

COMMENTS OF THE
COMPETITIVE ENTERPRISE INSTITUTE
TO THE U.S. DEPARTMENT OF AGRICULTURE,
FOOD SAFETY AND INSPECTION SERVICE
REGARDING THE AGENCY’S PROPOSED RULE
MANDATORY INSPECTION OF CATFISH AND CATFISH PRODUCTS

June 24, 2011

Docket No. FSIS-2008-0031

By Frances B. Smith and Nick DeLong

The Competitive Enterprise Institute (CEI) appreciates the opportunity to submit these comments regarding the U.S. Department of Agriculture, Food Safety and Inspection Service’s proposed rule on “Mandatory Inspection of Catfish and Catfish Products.” CEI is a non-profit research and advocacy organization and has been extensively involved in issues dealing with food safety and other matters of public health, including numerous comments submitted to both the Food and Drug Administration and the Department of Agriculture.

In addition, one of the co-authors of these comments has been involved with the workings of the Codex Alimentarius, had served for several years on the NAS Institute of Medicine’s Food Forum, and currently serves as a member of the U.S. Trade Representative’s Trade and Environment Advisory Committee.

CEI views the USDA’s proposed rule regarding catfish and catfish products as unnecessary as a food safety initiative duplicative of another agency’s food safety system, protectionist in its approach, arbitrary in carving out one type of fish for USDA supervision, and burdensome to the U.S. taxpayer and consumer.

Consequently, in the opinion of the Competitive Enterprise Institute, the reasons given in the USDA’s February 24, 2011 Federal Register notice fail to justify the wholly disproportionate regulatory burden proposed only for one type of fish. This proposed change in policy seems to suggest that USDA has identified consumption of catfish as a high-risk consumer safety issue that merits heightened scrutiny. This is clearly not the case. Given the safety record of both domestic and imported catfish, the proposed strengthening of the regulatory apparatus is clearly unwarranted.

I. Trade Philosophy

The benefits of open trade to people in both developed and developing countries are incontrovertible. In the richer countries, trade brings more competition, wider consumer choices, lower prices; while in the

poorer countries, open trade means that essential goods can get distributed, such as food, fuel, and clothing. In terms of producers, trade can lead to improvements in technology and systems, greater choices in supply of inputs for production, and encourage firms to continuously improve their efficiency. Trade and open economic systems can lead to improved economic performance, help to reduce poverty, and increase living standards for all participants.

Trade had its origins in bartering between individuals. Early tribes realized that another group often had something that they needed, and they had something of value to the other tribe in return. Often, of course, the "needs" of one group were satisfied through conquering the other; but trade between groups and between and among nations evolved over the centuries into the system of multilateral trade, where all countries participating can gain through open trade.

Indeed, as Harvard economics professor N. Gregory Mankiw once said, "Few propositions command as much consensus among professional economists as that open world trade increases economic growth and raises living standards."¹

It is with this philosophy that CEI promotes the value of open trade and opposes policies that are protectionist and seek to stem the flow of goods and services across borders to protect special interests at the expense of the public interest.

II. Background

Before 2002, aquatic animals classified under the order Siluriformes, which includes 36 families of fish, were labeled as "catfish" in the U.S. retail market. The Farm Security and Rural Investment Act of 2002, also known as the 2002 Farm Bill, changed the Federal Food, Drug, and Cosmetic Act to be more restrictive. Instead of "catfish" encompassing all fish in the order Siluriformes, only those fish classified under one family, Ictaluridae, were permitted to be sold as "catfish" in the U.S. All other fish, including those of the Pangasiidae family, were to be labeled as something other than "catfish." It is important to note that most "catfish" imported from Asia are of the Pangasiidae family, while North American "catfish" are of the Ictaluridae family. In accordance with the law, importers, guided by the FDA, began to label fish under the Pangasiidae family by other names. Today, those fish can be found on the retail market as basa, tra, and swai.

III. FSIS's Proposed Rule Concerning Mandatory Inspection of Catfish and Catfish Products

In 2008, Congress passed the Food, Conservation, and Energy Act, known as the 2008 Farm Bill. The bill amended the Federal Meat Inspection Act (FMIA) so that catfish, as defined by the Secretary of Agriculture and, by extension, the Food Safety and Inspection Service (FSIS), is an amenable species, that is, catfish had some commonality with meat and poultry, which is regulated by FSIS. Under FMIA, catfish and catfish products would be subject to continual inspection by the FSIS.

The scope of the inspection program will be determined by FSIS's definition of the term "catfish." FSIS is considering two definitions. "Catfish" could either mean fish classified only under the family Ictaluridae as is the case now or fish classified more broadly under the order Siluriformes.² If FSIS

¹ Mankiw, Gregory (2006-05-07). "Outsourcing Redux". Retrieved 2011-06-23.

² Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. 10436 (proposed Feb. 24, 2011)

chooses the latter definition, all “catfish” exported by a foreign country will be subject to continuous, onsite inspections.

In addition, according to the FSIS Impact Analysis of the proposal, the foreign state will be required to have an inspection system equivalent to the U.S. system and will have to certify individual processing establishments.³ FSIS will conduct a document review and evaluate the country’s laws, regulations, and other written information. Then, if a country passes through those hurdles, an FSIS team will do an on-site review in the country. On the condition that all goes well, FSIS will begin a rulemaking to list the country as eligible to export catfish to the U.S.

The approval process, including lengthy rulemaking, could extend over several years. If the inspection system is not approved by FSIS at the time the final rule is fully implemented, the foreign nation will be banned from exporting to the U.S.⁴

IV. Objections to the Proposed Rule

A. Unnecessary as a Food Safety Initiative

Under the proposal, catfish could be regulated by two separate bureaucracies. If catfish production were determined to present a high risk of food safety hazards, that might be a plausible approach. However, the evidence suggests that this concern is unwarranted. The FSIS notes in its February 2011 Federal Register notice (76 FR 10434), that the “FDA and the Centers for Disease Control Prevention (CDC) consider commercially raised catfish to be low-risk food.”⁵

Yet, the FSIS insisted on conducting an assessment of the potential risk to human health of catfish using Salmonella as model.⁶ Salmonella was considered a useful proxy for the human health risk of catfish because “its presence provides an indication of the sanitary conditions under which food is produced, and because an approach that produces a reduction in Salmonella through improved process control is effective in controlling for the presence of other microbial pathogens.”⁷ The FSIS admitted in its risk assessment that “no empiric evidence regarding concentrations of Salmonella on processed catfish carcasses was available and limited evidence was available regarding the prevalence of Salmonella contaminated catfish.”⁸

Undeterred, the agency used data from a single study of U.S. catfish (McCaskey et al., 1998) and from FSIS poultry testing to estimate the potential risk of human exposure to Salmonella from catfish.⁹ The assessment found a potential for 2,308 illnesses per year from Salmonella contaminated catfish.¹⁰

The assessment’s projection is questionable. The results run completely counter to the historical evidence recorded by the Centers for Disease Control and Prevention (CDC). The CDC has identified only one

³ Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. (proposed Feb. 24, 2011); Appendix A - Executive Order 12866 - Preliminary Regulatory Impact Analysis.

http://www.fsis.usda.gov/PDF/Catfish_Impact_Analysis.pdf accessed 23 June 2011.

⁴ Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. 10453 (proposed Feb. 24, 2011)

⁵ Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. 10438 (proposed Feb. 24, 2011)

⁶ Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. 10440 (proposed Feb. 24, 2011)

⁷ *Ibid.*

⁸ Draft Risk Assessment of the Potential Human Health Effect of Applying Continuous Inspection to Catfish; Risk Assessment Division, Office of Public Health Services, Food Safety and Inspection Service, United States Department of Agriculture; pg. 20

⁹ *Ibid.* pg. 21

¹⁰ *Ibid.* pg. 35

catfish-associated outbreak of Salmonella in the last twenty years resulting in ten illnesses.¹¹ This single event occurred before the FDA required catfish processors to submit their operations to Hazard Analysis and Critical Control Points (HACCP) inspection, a rigorous process with a proven track record of safety.¹² Furthermore, the FSIS acknowledged that “since [HACCP] implementation, no cases of salmonellosis linked to catfish have been reported.”¹³

B. Duplicative of Another Agency’s Food Safety System

Without the argument for consumer safety, there is no justification to have catfish subject to both the FDA and FSIS regulations. The proposed regulation is arbitrary, duplicative, and wasteful. According to the Government Accountability Office’s (GAO) 2011 *High-Risk Series* report, the USDA will spend \$30 million in taxpayer money to implement the new catfish inspection system.¹⁴ The same report noted the proposed regulation as high risk for mismanagement and abuse.¹⁵

During a period of deficit spending when redundant programs should be targets for budget cuts, adding new and unnecessary programs should be reconsidered.

C. Protectionist in Its Approach

In the face of such high costs, the primary motivation for the proposed regulation seems to be protectionism. The intent of the 2002 Farm Bill was to discourage American consumers from purchasing foreign fish. It didn’t work. The total amount of “catfish” imported into the U.S. from China, Vietnam, Thailand and Malaysia grew from 4,365 tons in 2002 to 30,090 tons by October of 2007.¹⁶ That’s a 689% increase in a period of roughly five years.

Through the passing of the 2008 Farm Bill and under the guise of consumer safety, the American catfish industry is attempting to enlist the Food and Drug Administration (FDA) and the U.S. Department of Agriculture (USDA) in their efforts to keep out foreign competition. Never in its entire history has the USDA inspected seafood products. Yet, catfish will be regulated under the USDA while all other seafood remains under the FDA’s authority. If the proposed regulation passes, it could result in a *de facto* ban on the exportation of foreign catfish to the American market without the use of explicit tariffs or quotas.

V. Plausible WTO Issue and Trade Partner Retaliation

CEI recommends that the proposed regulations should be scrutinized for compliance with WTO agreements. It is likely that a country – particularly a developing country – exporting catfish to the U.S. will view the new requirements as non-tariff trade barriers -- discriminatory, creating unnecessary obstacles to exports, and thus a disguised restriction on international trade.

¹¹ Mandatory Inspection of Catfish and Catfish Products, 76 Fed. Reg. 10440 (proposed Feb. 24, 2011)

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ U.S. Gov’t Accountability Office, GAO-11-278, High Risk Series: An Update (Feb. 2011)

¹⁵ *Ibid.*

¹⁶ Catfish Market Report – December 2007; TheFishSite.com; Chris Harris, Jackie Linden, Christ Wright, Sarah Mikesell, Charlotte Johnston; December 2007. <http://www.thefishsite.com/articles/373/catfish-market-report-december-2007> accessed 23 June 2011.

With regard to the protectionist aspects of the proposed regulation, CEI would suggest that the proposal may run afoul of the World Trade Organization's agreement on the Application of Sanitary and Phytosanitary Measures (SPS) as well as the agreement on Technical Barriers to Trade (TBT). The SPS agreement states that a country may institute measures to protect health and safety provided that those are applied "only to the extent necessary to protect human, animal or plant life or health," are based on scientific principles, are non-discriminatory and thus cannot be applied in a manner that "would constitute a disguised restriction on international trade."¹⁷

In addition, SPS measures are to be based on international standards, guidelines or recommendations.¹⁸ On food safety, the WTO defers to the international food safety standards-setting body, the Codex Alimentarius.

In relation to fish as food, Codex has extensive standards for safety that include a HACCP system and a Defect Action Point (DAP) analysis system. Aquaculture standards are included as can be seen from this Codex publication, *Code of practice for fish and fishery products*.¹⁹

The TBT Agreement's main purpose is to ensure that technical regulations and standards do not create unnecessary obstacles to international trade. That means, according to the agreement, "that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade."²⁰

TBT also deals with special consideration for WTO developing country members and notes that a country's technical regulations and standards "take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members."²¹

A similar protectionist policy was attempted by the European Community (EC). In 1989, the EC passed EEC No. 2136/89 which prohibited the use of the term "sardines" on tins containing *Sardinops sagax* fish. *Sardinops sagax* fish are found mainly around the Eastern Pacific near the coasts of Chile and Peru. In its regulation, the EC limited the use of the term "sardine" to only one species, *Sardina pilchardus*, which are found along the coast of the Eastern North Atlantic and in both the Mediterranean and Black Seas. Therefore, the fish from Peru could not be sold in the EC as a sardine.

However, subsequently, in the mid-1990s, the Codex Alimentarius issued a new international standard including *Sardinops sagax* as a sardine.²² Peru argued that the EC's regulation was inconsistent with the World Trade Organization's (WTO) Technical Barriers to Trade Agreement (TBT) and brought its

¹⁷ World Trade Organization, "The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)," website http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm, accessed 22 June 2011.

¹⁸ *Ibid.*

¹⁹ World Health Organization, Food and Agriculture Organization of the United Nations, Codex Alimentarius, *Code of practice for fish and fishery products*, Rome: 2009, pp. 36-44, <ftp://ftp.fao.org/docrep/fao/011/a1553e/a1553e00.pdf>, accessed 22 June 2011.

²⁰ World Trade Organization, "The WTO Agreement on Technical Barriers to Trade," website http://www.wto.org/english/tratop_e/tbt_e/tbtagr_e.htm, accessed 22 June 2011.

²¹ *Ibid.*

²² Codex Alimentarius, Standard for Canned Sardines and Sardine-Type Products (CODEX STAN 94-181 Rev. 1995), www.codexalimentarius.net/standardlist.asp, accessed 23 June 2011.

complaint to the attention of the Dispute Settlement Body (DSB). On the 29th of May 2002, the DSB ruled in favor of Peru.²³

As in the Peruvian Sardine case, the FSIS proposed regulation could be seen as a violation of the WTO's TBT agreement. Furthermore, the policy has the potential to spur a cycle of trade retaliation from our global economic partners; this is a bad idea during hard economic times. A policy which benefits a select few domestic catfish producers is, in this case, bad for America.

VI. Conclusion

Using safety as a cloak to disguise protectionist policies is an old ploy. If such pretenses prevail, a few uncompetitive firms will benefit at the expense of the many American taxpayers. Consumers will lose an opportunity for affordable – and safe – foods at a time when the economy is in a recession. Moreover, with price tag of \$30 million, the proposed regulation will raise the public debt at a time when Congress is calling for a decrease in public spending. Finally, this approach, of course, would harm small- and medium-sized foreign enterprises, but perhaps more importantly, would undermine the U.S. commitment to an open and free global economy, would further weaken the U.S. record with the WTO, and slow economic development in Asian countries, exacerbating U.S. security issues. For all of these reasons, such a policy is clearly unwarranted and undesirable.

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²³ World Trade Organization, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds231_e.htm (last visited June 22, 2011)