General Agreement on Tariffs and Trade art. XIII, § 1, Oct. 30, 1947, 55 U.N.T.S. 187. However, Article XX of the GATT detailed exceptions to that limitation, including an exemption for measures “necessary to protect human, animal or plant life or health.” *Id.* art. XX(b). This exception was subject to the limitation that such measure not be “arbitrary or unjustifiable.” *Id.* The signatories to the GATT also negotiated SPS during the Uruguay Round in 1995. *Understanding the WTO Agreement*, *supra* note 128. SPS sought to supplement provisions of the GATT by further ensuring that countries can effectively protect public health without using “strict health and safety regulations as an excuse for protecting domestic producers.” *Id.*

178. *US – Poultry from China*, *supra* note 85, ¶¶ 7.259, 7.263.

179. *See* Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. 10,434, 10,438-39 (proposed Feb. 24, 2011) (to be codified in scattered sections of 9 C.F.R.) (noting USDA’s studies suggesting imported catfish had heavy metal residues and pesticide levels below recommended safety limits and not justifying regulatory concern,

The United States might argue that the USDA catfish inspection program is permissible because the conditions in which catfish are raised in the United States are dissimilar from the conditions in Vietnam.<sup>180</sup> Proponents of the program have previously argued that Vietnamese Pangasiidae are produced in unsanitary conditions.<sup>181</sup> In a press interview in 2012, Congressman Rick Crawford of Arkansas justified the program based on a study published by Carole Engle of the University of Arkansas at Pine Bluff.<sup>182</sup> This study, which has been cited by other proponents, alleges that “half the food fed to Vietnamese fish is homemade without any monitoring to eliminate the use of harmful chemicals or drugs,” and that “human waste is released directly into the water being pumped into [Vietnamese] catfish farms.”<sup>183</sup>

Some evidence supports the proposition that Vietnamese Pangasiidae is produced under worse conditions than American Ictaluridae. The Ministry of Agriculture and Rural Development in Vietnam has admitted that the Vietnamese government has

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only the potential for unapproved antimicrobials, and, while imported catfish tested positive for *Salmonella* more frequently than domestic catfish, the imported catfish were not tested randomly).

180. Cf. *US – Poultry from China*, *supra* note 85, ¶ 6.54 (arguing Chinese poultry posed a special risk due to “poultry-related crises that occurred in China, such as China’s avian influenza problems, poultry smuggling, and the testing of Chinese poultry for melamine”).

181. See Bennett, *supra* note 38 (noting Representative Crawford pointing to research that catfish from Vietnam tested positive for antibiotics and remarking on unsafe practices of Vietnamese catfish producers); Norah Burton, *Does Imported Catfish Pose a Health Risk?*, FOOD SAFETY NEWS (Feb. 25, 2010), <http://www.foodsafetynews.com/2010/02/does-imported-catfish-pose-a-health-risk/> (remarking on concerns of polluted waters being used in Vietnamese catfish production); Jane Zhang, *Catfishy: Vietnamese Species Embroiled in Identity Crisis*, WALL ST. J. (Dec. 24, 2009, 12:01 AM), <http://www.wsj.com/articles/SB126144983541901133> (quoting the president of a catfish trade group claiming that Vietnamese catfish farms use “illegal chemicals and unsafe production facilities”); Elton Robinson, *Inspect Pangasius, Let Chips Fall Where They May*, DELTA FARM PRESS: FARM PRESS BLOG (Oct. 4, 2013), <http://deltafarmpress.com/blog/inspect-pangasius-let-chips-fall-where-they-may> (noting a video released by an American catfish advocacy group showing Vietnamese catfish swimming in waters polluted with raw sewage).

182. See Engle, *supra* note 63 (discussing the contaminants and toxins that Vietnamese fish are exposed in Vietnamese ponds).

183. *Id.*

difficulty overseeing the quality of aquaculture exports.<sup>184</sup> The USDA Proposed Rule in 2011 also cited scientific studies that indicate American catfish producers use hatcheries or inland ponds, whereas Vietnamese fish are grown in net enclosures in rivers or inlets, and sometimes underneath houseboats. As noted by the USDA Proposed Rule, the quality of river water is more difficult to control than water in hatcheries or inland ponds.<sup>185</sup>

However, these arguments are unlikely to succeed absent any evidence that Vietnamese *Pangasiidae* actually causes the outbreak of disease. Furthermore, in light of the overwhelming evidence weighing against the Farm Bills in all the other elements, the possibility of the WTO upholding the Farm Bills based solely on inconclusive evidence about the cleanliness of Vietnamese catfish farms is highly unlikely. For these reasons, the measures fail this sub-element.

*D. The measure must not be a disguised restriction on international trade*

The Appellate Body has held that Article 1 of the SPS Agreement requires members to adopt measures with the intention of upholding its requirements.<sup>186</sup> In accordance with Article 1, any measure adopted for an invidious purpose therefore violates the Agreement.<sup>187</sup> If a measure is adopted with the intention to restrict international trade, a panel might therefore find a violation of this element.<sup>188</sup> The United States has therefore probably violated this element.

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184. Bennett, *supra* note 38.

185. Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. 10,434, 10,437 (proposed Feb. 24, 2011) (to be codified in scattered sections of 9 C.F.R.).

186. See SPS Agreement, *supra* note 82, art. 1(1) (stating that sanitary and phytosanitary measures “shall be developed and applied in accordance with the provisions of this Agreement”); *WTO Analytical Index*, *supra* note 168, ¶ 14 (stating that “[i]t is clear from the definition contained in Annex A(1) that one of the elements which determine whether a particular measure is an SPS measure is the purpose of the measure”).

187. See SPS Agreement, *supra* note 82, art. 1(1) (requiring that all sanitary and phytosanitary measures be developed and applied in accordance with the provisions of the agreement).

188. *Cf. Australia – Salmon*, *supra* note 170, ¶ 239 (finding a violation because “the arbitrary or unjustifiable distinctions in the levels of protection for other Canadian

Four sources of evidence support this conclusion. First, the United States has been unable to provide any satisfactory explanation as to why inspection procedures for catfish were moved to USDA, while inspections procedures for no other seafood was included.<sup>189</sup> The SPS Agreement would require that, in light of the extent to which the measures single out catfish, catfish must be an exceptionally risky type of seafood. However, as noted in the discussion of the risk assessment above, there is no evidence that catfish is exceptionally risky, and both FDA and CDC consider most types of seafood to be low-risk to public health.<sup>190</sup> Therefore, a panel might conclude that the 2008 and 2014 Farm Bills were motivated by political concerns rather than by scientific concerns.

Second, as previously mentioned, USDA did not conduct its risk assessment until four years after the 2008 Farm Bill was passed.<sup>191</sup> When explaining why the USDA catfish inspection program was preserved in the Conference Report for the 2008 Farm Bills, Congress did not reference any scientific evidence that catfish posed a risk to public health.<sup>192</sup> This evidence indicates that Congress acted without any concern for public health, or that “Congress shot first and asked questions later.”<sup>193</sup>

Third, there is ample evidence that Vietnamese catfish were taking over the American market and running American producers out of business at the time the Farm Bills were enacted, which may indicate the measure was adopted in order to combat the rising popularity of Pangasiidae in the American market.<sup>194</sup> This argument would be especially salient since even the Congressional Research Service has stated that the

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salmon, on the one hand, and herring used as bait and live ornamental finfish, on the other, resulted in a disguised restriction on international trade”).

189. Bacchus Memo, *supra* note 1, at 3. James Bacchus has argued that WTO jurisprudence calls for “heightened scrutiny” in this case, because catfish was singled out for inspection among all seafood. *Id.*

190. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 143, at 13.

191. FSIS RISK ASSESSMENT, *supra* note 108.

192. H.R. REP. NO. 110-627, at 486-87 (2008) (Conf. Rep). The Conference Report for the 2014 Farm Bill did include a reference to a risk assessment. H.R. REP. NO. 113-333, at 556-57 (2014) (Conf. Rep).

193. Bacchus Memo, *supra* note 1, at 3.

194. *Id.*

measures taken over the last ten years, including the 2002 and 2008 Farm Bills, were “designed to have an impact on the import of Vietnamese basa and tra” in response to these exports securing a “growing share of the U.S. market.”<sup>195</sup>

Finally, there is evidence that major Congressional proponents of the 2008 and 2014 Farm Bills enacted these measures in order to restrict international trade. The Conference Report of 2008 avoided any suggestion of such a restriction, arguing that the bill was intended to subject catfish “to continuous inspection,” and to ensure that “imported catfish inspection programs be found to be equivalent under USDA regulations before foreign catfish may be imported into the United States.”<sup>196</sup> The Committee Report of 2014 reiterated these same points and also argued that the bill was supported by scientific evidence and upheld WTO obligations.<sup>197</sup> Congressional proponents of the bill similarly made numerous public media statements arguing that the program is only meant to protect the health and safety of the American public.<sup>198</sup>

However, in a number of candid statements, prominent Congressional supporters of the law have deviated from these

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195. *Id.* at 19.

196. H.R. REP. NO. 110-627, at 938.

197. H.R. REP. NO. 113-333, at 556-57.

198. See Chris Davis, Office of Senator Cochran, *Protecting Mississippi: Bill Could Cut Out Inspections, Wicker and Cochran Say No*, NEWS: SENATOR THAD COCHRAN (May 20, 2015) <http://www.cochran.senate.gov/public/index.cfm/2015/5/protecting-mississippi-catfish-bill-could-cut-out-inspections-wicker-and-cochran-say-no> (quoting Senator Thad Cochran as stating that USDA catfish inspection “has nothing to do with trade and everything to do with the health and safety of American consumers, who are exposed to dangerous chemicals and unapproved drugs in the imported fish they eat”); Press Release, Office of Senator Roger Wicker, *Wicker & Cochran Use Cancer Risk Evidence to Defend Catfish Inspection Program* (May 19, 2015), <http://www.wicker.senate.gov/public/index.cfm/press-releases?ID=82c74b3f-de69-4950-822c-92ae98eb9a34> (quoting Senator Roger Wickham as stating the USDA inspection program will “provide critical safety benefits” and protect American consumers from “carcinogens, harmful microbials, and heavy metals” found in imported catfish); Jeffrey Bartash, *Update: There’s a Catfight in Senate over Catfish Law*, AMERITRADE (May 22, 2015) <http://research.tdameritrade.com/grid/public/markets/news/story.asp?docKey=1-SN20150522011418&category=CorporateNews> (quoting Senator Roger Wickham as stating that the law is about “food safety for Americans in 50 states who deserve to know that the fish they are eating, that the product they are eating is unadulterated”).

official statements.<sup>199</sup> For example, when USDA was considering whether to define catfish to include Pangasiidae in 2011, Senator Thad Cochran of Alabama told a reporter, “the open question of defining catfish is the lynchpin that could decide whether catfish farmers in Mississippi and in other states will be able to compete.”<sup>200</sup> Senator Cochran, who is a strong proponent of the program, also issued a press release in 2014 claiming that the catfish inspection program can level “a very un-level market competition brought on by Asian producers, especially Vietnamese, undercutting U.S.-grown catfish by \$1.50 to \$2 a pound.”<sup>201</sup>

Likewise, Politico asked Congressman Mike Rogers about the USDA catfish inspection program in October 2013.<sup>202</sup> Congressman Rogers, a strong proponent of the program, claimed that the program was important and should not be

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199. “Public statements . . . of company executives and public officials” are permissible as evidence at the WTO. Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, ¶ 7.1919, WTO Doc. WT/DS316/R (adopted June 30, 2010). The Panel analyzes these statements with acknowledgement of the speaker’s “degree of self-interest.” *Id.* In doing so, the Panel takes the evidence into account to make their “own judgments as to its weight and probative value.” *Id.* Likewise, “[i]t appears to be the case that press reports, when significant but not denied by the responsible state, or when reporting other events such as official statements by responsible officials and agencies of that state, are accepted . . . but when they are uncorroborated or do not otherwise contain material with an independent title of credibility and persuasiveness, the tendency of the Court is to discount them almost entirely . . . . Similarly, we take into account the circumstances in which the reported remarks were made, the source, and whether the information is corroborated elsewhere or contrary evidence is offered, in assessing the value of these exhibits as evidence.” Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, ¶ 9.65 n.210, WTO Doc. WT/DS126/R (adopted May 25, 1999).

200. Press Release, Office of Senator Thad Cochran, Cochran Encourages U.S. Catfish Growers & Consumers to Speak up for Broad USDA Inspection Criteria (Feb. 18, 2011), <http://www.cochran.senate.gov/public/index.cfm/2011/2/pr021811-html>.

201. Erin Durkin, *FDA, USDA Move Ahead with Controversial Catfish Transfer Under Farm Bill*, FDA WEEK: INSIDEHEALTHPOLICY.COM, May 16, 2014, at 9-10.

202. Eric Bradner, *Vietnam Threatens WTO Challenge of U.S. Catfish Program*, POLITICO PRO (Oct. 31, 2013), <https://repealcatfish.files.wordpress.com/2013/11/politico-pro-103113.pdf>.

controversial.<sup>203</sup> “We just want to make sure we protect our industry,” he said, “which you know is pretty substantial.”<sup>204</sup>

Finally, Senator Jeff Sessions of Alabama has also publically made statements indicating that he had protectionist motives for supporting the inspection program.<sup>205</sup> When discussing the USDA catfish inspection program with industry groups, Senator Sessions attempted to highlight the importance of the program:

The way I see it, when you produce catfish, you sell it, collect money all around the region and bring it back here . . . It goes to the landowner, the farmer, the workers, the manufacturers and the fertilizer and feed suppliers. All those people benefit. Whereas when you buy it from abroad, all that money just stays abroad, and it’s not good for our economy . . . The way to [bring our country on a sound course] is to be more productive, allow more enterprises like the catfish industry to be successful and keep our taxes simple and as low as we can keep them.<sup>206</sup>

Although there are only a handful of such statements, a WTO panel would consider these statements as evidence in a potential dispute.<sup>207</sup> Furthermore, even though they are not conclusive, these statements would weigh in favor of finding a violation.<sup>208</sup> For these reasons, a WTO panel would probably find that the 2008 and 2014 Farm Bills violate this element.

### 1. The Precautionary Principle

There is a general exception to the requirements of Article 2.2 of the SPS Agreement, as described in Article 5.7, which applies to provisional measures.<sup>209</sup> In order to violate

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203. *Id.*

204. *Id.*

205. Johnson, *supra* note 40.

206. *Id.*

207. *See* Bacchus Memo, *supra* note 1, at 2-3 (arguing the United States has little possibility of successfully defending its measure against a WTO challenge partly due to evidence of the vexation of the domestic catfish industry and representatives caused by increased catfish imports).

208. Letter from Senator Shaheen to Senator Stabenow and Senator Cochran (November 26, 2013).

209. SPS Agreement, *supra* note 82, art. 2(2).

Article 2.2, a measure must either fail to meet one of the first three elements, or fail to fall into the Article 5.7 exemption.<sup>210</sup> This exception is called “the precautionary principle.”<sup>211</sup>

However, the United States does not satisfy the requirements to meet this exemption. Article 5.7 states that “[i]n cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members.”<sup>212</sup> Article 2.2 incorporates Article 5.7 as a “qualified exemption” to its requirements. Article 5.7 is the only such exemption.<sup>213</sup>

There are four elements to Article 5.7, the first of which is that the measure must only be imposed in respect to situations where “relevant scientific information is insufficient.”<sup>214</sup> In *Australia – Apples*, the Appellate Body held that members could choose to adopt provisionary measures in instances when scientific evidence is insufficient to determine whether a particular harm poses a risk.<sup>215</sup> However, the Appellate Body clarified in *Japan – Apples* that “[t]he application of Article 5.7

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210. *Id.* arts. 2(2), 5(7).

211. *Glossary Term*, WTO, [https://www.wto.org/english/thewto\\_e/glossary\\_e/precautionary\\_principle\\_e.htm](https://www.wto.org/english/thewto_e/glossary_e/precautionary_principle_e.htm) (last visited Nov. 9, 2015). The Article 5.7 exemption is called the “precautionary principle” because the SPS Agreement allows temporary “precautionary” measures. *Id.*

212. SPS Agreement, *supra* note 82, art. 5(7).

213. *Japan – Agricultural Products II*, *supra* note 102, ¶ 80. Article 5.7 has also alternatively been characterized as an “absolute or unqualified right.” Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 7.2973, WTO Doc. WT/DS291/AB/R (adopted Nov. 21, 2006). The Appellate Body has not accepted that the “precautionary principle” creates an exemption to SPS. See *EC – Hormones*, *supra* note 88, ¶ 124 (holding that “the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a Panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the *SPS Agreement*”).

214. *Japan – Agricultural Products II*, *supra* note 102, ¶ 89.

215. Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, ¶ 238, WTO Doc. WT/DS367/AB/R (adopted Dec. 17, 2010).

is triggered not by the existence of scientific uncertainty, but rather by the insufficiency of scientific evidence.”<sup>216</sup>

Some of the evidence in the present case indicates that there is a lack of information about the dangers of catfish to consumers. For example, a GAO report found that FDA tested only 0.1% of imported seafood products in 2009, and the USDA has concluded that “[s]parse information on the distribution of microbial contamination and chemical residues on catfish limit our ability to make strong statements about the baseline risk.”<sup>217</sup> However, as described in the FSIS Risk Assessment, no evidence proves that catfish causes outbreaks of illness.<sup>218</sup> The USDA catfish inspection program therefore does not qualify for the exception to Article 2.2 as provided by Article 5.7.

#### IV. RECOMMENDATION

If the United States implements the 2008 and 2014 Farm Bills, it will violate its WTO commitments, as described by the Agreement on Sanitary and Phytosanitary Measures. WTO litigation is “intensely fact-specific, and requires painstaking and extensive development and analysis.”<sup>219</sup> Therefore, predicting the outcome of WTO panels is difficult. However, considering the overwhelming evidence outlined in this paper, Vietnam would almost certainly prevail in any challenge it sought to bring against the United States for the USDA catfish inspection program.

The United States should therefore dismantle the proposed USDA catfish inspection program, and return sole authority for inspecting imported catfish to FDA. If antidumping duties do

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216. *Japan – Apples*, *supra* note 102, ¶ 184; see *Canada – Continued Suspension*, *supra* note 106, ¶ 677 (finding that Article 5.7 applies to instances when “deficiencies in the body of scientific evidence” do not allow a member to “arrive at a sufficiently objective conclusion”).

217. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 113, at 21; Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. 10,434, 10,436 (proposed Feb. 24, 2011) (to be codified in scattered sections of 9 C.F.R.).

218. See FSIS RISK ASSESSMENT, *supra* note 108, at 36 (noting attribution of *Salmonella* to catfish is rare and that in the past twenty years, catfish has only been identified as a potential vehicle for *Salmonella* poisoning).

219. Bacchus Memo, *supra* note 1, at 2.

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not remedy trade with Vietnam, then the United States should not pursue any other policies to limit catfish imports, as such policies may also run afoul of WTO commitments.