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CATFISH WARS: VIETNAM'S FIGHT FOR FREE TRADE IN THE U.S. COURT OF INTERNATIONAL TRADE

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Abstract: Since the end of the Vietnam War, relations between the United States and Vietnam have been largely based on trade, causing both cooperation and conflict. Beginning in the 1990s, economic exchange between the two nations was encouraged through the 1994 lifting of the post-war trade embargo, the 1998 waiver of the Jackson-Vanik Amendment, and the signing of the U.S.-Vietnam Bilateral Trade Agreement in 2000. Vietnam's successful catfish industry was born of this cooperation but, soon after the U.S.-Vietnam Bilateral Trade Agreement went into effect, became the source of international controversy.

U.S. catfish farmers responded to competition from lower-priced Vietnamese catfish beginning with an advertising campaign and later by lobbying Congress for strict product labeling laws. U.S. farmers then filed an anti-dumping complaint with the U.S. Department of Commerce ("DOC"), which resulted in the United States imposing anti-dumping tariffs on imported Vietnamese catfish. The Vietnamese catfish farmers challenged the DOC with a still-pending lawsuit in the U.S. Court of International Trade ("CIT"). Unfortunately, the CIT is not a stabilizing force in this conflict because of its structural defects. The CIT's deferential standard of review provides no significant check on the discretion of the DOC, thus reducing the DOC's accountability. Moreover, CIT decisions provide no precedential value and thus no guidance to parties in future cases. In order to be effective and promote U.S. foreign trade relations, the CIT should consider modifying its procedures for review of trade disputes.

I. INTRODUCTION

In 2000, the United States signed its first bilateral trade agreement with Vietnam,[1] encouraging the Vietnamese to expand private enterprise and trade freely with the United States. At the suggestion of an American trade delegation, the Vietnamese turned their natural catfish population into a burgeoning business.[2] Just three years later, in response to falling prices of U.S.-grown catfish fillets, the United States imposed tariffs on the increasingly successful Vietnamese catfish industry, reducing exports of the Vietnamese product to the United States by more than half, from 630

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1 *See* discussion *infra* Part II.C.

2 *Harvesting Poverty; The Great Catfish War*, N.Y. TIMES, July 22, 2003, at A18 [hereinafter *Harvesting Poverty*].

thousand pounds a month,[3] to 296 thousand pounds a month.[4] The imposition of tariffs followed a colorful smear campaign by the Catfish Farmers of America[5] that accused the Vietnamese product of being a "slippery catfish wannabe,"[6] and suggested that it was contaminated with Agent Orange.[7] This campaign began the first significant post-bilateral trade agreement trade dispute between the United States and Vietnam.[8]

The dispute escalated further in 2001 when U.S. catfish producers filed an anti-dumping complaint against Vietnamese catfish farmers with the U.S. Department of Commerce ("DOC"). Subsequently, the battle between the two factions of catfish farmers proceeded to the U.S. Court of International Trade ("CIT"), where the case is currently pending.

The only chance for review of U.S.-imposed tariffs on Vietnamese catfish lies with the CIT. The Vietnamese producers do not have access to review by the World Trade Organization because Vietnam is not currently a member.[9] Because the CIT functions as an appellate court that applies a deferential standard of review, the CIT cannot adequately resolve the dispute or set precedent for future conflicts of the same nature.[10]

The possibility of similar conflict arising in the future is not merely speculative. In December 2003, the Southern Shrimp Alliance filed a nearly identical complaint with the DOC, accusing six shrimp-producing countries, including Vietnam, of dumping.[11] These economic attacks not only damage

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[3] AGRIC. STATISTICS BD., NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., CATFISH PROCESSING (Nov. 2002), http://usda.mannlib.cornell.edu/reports/nassr/other/pcf-bb/2002/catf1202.pdf [hereinafter CATFISH PROCESSING (Nov. 2002)].

[4] AGRIC. STATISTICS BD., NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC. (Dec. 2003), http://usda.mannlib.cornell.edu/reports/nassr/other/pcf-bb/2003/catf1203.pdf [hereinafter CATFISH PROCESSING (Dec. 2003)].

[5] The Catfish Farmers of America is an Arkansas-based group that serves as a member-based trade organization for catfish farmers.

[6] *Harvesting Poverty*, *supra* note 2.

[7] *Id.*

[8] MARK E. MANYIN, LIBRARY OF CONG., THE VIETNAM-U.S. NORMALIZATION PROCESS 6 (2003), http://fpc.state.gov/documents/organization/27534.pdf (last visited Feb. 11, 2004).

[9] A working party on the accession of Vietnam to the World Trade Organization ("WTO") was formed in 1995 with the goal of offering Vietnam member status in 2005. WORLD TRADE ORGANIZATION, ACCESSIONS: VIETNAM, http://www.wto.org/english/thewto_e/acc_e/a1_vietnam_e.htm (last visited Feb. 11, 2004).

[10] An alternative to using the CIT is an agreement similar to the one Canada has with the United States. This agreement uses binational panel reviews to evaluate trade disputes and guarantees an outcome in 315 days. This type of system would allow both countries to be heard equally and in a timely manner. United States-Canada Free Trade Agreement Implementation Act of 1988, 19 U.S.C. § 2112 (1988).

[11] *U.S. Shrimpers Seek a Duty on Imports*, N.Y. TIMES, Jan. 1, 2004, at C2. *See also* Notice of Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam, 69 Fed. Reg. 3876-03 (Jan. 27, 2004) [hereinafter Antidumping Duty Investigations]. On February 17, 2004,

U.S.-Vietnam relations, but also jeopardize potential U.S. relations with similarly situated countries that look to Vietnam as an example of what might occur if they enter into similar trade agreements with the United States.

This Comment illuminates the flawed reasoning the DOC used in imposing tariffs on Vietnamese catfish and the structural flaws of the CIT that will prevent Vietnamese farmers from attaining meaningful review. Part II of this Comment addresses the development of trade relations between the United States and Vietnam, beginning in the early 1990s. Part III describes the threat U.S. catfish producers perceive from Vietnamese catfish exports to the United States and the domestic measures they have taken to protect their industry. Part IV explains the anti-dumping complaint filed by U.S. catfish producers with the DOC and describes how the DOC investigated that complaint. Finally, Part V addresses the suit filed in the CIT by Vietnamese catfish farmers challenging the DOC's findings and its decision to impose tariffs. This Part also analyzes potential arguments Vietnamese farmers might make to show that a remand to the DOC is necessary and also highlights prior CIT decisions that may help predict an outcome in the case. This Comment concludes that changes in the DOC's investigative process and in CIT review are needed to establish a consistent and thereby stabilizing system for resolving anti-dumping disputes.

II. THE DEVELOPMENT OF TRADE RELATIONS BETWEEN THE UNITED STATES AND VIETNAM

Until the catfish dispute arose, post-war U.S. relations with Vietnam had improved markedly since the early 1990s. From the end of the Vietnam War in 1975 until the early 1990s, a trade embargo froze economic relations between the United States and Vietnam.[12] President Clinton opened free economic exchange in 1994 when he ended the trade embargo against Vietnam.[13] Positive relations then progressed with the opening of U.S. liaison offices in Vietnam,[14] the appointment of the first U.S. Ambassador to

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the U.S. International Trade Commission decided that Vietnamese shrimp was being sold below fair value in the United States and causing injury to the U.S. industry. This decision allows the U.S. DOC to continue its anti-dumping investigation. A preliminary determination is due June 8, 2004. Andrew Beadle, *Six Countries Dumping Shrimp, Prawns in U.S., Commission Says*, J. COM. ONLINE, Feb. 18, 2004.

[12] MANYIN, *supra* note 8, at 1.

[13] *Id.* at 3.

[14] *Id.*

Vietnam,[15] the 1998 waiver of the Jackson-Vanik Amendment,[16] and the signing of the U.S.-Vietnam Bilateral Trade Agreement ("BTA") in 2001.[17] The momentum created by these events transformed once embattled nations into eager trading partners.[18]

A. The Normalization of U.S. Relations with Vietnam

Political and economic relations between the United States and Vietnam improved greatly during the Clinton Administration. In the early 1990s, Vietnam contributed to post-war reconciliation by demonstrating a willingness to find and return missing prisoners of war.[19] In response, President Clinton launched a policy designed to normalize relations.[20] The goals of the normalization were to "encourage Vietnam's cooperation on issues of interest to the United States and to promote Vietnam's integration into the region and the world economy."[21] The normalization simultaneously opened diplomatic and economic discourse between the United States and Vietnam.[22]

Elimination of the trade embargo in 1994 had an immediate economic impact.[23] U.S.-Vietnam trade increased from US$ 224 million in 1994 to US$ 948 million in 1996.[24] Trade slowed to US$ 666 million in 1997, in part because of the Asian financial crisis, but reached US$ 827 million in 1998, and almost US$ 1 billion in 1999.[25] This represents a total increase in trade of over three hundred percent between 1994 and 1999.[26] By 1999, the United States was the seventh largest investor in Vietnam with US$ 120.2 million invested in Vietnamese enterprises.[27]

Development of positive trade relations allowed the United States to move forward with normalizing foreign relations with Vietnam. In 1995, the

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[15] OFFICE OF THE PRESS SEC'Y, WHITE HOUSE, FACT SHEET: VIETNAM BILATERAL TRADE AGREEMENT (July 13, 2000) [hereinafter FACT SHEET: VIETNAM], 2000 WL 967020 (White House).

[16] *See* discussion *infra* Part II.B.

[17] OFFICE OF THE PRESS SEC'Y, STATEMENT BY THE PRESIDENT: VIETNAM BILATERAL TRADE AGREEMENT (June 8, 2001) [hereinafter STATEMENT BY THE PRESIDENT], 2001 WL 634226 (White House).

[18] *See infra* notes 23-27 and accompanying text.

[19] FACT SHEET: VIETNAM, *supra* note 15.

[20] *Id.*

[21] *Id.*

[22] MANYIN, *supra* note 8, at 3.

[23] *Id.* at 6.

[24] H.R. REP. NO. 106-794, at 3 (2000).

[25] *Id.*

[26] *Id.*

[27] *Id.*

United States and Vietnam "settled diplomatic and private property claims and opened liaison offices in Washington and Hanoi."[28] In April 1997, Douglas "Pete" Peterson became the first U.S. Ambassador to Vietnam and took up his post in Hanoi.[29] With diplomatic relations strengthened, President Clinton took a final step toward fully normalized relations with Vietnam in 1998 by granting a waiver of the Jackson-Vanik Amendment[30] and opening the door to a possible trade agreement.

B. The Jackson-Vanik Amendment Waiver

The Jackson-Vanik Amendment[31] was designed to prevent emigration abuses and, if waived by the President, carries significant economic benefits for foreign countries. The Jackson-Vanik Amendment lists three violations of emigration rights.[32] If the President determines that a country is not committing these violations and that granting the waiver will substantially promote the objectives of freedom of emigration, he is authorized to waive the Jackson-Vanik Amendment.[33] The waiver allows the President to grant Normal Trade Relations ("NTR")[34] status to a non-market economy[35] country.[36] President Clinton authorized a waiver in connection with Vietnam because Vietnam had made significant progress in promoting orderly and legal emigration.[37] The President believed that providing the waiver would encourage Vietnam to be more cooperative on emigration in the future and that waiver therefore promoted the best interests of the United States.[38]

Waiver of the Jackson-Vanik Amendment is not permanent and must

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[28] MANYIN, *supra* note 8, at 3.

[29] FACT SHEET: VIETNAM, *supra* note 15.

[30] Exec. Order No. 13,079, 63 Fed. Reg. 17,309 (Apr. 7, 1998).

[31] The Jackson-Vanik Amendment is an amendment to the Trade Act of 1974. 19 U.S.C. §§ 2192, 2193, 2432, 2437, 2439 (2001). The Trade Act of 1974 is meant to promote free international trade, stimulate competition, and encourage economic growth within the United States. 19 U.S.C. § 2102 (2001).

[32] 19 U.S.C. § 2432(a). The violations are: (1) denying citizens the right to emigrate; (2) imposing more than a nominal fee or consequence on emigration; and (3) imposing more than a nominal fee or consequence on any citizen desiring to emigrate.

[33] *Id.* § 2432(c).

[34] Formerly known as Most Favored Nation status. International Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 5003(b)(2), 112 Stat. 685.

[35] *See infra* Part IV.B.

[36] 19 U.S.C. § 2432(b).

[37] Press Briefing, Mike McCurry, Office of the Press Secretary, White House (Mar. 11, 1998), 1998 WL 107478.

[38] *Id.*

occur annually.[39] To renew the waiver, the President must submit a recommendation for a twelve-month extension no later than thirty days before the waiver's expiration date.[40] This waiver continues in effect unless "disapproved" by Congress within sixty calendar days after the expiration of the prior waiver.[41] Disapproval by Congress must be in the form of a joint resolution disapproving of the President's waiver determination.[42] The United States has renewed Vietnam's waiver every year from 1998 to 2003.[43]

Waiving the Jackson-Vanik Amendment provides a number of benefits to Vietnam. First, the waiver allows the United States to extend export promotion and investment support programs to Vietnam.[44] Second, the waiver enables Vietnam to be eligible to sign an agreement granting NTR status.[45] NTR status creates a reciprocal agreement under which both parties agree not to extend trade preferences to a third party country that are more favorable than the preferences established in the agreement.[46] All products from countries with NTR status are subject to the same tariffs upon entering the United States[47] and changes in tariffs are applied equally to all status countries.[48]

Waiver of the Jackson-Vanik Amendment also has economic benefits for U.S. businesses. Waiving the Amendment allows U.S. exporters doing business in Vietnam access to U.S. government programs that provide credits and credit or investment guarantees.[49] These benefits are provided by agencies such as the Overseas Private Investment Corporation, the Export-Import Bank, and the U.S. Department of Agriculture.[50] Indeed, in March of 1998, the Overseas Private Investment Corporation and Vietnam signed an agreement that led to a US$ 2.3 million loan to Caterpillar Inc.'s

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[39] 19 U.S.C. § 2432(d)(1).
[40] *Id.*
[41] 19 U.S.C. § 2432.
[42] *Id.*
[43] MANYIN, *supra* note 8, at 4-5. *See also* Vietnamese Products Approval, Pub. L. No. 107-52, 115 Stat. 268 (2001).
[44] FACT SHEET: VIETNAM, *supra* note 15.
[45] *Id.*
[46] International Trade Data System, *Normal Trade Relations (Formerly known as Most Favored-Nation Status MFN)*, Dec. 19, 2002, http://www.itds.treas.gov/mfn.html (last visited Feb. 11, 2004).
[47] *Id.*
[48] *Id.*
[49] H.R. REP. NO. 106-794, at 2-3 (2000).
[50] *Id.*

authorized dealership in Vietnam.[51] The following month, the Export-Import Bank[52] announced that it would finance sales to Vietnam and signed two framework agreements with the State Bank of Vietnam later that year.[53] The waiver also made commercial sales of agricultural commodities to Vietnam eligible for coverage by the U.S. Department of Agriculture's Southeast Asia Regional Export Credit Guarantee Program.[54] This economic cooperation paved the way for a U.S.-Vietnam bilateral trade agreement.[55]

C. The U.S.-Vietnam Bilateral Trade Agreement

The United States and Vietnam fully normalized their economic relationship by signing the U.S.-Vietnam Bilateral Trade Agreement ("BTA") in 2000.[56] The BTA, along with the continued waiver of the Jackson-Vanick Amendment, allowed Vietnam to achieve and maintain NTR status.[57] The Clinton Administration hailed the BTA as "committing Vietnam to sweeping economic reform."[58] The BTA was to "advance reform by leading to significantly more open markets and to Vietnam's

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[51] *Id.* Caterpillar Inc. is a Fortune 100 company that manufactures construction and mining equipment, diesel and natural gas engines, and industrial gas turbines. *See generally* CATERPILLAR, COMPANY INFORMATION, http://www.caterpillar.com/about_cat/company_information/company_information.html (last visited Feb. 11, 2004).

[52] The Export-Import Bank is the official export credit agency of the United States. The agency assists in financing the export of U.S. goods and services to international markets. *See generally* EXPORT-IMPORT BANK OF THE UNITED STATES, http://www.exim.gov/ (last visited Feb. 11, 2004).

[53] H.R. REP. NO. 106-794, at 3.

[54] *Id.* The Export Credit Guarantee Program encourages the sale of U.S. "exports to buyers in countries where credit is necessary to maintain or increase U.S. sales, but where financing may not be available without such credit guarantees." This is accomplished by underwriting credit extended by the U.S. private banking sector to foreign banks to pay for food and agricultural products sold to foreign buyers. FAS, FACT SHEET: CCC EXPORT CREDIT GUARANTEE PROGRAMS (GSM-102/103) (2001), http://www.fas.usda.gov/info/factsheets/gsmprog.html (last visited Feb. 11, 2004).

[55] U.S. expansion into Vietnamese markets continues. Most recently, due to a December 2003 decision allowing direct flight from Vietnam to the United States for the first time since the end of the Vietnam War, American Airlines has opened its first office in Vietnam. *See American Airlines Opens in Vietnam*, CNN, Jan. 30, 2004, at http://us.cnn.com/2004/TRAVEL/01/30/biz.trav.aa.vietnam.reut/ (last visited Feb. 11, 2004); *U.S. and Vietnam Agree on Direct Air Travel*, N.Y. TIMES, Oct. 10, 2003, at A11.

[56] STATEMENT BY THE PRESIDENT, *supra* note 17. The BTA was passed by the U.S. Senate and signed by President Bush on July 13, 2000. Agreement Between the United States of America and the Socialist Republic of Vietnam on Trade Relations, July 13, 2000, ch. 1, art. 1, 2001 WL 1792868.

[57] Vietnam's Normal Trade Relations ("NTR") status is on a waiver basis only. Vietnamese Products Approval, Pub. L. No. 107-52, 115 Stat. 268 (2001). Granting of Permanent Normal Trade Relations will be considered upon Vietnam's accession to the World Trade Organization. U.S.-Vietnam Trade Council, *U.S.-Vietnam NTR Status and the Bilateral Trade Agreement*, http://www.usvtc.org/Fact%20Sheets/bta_ntr.htm (last visited Feb. 11, 2004).

[58] FACT SHEET: VIETNAM, *supra* note 15.

firmer integration into the global economic community."[59]

Analysis of the BTA's legislative history suggests that it was intended to create a "transparent, predictable business market" and promote Vietnamese free private enterprise.[60] A Senate report approving the extension of Vietnam's NTR status described the BTA transparency article as "requiring that laws, rules and procedures be regularly and promptly published . . . [and] that nationals of each country be given a fair opportunity to comment on the formulation of laws, rules and procedures . . ."[61] The report also states that, to facilitate this goal, the BTA parties must administer their laws in a "uniform, impartial, and reasonable manner."[62] In testimony encouraging the approval of the BTA, Stanley O. Roth, the U.S. Assistant Secretary of State for East Asian and Pacific Affairs, stated that the BTA was in the United States' interest because it would strengthen Vietnam's private sector, giving ordinary Vietnamese citizens the power to determine their own economic future.[63] Thus, the BTA was designed to both benefit Vietnamese citizens and further U.S. foreign policy.

The United States also linked a transparent market and free private enterprise with loftier ideological goals for Vietnam. By opening trade relations, the United States also expected to foster the rule of law and democracy in Vietnam.[64] Robert B. Zoellick, the U.S. Trade Representative, emphasized that American ideals are entangled with free trade and private enterprise, stating that, "[t]rade promotes freedom by supporting the development of the private sector, encouraging the rule of law, spurring economic liberty, and increasing freedom of choice."[65]

Despite its supporters' optimism, commentators predicted the BTA

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[59] *Id.*

[60] *Trade With Vietnam: Hearing Before the Sen. Subcomm. on Int'l Econ. Policy, Exports and Trade Promotion and the Sen. Subcomm. on East Asian and Pac.-Affairs*, 106th Cong. (1999) (statement of Douglas "Pete" Peterson, U.S. Ambassador to Vietnam) [hereinafter statement of Pete Peterson].

[61] S. REP. NO. 107-49, at 5 (2001) (quote from statement of Douglas "Pete" Peterson, Ambassador to Vietnam).

[62] *Id.* at 8.

[63] *International Economic Policy and Trade U.S.—Vietnam Trade: Hearing Before the House Comm. on Int'l Relations*, 106th Cong. (2000) (statement of Stanley O. Roth, Assistant Secretary of State for East Asian and Pacific Affairs). *See also* Statement of Pete Peterson, *supra* note 60 (stating that the BTA will "produce greater economic freedom and commercial opportunity for domestic private enterprise empowering the Vietnamese people to direct their own economic destiny.").

[64] A Senate report on the BTA stated that normalized economic ties between the United States and Vietnam would create an "increasingly open society governed by the rule of law and democratic principles [in Vietnam]." S. REP. NO. 107-49, at 10.

[65] *Argentina Collapse IMF Role Review: Hearing Before the Sen. Comm. on Fin.*, 107th Cong. (2002) (statement of Robert B. Zoellick, U.S. Trade Representative).

would have some negative economic consequences for the United States.[66] Although some U.S. businesses would benefit greatly from investment opportunities in the newly opened Vietnamese market, free trade between the countries would not be positive for every U.S. business.[67] Congress predicted that granting normalized trade relations through the BTA would affect the composition of Vietnamese exports to the United States and certain goods would be exported to the United States in larger volume after high tariffs were removed.[68] Specifically, a Senate report predicted that the U.S. processed food industry would be negatively affected.[69] Shortly after its passage, many of the BTA's predicted benefits and negative consequences were realized in Vietnam's burgeoning catfish industry.

III. TRADE RELATIONS LEAD TO CONFLICT BETWEEN U.S. AND VIETNAMESE CATFISH PRODUCERS

Vietnamese catfish exports to the United States proliferated after the BTA's implementation.[70] Because Vietnamese catfish production techniques cost less than those in the United States, the relatively inexpensive Vietnamese exports threatened the U.S. catfish industry.[71] U.S. farmers fought back with aggressive advertising and lobbying for new labeling requirements.[72]

A. Differences in U.S. and Vietnamese Catfish Farming Techniques Result in Lower-Priced Vietnamese Catfish

Both Vietnamese and U.S. farmers use similar, integrated techniques for raising and processing catfish.[73] Vietnamese farmers, however, have at least one significant advantage that lowers their cost of production; they are able to produce catfish more efficiently because the fish are raised in their natural habitat and thrive without much farmer intervention.[74]

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[66] S. REP. NO. 107-49, at 9.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] Nguyễn Xuân Thành, Catfish Fight: Vietnam's Tra and Basa Fish Exports to the U.S. 6 (Mar. 2003) (unpublished case study, on file with author).
[71] Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. 47909 (Aug. 12, 2003) [hereinafter Notice of Antidumping Duty Order].
[72] *See* discussion *infra* Part III.B-C.
[73] *See* discussion *infra* Part III.A.1-2.
[74] Nguyễn, *supra* note 70, at 2.

1. Vietnamese Catfish Farming Techniques

Vietnamese farmers raise their catfish relatively efficiently by locating their farms in natural catfish habitats, primarily in the Mekong River Delta.[75] The Vietnamese catfish industry became especially lucrative in 1995 when breeding technology was introduced and fingerlings[76] no longer had to be caught in the wild.[77] Because Vietnamese farmers "bring the farm to the fish" by raising their catfish fingerlings in cages submerged under houseboats, the purchase and construction of the cages accounts for their largest initial investment cost.[78] Recurring expenses include fingerlings, feed, labor, fuel, disease control, interest and taxes.[79] The cost to raise tra,[80] a type of catfish, is about thirty cents per pound.[81]

Fish processing plants in Vietnam are located in close proximity to the farms, further lowering the cost of producing frozen fish fillets.[82] At the processing plant, whole adult fish are washed, fileted, skinned, packed, and frozen for export.[83] Most processors use imported machinery in their factories and subscribe to health standards[84] created by the U. S. Food and Drug Administration.[85]

Between the passage of the BTA in 2000 and 2002, the volume of Vietnamese catfish exported to the United States rose from 8624 tons to 20,965 tons (a 143% increase).[86] By September 2002, 94% of the 670,000 pounds of frozen boneless catfish fillets exported to the United States were from Vietnam.[87] A year later, after tariffs were imposed,[88] exports to the United States were down 77% to 150,000 pounds.[89]

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[75] *Id.*

[76] A fingerling is a fish in its very early stages of development.

[77] Nguyễn, *supra* note 70, at 2. From 1996 to 2000 export volume to the United States rose from 98 tons to 8624 tons (an 8700% increase in volume and a US$ 29,211,366 increase in value). *Id.* at 6.

[78] *Id.* at 2. A small cage costs roughly US$ 6385.

[79] *Id.*

[80] Tra and basa are two types of Vietnamese-farmed catfish.

[81] Calculated using data from Nguyễn, *supra* note 70, at 4. Unit cost of 10,398 Vietnam Dong / kilogram of fish * 2.2 lbs. = 30 cents per pound (based on a conversion rate of US$ 1= 15,709.00 VND). This price is an approximation using numbers from the most expensive inputs.

[82] *Id.* at 5.

[83] *Id.*

[84] CENTER FOR FOOD SAFETY AND APPLIED NUTRITION, HAZARD ANALYSIS CRITICAL CONTROL POINTS (2003), *at* http://vm.cfsan.fda.gov/~lrd/haccp.html (last visited Feb. 11, 2004).

[85] Nguyễn, *supra* note 70, at 5.

[86] *Id.* at 6.

[87] CATFISH PROCESSING (Nov. 2002), *supra* note 3.

[88] *See infra* Part IV.B.

[89] CATFISH PROCESSING (Dec. 2003), *supra* note 4. Vietnamese exports to the United States were replaced with exports from China and Guyana.

2. *U.S. Catfish Farming Techniques*

Catfish farming in the United States is more costly than Vietnamese catfish farming because of higher overhead and labor costs.[90] Catfish farming began as an industry in the United States in the 1960s,[91] with both small and large-scale farms.[92] The smaller growers make more money by selling live fish or providing event catering using their own farm-grown fish.[93] The larger farms are generally integrated, meaning they have their own processing plants.[94] Because the price of U.S.-grown catfish dropped around the time the BTA was implemented, these larger farming and processing operations claim to have been negatively affected by the Vietnamese catfish industry.[95]

Large U.S. catfish farms have high operating costs because they utilize state-of-the-art technology, mechanization, and artificially-created environments for their fish.[96] Farm operators excavate artificial holding ponds and then pump in fresh water, constantly maintaining optimal oxygen levels.[97] Farmers often employ workers twenty-four hours a day to monitor the ponds and ensure that pump problems are caught immediately and the fish have a steady level of oxygen.[98] Employees record water quality, temperature, and oxygen levels at least once a day[99] and may apply herbicides to control growth of weeds and algae in the ponds.[100] A sample yearly budget of a fish farm producing 65,625 pounds of catfish shows a total yearly budget of US$ 43,492,[101] a cost of about sixty-six cents per pound of fish—or more than two times the price of producing Vietnamese

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[90] ROBERT M. DURBOROW, CATFISH FARMING IN KENTUCKY 9 (2000), *available at* http://www.ksuaquaculture.org/Catfish.pdf (last visited Feb. 11, 2004).

[91] *Id.* at 4.

[92] *Id.*

[93] *Id.* at 12.

[94] For a description of catfish processing techniques, see SOUTHERN PRIDE, CATFISH PROCESSING, at http://www.southernpride.net/farmprocess/plant.html (last visited Feb. 11, 2004); DELTA PRIDE, THE DELTA PRIDE DIFFERENCE: FROM THE FARM TO THE PLATE, at http://www.deltapride.com/co_info.difference.htm. (last visited Feb. 11, 2004).

[95] Notice of Preliminary Determination of Sales at Less than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. 4986 (Jan. 31, 2003) [hereinafter Notice of Preliminary Determination of Sales].

[96] DURBOROW, *supra* note 90, at 9.

[97] *Id.*

[98] *Id.*

[99] *See id.* at 9, 63, 76.

[100] *See id.* at 94.

[101] *Id.* at 22.

catfish.[102]

Integrated farms benefit from economies of scale and comprehensive quality control. Operations that both raise and process their own fish are referred to as "vertically integrated."[103] The integration of the raising and processing of the fish is touted as increasing the quality and freshness of the product.[104] Farms that manage each stage of the catfish production process, from fingerling to fillet, can ensure that everything is in accordance with their particular standards.[105] Promotional websites emphasize the freshness of the water in the ponds, the quality of the feed, the speed and reliability of company-owned refrigeration trucks, and the efficiency of their processing plants.[106]

B. *U.S. Catfish Farmers Launch an Advertising Campaign to Promote Their Product*

After the BTA went into effect, sales of U.S.-grown frozen catfish fillets rose, but the average price per pound dropped steadily.[107] U.S. catfish farmers, daunted by the disparity in production costs with Vietnam, tried to win back their business by running an advertising campaign distinguishing U.S. catfish from its Vietnamese counterpart.[108] The campaign, sponsored by Catfish Farmers of America,[109] emphasized the difference between U.S. and Vietnamese catfish varieties and the different environments in which the fish are raised.[110] The campaign accused Vietnamese fish of being a

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[102] *See supra* note 81 and accompanying text.

[103] *See generally* AMERICA'S CATCH, HOW WE DO IT, *at* http://www.catfish.com/2003/compmid.html (last visited Feb. 11, 2004).

[104] For a product promotion based on this theory see SOUTHERN PRIDE, *supra* note 94.

[105] *See, e.g.*, DELTA PRIDE, *supra* note 94 (stating that, from the earliest stages, Delta Pride catfish are held to the strictest standards for quality).

[106] *See, e.g.*, HEARTLAND CATFISH, WELCOME TO HEARTLAND CATFISH, *at* http://www.heartlandcatfish.com (last visited Feb. 11, 2004) ("Our catfish are the most pampered fish you can buy. You see, at Heartland, we control absolutely every stage of their growth and processing. From fingerlings to final products, they're never out of our hands. Our vertically intergrated [sic] approach assures you the finest quality fish on the market.").

[107] AGRIC. STATISTICS BD., NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., *at* http://usda.mannlib.cornell.edu/reports/nassr/other/pcf-bb/ (last visited Mar. 1, 2004). The volume of imported frozen fillets also dropped during this time period. *Id.*

[108] *Harvesting Poverty*, *supra* note 2.

[109] See *supra* note 5.

[110] *Harvesting Poverty*, *supra* note 2. In 2001, when the Food and Drug Administration sought an expert opinion on species identification of catfish, they consulted Dr. Carl J. Ferraris Jr., an adjunct curator of ichthyology at the California Academy of Sciences who specializes in the world's catfish species. Dr. Ferraris confirmed that there is "no justification, historically or scientifically," for limiting the word catfish

"slippery catfish wannabe," "probably not even sporting real whiskers," and "float[ing] around in Third World rivers nibbling on who knows what."[111] One U.S. company wrote that the fish from Vietnam "is different [from U.S. fish] and so are the farming conditions—not to mention government standards for quality, cleanliness and safety."[112] Congressman Marion Berry (D-Arkansas) was reputedly involved in a campaign suggesting that Vietnamese catfish are contaminated with Agent Orange.[113] His Washington, D.C. office, however, denies his involvement.[114]

C. *Congress Passes Two Laws Regulating the Use of the Word "Catfish" on Product Labeling*

Adding to the threat of serious competition, consumers were easily confused by the labels on Vietnamese catfish fillets.[115] The Vietnamese fish were originally exported to the United States under the names "basa" and "tra" but, because U.S. consumers did not recognize this product as catfish, Vietnamese exporters changed the packaging to read "catfish."[116] In some instances, new packaging even referred to the fish as being "fresh delta," causing the Mekong River Delta to be confused with the Mississippi River Delta.[117] Because it was impossible to distinguish the two products in stores, U.S. farmers lost any advantage they may have had from being local.[118]

The U.S. catfish farmers successfully lobbied their congressional representatives to create labeling standards. On July 10, 2001, eleven congressional representatives from catfish farming states[119] introduced House Bill 2439.[120] The bill would have amended the Agricultural Marketing Act of 1946 by requiring farm-raised fish retailers to inform

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to North American catfish. Elizabeth Becker, *Delta Farmers Want Copyright on Catfish*, N.Y. TIMES, Jan. 16, 2002, at A1.

[111] *Harvesting Poverty*, *supra* note 2.

[112] DELTA PRIDE, MADE IN AMERICA, *at* http://www.deltapride.com/co_info_american.htm (last visited Feb. 11, 2004).

[113] *Harvesting Poverty*, *supra* note 2.

[114] Telephone Interview with Nathan Reed, Legislative Aide to Congressman Berry (Nov. 3, 2003).

[115] Nguyễn, *supra* note 70, at 8.

[116] *Id.* at 5.

[117] *Id.*

[118] *Id.* at 8.

[119] Those representatives were: Mike Ross (AR), Marion Berry (AR), Chip Pickering (MS), Bennie Thompson (MS), Ronnie Shows (MS), Harold Ford (TN), Max Sandlin (TX), Brad Carson (OK), Mike Thompson (CA), Jim Turner (TX), and Jane Harman (CA). *See* H.R. 2439, 107th Cong. (2001).

[120] *Id.*

consumers of the commodities' country of origin at the final point of sale.[121] While this bill was ruled out of order and never became law,[122] the representatives in support of the bill were not deterred.

Within the next year, they passed two new pieces of legislation aimed at protecting the U.S. catfish industry.[123] First, a section of the Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2002 prohibited any funds it appropriated to be used in allowing admission of fish labeled "catfish" unless it was of the *ictaluridae* family.[124] *Ictaluridae* is the only type of catfish native to North America.[125] On May 13, 2002, the Farm Security and Rural Investment Act of 2002 became law.[126] It further limits the use of the word "catfish" on labeling to fish classified within the family ictaluridae.[127] Lobbying successfully for the passage of these acts marked the end of U.S. farmers' quest for a domestic remedy.

IV. U.S. CATFISH PRODUCERS SEEK AN INTERNATIONAL REMEDY

U.S. catfish farmers pursued protections beyond the domestic labeling victory and advertising campaign.[128] On June 28, 2002, the Catfish Farmers of America, along with eight individual processors,[129] sought an international remedy[130] by lodging an anti-dumping complaint[131] with the

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[121] *Id.*

[122] Dan Morgan, *Vietnamese Catfish Rile Southern Lawmakers*, WASH. POST, Sept. 10, 2001, at A19.

[123] *See infra* notes 124, 126.

[124] Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2002, Pub. L. No. 107-76, § 755, 115 Stat. 704.

[125] Catfish species grown in Vietnam are pangasius bocourti, pangasius hypophthalmus, and pangasius sutchi. FACT SHEET: NEW U.S. LAW DOES NOT PROHIBIT EXPORT OF VIETNAMESE FISH TO THE U.S. (2001), http://hanoi.usembassy.gov/wwwhcatfish011231.html (last visited Feb. 11, 2004).

[126] Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10806, 116 Stat. 134.

[127] *Id.*

[128] In May 2002, U.S. prices for frozen fish fillets were down eighteen cents a pound from the prior year. AGRIC. STATISTICS BD., NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., CATFISH PROCESSING 1 (June 2002), http://usda.mannlib.cornell.edu/reports/nassr/other/pcf-bb/2002/catf0602.pdf (last visited Feb. 11, 2004).

[129] Notice of Preliminary Determination of Sales, *supra* note 95. The eight individual U.S. catfish processors are America's Catch, Inc., Consolidated Catfish Co., L.L.C., Delta Pride Catfish, Inc., Harvest Select Catfish, Inc., Heartland Catfish Company, Pride of the Pond, Simmons Farm Raised Catfish, Inc., and Southern Pride Catfish Co. *Id.*

[130] Although the DOC is not an international forum, a DOC determination can provide a solution that affects trade on an international level.

[131] An anti-dumping complaint asserts that a foreign producer is selling its product in the United States for less than it is being sold in the exporting country. This also implies that the foreign producer is selling the product at less than the cost of producing it.

DOC against Vietnamese catfish farmers.[132] The DOC investigated the complaint and later issued a final report, which resulted in the imposition of tariffs on Vietnamese catfish exports to the United States in 2003.[133] The Vietnamese farmers responded with a lawsuit against the DOC in the CIT.[134]

A. Review of Anti-Dumping Complaints

Two separate, quasi-judicial U.S. administrative agencies review anti-dumping complaints such as the complaint filed against the Vietnamese catfish producers.[135] A petitioner initiates an anti-dumping case by simultaneously filing a complaint with the DOC and the International Trade Commission.[136] The International Trade Commission[137] then investigates whether the domestic industry has been injured.[138] At the same time, the DOC determines whether dumping has actually occurred and, if it finds that it has, may impose tariffs on the offending party.[139] Both agencies must find for the plaintiff for the case to continue.[140] Because the finding of injury by the International Trade Commission is not contested by the Vietnamese producers, this Comment analyzes the DOC's process.[141]

The DOC, an independent agency headed by the Secretary of Commerce, investigates the complaint and determines if there has been dumping of the named product.[142] The petition that initiates the investigation supplies the bulk of the information used to make this determination.[143] The DOC also gathers facts by sending questionnaires to

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[132] Notice of Antidumping Duty Order, *supra* note 71.

[133] *Id.*

[134] *See infra* Part V.

[135] STEVEN HUSTED & MICHAEL MELVIN, INTERNATIONAL ECONOMICS 241 (4th ed. 1998).

[136] *Id.*

[137] The U.S. International Trade Commission ("ITC") is an independent, quasi-judicial federal agency that functions very similarly to the DOC. During its investigation, the ITC collects data on the domestic industry suffering alleged injury as well as prices and quantities of imports. Using this data, the ITC determines if the state of the domestic industry is due to dumping of the foreign product named in the complaint. The ITC must find this link in order for the DOC to impose tariffs. *Id.*

[138] *Id.*

[139] *Id.* at 242.

[140] *Id.*

[141] An Giang Agric. & Food Imp. Co. v. United States, No. 03-00563 (Ct. Int'l Trade filed Aug. 20, 2003) [hereinafter An Giang Complaint].

[142] The responsibility of investigating the size of dumping margins was transferred from the Treasury Department to the DOC in 1980. HUSTED & MELVIN, *supra* note 135, at 242.

[143] Although the Secretary of Commerce has the power to initiate dumping investigations, the investigation is normally initiated by a petition filed by a domestic interested party. Necessary contents of a petition are listed in 19 C.F.R. § 351.202 (2003).

the respondents, in this case the Vietnamese fish farming companies.[144] The DOC commissioners, who are appointed by the President, compare the product's export price and the product's normal value in the exporting country.[145] Dumping has occurred if the export price is lower than the normal value.[146] Any interested party may request a hearing on arguments they plan to raise during the investigation.[147] Hearings, however, are not subject to many of the Administrative Procedure Act's procedural safeguards.[148] For example, witnesses are not subject to oath or cross-examination, although the chair of the hearing may ask questions of persons or witnesses.[149] If one of the parties does not agree with the final DOC determination, that party may appeal to the CIT.[150]

B. *The DOC Investigation and Report of the Vietnamese Catfish Producers*

In conducting its nearly year-long investigation, the DOC first determined that Vietnam is a non-market economy, which made its determination of the normal value of catfish particularly complicated.[151] This section briefly explains the DOC's valuation process.[152]

A "non-market economy" does not operate on "market principles of cost and pricing structures,"[153] but instead is subject to artificial government control. The result is that product prices in the non-market economy do not reflect the product's fair value.[154] By law, the DOC must determine the "normal value" of a non-market economy product based on "the value of the

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[144] 19 C.F.R. § 351.301(a).

[145] 19 U.S.C. § 1677b(a).

[146] Normal value is the price at which the foreign product is sold in the exporting country in the ordinary course of trade. *Id.* § 1677b(a)(1)(B)(i).

[147] 19 C.F.R. § 351.310(c).

[148] *Id.* § 351.310(d)(2). *See generally* Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946). The Administrative Procedure Act was designed to make government agencies more accountable. Marci A. Hamilton & Clemens G. Kohnen, *The Jurisprudence of Information Flow: How the Constitution Constructs the Pathways of Information*, 25 CARDOZO L. REV. 267, 286 (2003) (citing H.R. Rep. No. 76-1149, at 2 (1939)).

[149] 19 C.F.R. § 351.310(d)(2).

[150] 19 U.S.C. § 1516a. In the case of an appeal, the appealing party, in this case, the Vietnamese producers, is represented by private counsel in their suit against the U.S. governmental agency.

[151] Notice of Preliminary Determination of Sales, *supra* note 95, at 4990.

[152] *See infra* Part V.B for a more detailed discussion.

[153] 19 U.S.C. § 1677(18)(A). In identifying a non-market economy, the DOC considers currency convertibility, wage rates, permitting of joint ventures or foreign investment, governmental control of production, allocation of resources and price and output decisions, among other factors. *Id.* § 1677(18)(B).

[154] *Id.* § 1677(18)(A).

factors of production utilized in producing the merchandise."[155] Such "factors of production" include items like the cost of labor, raw materials, energy, and capital costs.[156] The DOC must value these factors in the non-market economy based on known price and cost data from a surrogate country with a market economy considered appropriate by the DOC.[157] The DOC uses data from companies in the surrogate country to produce its preliminary anti-dumping determination.[158]

After applying this process, the DOC issued a notice of preliminary determination that eventually led to an anti-dumping duty order on Vietnamese frozen catfish fillets.[159] In its determination, the DOC found that frozen fish fillets were sold in the United States at less than their normal value.[160] In turn, the DOC required Vietnamese exporters to give a cash deposit or post a bond equal to the dumping margin calculated in the preliminary determination.[161] After the preliminary determination, the DOC invited both parties to contest the findings, which they did.[162] The DOC filed its final determination in June 2003,[163] and published its anti-dumping duty order against Vietnamese frozen fish fillets in August 2003.[164] Later that month, the eleven Vietnamese exporters named in the final anti-dumping order filed a lawsuit in the CIT challenging that order.[165]

The complaint filed in the CIT by the Vietnamese producers argues that the DOC incorrectly calculated the normal value of their product by valuing the whole, pre-processed fish as a factor of production and not

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[155] *Id.* § 1677b(c)(1)(B).

[156] *Id.* § 1677b(c)(3)(A)-(D).

[157] *Id.* § 1677b(c)(1)(B).

[158] 19 U.S.C. § 1677b(c).

[159] Notice of Antidumping Duty Order, *supra* note 71.

[160] Notice of Preliminary Determination of Sales, *supra* note 95. The DOC based this determination on valuation of factors of production in the surrogate country of Bangladesh. *Id.* at 4992. For additional discussion of Bangladesh's selection as a surrogate country for Vietnam, see *infra* Part V.B.3.a. *See also* Memorandum from Alex Villanueva and Paul Walker, Case Analyst, through James C. Doyle, Program Manager, to Edward C. Yang, Office IX (Jan. 24, 2003) (on file with author).

[161] The dumping margin ranged from 37.94 to 63.88 percent (the amount that normal value exceeded export price). Notice of Preliminary Determination of Sales, *supra* note 95, at 4997.

[162] Notice of Antidumping Duty Order, *supra* note 71.

[163] Notice of Final Antidumping Duty Determination of Sales at Less than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. 37116 (June 23, 2003) [hereinafter Notice of Final Antidumping Duty Determination].

[164] Notice of Antidumping Duty Order, *supra* note 71. The anti-dumping order lists a separate duty for each of eleven different Vietnamese catfish producers and one Vietnam-Wide duty. *Id.* at 47910. The Vietnam-Wide duty is to be applied to producers who failed to respond to DOC investigatory questionnaires and therefore did not "demonstrate entitlement to a separate rate." Notice of Preliminary Determination of Sales, *supra* note 95, at 4992.

[165] An Giang Complaint, *supra* note 141, at 7-9.

valuing the factors used to produce the whole fish.[166] The DOC calculation relied on a method of production that was completely contrary to the method reflected in arguments submitted by the Vietnamese producers during the investigation process.[167] The Vietnamese lawsuit challenging the DOC's method of calculation[168] is still pending in the CIT.

V. THE VIETNAMESE PRODUCERS' CASE AGAINST THE DOC DEMONSTRATES THAT A BROADER STANDARD OF REVIEW IS NECESSARY TO INCREASE DOC ACCOUNTABILITY

This lawsuit, and the growing trade dispute it represents, may destabilize the nascent relationship between the United States and Vietnam if left unaddressed. However, the two fora available to hear this type of trade dispute—the DOC and the CIT—are unlikely to provide adequate redress for Vietnamese concerns due to existing structural and procedural limitations. For example, the CIT cannot adequately reconcile decisions on similar issues because each decision is made on a case-by-case basis, provides no precedential value, and the court is bound by a limited standard of review.[169] In the case of Vietnamese catfish, the CIT's inherent limitations compound the DOC's flawed decision-making process and threaten lasting harm to trade between the United States and Vietnam.

A. The Structure of the CIT Limits its Utility

Although Congress reorganized the CIT to specifically scrutinize DOC anti-dumping decisions, the CIT is still hampered by its deferential standard of review and inability to use precedent to guide its decisions.

1. The Reorganization of the CIT Has Not Deterred the DOC From Abusing Its Discretion

Reorganized by Congress in 1980, the CIT is now meant to provide

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[166] *Id.*

[167] Memorandum from Barbara E. Tillman, Acting Deputy Assistant Secretary for Import Administration, Group III, to Joseph A. Spetrini, Acting Assistant Secretary for Import Administration (June 16, 2003), *available at* http://ia.ita.doc.gov/frn/summary/vietnam/03-15794-1.pdf (last visited Feb. 11, 2004) [hereinafter Tillman Memorandum].

[168] An Giang Complaint, *supra* note 141.

[169] *See* discussion *infra* Part V.A.

more transparency in DOC anti-dumping decisions.[170] Congress believed that CIT review would encourage the DOC to be more conscientious about explaining its decisions,[171] thereby controlling unfettered executive branch discretion.[172] In its reorganized form,[173] the CIT is an Article III court[174] that hears civil actions arising from U.S. international trade law.[175] Although technically a trial court, the CIT functions as an appellate court for government agencies.[176] The appellate nature of the court requires it to act with significant deference, creating a situation where government agencies ultimately make final decisions.[177] While CIT review may have improved the situation, it has not solved the problem. In order to provide a truly effective check, the CIT must be able to set precedent and review the DOC's decisions using a broader standard of review.[178]

2. *Because of Its Deferential Standard of Review, the CIT Cannot Provide a Sufficient Check on the DOC*

The CIT employs an extremely deferential standard of review, which limits its utility. The CIT applies the substantial evidence standard,[179]

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[170] James A. Toupin, *The U.S. Court of International Trade and the U.S. International Trade Commission After Ten Years – A Personal View*, 14 FORDHAM INT'L L.J. 10, 11 (1991).

[171] *Id.*

[172] Leonard M. Shambon, *Accomplishing the Legislative Goals for the U.S. Court of International Trade: More Speed! More Speed!*, 14 FORDHAM INT'L L.J. 31, 32 (1991).

[173] The modern CIT is the result of almost one hundred years of evolution. The CIT's earliest predecessor was the Board of General Appraisers, established by Congress in 1890. This board reviewed "appraisals of imported goods and classifications of tariffs." In 1908 the Board was relieved of administrative duties and granted U.S. Circuit Court powers to compel testimony and punish contempt. In 1926 the name of the court was changed to the U.S. Customs Court. The Tariff Act of 1930 transferred administrative support from the treasury to the Justice Department and a 1956 act declared the court established under Article III, FEDERAL JUDICIAL HISTORY, U.S. COURT OF INTERNATIONAL TRADE, 1980-, *at* http://www.fjc.gov/history/home.nsf/page/custom_cit_bdy (last visited Feb. 11, 2004).

[174] 28 U.S.C. § 251(a) (2000). An Article III court derives its jurisdiction from U.S. CONST. art. III, § 2. Its judges are appointed for life. *Id.* art. III, § 1.

[175] 28 U.S.C. § 1581 (2000). The CIT has a "residual grant of exclusive jurisdictional authority to decide any civil action against the United States, its officers, or its agencies arising out of any law pertaining to international trade." In addition, the CIT has "exclusive subject matter jurisdiction of certain civil actions brought by the United States under the laws governing import transactions, as well as counterclaims, cross-claims, and third-party actions relating to actions pending in the court" as well as certain other specified types of subject matter jurisdiction, U.S. COURTS, JURISDICTION OF THE COURT, *at* http://www.cit.uscourts.gov/informational/about.htm (last visited Feb. 11, 2004) (referencing the Customs Courts Act of 1980).

[176] 19 U.S.C. § 1516a (2000).

[177] Toupin, *supra* note 170, at 25.

[178] This Comment does not address how these changes might be implemented.

[179] 19 U.S.C. § 1516a(b)(1)(B)(i).

defined as "something less than the weight of the evidence,"[180] when reviewing DOC findings. This standard requires the reviewing court to restrict its own review[181] and be extremely deferential.[182] Indeed, the CIT must sustain the DOC's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law."[183] If the DOC's interpretation of the evidence is "sufficiently reasonable, it will be sustained and it need not be the only reasonable interpretation."[184] When a remand does occur under this standard, it often merely asks for an explanation of the DOC's finding.[185] Thus, DOC commissioners may easily review a report upon remand and still come to the same conclusion.[186] As a result, the DOC is rarely forced to change the outcome of its reports.[187]

The deferential standard of review used by the CIT severely limits the possibility of appellate relief. Furthermore, were the Vietnamese farmers to appeal the CIT decision to the U.S. Court of Appeals for the Federal Circuit, they would face the same deferential standard of review.[188] Trade cases heard in the Federal Circuit are rarely granted certiorari to the U.S. Supreme Court, in part because no circuit split controversy exists.[189] The CIT's deferential standard of review is one factor that will prevent the current dumping conflict from being resolved justly and in a manner that stabilizes U.S.-Vietnam trade relations.

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[180] Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 619-620 (1966)).

[181] Mitsubishi Elec. Corp. v. United States, 700 F. Supp. 538, 552 (Ct. Int'l Trade 1988).

[182] *See e.g.*, Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 149 (1997) ("The substantial evidence standard is extremely deferential to the factfinder..."); Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 705 (1980) ("As we have emphasized, however, judicial review under the substantial evidence test is ultimately deferential.").

[183] 19 U.S.C. § 1516a(b)(1)(B).

[184] *Mitsubishi*, 700 F. Supp. at 552. *See also Matsushita*, 750 F.2d at 933 (quoting *Consolo*, 383 U.S. at 619-620) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence.").

[185] *See, e.g.*, USX Corp. v. United States, 698 F. Supp 487 (Ct. Int'l Trade 1987); Maine Potato Council v. United States, 613 F. Supp. 1237 (Ct. Int'l Trade 1985); SCM Corp. v. United States, 544 F. Supp. 194, 196 (Ct. Int'l Trade 1982) ("Clearly, the Commission's new statement did not recast any of the reasons articulated in its original statement, and the orders of remand did not oblige the Commission to arrive at a different substantive result.").

[186] Toupin, *supra* note 170, at 25.

[187] *Id.*

[188] Herbert C. Shelley et al., *The Standard of Review Applied by the United States Court of Appeals for the Federal Circuit in International Trade and Customs Cases*, 45 AM. U. L. REV. 1749, 1756 (1996).

[189] Toupin, *supra* note 170, at 19. *See also* SUP. CT. R. 17.

3. *The CIT Cannot Provide a Lasting Solution Because Its Decisions Have No Precedential Value*

A CIT decision binds only the parties involved in that dispute and creates no precedent for other CIT judges or the DOC.[190] Although *stare decisis* counsels the CIT in extreme cases,[191] the Court of Appeals for the Federal Circuit[192] has held that a decision by one CIT judge does not bind the other judges on the court.[193] Therefore, analysis of past CIT opinions can only suggest a possible outcome in any given case. In the current case, for example, two decisions exist that should have limited the discretion of the DOC and provided the method of valuing factors of production.[194] Because the CIT decisions are not binding, however, these cases did not limit or otherwise appear to affect the DOC's investigation into Vietnam's alleged catfish dumping in the United States. Instead, the DOC had the freedom to ignore the method of valuation advised in prior CIT cases.

B. *The DOC's Method of Valuing Factors of Production is Unsupported by the Evidence and Not in Accordance with Current Law*

The CIT's deferential review of the DOC's dumping determination and the lack of precedential value provided by other CIT cases are both factors that threaten to limit the Vietnamese producers' likelihood of successfully appealing the DOC decision. Two of the producers' five complaints against the DOC merit critical review by the CIT.[195] The first count claims that the DOC did not follow regulation, statute, or practice when calculating normal value in a non-market economy.[196] The second count claims that the DOC disregarded relevant factors when calculating

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[190] Algoma Steel Corp. v. United States, 865 F.2 d 240, 243 (Fed. Cir. 1989).

[191] *See, e.g.*, American Lamb Co. v. United States, 611 F. Supp 979, 981 (Ct. Int'l Trade 1985) (when defendant's arguments had been rejected three times within the year by two judges on the CIT, the court, faced with these same arguments a fourth time, considered itself bound by the three prior rejections).

[192] There is a right of appeal from the CIT to the United States Court of Appeals for the Federal Circuit, formerly the Court of Customs and Patent Appeals. Act of Oct. 10, 1980, Pub. L. No. 96-417, 94 Stat. 1727.

[193] *Algoma Steel*, 865 F.2d at 243.

[194] *See infra* Part V.B.2.

[195] The final three counts of the complaint are 1) the DOC did not correctly distribute the different names each business imported under, causing the importers to have to pay the higher country-wide rates, 2) the DOC used incomplete factual information, and 3) the DOC made general errors in its report. An Giang Complaint, *supra* note 141, at 8-9.

[196] *Id.* at 7.

normal value.[197] For each count, the CIT must find the DOC's report to be supported by substantial evidence in the record and to be in accordance with the law.[198] The burden of showing otherwise lies with the Vietnamese producers.[199] Although the CIT permits some deviation from established methods, the DOC fails to meet the standards required for such deviations.

As part of its anti-dumping investigation, the DOC has a duty to determine the normal value of the product named in the anti-dumping complaint.[200] The process the DOC uses to determine normal value must follow the "well-established method" of valuing all factors of production, including the primary factors of production.[201] In some circumstances, the DOC is permitted to deviate from the well-established method of determination, but there are two restrictions on permitted deviation.[202] The DOC inappropriately deviated from the well-established method because it did not value the Vietnamese producers' primary factors of production and did not meet either of the two restrictions.

1. The DOC Must Determine Normal Value in Accordance with Legislation, Prior CIT Decisions, and Common DOC Practice

The DOC decision should be remanded because the DOC did not calculate normal value[203] using the method established legislatively, judicially, and through practice.[204] The Tariff Act of 1930[205] describes the appropriate method for determining normal value in the case of non-market economies.[206] The Tariff Act requires that normal value be determined by assigning values to factors of production such as fish feed, farmer's labor, and cages.[207] The DOC assigns value to factors of production based on the value of these same factors in a comparable surrogate market economy.[208] In this case, the DOC did not correctly identify all of the Vietnamese producers' factors of production. This abuse of discretion resulted in a

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[197] *Id.* at 7-8.
[198] 19 U.S.C. § 1516a(b)(1)(B)(i).
[199] 28 U.S.C. § 2639(a)(1).
[200] 19 C.F.R. § 351.401(a).
[201] *See* discussion *infra* Part V.B.2.
[202] *See* discussion *infra* Part V.B.3.
[203] Normal value is the price at which the product is sold in the exporting country. 19 U.S.C. § 1677b(a)(1)(B)(i).
[204] *See infra* Part V.B.1-3.
[205] As codified in 19 U.S.C. § 1677b.
[206] *Id.* § 1677b(c). *See also* 19 C.F.R. § 351.408.
[207] 19 U.S.C. § 1677b(c)(1)(B).
[208] *Id.*

valuation method that was not supported by the evidence or in accordance with the law.

2. *Case Law Defines the Well-Established Method of Determining Normal Value*

Two very recent CIT decisions, *Pacific Giant, Inc. v. United States*[209] and *Anshan Iron & Steel Co., Ltd. v. United States*,[210] further define the correct method for determining normal value in non-market economies and address the role of primary and intermediate[211] factors of production.[212] For example, the plaintiff in *Anshan Iron*, a steel producer, used energy in its production process.[213] Because *Anshan Iron* did not purchase the energy, but generated it itself, the energy was an intermediate factor of production and the coal used to produce the energy was a primary factor of production.[214] According to the CIT decision, the well-established method is to assign surrogate values to the primary factors of production, such as coal, used to create self-produced intermediate factors of production, such as energy.[215]

In *Pacific Giant*, the court defined "factor of production" as any input used for more than incidental purposes.[216] The *Pacific Giant* court found that well water consumed in the process of producing crawfish meat was used for more than incidental purposes.[217] The court held that any such input must be valued.[218] Just one year later, the CIT elaborated further upon this concept in *Anshan Iron*. In that case, the CIT held that the DOC's decision to assign surrogate values to the producer's intermediate factors of production and not the producer's primary factors of production

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[209] Pacific Giant, Inc. v. United States, 223 F. Supp. 2d 1336 (Ct. Int'l Trade 2002) (Chinese producers of freshwater crawfish tail meat contested an antidumping determination on grounds that the DOC incorrectly applied surrogate values to well water used in the production process).

[210] Anshan Iron & Steel Co. v. United States, 27 CIT ___, ___, 2003 WL 22018898, at *9 (Ct. Int'l Trade July 16, 2003) (Chinese producers of hot rolled steel products contested an antidumping determination on the grounds that intermediate factors had been valued on their face instead of determining their value using the primary factors used to create them).

[211] Primary factors of production are used to produce intermediate factors of production which, in turn, are used to produce the final product. The Tariff Act of 1930 does not differentiate between primary factors of production and intermediate factors of production.

[212] *Anshan*, 2003 WL 22018898; *Pacific Giant*, 223 F. Supp. 2d at 1336.

[213] *Anshan*, 2003 WL 22018898.

[214] *Id.* at *1-2.

[215] *Id.* at *3.

[216] *Pacific Giant*, 223 F. Supp. 2d at 1346.

[217] *Id.*

[218] *Id.*

"constitute[d] a deviation from [the DOC's] established practice to value the factors of production of self-produced intermediate inputs."[219] The court had two reasons for this decision. First, under the statute governing the method of determining normal value in an alleged dumping case,[220] the court found that the DOC could interpret the statute on a case-by-case basis.[221] The court, however, held that this discretion is limited by its own, consistent interpretation of the statute.[222] The court has consistently interpreted the anti-dumping statute[223] as requiring the DOC to determine normal value of a non-market economy product in the same manner as it would a market economy product.[224] This means the DOC must assign surrogate values to primary factors of production.[225]

In *Anshan Iron*, the CIT also quoted the DOC's own explanation of its established practice for determining the normal value of a non-market economy product.[226] The DOC summarized its practice as collecting data for all direct inputs used in producing the product and "any indirect inputs used in the in-house production of any direct input."[227] For example, the court required consideration of the coal used by the plaintiff in *Anshan Iron* to produce energy.[228] Therefore, the DOC established, and the CIT confirmed, that the well-established method of calculating a product's value in a non-market economy is to assign surrogate values to both primary and intermediate factors of production.

By ignoring statutory requirements, prior CIT decisions, and its own practices, the DOC deviated from the well-established method of assigning surrogate value to the primary factors of production, and therefore abused its discretion. Instead of assigning values to primary production factors such as labor, energy, feed, and fingerlings, the DOC assigned value only to the intermediate factor of production—the whole adult catfish used for

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[219] *Anshan*, 2003 WL 22018898, at *9.

[220] The governing statute is 19 U.S.C. § 1677b.

[221] *Anshan*, 2003 WL 22018898, at *3 (citing Timken Co. v. United States, 166 F. Supp. 2d 608, 616 (Ct. Int'l Trade 2001)).

[222] *Id.*

[223] 19 U.S.C. § 1677b(c).

[224] *Anshan*, 2003 WL 22018898, at *3 (citing Timken Co. v. United States, 166 F. Supp. 2d 608, 616 (Ct. Int'l Trade 2001)).

[225] *Id.*

[226] *Id.* at *4 (citing Certain Final Determination of Sales at Less Than Fair Value, Cut-to-Length Carbon Steel Plate from the People's Republic of China, 62 Fed. Reg. 61,964 (Nov. 20, 1997)).

[227] *Id.*

[228] *Id.* at *16.

processing.[229] If CIT decisions were binding, the DOC would have had to follow the method outlined in *Anshan Iron* and *Pacific Giant*. Because the court's decisions are not binding, the DOC was able to make its determination to impose tariffs on Vietnamese catfish using a method that is inconsistent with prior determinations.

3. *Permitted Deviation from the Well-Established Method of Valuation and Its Two Restrictions*

While the CIT has held that the DOC may deviate from the well-established method,[230] any such deviation is subject to at least two restrictions.[231] First, in the interest of fairness,[232] the DOC cannot deviate from the well-established methodology if a respondent "has detrimentally relied on an old methodology used in previous reviews."[233] Second, the DOC must explain changes in methodology in a manner that is in accordance with the law and supported by substantial evidence.[234]

A well-established method has been detrimentally relied on if the parties believed it was the method in use at the time of the investigation.[235] This belief may be based on methodology used in previous DOC reviews.[236] If such reliance has occured, the respondents must be notified of a change in methodology so that they have a final opportunity to comment.[237] If there is no notification, their reliance is detrimental.[238]

The Vietnamese producers relied on the well-established method of assigning surrogate value to primary factors of production to their detriment. Despite an on-going investigation, the DOC apparently never notified the parties that a deviation from the normal method, as established by statute, case law, and practice, would be used. The DOC contended throughout the investigation and in the final report that the method used was "simply an

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[229] Tillman Memorandum, *supra* note 167, at 41. *See also* Notice of Final Antidumping Duty Determination, *supra* note 163.

[230] Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States, 178 F. Supp. 2d 1305, 1327 (Ct. Int'l Trade 2001).

[231] Anshan Iron & Steel Co. v. United States, 27 CIT ___, ___, 2003 WL 22018898, at *6 (Ct. Int'l Trade July 16, 2003).

[232] Shikoku Chem. Corp. v. United States, 795 F. Supp. 417, 421 (Ct. Int'l Trade 1992).

[233] *Anshan*, 2003 WL 22018898, at *6.

[234] *Id.*

[235] *Shikoku*, 795 F. Supp. at 421-22.

[236] *Id.*

[237] *Anshan*, 2003 WL 22018898, at *6.

[238] *Id.*

articulation of the current policy."[239] The report, however, shows that this was not actually the case, and the DOC did not notify the parties of a deviation from the well-established method, to the detriment of the Vietnamese producers.

A sufficient explanation for a method change is one that is supported with substantial evidence and in accordance with the law.[240] Such an explanation is necessary because it gives the reviewing court a basis for understanding the DOC's actions and allows the court to "judge the consistency of that action with the agency's general mandate."[241] An explanation for deviation is not in accordance with law if the reasoning is "inconsistent with the statutory mandate"[242] or, to a lesser extent, if "the reasoning (or lack thereof) violates general principles of administrative law."[243]

The DOC's explanation for the change in methodology was not supported by substantial evidence or in accordance with the law. The reasoning given for the change is not based on the facts and is inconsistent with prior decisions and statutory mandate. The DOC exceeded its discretion because it deviated from the well-established method without giving an appropriate explanation. The DOC gave three reasons for not valuing the primary factors of production: (1) financial information from companies in the surrogate country; (2) level of integration; and (3) problems with the upstream data.[244] However, these explanations are insufficient because they are not supported with substantial evidence or in accordance with the law. Therefore, the DOC's deviation from the well-established method should not be permitted.

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[239] Tillman Memorandum, *supra* note 167, at 45. Given the context of this quotation and the Vietnamese producers' argument, the author assumes that by "policy" the DOC refers to the method of determining normal value.

[240] *Anshan*, 2003 WL 22018898, at *6.

[241] Cultivos Miramonte S.A. v. United States, 980 F. Supp. 1268, 1274 n.6 (Ct. Int'l Trade 1997) (citing Chennault v. Dep't of Navy, 796 F.2d 465, 467 (Fed. Cir. 1986)).

[242] *Id.* at 1274 n.7.

[243] *Id.*

[244] Tillman Memorandum, *supra* note 167, at 41.

a. *If CIT decisions had precedential value,* Anshan Iron *would force the DOC to use the well-established method and thus base its determination on the Vietnamese producer's method of production and not that of the surrogate company*

The first reason the DOC gave for not valuing primary factors of production was the financial information collected from companies in the surrogate country, Bangladesh.[245] The DOC chose Bangladesh as the surrogate market economy country because the DOC found that, pursuant to the Tariff Act of 1930,[246] Bangladesh was a significant producer of comparable merchandise and is at a similar level of economic development.[247] Within Bangladesh, the DOC looked for surrogate companies that did not receive government subsidies, produced only catfish, and used the same production process as the Vietnamese producers.[248] Finding surrogate companies with these similarities allowed the DOC to assign value to Vietnamese factors of production using Bangladeshi prices. From a list of seven possible companies,[249] the DOC used financial data from two Bangladeshi shrimp processing companies, Apex and Bionic Sea Food Exports.[250] Neither company raises its own shrimp.[251] The other five companies were fish or shrimp farming companies that do not appear from the record to be processors.[252]

The record also provides financial data for six Indian companies, however, the DOC did not ultimately use any of this data.[253] Of these six Indian companies, three were disqualified because petitioners failed to submit the necessary financial statements and another was disqualified for receiving a government subsidy.[254] The final two companies were Euro Marine and Waterbase.[255] The financial statements for Euro Marine suggested that it was an integrated fish-raising and processing company similar to the Vietnamese respondent companies.[256] The DOC, however,

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[245] *Id.*
[246] 19 U.S.C. § 1677b(c)(4)(A)-(B).
[247] Notice of Preliminary Determination of Sales, *supra* note 95, at 4992.
[248] Tillman Memorandum, *supra* note 167, at 42.
[249] *Id.* at 41.
[250] *Id.* at 42.
[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] *Id.*

disqualified Euro Marine as a surrogate because its output was listed as "frozen marine products," a discription the DOC found to be insufficiently specific.[257] The final Indian company, Waterbase, was also an integrated raising and processing facility, but was nonetheless disqualified because there was no indication that it used river-based cages similar to those used by Vietnamese farmers.[258] Having settled on Apex and Bionic Sea Food Exports, the DOC found that using the value of the whole fish as input would "complement the use of these companies."[259]

Deviating from the well-established method on the basis of financial information from companies in the surrogate country is inconsistent with the CIT decision in *Anshan Iron*. If the CIT were a precedent-setting court, *Anshan Iron* would have directed the DOC during its investigation. In *Anshan Iron*, the DOC disregarded inputs used to generate electricity because the surrogate company did not generate their own electricity.[260] The DOC reasoned that valuing the Vietnamese producers' actual input would create an improper calculation of normal value.[261] The CIT rejected this determination in *Anshan Iron* because the DOC's reasoning was not supported by evidence or in accordance with law.[262] In the current case, the DOC reasoned that valuing the whole fish would complement the use of the Bangladeshi surrogate companies because the surrogate companies were only processors and did not raise their own seafood.[263] Like *Anshan Iron*, the CIT should remand the case at hand for flawed reasoning.

b. Prior CIT decisions suggest, and federal statute demands, that the DOC value factors of production utilized by the Vietnamese producers for more than incidental purposes and recognize that Vietnamese production is integrated

The second reason the DOC gave for valuing the whole fish as a

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[257] *Id.*
[258] *Id.*
[259] *Id.*
[260] Anshan Iron & Steel Co. v. United States, 27 CIT ___, ___, 2003 WL 22018898, at *6-7 (Ct. Int'l Trade July 16, 2003)
[261] *Id.* at *6.
[262] *Id.*
[263] Tillman Memorandum, *supra* note 167, at 42. The DOC decision presumes that the value of the whole fish will "encapsulate the relevant financial information for the upstream stages." This is not supported by any facts in the memo. Furthermore, the Vietnamese producers assert that the choice to raise the fish themselves is an integral part of the business and affects efficiency, *id.* at 28, showing that the two scenarios are in fact very different.

factor of production was the level of integration of raising and processing in Vietnamese companies. The DOC found that the Vietnamese companies were not sufficiently integrated to warrant valuing the factors used to produce the whole fish.[264] This argument is based on information that shows a number of the Vietnamese companies rent the cages to raise the fish that they later process.[265] Although the companies rent the cages, they provide the labor, energy, feed, and fingerlings necessary to produce the fish.[266] Because a portion of the rental fee is linked to the number of fish raised, the DOC found that the Vietnamese companies did not incur the entire risk of production and therefore were not fully integrated.[267] The DOC report also stated that using input factors of labor, energy, feed, and fingerlings would introduce inaccuracies.[268]

Deviation from the well-established method based on classification of Vietnamese producers as non-integrated is an insufficient explanation because it is not based on the facts. The facts show that the Vietnamese producers are integrated because they provide inputs to produce the whole fish.[269] Integration must be recognized because, under the U.S. Code of Federal Regulations, the DOC is required to value these inputs.[270] The regulations require the DOC to value factors of production actually utilized.[271] These factors include labor, raw materials, energy and utilities, and capital costs.[272] The facts show that the Vietnamese producers have inputs of labor, energy, feed, and fingerlings in the production of the whole fish.[273] Under the governing regulation, these inputs must be recognized, and concurrently, it must be recognized that the Vietnamese producers' process is in fact integrated.

Case law addressing the determination of normal value establishes that the DOC should value all input that is more than incidental to the production of the finished good.[274] Labor, energy, feed, and fingerlings are more than incidental to the catfish farming and production process because,

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[264] *Id.* at 44.
[265] *Id.*
[266] *Id.* at 36.
[267] *Id.* at 44.
[268] *Id.* The report does not explain why this method would result in an inaccurate valuation but suggests that using "all these factors" would produce a calculation that was complicated or difficult.
[269] *Id.*
[270] 19 C.F.R. § 351.408(a).
[271] *Id.*
[272] 19 U.S.C. § 1677b(c)(3)(A)-(D).
[273] Tillman Memorandum, *supra* note 167, at 44.
[274] Pacific Giant, Inc. v. United States, 223 F. Supp.2d 1336, 1346 (Ct. Int'l Trade 2002).

by providing these inputs, the Vietnamese producers control the quality and efficiency of their production process.[275] In fact, the Vietnamese producers claim that not valuing these factors of production will reject more than seventy-five percent of their reported factors.[276] A deviation from the well-established method is not warranted based on the Vietnamese producers' level of integration.

c. *A claim of inadequate data is not a sufficient explanation for deviating from the well-established method because it is incumbent on the DOC to collect all data necessary for analysis*

Finally, the DOC reasoned that the whole fish must be valued instead of its primary factors of production because there were "a number of problems" with the primary factors of production data provided by the Vietnamese companies.[277] They found that factors of production were unreported or misreported and this problem could not be remedied because there was insufficient data and lack of surrogate values.[278]

Insufficient data is not a satisfactory explanation for deviating from the well-established method of calculating normal value. It is incumbent on the DOC to collect all the data necessary for analysis.[279] If the DOC does not find the information submitted to be sufficient, it must notify the respondents.[280] According to the complaint filed with the CIT, the Vietnamese producers complied with all DOC requests for data.[281] If full compliance on the part of the Vietnamese producers did not provide sufficient data for constructing the non-market economy value, it was

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[275] Tillman Memorandum, *supra* note 167, at 28. Note that U.S. producers also emphasize their control over the entire production process in their advertising, claiming that it is what makes their product high quality.

[276] *Id.*

[277] *Id.* at 44.

[278] *Id.* at 45.

[279] *Mitsubishi*, 700 F. Supp. 538, 564 (Ct. Int'l Trade 1988) (citing Kenda Rubber Indus. Co., v. United States, 630 F. Supp. 354 (Ct. Int'l Trade 1986) (interpreting 19 U.S.C. § 1677(4)(D)).

[280] 19 U.S.C. § 1677m.

[281] An Giang Complaint, supra note 141, at 3-6. Had the Respondents been uncooperative or unable to produce the necessary information, the DOC would have been at liberty to imply adverse inferences. 19 U.S.C. § 1677e. It seems, however, that the DOC deemed Respondents cooperative because none are subject to the Vietnam-Wide dumping margins. Notice of Final Antidumping Duty Determination, *supra* note 163. In fact, the DOC wrote that, as of the preliminary report, all six non-mandatory respondents "cooperated in providing all the information the Department requested of them." Notice of Preliminary Determination of Sales, *supra* note 95, at 4992.

incumbent on the DOC to request further information.[282]

The DOC's argument that it lacked accurate surrogate values is also inadequate given the many possible surrogate companies listed in the DOC report.[283] The DOC notes that the problems with the data could not be remedied because no surrogate company was available to properly value primary factors of production.[284] The DOC, however, rejected the Indian company Waterbase[285] as a possible surrogate company on the grounds that usable information from the primary surrogate country exists.[286] This explanation is contradictory in light of the DOC report.

The DOC did not have the freedom to deviate from the well-established method because the two restrictions on deviation were not met. The Vietnamese producers detrimentally relied on the well-established methodology and the DOC failed to provide a sufficient explanation for the deviation. The methodology used in the report to calculate normal value is incorrect and reflects an abuse of discretion on the part of the DOC. Broader review of the DOC by the CIT, coupled with precedent-setting decisions, would help to prevent such abuses.

VI. CONCLUSION

Current friendly relations between the United States and Vietnam, largely based on trade, have resulted in both economic cooperation and industry competition. This phenomenon is evidenced in the catfish industry. Cooperation between the two countries initially led to the development of a Vietnamese catfish farming industry but ultimately resulted in conflict between Vietnamese and U.S. producers. The conflict provides a case study of the efficacy of the current U.S. system for resolving such trade disputes and suggests areas for potential reform.

Structural changes are needed in the way international trade conflicts are resolved in the U.S. The CIT's deferential standard of review provides no significant check on the discretion of the DOC, thus reducing the DOC's

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[282] *Mitsubishi*, 700 F. Supp. at 564 (citing Kenda Rubber Indus. Co. v. United States, 630 F. Supp. 354 (Ct. Int'l Trade 1986) (interpreting 19 U.S.C. § 1677(4)(D)).

[283] Tillman Memorandum, *supra* note 167, at 41.

[284] *Id.* at 45.

[285] Waterbase used a fully integrated production process, just as the Vietnamese producers do.

[286] Statute dictates that the DOC's normal practice is to value factors of production first from the primary surrogate country when appropriate data are available. 19 C.F.R. § 351.408(c)(2). However, the final report states that in the event that no surrogate value is available in the primary surrogate country, concerns with using a secondary surrogate country can be overcome. Tillman Memorandum, *supra* note 167, at 43.

accountability. Moreover, CIT decisions create no precedent. Thus, even if the CIT requires the DOC to recalculate normal value in this case, as it should, the court's decision will provide no guidance to parties in future cases. Because of these structural defects, the CIT is not a stabilizing force in U.S. economic relations. To encourage trade with new partners and maintain relations with Vietnam, the United States should consider modifying its procedures for review of trade disputes. Because the Vietnamese producers' case is still pending, an opportunity currently exists for renewing positive trade relations with Vietnam by requiring the DOC to utilize methods established by legislation, case law, and its own past practices.