

# Technical Barriers to Trade regarding labelling: A Case Study of Catfish Dispute between the United States and Vietnam

Tran Vang Phu  
School of Law, Can Tho University, Vietnam;

**Abstract:** The sharp increase in quantity of Vietnamese catfish in the U.S. market took attention of the U.S. catfish industry, therefore, Catfish Farmers of America (hereafter CFA) acted to protect their market as well as interests. Firstly, the CFA conducted an advertisement campaign against Vietnamese catfish on environmental and sanitary ground [1]. The CFA moved into the second campaign was so-called “catfish trade name”. The CFA alleged that Tra and Basa fish (Vietnamese catfish) were not “catfish”, thus, these fish could not be sold with the labelling as “catfish” [2], and the term “catfish” should solely be permitted to use for fish of the family Ictaluridae which is mainly raised in the Southern States of the U.S [3]. This paper’s aim is to illustrate whether or not regulation on employing the term “catfish” of the United States is consistent with the Technical Barriers to Trade Agreement.

**Key words:** technical barriers to trade, catfish labelling, catfish dispute, TBT Agreement

## 1. In brief on technical barriers to trade

When a country wants to export its products to other countries, such products are not only required to meet regulations and standards in the home market, but must also have to conform to the regulations and standards of importing countries. The requirement of conformity with the regulations, standards of the importing country is the main key to decide whether such products are fulfilled for exporting or not. This circumstance requires the conformity and equivalence of the regulations and technical standards of the exporting and importing countries. To achieve this goal, the exporting countries have to spend huge expenses such as cost of translation of foreign laws and standards, costs of hiring foreign experts to explain regulations as well as standard in concerned, costs that domestic producers spend to adjust their production system to conform to the requirements of importing countries [5]. All the costs and procedures require producers to spend a lot of time and money, and these costs are greatly increased in

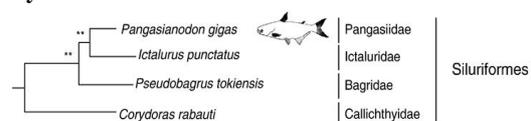
case merchandises are exported to vary countries because each country which has its own rules and standards. The Agreement on Technical Barriers to Trade (hereafter TBT Agreement) was passed by the WTO Members in order to resolve this issue and facilitate international trade.

## 2. Definition of catfish

Catfish is a common name of 34-38 families [6] of fish of the order *Siluriformes*, including the family *Ictaluridae* (North American freshwater catfish) and the family *Pangasiidae* (Southeast Asia freshwater catfish, included *Tra* and *Basa* fish). In addition, “catfish” is also named for a diverse group of fish that has similar shapes and characteristics such as barbells, slender, whisker-like tactile organs near the mouth, which give the image of cat-like whiskers. Catfish are very diverse, ranking second or third in diversity among orders of vertebrates with nearly 3,000 known species [7].

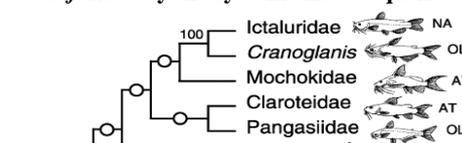
This research is only to consider two families of the order *Siluriformes* fish; they are the family *Ictaluridae* and *Pangasiidae*, (see Figure 1 and 2).

Figure 1. Taxonomy of *Siluriformes* order by the DNA



Source: John G. Lundberg (2003) [7]

Figure 2. Taxonomy of the order *Siluriformes* by the cytochrome b sequences



Source: M. Hardman (2005) [8]

## 3. The United States technical regulations on using the term “catfish”

According to the Preamble and Annex 1.1 of the TBT Agreement if a document of WTO Members that requires *applying terminology, symbols, packaging, marking or labelling*

requirements to a product, process or production method, such document will be a technical regulation. In this situation, therefore, the U.S. regulations on employing the term “catfish” for labelling and advertising of catfish product are technical regulations, and as these measures directly affect to imported catfish, thus, such TBT measures are governed by the TBT Agreement.

Section 10806(a) of the 2002 Farm Bill regulates that the term “catfish” may *only be considered* to be a common or usual name for fish of the family *Ictaluridae*; and *only labelling or advertising* for fish of *that family* may include the term “catfish”. In addition, Section 403(t) of the Federal Food, Drug and Cosmetic Act (amended 2004) also regulates that “*if it purports to be or is represented as catfish, unless it is fish classified within the family Ictaluridae*”. This regulation of employing the term “catfish” is being detailed by Section 541.7d (1 and 2) of Title 9 of U.S. Code of Federal Regulations (hereafter 9 CFR 541.7d (1, 2)). Accordingly, the 9 CFR part 541.7d (1, 2) regulates that fish of the order *Siluriformes* and the products of these fish must use the appropriate “*common or usual names*” of the fish for advertising and labeling. For example, term “*Basa*” and “*Tra*” or “*Swai*” must be bearded for the species *Pangasius bocourti* and the species *Pangasius hypophthalmus* of the family *Pangasiidae*, respectively; and only of fish and fish products within the family *Ictaluridae* may be allowed to use the term “catfish” for labelling or advertising in the U.S. market. In other words, only 51 fish species of the family *Ictaluridae* [9] are permitted to use the term “catfish” for selling, labelling and advertising within the U.S. jurisdiction.

According to the U.S Food and Drug Administration (FDA), the term “*acceptable market name*” is understood that the name which represents the “*identity of the species to U.S. consumers*”, and the “*common or usual name*” is the *English version* of the name established and widely employed by ichthyologists and other fishery experts to “*describe a specific species, and is distinct from the scientific name*” [10]. It is worth noting that under the States laws of Alabama [11], Arkansas [12], Louisiana [13], and Mississippi [14] also regulate the term “catfish” which is solely used for fish within the family *Ictaluridae* and such States’ laws also verify that “Chanel catfish” is a common name of the fish of the family *Ictaluridae* [15].

#### 4. The arguments of the parties involved in the dispute on TBT measures

##### 4.1 The arguments of the CFA on the catfish labelling regulations

After the advertising campaign on SPS measures got unexpected outcome. The United States Trade Representative (USTR) official went to the FDA for advice, but the FDA officer said that they could not revoke Vietnam’s right to label their *Tra* and *Basa* fish with a modifier such as “Vietnamese catfish”, because the Vietnamese *Tra* and *Basa* products were actually a kind of catfish. Moreover, the FDA’s *Seafood list in 1993* listed twenty different types of fish consists of the Vietnamese *Tra* and *Basa* fish as eligible for marketing with a label including the term “catfish” [16]. The CFA claimed that they invested huge money to advertise their catfish products to the U.S consumers; therefore, it was unfair for them if the foreign fish was permitted to label as catfish products; and if the imported catfish did so, it might cause confusing and misleading to the U.S consumers. By this reason, the CFA claimed that Vietnamese catfish (*Tra* and *Basa* species - *Pangasiidae* genus) was not catfish, and only the Chanel catfish (*Ictaluridae*), which are widely raised in the South of the U.S, was allowed to call catfish. Finally, the Congress passed the law requiring the name of catfish be used for fish in the family *Ictaluridae*, in November 2001 [2]. As a consequence, Vietnamese catfish had to choose another name and labelled with *Tra* or *Basa*, or *Striped* fish when exporting to the U.S. market.

There arises a question of whether or not other countries are accepted to label their fish by using the usual name of their fish such as Vietnamese catfish or *Basa* catfish, Thai catfish, Indonesian catfish, and so on. It is widely accepted that the term “catfish” is a common “*tag name*” which is popular used for all fish of the order *Siluriformes* by international organizations and fishery scholars. For example, the fish database (fishbase.org) which was developed by the World Fish Center, in collaboration with the Food and Agriculture Organization of the United Nations (FAO) [17] lists nearly two hundred fish species with “catfish” in name [18]. Furthermore, some other international-recognized fishery websites (i.e. theaquariumwiki.com [19], encyclopedia.com [20], tolweb.org [21] etc.), are also consider the term “catfish” is a common name for all fish of the order *Siluriformes*, and the term catfish is defined by the Columbia Encyclopedia (6th ed., 2015) as “*common name applied to members of the fish families constituting the order Siluriformes*” [20].

##### 4.2. The arguments on the side of the Vietnam Association of Seafood Exporters and Producers (VASEP) on the U.S. catfish labelling rules

As mentioned, there is a fact that catfish is a common name for a diverse group of fish that belongs to the order *Siluriformes*. Therefore, of

course, catfish is also the common name for both *Ictaluridae* and *Pangasiidae*, two families of the order *Siluriformes* (see Figure 1 and 2) [22]. Besides that, the FDA's seafood list in 1993 allowed Vietnamese catfish to label its *Basa* and *Tra* fish with the word catfish and when the 2002 Farm Bill came into enforced, FDA removed Vietnamese catfish out of the list without any scientific ground. The Section 10806 of the 2002 Farm Bill is still in effect. According to the FDA's Seafood list was updated on February 18, 2016, there are only six fish species of *Siluriformes* fish (see Figure 3), which are considered appropriate to label and market with the term "catfish". They are *White Catfish*, *Blue Catfish*, *Yaqui Catfish*, *Brown Bullhead*, *Flathead Catfish* and *Chanel Catfish*. Nevertheless, there are many other fish species of the order *Siluriformes* which are also recognized by the FDA that they have the common name with the term catfish like the six fish species abovementioned, but these species do not accept to use the market name with the term "catfish" such as *Hardhead Catfish*, *Bagrid Catfish*, *Sutchi Catfish*, *Mekong Giant Catfish*, etc.

**Figure 3. FDA's Seafood list - Acceptable Market names of fish of the order *Siluriformes***

Acceptable Market Name(s)	Common Name	Scientific Name
<i>Catfish</i>	<u>White Catfish</u>	<i>Ameiurus catus</i>
<i>Catfish</i>	<u>Blue Catfish</u>	<i>Ictalurus furcatus</i>
<i>Catfish</i>	<u>Yaqui Catfish</u>	<i>Ictalurus pricei</i>
<i>Catfish</i>	<u>Channel Catfish</u>	<i>Ictalurus punctatus</i>
<i>Catfish</i>	<u>Flathead Catfish</u>	<i>Pylodictis olivaris</i>
<i>Bullhead or Catfish</i>	<u>Brown Bullhead</u>	<i>Ameiurus nebulosus</i>
Pabdah Fish	<u>Pabdah Catfish</u>	<i>Ompok pabda</i>
Whiskered Fish	<u>Hardhead Catfish</u>	<i>Ariopsis felis</i>
Gafftopsail Fish or Gafftopsail Whiskered Fish	<u>Gafftopsail Catfish</u>	<i>Bagre marinus</i>
<i>Swai or Sutchi or Striped Pangasius or Tra</i>	<u>Sutchi Catfish</u>	<i>Pangasianodon hypophthalmus</i>
<i>Mekong Giant Pangasius</i>	<u>Mekong Giant Catfish</u>	<i>Pangasius gigas</i>
<i>Baga Ayre</i>	<u>Giant River Catfish</u>	<i>Sperata seenghala</i>
<i>Gilded Fish or Zungaro</i>	<u>Gilded Catfish</u>	<i>Zungaro zungaro</i>
...	...	...

Source: FDA (2016) [23]

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

products from these fishes.

It is interesting to note that, the regulation of catfish labelling which does not help the U.S. catfish farmers and producers increase their catfish market share in the U.S. market, indeed. The U.S. lawmakers who did not predict that *Ictaluridae* fish could be raised in other countries that have the similar climatic conditions as Southern States of the U.S. and catfish from such countries are legally labelled with the term "catfish" when they are sold in the U.S. market. In fact, China and some other countries are deriving advantages from this regulation [24]. Currently, Vietnamese catfish producers who refer to use local name/Vietnamese name to label fish of the family *Pangasidae* because the advertising campaign of the CFA against imported catfish, especially from Vietnam, which help Vietnamese products to be popular not only in the U.S., but also in other markets such as E.U, Japan, Australia etc. During the last time, Vietnamese catfish producers are always willing to adjust their products trade name to comply with the U.S. rules, and now Vietnamese catfish proud to use their own name *Tra* and *Basa* and the U.S. catfish consumer who like to do so [24].

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

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

First of all, as mentioned (Figure 3), the FDA's Seafood list lists 43 fish species of *Siluriformes* fish that have similar recognized common name, but there are only six fish species, which are allowed to use market name as catfish in the U.S. It should be noted that the common name of the *Ictaluridae* fish is Channel Catfish, and other fish species of the order *Siluriformes* also have the common tag name with the term "catfish". Besides that, the U.S. catfish labelling rules are not based on any scientific evidence and relevant international standards. For example, *Section 4.1* of the General Standard for the Labelling of Pre-packaged Foods (*Codex Stan 1 – 1985*, amended 2010) states that "the name of the food shall indicate the *true nature name* of the food and normally be specific and *not generic*... and a *common name or usual name existing by common usage* as an appropriate descriptive term without causes confusing or misleading to the consumer shall be used." In addition, *Section 6.1* of the Codex Stan 190-1995 [25] and *Section 6.1* of the Codex Stan 119-1981 [26] which allow a product to be labelled by its existing common or usual name if such name is not lead to the consumer's

*misleading or confusing*. It means that a product can be labelled with its common name if such name can help the consumer identify the product among like products. Additionally, Article 2.4 of the TBT Agreement which regulates that WTO Members have obligation to employ the relevant international standards as a basis for their technical regulations. In this circumstance, it could be stated that these Codex Standards which could be used to address the U.S technical regulation in question; and Section 10806 of the 2002 Farm Bill, Section 403(t) of the Federal Food, Drug and Cosmetic Act (amended in 2004) and Section 541.7(d) of the 9 CFR as well as some U.S. States' laws, as abovementioned, which are not based on pertinent international standards, groundless and violate the Article 2.4 of the TBT Agreement.

Last but not least, it is important to consider other similar cases that were resolved by the WTO's Dispute Settlement Body, especially the *EU – Sardines (2002)* case [27]. Accordingly, in 1989, the European Community issued the Regulation (EEC) 2136/89 which established common marketing standards for preserved sardines, including a specification that only products prepared from *Sardina pilchardus* could be marketed or labelled as preserved sardines. It means that the EU did not accept imported Peruvian fish as "Sardine", and limited the use of the word "sardine" to only one species, *sardina pilchardus*, found close to Europe. Additionally, the EC officials proposed that the Sardines species from Peru (*Sardinops sagax*) should be marketed as "Pilchards" or "Sprats" in order to avoid consumer's misleading and confusing [16, p.232]. On 20 March 2001, Peru requested consultations with the EC on the EC technical regulations in question. Peru argued that the EC technical regulations in concerned which did not conform to the relevant international standard e.g. the Standard for Canned Sardines and Sardine-Type Products (Codex Stan 94-1981, amended 2013). Section 2.1.1 and 6.1 of the Codex Stan 94-1981 (amended 2013), which indicate that there are 21 *Sardines species*, which could be labelled "Sardines" or "X sardines" [28]. Finally, the Appellate Body upheld the Panel Report that the EC Regulation was inconsistent with Article 2.4 of the TBT Agreement, and two sides got mutual agreed solution in July 2003 [29].

Similarly, in the catfish labelling issue, the FDA accepted *Tra and Basa* fish from Vietnam to be labelled as catfish in the FDA's Seafood list in 1993, but the 2002 Farm Bill which saves the term "catfish" only for fish of the family *Ictaluridae*. As mentioned, the FDA's Seafood list in 2016 that lists 43 fish species that have common name with the "tag name" catfish, but the term "catfish" is solely permitted as acceptable market name for

only six fish species of the family *Ictaluridae*. Besides that, the relevant Codex Standards also permits a product to use its common or usual name if such name which does not cause confusing to the consumer. There may be no doubt that if *Tra* and *Basa* fish are labelled as "Vietnamese catfish" – "made in Vietnam" and sold in the U.S market, such market name will not lead to confusion for the U.S. consumer.

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

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

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

## 5. Acknowledgement

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