

U.S. Technical Barriers to Trade and Vietnamese Seafood Exports*

Tran Van Nam, Ph.D.
National Economics University

June 2005

Abstract

Technical barriers to trade (TBTs) exist in most industries but are particularly widespread in the international exchange of primary and processed agricultural and aquacultural products. Recently, a considerable number of Vietnamese seafood products have been rejected at U.S. ports because they failed to comply with U.S. regulations on environmental amenities, food safety, and so on, causing significant losses to Vietnamese producers and exporters. This paper discusses TBTs that have been applied to Vietnam's seafood products as a means of import restriction. The paper also evaluates the effects of TBTs on Vietnamese seafood exported to the U.S. market. The resolution of this problem will contribute to the Vietnamese business community, assisting them to expand the volume of its trade with the U.S and gain a solid foothold in this important market.

* The author gratefully acknowledges the financial support provided by VDF Hanoi, a joint project between GRIPS and NEU, and the generous intellectual assistance of numerous Vietnamese state officials, experts and entrepreneurs. Special thanks are extended to Professor Kenichi Ohno, Mr. Peter Irwin, Dr. Trinh Minh Anh and Ms. Pham Kim Yen for their comments on the early draft of this paper.

1. Introduction

The United States is considered to be Vietnam's most important market in the future offering new opportunities to exporters in the next ten years as stated in the Vietnamese government strategy on export development during the period 2001-2010. The bilateral share of the U.S. in Vietnam's total exports is expected to increase to 15-20% by 2010 from 5-6% in 2001. The signing of the U.S.-Vietnam Bilateral Trade Agreement opened the door for Vietnamese goods such as sea products, garment, footwear and coffee and they have actually begun to enter the U.S. market. However, there are still many barriers to the expansion of Vietnamese exports into this market.

Trade barriers are a global issue. The relationship between the policy of an importing country and the interests of domestic producers can become quite complicated and controversial. Developed countries including the U.S. often set high technical trade standards that are related to political and economic situations of that country. Many studies show that traditional barriers in international trade have been removed by international negotiations and multilateral trade agreements. As a result, the U.S. is currently faced with the inflow of goods from developing countries, including Vietnam, with prices, labor standards and technology that are lower than those of American goods. The U.S. has reacted to this situation by setting up a number of restrictive requirements which are difficult for exporters, especially those from developing countries, to meet.

Technical trade barriers exist in most industries, but are particularly important in the international exchange of primary and processed agricultural products. The regulatory environment for agricultural products is expected to become more complex, even though reform initiatives aimed at reducing the number and rigidity of regulations faced by the private sector are currently underway in many countries. Recently, a considerable number of Vietnamese aquacultural products have been rejected at U.S. ports because they did not comply with U.S. regulations on environmental amenities, food safety, and so on, causing losses to Vietnamese producers and exporters.

Using the current catfish dispute between the U.S. and Vietnam and the "sardine" dispute between the EU and Peru as examples, this paper will show that Vietnam is far from enjoying bilateral trade with the U.S. in a genuinely free environment. Previous cases have shown that the U.S. uses technical barriers to trade (TBTs) for curtailing the exports of

agricultural products from Vietnam. The paper will also contain some discussion on how U.S. TBTs have been applied to Vietnam's aquacultural products as a means of import restriction.

Besides discussing U.S. technical trade barriers, the paper will explain some terms that may be useful in the study of trade barriers in agricultural markets and examine why technical barriers are becoming an increasing focus of public policy debate. It will then evaluate the effects of technical trade barriers on Vietnamese seafood exported to the U.S. market. The resolution of this problem will assist the Vietnamese business community to expand the volume of its trade with the U.S.

2. U.S. Technical Barriers to Trade

2.1 Overview of non-tariff barriers (NTBs) and technical barriers to trade (TBTs)

2.1.1 What are non-tariff barriers (NTBs)?

According to a recent OECD's survey, many developed countries have introduced non-tariff barriers to replace increasingly low tariffs under WTO. NTBs now make up a very large category. The full range of NTBs may be listed as follows¹:

- Technical measures
- Internal taxes or charges
- Customs rules and procedures
- Competition-related restrictions on market access
- Quantitative import restrictions
- Procedures and administration (general)
- Public procurement practices
- Subsidies and related government supports
- Investment restrictions or requirements
- Transport regulations or costs
- Restrictions of services (general)
- Restrictions on mobility of business people or labor
- Defensive trade instruments (antidumping, countervailing duty, safeguards)
- Local marketing regulations

To date, there are various "weapons" for the purpose of trade protection. For instance, U.S. non-tariff barriers shut the door against many categories of products including toys, lighters and traditional Chinese medicine (TCM). The State of California in particular insists that over 110 TCMs originating in China contain excessive heavy metals by the standards of drinking water in California and requests all these medicines to be labeled

¹ *OECD Business Survey*, March 2003.

“poisonous”². Other NTBs could be seen in the enactment of U.S. Bioterrorism Act of 2002, which imposes strict requirements on companies exporting food to the U.S. that they register with the Food and Drug Administration (FDA) and serve prior notice to the agency before food shipments can enter the country. All foreign firms that manufacture, process, pack or store food for human or animal consumption in the U.S. were required to register with the agency by December 12, 2004³. Failure to comply with the regulation could lead to goods being refused entry at U.S. ports and prosecution of exporters.

Due to limited space, this research seeks to examine only what are technical barriers to trade and how the U.S. uses these barriers against imported seafood, particularly aquacultural products from Vietnam.

2.1.2 Technical barriers to trade (TBTs)

Following the reduction of tariffs on a global scale, the focus of WTO and other international agreements has turned to removing non-tariff barriers to trade. Among non-tariff barriers, technical barriers to trade are least clearly identified. Technical barriers refer to product standards which may differ from country to country⁴. These standards can also have the effect of restricting trade. Such standards can include specifications of characteristics of any type of product and may be established by private or public bodies. Although compliance with these specifications may not be mandatory, the market may still penalize those who do not comply. Technical standards may require that products meet certain requirements before they are placed on the market. These specifications may act as barriers to trade especially when they differ from country to country. Conforming to these specifications can be so difficult and costly that it becomes economically impossible to comply with them and still remain competitive in the foreign market⁵.

Technical barriers to trade can be grouped into three main categories⁶:

1. *Sanitary and phytosanitary*: these regulations are implemented by countries to protect human, animal and plant life or health.

² See “Information,” *Financial Times*, November 25, 2003.

³ See The Economist Intelligence Unit, *China regulations: New law to raise costs for China's food exporters*, January 6, 2004.

⁴ Kristina Kloiber, “Removing technical barriers to trade: the next step toward free trade,” *Tulane Journal of International and Comparative Law*, 2001.

⁵ *Id.*

⁶ John Skorburg, *Technical Barriers to Trade*, American Farm Bureau Federation, Nov. 1, 1998. Available at <http://www.fb.org/issues/analysis/tradebar.html>.

2. *Consumer measures*: they regulate food safety and quality including labeling, packaging, pesticide residues, nutritional content and contamination. These regulations can allow a country to use barriers that may keep even safe commodities out for no real reason.
3. *Trade measures*: these are implemented to prevent commercial fraud including shipping and financial documents, standards of identity and standards of measurement.

The emergence of invisible TBTs has created an overall negative trading environment. While some TBTs are based on sound science, others are not and have increasingly been used to unduly inhibit trade. Since the mid 1990s, the U.S. Department of Agriculture estimated that U.S. agricultural exports valued at almost \$5 billion were being subjected to a growing set of restrictive TBTs in 63 countries around the world. On the other hand, the U.S. has considerably increased its import inspection at the port of entry over the last few years leading to an expansion of targeted surveillance sampling of imported products.

2.2 U.S. institutions and regulations for imported seafood

2.2.1 U.S. institutions for overseeing imported seafood products

The Food and Drug Administration (FDA) is part of the Department of Health and Human Services (DHHS) and the Public Health Service (PHS). All food products must be designed and produced in compliance with relevant FDA standards. FDA is the scientific regulatory agency responsible for the safety of all foods (except meat, poultry, frozen and dried eggs and the labeling of alcoholic beverages and tobacco, cosmetics, drugs, biologics, medical devices, and radiological products). The task of FDA is to ensure that food products are safe, clean and wholesome and their labeling is honest and informative. FDA also initiates food safety programs. In 1994, FDA proposed regulations that would establish the Hazard Analysis Critical Control Points (HACCP)⁷ system for the seafood industry. FDA issued its

⁷ HACCP programs for seafood processors in the U.S. were announced two years prior to implementation on December 18, 1997. It is a system of ensuring food safety by identifying the points in processing at which food safety hazards may occur, and developing a plan to monitor and prevent potential problems. According to the National Fisheries Education and Research Foundation, Inc., three types of costs were identified for the raw fish processing industry to comply with the HACCP requirements:

- (1) costs to processors directly related to complying with the requirements of HACCP models;
- (2) consumer effects indirectly associated with these compliance activities; and
- (3) further impacts on raw fish processors linked to a change in consumption patterns.

final rule on HACCP for seafood in December 1995. HACCP has been endorsed by the National Academy of Sciences, the Codex Alimentations Commission (an international food standard-setting organization), and the National Advisory Committee on Microbiological Criteria for Foods.

U.S. Custom Service is an agency of the U.S. Department of Treasury responsible for the assessment and collection of import duties and taxes and the control of carriers, persons, and articles entering or departing the U.S.

National Marine Fisheries Service (NMFS) is an agency belonging to the National Oceanic and Atmospheric Administration, U.S. Department of Commerce. Marine product imports are subject to the requirements of this agency and FDA. NMFS oversees fisheries management in the U.S. and, through the 1946 Agricultural Marketing Act, provides a voluntary inspection service to the industry. The NMFS Fishery Products Inspection Program offers a variety of professional inspection services which assure compliance with all applicable food regulations. In addition, product quality evaluation, grading and certification services on a product lot basis are also provided.

2.2.2 U.S. regulations on imported seafood

Imports to the U.S. are not only subject to the relatively transparent system of import duties but also to quality and grade standards to ensure the safety of American food supply.

*Bioterrorism Act of 2002 (BTA)*⁸. This was enacted to enable FDA to respond quickly to terrorist threats against U.S. food supply and other food-related emergencies. The Bioterrorism Act stipulates that FDA and the Customs and Border Protection (CBP) can refuse entry to imported food from foreign facilities that have not registered as required, and food for which there is inadequate prior notice. FDA and CBP have published compliance policy guides (CPGs) that explain how the agencies intend to enforce the provisions of these rules. Under CPGs, the agencies exercised broad enforcement discretion for the first eight months of implementation and generally focused on the education of affected parties rather than refusal of shipments that failed to comply with the requirements of either rule. Enforcement of all provisions of the rules began on August 12, 2004 with full enforcement to begin on November 1, 2004. This is likely to become an additional trade barrier in the future.

⁸ Audrey B. Talley, "Update on Bioterrorism Act Enforcement," Food Safety and Technical Services Division, International Trade Policy, FAS, 2004.

Trademark laws. Several provisions in the U.S. laws administered by various government agencies offer protection against the misuse of trademarks, trade names, copyrights, and patents. The Trademark Act of 1946 prohibits importation of articles bearing marks which are confusingly similar to or the counterfeit of trademarks registered in the U.S. Patent and Trademark Office. The Tariff Act of 1930 requires the U.S. Customs Service to prohibit importation of foreign-made goods bearing marks which have been registered in the Patent and Trademark Office by a U.S. citizen or corporation if a copy of the certificate of registration has been filed with the U.S. Treasury Department. U.S. regulations require that a trademark or copyright owner record its mark or copyrighted work by application, which may be in the form of a letter, to the Customs Commissioner, Washington, D.C., with a payment of applicable fees.

Other regulations. FDA operates an oversight compliance program for Low-Acid Canned Food (LACF), which is based on the HACCP concept, and is focused on thermally processed, commercially sterile foods including seafood such as canned tuna and salmon.

U.S. Federal Register system. There are two acts that define the basic functions of the Federal Register system and provide the framework for the promulgation of U.S. government regulations. They are the Federal Register Act and the Administrative Procedure Act. The former establishes a uniform system for handling agency regulations⁹ while the latter adds several important requirements to the Federal Register System¹⁰.

Labeling requirements. In principle, all food products must be inspected and labeled to meet the relevant laws and regulations. According to the Federal Food, Drug, and Cosmetic Act (FD&C Act), a food label must contain specified information, displayed conspicuously and in terms that the ordinary consumer is likely to read and understand under ordinary conditions of purchase and use. All food must have a label in English containing information on the ingredient, nutrition, serving size, daily reference value of a dietary standard, country of origin, the manufacturer or importer's name and address and so on in English language.

⁹ Enacted in 1934 and became law on July 26, 1935 (44 U.S.C. Chapter 15).

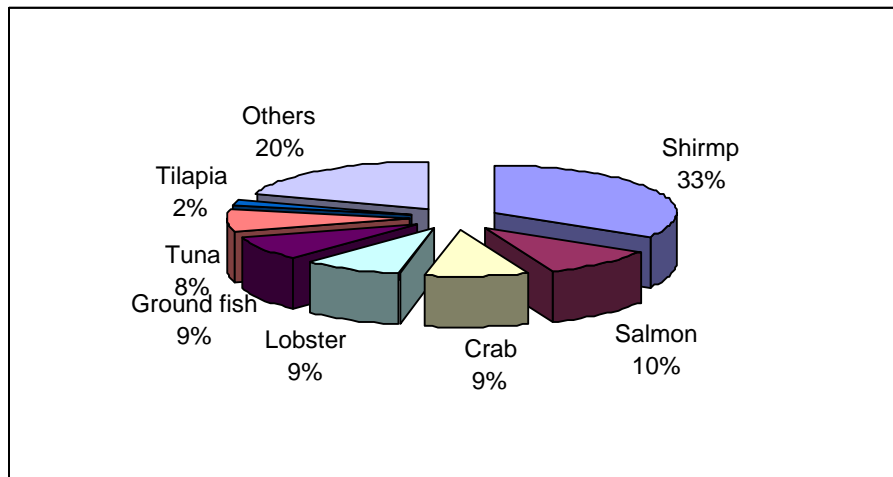
¹⁰ Became law on June 11, 1946 (5 U.S.C. 551 et seq.).

Food additive regulations. Pre-market approval is required for food additives. Before marketing a food or color additive in the U.S., a manufacturer must petition FDA for approval. A food or color additive petition must provide convincing evidence that the proposed additive performs as it is intended. FDA will then determine if the additive is safe under the proposed conditions of use, based on the best scientific knowledge available.

2.3 The U.S. seafood import market at a glance

The U.S. is the world largest seafood exporter as well as the second largest country in seafood imports, after Japan. It is considered as one of the most attractive seafood import markets in the world. The U.S. citizens have high income and diverse food demand. For these reasons, seafood prices often stay at a high level.

Figure 1. Composition of U.S. Seafood Imports, 2003



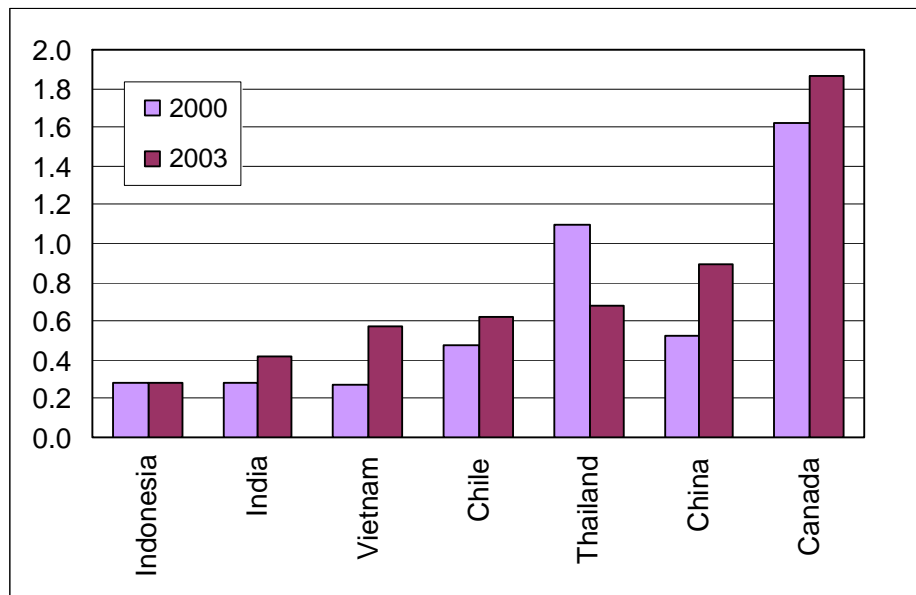
Source: Department of Commerce, U.S. Bureau of the Census, *Annual Summary*, 2003.

The domestic supply of edible seafood products from commercial fisheries in the U.S. has fallen continuously in the past few years. This decline has resulted principally from reduction in the landings of pollock and cod. In terms of fishing volume, the U.S. ranks fourth after China, Japan, and India. The National Marine Fisheries Service estimates that 62 fishery stocks in U.S. territorial waters are over-utilized and another 109 are fully utilized.

The U.S. imports about 1.5-1.7 million tons of seafood per year, of which shrimp, including lobster, occupies the largest share (40%). Asia has become the main supplier to the U.S. seafood market (50% of total seafood imports). In the U.S., a modern distribution network with cold storage allows both imported and domestic seafood to be supplied just-in-time with high quality. Suppliers can export their seafood to the U.S. by direct import-export contracts, consignment contracts or through sales agents in the U.S. that charge commission.

Figure 2: Major Seafood Exporters to the U.S. (2000 and 2003)

(Million USD)



Source: Department of Commerce, U.S. Bureau of the Census.

3. Implications of U.S. TBTs on Vietnamese Seafood Exported to the U.S. Market

3.1 The current state of Vietnamese seafood exports to the U.S.

3.1.1 From 1994 to 2000

Since 1994, when the U.S. lifted the trade embargo against Vietnam which had been in place since the American War, Vietnamese seafood has been exported to the U.S. From 1994 to July 2000, even before the Bilateral Trade Agreement (BTA) was inked, the export value of Vietnamese seafood was rising steadily. The Vietnam Association of Seafood

Exporters and Producers (VASEP) and individual seafood exporters such as Seaprodex, Agrifish, etc. have been among those involved in the U.S. market since that time.

Table 1. Vietnam's Seafood Export to the U.S. (1995-2000)
(US\$ million)

Year	Turnover
1995	19.58
1996	33.99
1997	46.38
1998	80.60
1999	128.12
2000	301.30

Source: Ministry of Fisheries of Vietnam.

In the year 2000, Vietnam's seafood exports to the U.S. increased dramatically, mainly due to the ratification of the U.S.-Vietnam BTA. Among Vietnam's seafood export to the U.S., shrimp was the main component and accounted for 74% of the overall value. Frozen shrimp shipped from Vietnam is generally preferred by U.S. consumers. The export value of shrimp increased steadily in recent years, making Vietnam the ninth largest shrimp exporter to the U.S. market. However, Vietnamese shrimp still occupies only a small share (5.3%) of total U.S. imports for this item in comparison with Thailand (44.2%) and Mexico (10.2%)¹¹. Other fish, such as crustaceans and aquatic invertebrates also make up an essential part of Vietnam's seafood export balance to the U.S.

¹¹ Le Hoang Lan, "Improving the competitiveness of SEAPRODEX Hanoi in the US market," unpublished final thesis paper, MBA Program, CFVG Hanoi, 2004

Table 2: Vietnam's Seafood Export to the U.S. (1995 – 2000)

Unit: thousand US\$

Items	1995	1996	1997	1998	1999	2000
Fish, live	44	115	180	113	129	175
Fish, dried, salted, smoked, etc.	41	129	208	595	394	374
Mollusks, anaquatic invertebrates, etc.	391	1,06	1,06	665	2,92	8,17
Fish, frozen (excl. fish fillets or other fish meat)	976	2,55	3,15	4,47	5,27	6,80
Fish, fresh or chilled (excl. fish fillets or other fish meat)	46	14	65	1,63	3,45	9,59
Fish fillets and other fish meat, fresh, chilled or frozen	1,14	1,51	4,80	8,44	15,62	32,61
Warm water shrimp	16,94	28,60	36,90	64,68	80,28	185,12

Source: U.S. Trade Statistics Express™ - National Trade Data.

3.1.2 Vietnam's seafood exports to the U.S. after 2000

With the ratification of the BTA between the U.S. and Vietnam, Vietnamese seafood producers now have an opportunity to increase their share in this significant market. After the BTA, Vietnam's seafood export value increased dramatically to over US\$ 2 billion in 2002 and 2003. Vietnam is now ranked 13th or 14th export country in seafood and fisheries in comparison with 25th or 26th in the 1990s.

Table 3. Vietnam's Seafood Exports (2001-2003)

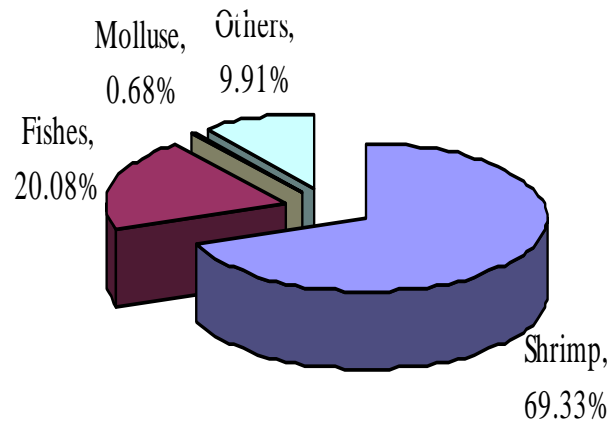
(US\$ million)

	Turnover (to US)	Turnover (total)	Growth (total)
2001	489.03	1,777.5	20.2%
2002	654.98	2,022.8	13.8%
2003	777.66	2,199.6	8.7%

Source: Fisheries Information Centre of Vietnam's Ministry of Fisheries.

Seafood export to the U.S. market has become more diverse over time. Besides shrimp, Vietnamese enterprises also export fresh products such as tuna, mackerel, and crab at stable prices¹². Overall, the seafood export structure in the post-BTA period did not change sharply as shown in Figure 3. Shrimp and fish remain the key Vietnamese seafood exports to the U.S. market, in which commodities with a large volume in 2002 were shrimp of all kinds (33,200 tons), tra and basa (7,800 tons), and tuna of all kinds (1,200 tons). Shrimp by far is the largest item in terms of both volume and value¹³. It is the third largest export item of Vietnam after crude oil and garment.

Figure 3. Vietnam's Seafood Export to U.S. by Product, 2002



Source: Ministry of Fishery.

Vietnam's tra and basa fish have gained a considerable share of overall U.S. seafood imports for these commodities, and American consumers are becoming familiar with them. This provides further motivation for Vietnamese producers to boost their exports to the U.S. However, the decision of the U.S. Department of Commerce on June 16, 2003 to place punitive import duties on tra and basa fish entering the U.S. market at the rates of 36.84% and 63.88%, respectively, constitute a very serious trade barrier for Vietnamese seafood products.

¹² See Id.

¹³ Because of the significance of the shrimp component, the recent shrimp dumping decision by the U.S. and the consequent imposition of penalty duties had a serious effect on Vietnam's seafood export. However, these duties are not classified as TBTs as they are part of the tariff system.

Table 4. Vietnam's Global Seafood Export by Product (2003)

Product	Turnover (US\$ mil)	Share
Shrimp	1,058.1	47.7%
Fish	466.5	21.0%
Squid, cuttlefish and octopus	113.9	5.1%
Dried sea fish products	73.7	3.3%
Other	504.4	22.8%

Source: VASEP.

Vietnam's total exports to the U.S. market was about US\$3.2 billion in 2003, an increase of 35% over the previous year, of which seafood products accounted for US\$ 130 million¹⁴. In 2003, the U.S. imported US\$ 617 million worth of Vietnamese seafood, consisting of over 30 kinds and about 100 product items such as shrimp (black tiger and cat tiger), fish (tongue sole, mahi-mahi, anchovy, red snapper, Spanish mackerel, catfish and yellow-fin tuna), cephalopods such as octopus and squid, and mollusks in various forms including frozen, dried, value-added and fresh¹⁵.

3.2 Some challenges facing Vietnamese seafood entering the U.S. market

It is crucial that when Vietnamese exporters ship their products to the U.S. and other major markets, these products meet current seafood safety regulatory requirements¹⁶. In general, technical barriers to trade can be identified as measures that require foreign seafood exporters to (1) comply with technical regulations and standards; (2) comply with trademark or labeling regulations; (3) control dishonest trade acts; (4) follow the rules of product's origin; and (5) ensure safety and environmental protection¹⁷.

¹⁴ <http://www.bvom.com/news/english/news/>.

¹⁵ Supra note 11.

¹⁶ Tony Chamberlain, *Improving HACCP application in the Pacific Islands*, Available at the following website: http://www.spc.int/coastfish/Sections/training/SIG-Training/Sig17ENG/Sig17_P03_1.htm.

¹⁷ Nguyen Tu Cuong, *SPS on aquatic products in EU*, MUTRAP Seminar on Exporting food product to the EU: Meeting International sanitary standards, Ho Chi Minh City, Jan 15, 2004.

In order to be able to enter the U.S. market, all foreign companies are required to implement HACCP to a basic level of compliance. In the recent webpage of the Food and Drug Administration (FDA), it is revealed that a significant amount of seafood exported from Vietnam has been rejected¹⁸. This was because the U.S. found that the seafood had been contaminated with disease germs such as *Salmonella* and toxic chemicals and poisonous components. Some examples of the reasons for rejection are given as below¹⁹:

Reason: CLORAMP

Section: 402(a)(2)(C)(i), 801(a)(3); ADULTERATION

Charge: The article appears to contain a food additive, namely chloramphenicol that is unsafe within the meaning of 21 U.S.C. 348.

Reason: POISONOUS

Section: 601(a), 801(a)(3); ADULTERATION

Charge: The cosmetic appears to bear or contain a poisonous or deleterious substance which may render it injurious to users under the conditions prescribed in the labeling thereof, or, under such conditions of use as are customary

Reason: PESTICIDES

Section: 402(a)(2)(B), 802(a)(B); ADULTERATION

Charge: The article is subject to refusal of admission pursuant to section 801(a)(3) in that it appears to be adulterated because it contains a pesticide chemical, which is in violation of section 402(a)(2)(B).

Reason: BACTERIA

Section: 402(a)(1), 801(a)(3); ADULTERATION

Charge: The article appears to contain a poisonous and deleterious substance which may render it injurious to health.

According to incomplete statistics from Vietnam's General Department of Custom, the Vietnamese seafood rejected by the U.S. in 2002 were 33,932 pounds valued at US\$ 109,650. The corresponding numbers in 2003 were 65,124 pounds and US\$ 532,748. There were 224,014 pounds of rejected seafood with total value of US\$ 1,720,502 in 2004. According to the same source, the number of Vietnamese exporters that had received their

¹⁸ See the list of rejected Vietnamese seafood at the web: http://www.fda.gov/ora/oasis/1/ora_oasis_c_vn.html in January 2004 and http://www.fda.gov/ora/oasis/12/ora_oasis_c_vn.html in December 2004.

¹⁹ See http://www.fda.gov/ora/oasis/5/ora_oasis_c_vn.html for more.

goods back was five companies in 2002, seven companies in 2003, and nine companies in 2004.

Most of the exporters when being interviewed revealed that their seafood had been processed in compliance with HACCP procedures and subsequently tested by regional seafood safety inspectors (Nafiquaveq) before being shipped to the U.S. However, the only notification they received was the information that their products were rejected by the FDA conveyed by their American business counterparts (importers). Direct notification by the FDA would certainly assist them in increasing compliance for their export products.

In the U.S., it is the responsibility of the alleged (the one accused of violation) to prove their innocence. It is very costly for a Vietnamese seller to go to the U.S. to defend his exports. As a consequence, rejected seafood is usually returned to Vietnam for refurbishing and resale in other markets²⁰.

3.3 The recent “catfish” trade name disputes

Another U.S. TBT measure applied to imported seafood from Vietnam has been the U.S. ban on the import of catfish (tra or basa) bred in the Mekong River Delta.

The Catfish Farmers of America (CFA) started the dispute by asserting that the Vietnamese producers had taken 20 percent of the U.S. frozen fillet market through the use of misleading labels. Vietnamese catfish were widely marketed to restaurant chains and food distributors with such labels as “Delta Fresh” and “Cajun Delight.” American catfish farmers lobbied Congress to pass a law restricting the use of the term “catfish” to American varieties. CFA argued that Vietnamese “catfish” were not catfish and that only the North American species, known as *Ictaluridae*, should be branded in this way. In reality, marine biologists recognize more than 2,000 species of catfish. To convince Congress of the legitimacy of this claim, CFA argued that American consumers had the right to know if the catfish they buy or order was really catfish or something else. The Vietnamese representative (VASEP) argued that their basa and tra catfish are different catfish from the American varieties and did not imitate or violate U.S. brands.

²⁰ An interview with a number of VASEP members in the central and southern regions of Vietnam in December 2004 and January 2005.

Congress took CFA's side and barred the Vietnamese exporters from using the word "catfish," even though fishery experts maintained that the Vietnamese varieties looked and tasted the same as the U.S. products. Congress proceeded to prohibit the labeling of catfish from Vietnam as catfish²¹. It is suggested that the reason for this decision had more to do with the fact that imports were cutting into the sales of U.S. catfish. The Bill²² allowed Vietnamese catfish to be sold in the U.S. market under the names of Basa Bocourti and Basa Catfish. The Vietnamese exporters complied with the Bill, and thereafter had to label their catfish "tra" or "basa"²³. The ban was ended on September 30, 2002 but it nevertheless had an adverse effect on Vietnamese exports.

However, despite CFA's effort to restrict Vietnamese catfish imports, such imports have continued to grow. In 2001, two Congressional Representatives²⁴ urged the Bush Administration to introduce mandatory country-of-origin labels²⁵ on catfish, particularly those from Vietnam. They claimed that to capture 20 percent of the market, Vietnam stopped labeling its fish as just basa and started calling them basa catfish under similar packaging and, in a creative twist, promoted them as "Delta Fresh." In this case, the products were shipped frozen from the Mekong Delta instead of the Mississippi Delta where 94 percent of the American products are raised in six southern states. The Vietnamese exporters countered that all fish products from Vietnam were labeled "Product of Vietnam" and "there is no reason for Vietnamese exporters to imitate American brands and logos." The U.S. government again supported the domestic farmers and producers by enacting a law requiring meat and seafood products to be labeled with their country of origin²⁶.

The decisions against Vietnamese catfish are obviously critical factors in future U.S.-Vietnam seafood trade. However, if Vietnam had been a member of WTO, the case could

²¹ Tran V. Nam, "UnFree Trade with Developing Countries: A Case Study of the Current Catfish Dispute between US and Vietnam," presented at a public seminar of the South East Asia Center, University of Washington, USA, May 14, 2003.

²² The Bill is a provision in Section 755 of Title VII-General Provisions of Public Law No: 107-76, Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act 2002 to regulate the labeling of imported fish. Section 755 says "None of the funds appropriated or otherwise made available by this Act to the Food and Drug Administration shall be used to allow admission of fish or fish products labeled wholly or in part as 'catfish' unless the products are taxonomically from the family Ictaluridae."

²³ Diep Thai, "Does free trade mean freely trade to developing countries? A case study of catfish dispute between US and Vietnam," final thesis, Graduate Program, Geography Department, University at Buffalo.

²⁴ Ronnie Shows and Bennie Thompson, both of whom are Mississippi Democrats.

²⁵ "Country-of-Origin Labeling Bill" (H.R.2439) amended the Agricultural Marketing Act of 1946 to require retailers to inform consumers of the country of origin of the fish that they sell. According to this rule, Vietnamese catfish shall be labeled with the phrase "Product of Vietnam" or "Made in Vietnam."

²⁶ Supra note 22.

have been brought to a dispute settlement panel. Looking at the Peru-EU “sardine” dispute below²⁷, it is clear that catfish from Vietnam should remain as “catfish” when it enters the U.S. market.

3.4 Reference to the Peru-EU “sardine” dispute

This case was concerned with an international standard for the classification of sardines which the European Union refused to recognize in the EU technical regulation²⁸. The issue was whether one variety of fish, *sardinops sagax* to specialists, should be classified as a sardine. In a 1989 regulation, the EU did not accept imported Peruvian fish as “sardine,” and limited the use of the word *sardine* to one species only, *sardina pilchardus*, found close to Europe. *Sardinops sagax*, found in various waters, and notably off the coast of Peru, could therefore not be sold in the EU as a sardine.

In the mid-1990s, the international standards body Codex Alimentarius issued a new international standard that said that *sardinops sagax* could be described as a sardine. Following the adoption of this standard, the Government of Peru asked the EU to change its regulation accordingly but the EU refused to do so²⁹. Peru believed that this was an unjustified restriction on trade and that Peruvian export prospects was harmed by the refusal to classify their fish as sardines. It therefore applied the process specified in the WTO agreements to pursue this case. In May 2001, the Peruvian Government formally requested consultation under WTO dispute settlement rules, then requested the establishment of a panel to examine the EU regulation, claiming that it violated the TBT Agreement³⁰. Peru finally won the case at the WTO’s Dispute Settlement Panel and its Appellate Body³¹.

²⁷ The full text of the rulings is available on the WTO web page by searching under “Peru complaint.”

²⁸ Raymond Schonfeld and John Dobinson, *Using International Standards: A Wake-Up Call to Regulators?* Available at http://www.astm.org/SNEWS/JANUARY_2004/schondob_jan04.html. For the first time, the World Trade Organization’s Technical Barriers to Trade (WTO/TBT) Agreement was used to force a WTO member government to change a technical regulation in force in order to incorporate the provisions of a relevant international standard. The implications of this case are immense and, although the standard was not concerned with industrial products, the case is directly relevant to all international standards bodies.

²⁹ *Id.*

³⁰ See more at *Sardines Panel Sides With Peru* available at <http://www.ictsd.org/weekly/02-06-04/story3.htm>. The panel found that the EC Regulation was inconsistent with Article 2.4 of the TBT Agreement.

³¹ *Supra* note 28.

4. Recommendations for Enhancing Vietnamese Aquacultural Export to the U.S.

4.1 Recommendations for Vietnamese processors and exporters

Since seafood products must meet all requirements to get through the U.S. border checking points, Vietnamese exporters should be aware of U.S. regulations and standards on quality, size, packaging, labeling, etc. Processors from Vietnam need to expand their risk estimates and programs to evaluate compliance with seafood HACCP in production and processing facilities. This would help exporters to more effectively ensure food safety at the processing level and passage at any point-of-entry tests which are used as verification in the U.S. Regarding the labeling issue, all VASEP members should pay due attention to Vietnam's current regulations³² to ensure that all exported products bear suitable labels.

In order for Vietnamese fishery companies to improve their competitiveness and secure a strong foothold in the U.S. market, they should consider ways to guarantee high quality in their export to the U.S. market. To achieve this target, all local companies need to:

- (1) Carry out the program of toxic chemical residues in aquatic product control.
- (2) Obtain a certificate of being free from physical, chemical and microbiological danger for every lot of exported products.
- (3) Insist not to trade or use any toxic chemical in processing aquatic products.
- (4) Invest in modern equipment and maintain the quality of their products by applying the ISO 9000, ISO 14000 and HACCP standards³³.
- (5) Establish closer relationship between fish suppliers and processing companies and conclude most of the purchasing contracts with fishermen at the beginning of the crop season.

By implementing these measures, both exporters and processors should be able to mitigate the risks of material shortage and effectively cope with the barriers erected against Vietnamese fish exports.

³² Such as the Circular 03/2000/TT-BTS issued by the Ministry of Fishery of Vietnam dated September 22, 2000 on guiding Decision 178/1999/QD-TTg that set out the rule for labeling domestic and exported seafood products.

³³ Dinh Van Thanh, *Barriers in International Trade*, Thong Ke Publisher, Hanoi, 2005, page 266.

4.2 Recommendation for Vietnamese policy makers and administrative agencies

Unless Vietnam becomes a member of the WTO, it will continue to suffer discrimination in world trade. As a non-member of the WTO, Vietnam is not yet able to use the WTO dispute settlement mechanism to defend its interests. Vietnam urgently needs to access the WTO dispute settlement mechanism as trade disputes with its trading partners are increasing rapidly. Therefore, the primary target for Vietnam now should be to actively negotiate membership of the WTO before the conclusion of the Doha Round in 2005. In order to gain accession to the WTO, Vietnam is doubling its effort to conform to international regulations and standards on a bilateral, regional and multilateral basis. Once it becomes a contracting member of WTO, Vietnam can adopt the WTO's TBT agreement and sue the U.S. at a WTO dispute settlement panel for obtaining the "catfish" name for its *basa pangasius* varieties currently exported to the U.S.

The Government of Vietnam should plan to conclude a government-to-government agreement with the U.S. for mutual recognition of competent authorities in the assessment of aquatic products. To support local exporters in ensuring the safety of seafood entering the U.S., the Vietnamese Government needs to negotiate with FDA for voluntary food-safety standards agreements equivalent to those in the U.S.

As resources on the Vietnamese side are limited, official support should focus more on training seafood inspection technicians. Short courses are needed for seafood processing, inspection, exporting, purchasing, and quality assurance³⁴. This support should include inviting U.S. FDA and seafood experts to facilitate such training in Vietnam.

It is important for the Government of Vietnam to launch a massive campaign at the grassroots level to educate fishermen on the non-advisability of using anti-biotic substance to keep fish population in fine fettle. Such campaign would immensely benefit both fishermen and marine product exporters by ensuring that export consignments leaving the Vietnamese shore do not fall victim to "standards" that eventually turn out to be market access barriers for Vietnam's exports to the U.S.

In the short run, a set of regulations on traceability of the origin of seafood products should be soon promulgated by the Ministry of Fishery of Vietnam. These regulations aim to appropriate authorities and other stakeholders, enable them to identify a specific seafood product and to reject unsafe products in order to protect consumers, the seafood processors and exporters as well.

³⁴ Dao N. Chuong, *Technical barriers to trade and its impacts*, Thuong mai Journal, No 38, 2004; page 5

5. CONCLUSION

Over the last decade, Vietnam has become increasingly dependent upon external trade for domestic economic development. Having moved from a traditional socialist model to a market-based system, external trade is now a major economic priority of the Vietnamese Government. As with other newly emerging exporter countries, however, Vietnam does not enjoy unrestricted access to the U.S. market as a result of tariffs and non-tariff barriers notably in agricultural commodities.

As U.S. TBTs become stricter and more diverse, Vietnamese processors and exporters are being forced to pay increasing attention to these barriers in order to maintain a strong foothold in the U.S. market. The Vietnamese Government should attempt to remedy the situation of excessive and undue trade restriction through a further bilateral agreement with the U.S. for mutual recognition of competent authorities in the assessment of aquacultural products. This would benefit Vietnam by ensuring that the U.S. applies trade barriers with increased neutrality and transparency. Also, Vietnam needs to accede quickly to the WTO in order to take advantage of its dispute settlement mechanism to defend the interests of its business community in the age of international integration.

APPENDIX 1

STATISTICS OF UNSAFE SEAFOOD PRODUCTS REJECTED BY MAJOR MARKETS 2000-2004

Markets	Reasons	2000	2001	2002	2003	2004	Sum
EU	Sum	8	32	59	19	32	150
	microorganism	8	9	10	9	14	50
	anti-biotic	0	23	49	10	8	90
	chemical, mercury	0	0	0	0	10	10
USA	Sum	33	71	151	163	73	491
	microorganism	33	71	143	155	60	462
	anti-biotic	0	0	8	8	13	29
	chemical, mercury	0	0	0	0	0	0
Canada	Sum	0	0	17	6	3	26
	microorganism	0	0	0	0	0	0
	anti-biotic	0	0	17	6	3	26
	chemical, mercury	0	0	0	0	0	0
Switzerland	Sum	0	5	11	13	0	29
	microorganism	0	0	0	0	0	0
	anti-biotic	0	5	11	13	0	29
	chemical, mercury	0	0	0	0	0	0
South Korea	Sum	0	0	0	3	3	6
	microorganism	0	0	0	3	3	6
	anti-biotic	0	0	0	0	0	0
	chemical, mercury	0	0	0	0	0	0