Catfish Inspection Program of the United States: Does it consistent with the WTO laws?

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Abstract: As on December 02, 2015, the U.S. Department of Agricultural (USDA) issued the “Final Rule on Mandatory Inspection of Fish of the Order Siluriformes and Products Derived from such Fish” (hereafter 80 FR 75589). Accordingly, the 80 FR 75589 regulates that the inspection program on all fish of the order Siluriformes [1] will be transferred from the U.S. Food, Drug and Administration (FDA) to the U.S Department of Agriculture (USDA) by March 01, 2016. Besides, the inspection system of poultry is being applied to catfish. This rule is criticized to create more barriers for trading of catfish when such products are exported to the U.S market. By analysing the U.S regulations on catfish inspection program and the Sanitary and Phytosanitary Agreement (SPS Agreement), this paper will illustrate whether or not the U.S catfish inspection program is consistent with the SPS Agreement.

Key words: catfish - Siluriformes, trade dispute, sanitary and phytosanitary measures, WTO

1. Introduction

The dispute regarding catfish between the United States and Vietnam was a landmark case for the international trade dispute between developed and developing countries in imbalance relations. This dispute began when Vietnam exported a large volume of Tra and Basa fish [2] to the U.S, and labelled and sold as “catfish” at prices lower the domestic product’s prices. In that situation, in order to protect home market, the U.S. Catfish Farmers Association (CFA) argued that Tra and Basa fish were not “catfish”; thus, these fish could not be allowed to use term “catfish” for labelling as well as advertising. The CFA continued to allege that the term “catfish” should be permitted to solely use to genus Ictaluridae (Channel catfish) which is raised in the Southern States of the U.S. In response, the U.S Congress passed a law which regulates that Vietnamese catfish is not catfish and not allowed to employ the term “catfish” for Tra and Basa fish (these regulations are still in effect), in 2003. In addition, the CFA conducted an advertisement campaign against Vietnamese catfish on environmental and sanitary grounds. In 2001, the CFA lobbied for a ban on imports of catfish, especially from Vietnam, and its arguments were such imported catfish was unsafe for consumption since such fish was grown in unhygienic conditions and containing poisons, pesticides residue and so on. Based on such arguments, the CFA and its supporters claimed that it was necessary to impose a stringent inspection program on imported catfish (all fish of the order Siluriformes). As predicted outcome, the U.S 2008 Farm Bill and currently the 2014 U.S Farm Bill states that all fish of the order Siluriformes are inspected by the Food Safety and Inspection Service (FSIS), a subdivision of the United States Department of Agriculture (USDA) rather than the U.S Food, Drug and Administration (FDA), by March 1, 2016.

The inspection system on catfish of the U.S is criticized as a protectionist policy and also inconsistent with the GATT 1994 and the SPS Agreement as well.

2. The U.S.’s SPS measures on catfish (Siluriformes)

Based on the claims of some U.S. Congressmen and Senators as well as lobbying of the CFA, the U.S. House of Representatives passed some laws, especially the three versions of the U.S. Farm Bill, in which have strongly effect on the exporting of catfish from Vietnam and other countries such as Thailand, Bangladesh, and Indonesia etc. to the U.S. market.

Subject to the Annex A.1(b) of the SPS Agreement, any measure is deemed as a SPS measure if such measure is applied to protect human or animal life or health from risk of arising from additives, contaminants, toxics or disease-causing organisms in foods, beverages or feedstuffs. In this circumstance, the supporters of the inspection program on catfish (Siluriformes) argue that the aim of this program is to protect the U.S consumer from risk of Salmonella disease in Siluriformes fish. By this reason, it could be concluded that the inspection program on catfish is a SPS measure and governed by the SPS Agreement.
Before the enforcement date of the 2008 Farm Bill, both domestic and imported seafood were inspected by the FDA, and since the labeling campaign and anti-dumping measures could not help the CFA recover the catfish market share, they conducted an advertising campaign that imported catfish were not safe enough for eating because they contain pesticide residues, antibiotic, chemical etc.; and lobbied the Congressmen to adopt a stricter inspection program on imported catfish. On June 18, 2008, the 2008 Farm Bill was passed and Section 11016(b) of this Bill amended Section 601(w) of the Federal Meat Inspection Act shifted inspection of program of catfish (Ictaluridae) from the FDA to the USDA. However, the inspection program of catfish under the 2008 Farm Bill was not come into enforce because the behind objective of this Bill was to eliminate the volume of imported Basa and Tra fish from Vietnam was not reached. The reason was that the term “catfish” is only used for fish of the family Ictaluridae, not Basa and Tra fish from Vietnam. It means that the USDA just inspected fish of the family Ictaluridae, beside meat, poultry and eggs; other seafood and fish of the order Siluriformes were still inspected by the FDA, at that time. By this reason, the CFA continued to conduct a lobby campaign to amend the 2008 Farm Bill in order to shift all fish of the order Siluriformes to the inspection program of the FSIS – a subdivision of the USDA. As a predicted result, the 2014 Farm Bill was enacted on February 7, 2014 and Section 12106 of this Bill amended Section 601(w) of the FMIA, which replaced the term “catfish” by “fish of the order Siluriformes”. It means all Siluriformes fish are inspected by the Food Safety and Inspection Service (FSIS) by March 1, 2016, including Basa and Tra fish from Vietnam, of course.

It is should be underscored that Section 606(b) of the U.S. Federal Meat Inspection Act of 1906 (FMIA) regulates that the USDA does not only take examination and inspection on the quality of the Siluriformes fish, but it shall also “take into account the conditions under which the fish is raised and transported to a processing establishment”. Section 606(b) of the FMIA is detailing by Chapter XII of the 80 FR 75589 and the 9 CFR (9 CFR 532.1(b5) and 534). Accordingly, Chapter XII of the 80 FR 75589, in which regulations that the FSIS will conduct sampling and testing of Siluriformes fish and products from these fish to ensure that these products are not adulterated or misbranded. Additionally, by March 1, 2016, establishments of other countries which are exporting fish and fish product of Siluriformes to the U.S. and wish to continue to do so, such exporting countries are required to provide written documents to identify which establishments currently export and will continue to export Siluriformes fish and products to the U.S. Furthermore, catfish exporting countries must also submit written documents to demonstrate that their countries have regulations to govern the growing and processing of Siluriformes fish, and must ensure that these rules compliance with the FDA’s regulations.

It is necessary to note that, however, these documents abovementioned will not be used to evaluate the equivalency of foreign inspection system with the U.S system, these foreign documents are just employed to prove such fish and products of Siluriformes of exporting countries which meet the U.S regulations. It is worth emphasizing that if a catfish exporting country, during the 18-month transitional period by March 1, 2016, does not submit the required documents to the FSIS within a given time, fish and products of Siluriformes from such country will be refused to import into the U.S. Moreover, by March 1, 2016, all imported Siluriformes fish will be re-inspected by the FSIS and Section 533.5 of 9 CFR regulates that Siluriformes fish and meat are applied the same processing establishments.

Another important regulation under the 80 FR 75589 is that if a catfish exporting country does not submit a request for evaluating the equivalency and provide evidence to illustrate that its system is equivalent with the U.S system after the end of the 18-month transitional period, by the September 1, 2017, the FSIS will not permit to import fish and products of Siluriformes from such country. In other words, by September 1, 2017, in order to export Siluriformes fish to the U.S, exporting country has to get recognition of the FSIS that the inspection system and relevant requirements of such country are equivalent to FSIS’s.

In brief, there may be four vital regulations under the U.S laws which pertinent to trading of Siluriformes products: (i) only fish of the order Siluriformes are subject to the jurisdiction and inspection of the USDA, other seafood products are still inspected by the FDA; (ii) in order to continue to export Siluriformes fish and products to the U.S, catfish exporting countries must submit relevant documents as required by the FSIS in the given time and their inspection system must be got the recognition of equivalency with the U.S.’s system by the FSIS; (iii) instead of control on quality and safety of food, the U.S. will control also farming and processing process in catfish exporting countries; and (iv) although exporting countries get recognition of equivalency of their inspection program with the U.S, their products will be re-
inspected by the FSIS before selling on the U.S. market.

3. Are the U.S. measures consistent with the SPS Agreement?

Based on the SPS Agreement, if a WTO member would impose and maintain a SPS measure on imports, such SPS measure must be based on sufficient scientific evidence (Article 2.2 of the SPS Agreement), in the extent that there is lack of sufficient scientific information, the importing country just has right to adopt provisional SPS measures on the basis of available relevant information and on the support of an objective assessment of risk (Article 5.7 of the SPS Agreement). It is vital to note that the WTO member shall ensure that its SPS measures are applied in an appropriate level of protection and not constitute a disguised restriction on international trade (Article 5.5 and 5.6 of the SPS Agreement).

Despite the opposition of a group of 76 Congressmen who signed a letter calling for repeal of the USDA program in the 2014 Farm Bill [3], and the Government Accountability Office, in 2011, reported that they found little evidence to conclude Asian catfish were unsafe to eat [4], the U.S. government with the lobby of the CFA, consequently, issued a lot of regulations that have been generated the unjustifiable discrimination on imported catfish from Vietnam as well as other catfish exporting countries. The first concern issue is that the Section 11016(b) of the 2008 Farm Bill amended the FMIA, and regulated that the inspection program of catfish would be shifted from the FDA to the USDA [5] because the CFA and Senator Boozman argued that the FDA did a poor job and it just inspected 2 percent of imported catfish during the last period [4]. As a predicted result, the 2014 Farm Bill was passed and amended Section 1(w) of the FMIA to replace the phrase “catfish, as defined by the Secretary” by the phrase “all fish of the order Siluriformes”. It means that, by March 1, 2016, all of fish and products of fish of the order Siluriformes are under the FSIS jurisdiction and inspection [6], including Basa and Tra fish from Vietnam and the U.S. catfish, of course.

It is obviously to conclude that, the U.S. has autonomous right to set out any its own SPS measures that it deems appropriate to protect the health of its citizen. There would not be a case if the 2008 Farm Bill, and now is the 2014 Farm Bill were to shift the inspection of all seafood to the USDA, however, the 2014 Farm Bill transfers only the fish of the order Siluriformes to the USDA [7], other kinds of fish/seafood will continuous be inspected by the FDA. The USDA and their supporters argue that they are strongly concerning on the risk of Salmonella bacteria, thus, it is necessary to put all fish of the order Siluriformes under the USDA’s jurisdiction for inspection of such bacteria. However, as earlier mentioned, it is vital to emphasize that Salmonella bacterium which has been detected in various sources such as eggs, poultry, meat, fruits and vegetables, nuts, reptiles, amphibians (frogs), birds, pet food and treats and so on [8]. It is explicitly that the Section 12106(a) of the 2014 Farm Bill which violates the Article 2.3 of the SPS Agreement as well as the Article I of the GATT 1994 because such regulation which creates a discrimination between fish and seafood products where the same risk and conditions prevail. Accordingly, the Article 2.3 of the SPS Agreement and the Article I of the GATT 1994 which regulate that the obligation of WTO Members is to ensure that their SPS measure shall confirm with the Most-Favoured Nation and National Treatment principles, not to create a manner in which causes an arbitrary or unjustifiable discrimination between Members, where “identical or similar conditions prevail” The Panel in Australia — Salmon (1998) [9] stated that the term “discrimination” in the context of the Article 2.3 of the SPS Agreement should be understood that it may not only mean the discrimination between similar products, but also between different products; and the “identical or similar conditions” in this sense refers to the similarity of the risks, not the products as under other WTO Agreements [9]. It could be concluded that the Section 12106(a) of the 2014 Farm Bill and the 80 FR 75589 create discrimination between Siluriformes fish and other foods, thus, these regulation violate Article 2.3 of the SPS Agreement and Article I of the GATT 1994.

It could be stated that the Section 12106(a) of the 2014 Farm Bill and the 80 FR 75589 are also inconsistent with the Article 5.1 and Article 5.6 of the SPS Agreement. The Article 5.1 of the SPS Agreement regulates if a Member wants to adopt or apply a SPS measure on imports, such measure must be based on risk assessment and there must also be a rational relation between the assessment of risk and the SPS measure in concerned. Additionally, the Article 5.6 of the SPS Agreement requires that WTO Members shall ensure that their SPS measures which are not more trade restrictive than required. In this case, the “Assessment of Potential Change in Human Health Risk associated with Applying Inspection to Fish of the order Siluriformes” made by the FSIS of the USDA in January 2015, which stated that the FSIS could not make statements about the baseline risk of the Siluriformes fish because there are a "limited
information on the extent of microbial contamination and chemical residues on Siluriformes fish” [10]. In addition, the FSIS confirmed that they do not have experience on implementing the inspection program of Siluriformes fish; thus, they apply the same inspection program of poultry and other meats to Siluriformes fish [10].

Based on these arguments, it could be pointed out that the inspection program on Siluriformes fish that creates more trade-restrictive than necessary and at an inappropriate level of protection in at least three reasons: (i) the risk assessment of Siluriformes fish indicated that there is not a potential risk of Salmonella disease from catfish baising on the current available data; (ii) Salmonella bacteria has been detected in many kinds of food such as fruits, vegetable, eggs, meats, water etc., but a stricter inspection program is only applied for Siluriformes fish, beside meat and eggs, while other types of food has been detected with Salmonella bacteria are still inspected by the FDA; and (iii) the USDA applies the inspection program of poultry for catfish (Siluriformes).

This issue would be more complicating and interesting in the extent that if the U.S were to argue that the Article 5.7 of the SPS Agreement allows the U.S has right to apply SPS measure in the circumstance that there is insufficient scientific evidence on the risk of Salmonella from catfish products, therefore, their SPS measure on catfish is consistent with the SPS Agreement. As discussed, with the current data, the U.S could not have sufficient scientific information to support their arguments, thus, they quote Article 5.7 of the SPS Agreement as basis ground for their SPS measures. Yet, in the view of this author, the U.S may not be able to base their argument on the Article 5.7 of the SPS Agreement because the inspection program on catfish does not meet all the requirements of the Article 5.7, in this case, with at least two following reasons.

Firstly, the Article 5.7 of the SPS Agreement requires that in the circumstance of lack of sufficient scientific evidence, importing country may temporary adopt SPS measure in order to protect the health or life of the human, animal or plant in its territory and such SPS measure must be supported by “the basis of available pertinent information” and based on an assessment of risk as regulated in Article 5.1 of the SPS Agreement. In this case, the catfish inspection program is applied and reviewed in the period of 5 years, thus, such program is a provisional SPS measure. However, the prevalence data that the FSIS has collected which showed that there was only one case of Salmonella illness had been detected in catfish during the last 20 years in the U.S, and the relevant available information also illustrates that there may not be a potential risk of Salmonella disease come from catfish products. By this reason, the U.S. catfish inspection program does not base and supported by the relevant information. Secondly, this Article also requires that the importing Member must conduct a “more object assessment of risk” by seeking to obtain the available information. As mentioned, the Catfish Risk Assessment that conducted by the FSIS in 2015, which is not an objective assessment as such risk assessment could not prove any available data that there is a potential risk of Salmonella disease from Siluriformes fish products and the FSIS had to assume that the risk of Salmonella on catfish would be considered similar as in poultry products. Therefore, the U.S.’s SPS measure on catfish, which did not base on an objective risk assessment. In other words, there is not a rational relation between the SPS measure and the risk assessment. To conclude, the U.S may not quote the Article 5.7 of the SPS Agreement as a ground for their SPS measures.

Additionally, in a letter sent to Senator Mitch McConnell and Senator Harry Reid by Sir James Bacchus, a former Congressman from Florida and Chairman of the Appellate Body of the WTO (in period 2001-2003) stated that the catfish provision of the 2014 Farm Bill violates not only the terms of the GATT 1994, but also the SPS Agreement and such SPS measures may lead to a case against the U.S government in the WTO by affected countries, and other products of the U.S may face with retaliation from other countries [11]. Moreover, the U.S. Government Accountability Office reported that the U.S measures on catfish (Siluriformes), which are considered as a duplicative and protectionist policy, an unnecessary and wasteful program [12]. Besides, Smith and Delong [13] who commented that the U.S. regulations which relevant to Siluriformes fish are creating unnecessary obstacles and disguised restriction on international trade, and may lead to retaliation from U.S.’s trade partners. Indeed, Thailand and China also raised their concerns on the catfish inspection program of the U.S [4].

Last but not least, it is necessary to analyse the case EU - Hormones (1998) [14], also call “EC - Beef Hormones cases”. On January 1989, the EU imposed a ban on U.S. imports of animals and meat from animals treated with hormones to promote rapid growth. The U.S. requested consultation with the EU in January 1996. The WTO Dispute Settlement Body established a panel to hear the case in response to a U.S. request in May 1996. It
was explicitly to point out that the prohibition of the EU had not been based on any standards or recommendations of itself or any other international recognized standard [15]. The Panel’s final report concluded that the EU’s measures were inconsistent with the SPS Agreement, and the EU’s ban was not based on risk assessment [16]. Similarly, the U.S. inspection program on catfish does not base on sufficient scientific evidence and not supported by the catfish risk assessment.

Based on the analysed and discussed arguments above, it could be concluded that the U.S. measures on inspection program of Siluriformes fish (i.e. Section 12106(a) of the 2014 Farm Bill, Section 606(b) of the Federal Meat Inspection Act, 9 CFR and 80 FR 75589) are inconsistent with its obligation under the Article I GATT 1994 and Article 2.3 of the SPS Agreement, as well as violate Article 5.1 and 5.6 of the SPS Agreement. Since the WTO Dispute Settlement Mechanism is a rule-based system, thus, it provides a platform for developing countries (i.e. Thailand, Vietnam, Indonesia...) to initiate any legal proceeding against more powerful countries [17]. Hence, affected catfish exporting countries may request consultation with the United States in order to address the issues regarding the new inspection program on catfish of the U.S.

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5. References


