Fishing for NTBs : The Catfish Wars as a Rent-Seeking Problem

William R. Schubert

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Fishing for NTBs: The Catfish Wars as a Rent-Seeking Problem

William R. Schubert[1]

Abstract

Over the past decade, US catfish producers have been collectively engaging in protectionist rent seeking against lower-priced import competition, most notably from Vietnam. This one-sided strategy, which has ironically characterized the so-called Catfish Wars thus far, has lead to the imposition of several nontariff barriers (NTBs). For Vietnamese exporters, uncertainty as to trade conditions in the United States, including the ultimate impact of the low-visibility NTBs in existence, has been a persistent problem. This problem is characteristic of a contemporary phenomenon affecting exporters worldwide: the prevalence of *disguised* forms of protectionism. Viewing the Catfish Wars as a rent-seeking problem, this article discusses the incentives and other factors that lead to disguised protectionism. Further, it discusses how exporters doing business in the United States can reduce the potential impact of disguised protectionism though coordinating with consumer-oriented groups.

Keywords

international trade law, global economics, protectionism, WTO, nontariff barriers (NTBs), antidumping, Vietnam, catfish, rent seeking, collective action problem

Introduction

Following an influx of competition from Vietnamese producers in the US catfish market, US catfish producers began collaborating in a strategy of protectionist rent seeking, aiming to keep from losing their leverage to lower prices by securing trade protection. As one would expect, the protectionist trade measures that resulted preserved wealth for an inefficient US industry at the expense of US consumers, while depriving Vietnamese catfish exporters of potential gains from trade. A more vexing set of problems has derived from the discreet nature of the nontariff barriers (NTBs) employed in the so-called Catfish Wars. The controversy has involved the lack of fairness inherent in low-visibility NTBs that frustrate the reasonable business expectations of the Vietnamese, among other export industries. The fact that the Vietnamese industry was so heavily invested in the US market at the beginning of the Catfish Wars made the results particularly devastating at times. Regardless of who is responsible for the protectionist impact of low-visibility NTBs, or whether exporters can avoid the problem—this article refers to it as *disguised protectionism*—the result of this problem is unnecessary economic harm for exporters, in which their consumers must share. When uncertain trade conditions in export markets arise in the future, exporters may be able to lessen the impact of protectionist rent seeking and disguised protectionism by coordinating with groups that work toward closely aligned, consumer-oriented goals. By organizing effectively with those representing (directly or indirectly) the interests of US consumers, foreign exporters can better foresee potential trade barriers before they arise, thereby taking some of the sting out of disguised protectionism. Further, improved networking between these two sets of interests can enable more efficient spending on activities such as media relations and lobbying, which can lead to an improved public image and better representation in the policy-making arena.

Protectionist Rent Seeking and the Affected Stakeholders

A rent seeker makes expenditures in a "political economy" of sorts; it seeks to secure government resources that would result in valuable returns (or "rents") rather than to engage purely in market competition. "Rent seeking" can describe a broad range of activities by various types of actors. Krueger (1974) coined the term in reference to the politically oriented "competition" for import licenses that may occur when quantitative import restraints are in effect. The Catfish Wars involve a

[1] Loyola University Chicago School of Law, Chicago, IL, USA

Corresponding Author:
William R. Schubert, 604 Flock Ave., Naperville, IL 60565, USA
Email: wschubert@luc.edu

different sort of rent seeking: expenditures by domestic producers seeking protectionist trade measures to hinder the efficiency of import competition and preserve the advantage of the domestic industry.

In rent-seeking scenarios such as the Catfish Wars (where domestic producers seek protection from more efficient foreign competition), producers of the product at issue team up by country. The domestic producers can be seen as a single industry. While domestic producers are presumably competitors in the context of everyday business, they share a common adversary in lower-priced imports. Trade associations such as the Catfish Farmers of America (CFA) organize the interests of domestic producers so that they can collectively act as an industry. Foreign firms exporting to the domestic industry's country can likewise be viewed as a single industry, typically represented through a trade organization such as the Vietnam Association of Seafood Exporters and Producers (VASEP). Thus, in a rent-seeking problem where domestic producers seek a protectionist trade barrier to impair the efficiency of foreign rivals, the primary groups of adversaries are the "domestic industry" and any more-efficient "foreign industry" that the trade barrier would affect.

Two other important sets of domestic stakeholders (in the importing country) are common: consumers of the product, and sometimes, industries in other unrelated product markets that lose export sales as an indirect result of the initial trade barrier. The first set of other domestic stakeholders, consisting of importers and all other domestic consumers, always exists. This is true regardless of whether consumers are cognizant of their stake in the matter, or whether consumers actually organize to counter the rent-seeking industry's efforts. Consumers vote with their feet in favor of low prices, all else being equal. Their interests therefore align with those of the more-efficient export industry and oppose those of the domestic industry. In the Catfish Wars, the National Fisheries Institute (NFI) has represented the interests of US catfish consumers on several different levels, thereby accounting for some of domestic consumers' stake in the matter. A second set of other domestic stakeholders consists of any domestic exporters in other product markets indirectly harmed by the trade barrier (e.g., due to retaliation or "trade wars"). When the protectionist trade barrier at issue is controversial, the threat of retaliation abroad may jeopardize these exporters' future sales. These domestic producers are accordingly stakeholders, and their interests are aligned with those of foreign exporters and domestic consumers. At least two scenarios in which other US export industries experienced harm following the catfish industry's rent-seeking activities are readily identifiable. One involves the US herring industry, which unfortunately, never had the opportunity to foresee the problem it faced. The US trade representative had to decline the herring industry's request to challenge a regulation in the European Union (EU), which effectively banned it from using the label "sardines" in the EU export market, because the regulation was so similar to the 2002 catfish labeling provision that the United States already had on the books (Cho 2005). A second example involves the US beef industry, which has organized against the 2008 catfish inspection law discussed herein. It fears that it could bear the losses resulting from retaliatory protectionism in Vietnam should a real, bilateral "trade war" gain traction (*Wall Street Journal* 2009b).

NTBs as Vehicles for Disguised Protectionism

The NTBs imposed in the Catfish Wars were controversial because they surprised Vietnamese exporters and frustrated their business expectations. This sort of problem has become common in international trade. Disagreements over whether NTBs represent *disguised* protectionism (or do so in violation of binding trade agreements) can easily occur without being resolved, as distinguishing legitimate policy reasons for an NTB from unnecessary protectionist impact is often quite difficult (Jackson 1989, 208). As such, disguised protectionism is a part of reality, and often a problem that exporters must manage.

Analysts have suggested that an upsurge in NTBs tending to foster protectionism—among the most common culprits today are the antidumping and countervailing duties laws, and various latently discriminatory regulations that might contain onerous substantive terms or create procedural hurdles that uniquely implicate imports—has coincided with the reigning in of tariffs over time (e.g., Ray 1987; Gould and Gruben 1994; Bhala 1995). Signatories to the General Agreements on Tariffs and Trade (GATT) managed to reduce tariffs on an international scale by gradually strengthening the tariff bindings rules and developing new ways to bargain with each other toward mutually beneficial arrangements while preserving their individualized needs to protect domestic interests (Jackson, Davey, and Sykes. 2008, 376-90). But a global reduction in tariffs does not necessarily mean a mass migration toward free trade. Rather, special interests and governments appear to have mastered another strategy tending to circumvent the upfront cost-benefit assessment that makes governments think twice before slapping on tariffs—the use of low-visibility NTBs as vehicles for disguised protectionism (e.g., Ray 1987; Gould and Gruben 1994; Bhala 1995; Vandenbussche and Zanardi 2010). If liberalization (or at the very least, predictability) is to be considered as a road to progress in international trade, the chaotic uprising of low-visibility NTBs disguising protectionism has distorted visibility on that road, making it difficult to gauge market conditions for what they are. Likewise, it is difficult to gauge with certainty the direction in which the international trade world is moving in today's World Trade Organization (WTO) era.

While governments might not agree on the implications of disguised protectionism or what might be done about it, one consequence is clear: exporters stand to lose from it. This article seeks to define the term "disguised protectionism" (a term that lacks an agreed-upon definition) in a way that recognizes this reality. Two tentative definitions are offered below. First, where an NTB purportedly serves a neutral, nonprotectionist purpose, disguised protectionism would seem to exist to the extent that the NTB does something else (or fails to relate to the

purpose in the first place), and in tandem, offsets the comparative advantages of foreign competitors with unnecessary costs. This problem can have a noticeable impact on competitors in growing economies, as wealthier countries can impose technical NTBs that offset comparative advantages mostly attributable to lower costs of living (Cho 2007; National Foreign Trade Council 2004). Without a doubt, this theme is implicated in the Catfish Wars. Second, a more relaxed definition of disguised protectionism might include any NTB placing a burden on exporters when the value of that burden to the exporter is unnecessarily difficult to ascertain prospectively. Because exporters want to know the rules ahead of time in order to optimize sales, an NTB would fall into this category to the extent that it creates an unnecessary guessing game for exporters. Principles that bind WTO members, such as the national treatment requirement for imports,[1] or transparency requirements regarding notification about policies affecting trade,[2] can afford some limited resistance to certain forms of disguised protectionism that would fall under the two definitions offered above. But as the Catfish Wars demonstrate, they offer nothing near a guarantee of insulation from disguised protectionism. As such, export industries today need to plan for (and ideally, plan around) the threat of disguised protectionism on their own initiative.

This article is divided into three sections below. The first section discusses the NTBs imposed during the Catfish Wars and the circumstances showing the presence of disguised protectionism. The second section discusses the incentives and systemic features that can facilitate protectionist rent seeking by US industries. The third section discusses how exporters can plan ahead in order to take the potential sting out of disguised protectionism. The main recommendation offered in the third section is the development of networks between foreign export industries and consumer-oriented groups (i.e., those which represent or otherwise share the interests of stakeholders on the US consumer side). Such networks can coordinate closely aligned interests and thereby minimize the potential impact of disguised protectionism.

The Catfish Wars: A Case Study of Rent Seeking, NTBs, and Disguised Protectionism

The US catfish industry's rent-seeking strategy aimed to obstruct the flow of catfish imports and resulted in the imposition of multiple NTBs. This strategy appears rational in light of the US industry's superior organizational capabilities coupled with its competitive disadvantage against imports.Vietnamese producers had first cracked the US market in the late 1990s (notably, US delegations had encouraged the growth of Vietnamese aquaculture), and their sales flourished due to low prices. The competitive edge of the Vietnamese producers is an example of the rule of comparative advantage: lower labor costs in Vietnam enable the Vietnamese industry to sell at much lower levels than the US industry (Roney 2010). By 2001, many US producers were incapable of meeting the lower prices of Vietnamese competitors without pricing below the cost of production (Thai 2005, 11). Organizing in support of import restraints may have therefore been the best strategy for a fading industry seeking to preserve its leverage in the US market. The domestic industry, organized through the CFA, accordingly lobbied its representatives in the US Congress (asking for import restraints, all of which have been NTBs with purportedly nonprotectionist aims) and launched a media campaign. Such efforts have continued to this day.

The CFA and its proponents have sought to avoid the idea that protectionism is at the heart of the matter by shifting attention to a clever (albeit often inflammatory and unrealistic) set of charges against the competitors in Vietnam. A consistent theme in the CFA's narrative of the story has been the portrayal of the US industry as a protector of American consumers. For example, an early idea urged by US industry proponents was that Vietnamese competitors mislead US consumers who had intended to buy US farm-raised catfish (Cho 2005, 321-22; Tran 2005, 15). Today, the CFA's main marketing tool appears to be the idea that imports contain health risks. US industry members have reasoned that if such risks become real problems, this would taint the public perception of US catfish (Fausset and Simon 2009; Roney 2010). These arguments, among other efforts, have continued to be part of the US catfish industry's rent-seeking strategy, which is ongoing to this day.

While national newspapers and other noticeable independent voices have fostered a frank discussion of the protectionist aims of the US industry's strategy (e.g., Brasher 2001; McCain 2001; *New York Times* 2003; *Wall Street Journal* 2009a, 2009b), the strategy has achieved some success. Three NTBs have marked the Catfish Wars to date. First, the US Congress passed a law in 2002, which effectively barred overseas producers from labeling their products as "catfish," and reserved that label for US producers. Second, beginning in 2003, the US Department of Commerce (Commerce) and the International Trade Commission (ITC) ordered the imposition of antidumping duties against catfish imports from Vietnam. Third, Congress passed another statute in the 2008 Farm Bill that mandated inspection of catfish by the US Department of Agriculture (USDA), although notably, this law has an uncertain future and it could be repealed or implemented so as not to impact trade at all. The US industry has obtained some of what it wants from the government (although not enough in its view), and it seems likely to keep trying in the future in more ways than one, as a very wide competitive gap remains between United States and Vietnamese prices.

This section discusses disguised protectionism with respect to the 2002 labeling law, the antidumping order, and the 2008 inspection law, and concludes that the first two fall under the ambit of disguised protectionism. Two key reasons support this conclusion. First, rather than merely serving the neutral proposes advanced by proponents, these two NTBs went further, affecting the US catfish market in unnecessary ways and offsetting the competitive advantages of Vietnamese exporters in the process. Specifically, the 2002 labeling law accomplished more than simply eliminating confusing product labels, even though other less restrictive means could have accomplished

that goal. The antidumping order, in a similar vein, effectively did more than simply offsetting the Vietnamese respondents' dumping margins (assuming that dumping had taken place). Second, both contained an aspect of surprise that frustrated the business expectations of Vietnamese exporters. This problem caused unnecessary losses for exporters, and in turn, adversely affected catfish consumers in the United States and around the world.

The 2002 FDCA Labeling Amendment

The 2002 labeling law was a discriminatory restraint on imports designed to preserve the US market for the domestic industry by giving domestic producers exclusive rights to label their products as "catfish." The law, which passed as a rider in the Farm Security and Rural Investment Act of 2002 (commonly referred to as the "2002 Farm Bill"), amended the Food, Drug, and Cosmetics Act (FDCA) to provide that a product would be considered misbranded for labeling purposes "if it purports to be or is represented as catfish, unless it is fish classified within the family *Ictaluridae*."[3] Thus, Vietnamese exporters could no longer access the US market if their products were labeled as "catfish."

According to the US catfish industry, the FDCA labeling amendment was necessary to stop foreign exporters from using misleading product labels to sell their catfish in the US market. Indeed, some of the Vietnamese imports bore labels such as "Cajun Delight" and "Delta Fresh," which could conceivably cause consumers to believe that the fish had come from the southern region of the United States. The industry's argument was essentially that US sales had been lost because ordinary American consumers—who would tend to associate "Cajun" with southern Louisiana, and assume that "Delta Fresh" pertained to the Mississippi River delta—mistakenly bought Vietnamese imports when they intended to buy US products (Cho 2005, 321-22; Tran 2005, 15).

However, the FDCA labeling amendment was not consistent with the purpose of clarifying product labels for the benefit of consumers. In spite of the FDCA's mission statement emphasizing the need to provide consumers with clear, descriptive, and nonmisleading product labels,[4] the amendment actually appears to cause consumer confusion rather than to eliminate it (Cho 2005, 323). For example, an ordinary US consumer would almost certainly find the common name "catfish" to be a more helpful product label than the taxonomic name of the species (e.g., *basa* and *tra*), which many Vietnamese exporters switched to using in order to comply with the FDCA amendment. A quick survey of food labels at a local grocery store would show that consumers regularly depend on common labeling terms to make informed purchases. Seafood labels designating products as "swordfish," "tuna," and "sardines" are all similar to the label "catfish," in that each one encompasses many organisms sharing commonly known characteristics. Thus, banning the term catfish for a particular group of import labels appears to fundamentally mislead consumers, making the FDCA labeling amendment inconsistent with the stated justification of helping consumers to make informed purchases (Cho 2005, 323).

A more serious problem pertains to the discriminatory impact of the FDCA labeling amendment: even if the stated purpose of informing consumers had been a valid justification, other alternatives existed that were not only more conducive to this purpose but also less restrictive on imports. For example, using more specific geographic terms to label true US species or implementing a voluntary labeling scheme among US producers would allow consumers to identify US products. While the labeling amendment discriminated against imports by giving US producers exclusive rights to use the label "catfish," voluntary labeling within the United States would have been a nondiscriminatory way to achieve the same purported goal (Cho 2005, 322). Alternatively, the country of origin labeling requirement (or "COOL," which was also part of the 2002 Farm Bill, although it did not go into effect until 2004)[5] would be sufficient to accomplish the purpose of informing consumers with a lesser degree of restriction. Since other less-restrictive alternatives could have better achieved the supposed purpose, the FDCA labeling amendment may have violated the principle of national treatment—a rule that has bound the United States and Vietnam since their signing of a Bilateral Trade Agreement (BTA) in 2001 (Cho 2005, 323-24), several years before Vietnam obtained this protection by virtue of its WTO membership.

Moreover, one can consider the US catfish industry's competitive struggles against Vietnamese producers during the relevant time frame and its previous efforts to thwart foreign competition as circumstantial indicators of an underlying protectionist purpose. Even before the FDCA labeling amendment, the US catfish industry had turned to rent seeking to stunt the progress of Vietnamese competitors. Most notably, legislators in some of the industry's key states tried to thwart the US Senate's ratification of the 2001 BTA between the United States and Vietnam, but to no avail (Cho 2005, 319). It should be no surprise that the domestic industry tried its hand at rent seeking again by lobbying Congress, and influencing the enactment of the labeling provision as a rider in an appropriations bill.

The Imposition of Antidumping Duties

The antidumping case in the Catfish Wars is likewise an example of rent seeking and disguised protectionism, because the dumping margins assigned by Commerce were invalid (i.e., too high) and unreliable. (As discussed herein, the problem runs far deeper than Commerce's decision making; it derives primarily from provisions in the Tariff Act itself).

Similar to antisubsidies laws (which allow for the imposition of countervailing duties to offset subsidies), antidumping laws exist to "level the playing field" for domestic industries against foreign competitors by allowing governments to impose duties on imports priced at less than fair value (LTFV). LTFV means less than what the normal price of the product is (or would be) in the exporter's home market.[6] Antidumping duties are calculated to reflect the estimated margin of price

discrimination,[7] which is called the "dumping margin."[8] Antidumping orders have become increasingly prevalent as NTBs in the international trade community, and rising concerns over the use of antidumping law as disguised protection have characterized the WTO era (e.g., Gould and Gruben 1994; Bhala 1995; Vandenbussche and Zanardi 2010). Notably, there is an agreement on the implementation of antidumping law that binds WTO members,[9] but it is often seen as too lax in application, and incapable of filtering out the bad calculations that amount to disguised protectionism (Gould and Gruben 1994). Moreover, it permits a curiously wide variety of methodologies to be used for the calculation of duties, venturing well beyond the traditional practice of simply measuring the margin of price discrimination as the dumping margin. Petitioners in the United States have flocked to such expansive methodological options as they became available under the Tariff Act. The rise in popularity of such methodologies invites the inference that petitioners have exploited them and enjoyed a trend toward overenforcement, that is, a growing tendency for dumping margins to account for more than merely the margin of price discrimination or the functional equivalent thereof (Clarida 1996, 360-61; Lindsey and Ikenson 2003).

The US antidumping laws are found in the Tariff Act of 1930. Typically, domestic industries initiate antidumping investigations against their foreign competitors. Investigations involve two executive agencies, which make findings as to whether two basic elements exist: (1) dumping and (2) material injury. First, Commerce determines the extent to which dumping or the likelihood thereof is taking place.[10] Second, the ITC determines whether "by reason of" dumping, the US industry has incurred material injury, or the threat thereof.[11] If both agencies make positive findings, the Act mandates the imposition of antidumping duties in the amount of the dumping margin.[12] Administrative review of an antidumping order is available beginning two years after an order is issued or upon a showing of changed circumstances, and a mandatory administrative "sunset review" takes place after five years to determine whether orders should be continued.[13] Judicial review is also available, but the chances of overturning administrative orders are often quite low, since courts give substantial deference to agencies' factual findings[14] and policy determinations.[15]

Whether antidumping law is a form of disguised protectionism may depend on case-specific questions. Because it sacrifices efficiency and consumer welfare to protect domestic producers, it appears to be a form of protectionism at the very least. By and large, dumping is not predatory: it rarely, if ever, presents the long-term threat of market foreclosure followed by a price increase or output restriction (Waller 2009, § 3.13). Despite the fact that domestic consumers' interests tend to be substantially greater in the aggregate than those of the protected industries that benefit from antidumping enforcement (Anderson 1993, 115), antidumping law blocks the lower, nonpredatory prices that would benefit consumers. Therefore, it appears to be protectionist by definition. (Ideological debate over the social and economic utility of protectionism in general is, of course, beyond this point). Some proponents of antidumping law would argue that it is not protectionist, but rather "counterprotectionist," because antidumping duties merely offset the so-called artificial advantages that dumpers leverage over domestic industries in importing countries (Mastel 1998, 15-17). Proponents might further argue that even if antidumping law is protectionist, it is not a form of *disguised* protectionism, since exporters can readily determine the existence of a "dumping margin" on their own, and can efficiently plan around antidumping law by considering it as a default rule.

Assuming for argument's sake that antidumping law is not necessarily a vehicle for disguised protectionism, the antidumping case in Catfish Wars can be distinguished as a case of disguised protectionism due to the presence of two basic problems reflected in enforcement. The first problem pertains to validity: some of the rates assigned during the Catfish Wars—particularly the Vietnam-wide rate assigned in the first antidumping order (issued on August 12, 2003)[16]—were indisputably higher than an accurate measurement would have yielded. The second problem relates to reliability: Commerce's measurements of the Vietnamese catfish industry's dumping margins have been unpredictable. For example, unforeseen variances in the surrogate country methodology have limited the abilities of respondents to prospectively self-monitor and to determine the extent to which they may be dumping.

US antidumping investigations have evolved to rely increasingly on methods that deviate from the traditional practice of using the true margin of price discrimination as the dumping margin (Clarida 1996, 360-61; Lindsey and Ikenson 2003). A pertinent illustration of this trend is the "surrogate country" methodology, which Commerce now applies in most cases involving respondents from so-called nonmarket economies (NMEs).[17] China, a frequent target of antidumping investigations, is an example of a country that Commerce currently classifies as a NME. According to the Tariff Act, NME prices presumably do not reflect their normal value (NV) due to the absence of market-based economic forces.[18] Commerce therefore presumes that respondents in a NME case do not have truly separate identities as firms and that all NME respondents should receive the same industry-wide rate.[19] NME respondents have the burden of responding to Commerce's questionnaires and demonstrating the absence of de facto and de novo government control over their businesses in order to rebut this presumption and receive firm-specific rates.[20] Otherwise, all NME respondents in a given country receive the same industry-wide rate, which Commerce typically determines based on the surrogate country methodology.

The Act defines a surrogate country as one in a so-called market-oriented economy (or a country that is otherwise considered appropriate by Commerce) with a level of economic development similar to the NME country in question, and with an industry that produces the same product or like product as the NME industry.[21] For example, India and Bangladesh might be considered as potential surrogates for China and Vietnam, respectively, based on the variable of similar economic development. The ultimate selection of the appropriate surrogate country, however, would depend on an additional inquiry into product similarities.

Commerce determines NV under the surrogate country methodology based on a series of estimates. The first step is to use surrogate country data to estimate the respondent industry's production costs. Commerce finds this imaginary figure by identifying the specific factors of production used by the respondent industry, valuing these factors based on surrogate country data, and then adding them together.[22] From this estimate (which theoretically reflects production costs at fair market value), Commerce creates two other imaginary figures: first, the value of costs pertaining to factory overhead, selling, and other general and administrative expenses (SG&A), and second, the value of a reasonable profit margin.[23] The grand total of these figures represents NV.

The surrogate country methodology may yield unpredictable results, thereby depriving NME respondents of an adequate benchmark with which to prospectively determine the extent to which they may be dumping (Do 2010, 1253). Further, the use of surrogate countries appears to generate findings that do not account for the comparative advantages of respondent industries and that tend to favor antidumping petitioners (Cho 2009, 383; Lindsey and Ikenson 2003).

Another example of a nontraditional method for estimating NV is the use of "facts available." The idea behind this method is simply that Commerce can use other reasonably available information when respondents' submissions are not complete.[24] Further, the Tariff Act provides that Commerce may draw *adverse* inferences against respondents upon determining that they have been uncooperative in the investigation.[25] While the rationale for this practice makes practical sense, the risks of invalid or unreliable findings still exist. These risks are particularly apparent considering the complexity of the pricing questionnaires that Commerce distributes to respondents in antidumping investigations, the rapid pace and deadline-driven nature of antidumping investigations, and the fact that investigation questionnaires are written in English. Notably, a respondent's failure to respond "to the best of its ability" to Commerce's requests for information may result in the use of adverse inferences against that respondent.[26] This means that Commerce may assign the "highest rate calculated in the initiation stage of the investigation from information provided in the petition (as adjusted by [Commerce])."[27] In NME cases, such penalization against one respondent may affect many others. That is exactly what happened in the first catfish investigation. The Vietnamese government did not respond to any of Commerce's requests, and Commerce accordingly drew adverse inferences when determining the Vietnam-wide dumping margin.[28] The fact that Commerce had classified Vietnam as a NME (in which firms presumably shared the same dumping margin) required Commerce to apply this high-end estimate of the dumping margin to *all* respondents that had not demonstrated entitlement to a firm-specific rate.[29] While ten of the eleven firms that had submitted price information and sought separate rates were successful (including all four "mandatory respondents," which were likely among the highest-volume shippers),[30] these were only a fraction of the fifty-three respondents that Commerce had investigated.[31] Several respondents did not have the informational resources or business record-keeping systems necessary to adequately respond (Do 2010, 1250). Others might have determined that the costs of responding were too prohibitive and that the better financial decision would be to accept an industry-wide rate in lieu of responding. Unfortunately, those nonmandatory respondents that opted not to apply for separate rates were left with a deliberately high rate of 63.88 percent pursuant to Commerce's use of adverse information available.[32]

The first antidumping order raised questions of both validity and reliability, illustrating important policy concerns pertaining to US antidumping law. With respect to validity, even if "dumping" (price discrimination or the functional equivalent thereof) had occurred, the rates assigned for many respondents were higher than an accurate measurement would have indicated. As for reliability, the respondents could not have reasonably known *how* Commerce would calculate dumping margins in an antidumping investigation. For example, Commerce's designation of Vietnam as an NME and its use of Bangladesh as a surrogate country for Vietnam were details that did not become known until the actual investigation unfolded. This reflects an enormous policy problem arising from the surrogate country methodology: NME exporters lack an adequate benchmark with which to determine whether they may have been dumping, since they do not know in advance the actual data upon which Commerce would rely in an investigation (Startup 2005, 1988; Do 2010, 1253). The fact that Vietnamese producers depended on the US market for around 60 percent of their export sales at the time of the initial antidumping investigation worsened the impact of this problem (Ludo and Tu 2008, 20-22).

Subsequent antidumping orders (based on administrative reviews and reviews of new shippers) have continued to foster the problem of disguised protectionism. On one hand, subsequent reviews in the catfish case did eliminate some of the problems in the initial order that are identified above. The review system allowed for exporters to adequately prepare the information requested by Commerce, to avoid the application of adverse information available, and in many cases, to obtain minimal rates (Do 2010, 1243-44). On the other hand, lack of reliability in enforcement, perhaps most noticeably created by use of the surrogate country methodology, continued to be an obvious source of frustration for exporters and a costly flaw in the system.

The results of the sixth antidumping duty administrative review and sixth new shipper review (which were released on September 15, 2010)[33] show how serious the reliability problem can be, even beyond the initial order, when the surrogate country methodology is used: changes in the designated surrogate country can lead to absurd variations in the dumping rates. In the sixth review, Commerce changed the surrogate country from Bangladesh (which it had used in all of its previous determinations of dumping margins) to the Philippines.[34] The change led to dumping margins ranging from $2.11 to $4.22 per kilogram[35]—an amount reflecting roughly 60 percent to 120 percent of the average price for imported *basa* and *tra*

catfish (VASEP 2010). Even more telling is the fact that this drastic jump in rates occurred even though prices remained level (and actually rose slightly) around the same time frame as the period of investigation (Pangasius-Fish.com 2009). VASEP protested the results of the sixth review, contending that Commerce's selection of the Philippines as a surrogate country was unreasonable, given that the overall production capacity in the Philippines's industry is only a tiny fraction of the typical production capacity in Vietnam (VASEP 2010).

Commerce's preliminary findings in the sixth review had widespread implications. Vietnamese exporters considered a likely exit from the US market, since such rates would have raised their costs to the point of making future business in the United States unattractive and irrational (Thai 2010). One factor at least softened the potential blow for Vietnamese exporters: by this time, a number of export markets other than the United States had been made available. Thus, the Vietnamese were more capable of cutting their losses and adjusting to an unexpected trade barrier than they had been years earlier. Unlike the situation in 2003, when the viability of Vietnamese catfish industry depended predominantly on US export sales, the industry had since evolved to do business in a diversified set of export markets (Ludo and Tu 2008, 20-22). But in spite of this, the Vietnamese industry would still have suffered immensely due a characteristic unique to US antidumping policy that adds even more unpredictability for exporters: duties are assigned retrospectively. However, this could change in the near future. Congress has considered the idea of changing the law, and last year, it sought and obtained a report from Commerce as to the implications of shifting to a system with prospective calculation of duties (International Trade Administration 2010).

Perhaps the most negative and inescapable implications of Commerce's sixth review preliminary findings were those faced by US stakeholders (i.e., catfish consumers and exporters selling in Vietnam). The higher rates would have reduced US consumer welfare by creating higher prices and causing efficient competitors to abandon the US market. Further, sources indicated that retaliation against US food exports in other product markets was likely (VASEP 2010). Thus, both of these sets of domestic stakeholders were put at risk, and unlike the Vietnamese industry, which had the option of exporting to other countries, these domestic stakeholders had no practical way with which to mitigate their economic losses.

But as time would eventually tell, the negative economic consequences that seemed imminent following Commerce's preliminary findings in its sixth review did not come to pass. In its final order (issued on March 22, 2011), Commerce reversed its findings, determining that duties would be implemented based on Bangladeshi values. In other words, Commerce decided that Bangladesh was still the most appropriate surrogate country, consistent with its findings in the first order and the previous sets of reviews. The precise ground for this reversal was the finding that the Bangladeshi values for the period of review constituted a "fuller set of data more appropriate for use" as surrogate values. This is not an explicit requirement under the Act or even Commerce's regulations; rather, it is one of several factors that Commerce looks to for guidance in the event of otherwise-unresolved surrogate country selection issues. Details vehemently raised by the respondents as to why using Philippine surrogate values artificially reduced the comparative advantage of Vietnamese competitors—including the nascent state of the Philippine industry, and its rapid growth and volatile pricing patterns during the period of review—ultimately informed Commerce's decision.[36] Thus, the disastrous consequences that would have resulted from using the new and unexpected surrogate values were avoided. This twist in the story is one reason to hope that as Vietnamese industries become increasingly familiar with antidumping and countervailing duties investigations around the world, they will encounter more reliable enforcement results.

The 2008 USDA Inspection Law

Even after the initial imposition of antidumping duties in 2003, the CFA's lobbying activities led to the enactment of another piece of legislation—this time, a rider in the 2008 Farm Bill that required the USDA to develop a new program to inspect catfish.[37] USDA has not yet implemented the regulatory scheme required under the law. And in spite of the law's existence, the ultimate impact of this law on imports (if any) is unknown as of the time of this writing. The answer could turn on questions not yet resolved. One potentially controlling decision is whether USDA will define "catfish" to encompass imports. Another is whether a bill introduced on March 7, 2011, by Sen. John McCain (R-Ariz)—a proposal which, if enacted, would repeal the USDA inspection law altogether—eventually becomes law.[38] The USDA inspection law is discussed below both in terms of its potential trade implications and as an illustration of a proposed NTB that has invoked an organized response from domestic stakeholders opposed to it.

The purpose of the 2008 USDA inspection law, according to its proponents, has been to require foreign catfish production facilities to meet the same health and safety standards as those imposed on meat and poultry under US law (Fausset and Simon 2009). While the future of the law and the details of its implementation are uncertain, the US industry's idea has at least some plausibility. The law appears to be facially neutral, and the purpose seems both legitimate and timely raised as a matter of concern in aquaculture. The CFA has called attention to the likelihood that a significant percentage of catfish import shipments that would otherwise be rejected due to testing positive for unapproved—and therefore, unlawful—antibiotics (if they were to be selected under the random sampling method of inspection used by the Food and Drug Administration [FDA]) actually go on to clear customs and enter the United States without consequence. This could reflect a real enforcement hole as opposed to merely being a consequence of an adequately functioning risk management system. For example, a recent Government Accountability Office (GAO) report cited this and other problems in the FDA inspection system, specifically calling attention to the FDA's failure to implement its

routine sampling methodology and other measures in a way that compelled regulatory compliance at the source of production.[39] However, with the purpose of the USDA inspection law seemingly lined up for use against imports, the statute itself stops short of defining the term "catfish" so as to cover them. Thus, it does not directly defy the supposed logic behind the 2002 FDCA labeling law by admitting that Vietnamese *basa* and *tra* are essentially "catfish." Instead, the CFA is hoping that the USDA will do so in the regulation.[40]

Although an actual analysis of the law is still premature, a few circumstantial observations (in addition to the ironic reversal from the 2002 labeling law definition) warrant some suspicion that disguised protectionism is in the works. First, the USDA inspection law curiously pertains only to catfish. The CFA has proposed that aquaculture should be regulated not only through FDA's inspection of seafood imports but also under the USDA scheme, reflecting the reality that fish farming is substantially similar to the farming of livestock and poultry. In other words, the idea is that aquaculture is agriculture, and should be regulated as such under the USDA's system. But this begs a practical question: Why does the USDA inspection law not cover any form of aquaculture other than catfish farming? Second, the CFA's proposed theory that public health is jeopardized by imported catfish is mostly unsubstantiated, even though the industry's complaints about failures of regulatory oversight are not unfounded. The level of risk resulting from import shipments that somehow violate FDA rules but still manage to enter the United States remains quite ambiguous. The CFA's portrayal of the issue as one of high concern for consumers seems imaginative. Notably, this is why the "consumer rhetoric" strategy tends to be effective. Individual consumers are largely unfamiliar with the FDA's system, and lack the necessary foundation that would enable one to make a fair comparison of different food safety risks. Still, consumers would obviously like to avoid any potential health risk they hear about. Since it is impossible to deny that unknown risks of food consumption *might* exist, an industry seeking to accomplish protectionism under the guise of health regulation can lean heavily on this truism. Aside from leading consumers toward unqualified assumptions about the risks of catfish imports, the CFA campaign materials color in the rest of the story with inflammatory images of polluted "third world" conditions used to raise fish and other unflattering portrayals of the competition that may border on poor taste (e.g., Catfish Farmers of America 2007, 2010). Even with all of this being said, any rational business interest can, and should, be expected to cry "foul" over a well-founded suspicion that even a small amount of its competitors evade regulatory requirements. The issue to watch for with respect to the 2008 USDA inspection law is whether, in light of the purported problem, the effect of the law on imports is more onerous than it ought to be (in either a procedural or substantive sense).

While the USDA inspection law was pending implementation after its enactment, something interesting happened: opponents of the law (including those from a different US export industry) organized successfully enough to create an ongoing question as to whether the law will indeed impact international trade. That question now hinges on two uncertainties: (1) whether the USDA will define "catfish" to cover imports and put the law into force and (2) whether Congress will enact into law a bill recently introduced by Sen. John McCain (R-Ariz), which would destroy the USDA inspection law.

With respect to the first uncertainty, any ultimate impact of the law would depend on the scope of USDA's definition of "catfish," along with the details of the regulatory scheme and how it is implemented. Domestic concern about trade tensions has included the fear of a beef boycott in Vietnam, which has prompted the US beef industry to oppose the US catfish industry's campaign (*Wall Street Journal* 2009b). Importers, retailers, and other consumers have also organized. They argue that due to the often-cumbersome process of negotiating USDA "equivalents" agreements, a USDA definition covering imported catfish may result in a "freeze out," effectively barring *basa* and *tra* imports for a significant period of time (i.e., from several months to several years; SeafoodSource.com 2010). Such a "freeze out" presents the threat of disguised protectionism not only due to potential overlap with the FDA and the degree of surprise involved, but also because it could offset the export industry's comparative advantage as a competitor through an onerous—and perhaps, purely procedural—barrier to entry. A likely result of the strong domestic opposition to the USDA inspection law has been additional action in the executive branch, effectively delaying the USDA's enforcement of the law. Specifically, the US Office of Management and Budget (OMB) has identified the law as a sensitive trade matter and has closely scrutinized the USDA's drafting of regulations. This has resulted in multiple requests for time extensions beyond the time frame contemplated under the law itself (Kindy 2010).

With respect to the second uncertainty, the chance that Congress will pass Senator McCain's bill and repeal the USDA inspection law, this possibility seems quite likely considering that the bill brings the trade controversy out into the open, whereas the implications of USDA inspection proposal, a rider in an important and lengthy appropriations bill, were hidden away in the past. Senator McCain's presence as an independent voice against both the 2002 FDCA labeling amendment and the 2008 USDA labeling law has been unique; it appears to show a commitment to liberalizing trade relations between the United States and Vietnam that is independent of political pressure from local business interests. Meanwhile, the presence of the new bill invites the political demands of other domestic constituents—the same stakeholders interested in limiting the scope of the USDA's regulations—to lobby their legislators in Congress. Based on the geographic dispersion of the ten Senators cosponsoring the bill at the time of this writing (including both Senators in the States of Maine, Idaho, and New Hampshire), it appears that US business interests specifically threatened by the USDA inspection law are responding.[41]

Which side will prevail remains to be seen. The US catfish industry, advantaged in rent seeking and likely to rely on it as

Figure 1. Catfish farmers of America advertisement.
Source: http://www.safecatfish.com/campaign/.

long as its competitive disadvantage remains wide, will not give up on the USDA inspection law without a fight. The CFA has responded with more public relations campaigning, again targeting its own consumers and suggesting that its foreign competitors expose the public to health risks (see Figure 1). Playing its unabashedly biased role as a consumer advocate, the CFA has gone beyond subtly asking its buyers to pay higher prices; it has adamantly called on consumers to do some of its legwork in the policy arena. Specifically, the CFA has urged consumers to write the Secretary of Agriculture and the President, to demand prompt implementation of a catfish inspection scheme that would cover imports. Archives of the CFA's campaign materials, including newspaper and magazine advertisements and messages targeting consumers over the "health and safety" implications of imports, can be found at http://www.uscatfish.com/catfish-farmers-of-america-news.html and http://www.safecatfish.com/campaign/.

Factors Facilitating the Creation of Disguised Protectionism

A rent-seeking strategy may succeed in spite of the widespread inefficiencies that it would cause to other stakeholders on account of protectionism, or, going a step further (as discussed in the introduction of this article), the more complicated problem of *disguised* protectionism. The organizational phenomenon attributable to a protectionist's ability to win what it wants through rent seeking is called the collective action problem. Under the collective action problem, domestic producers are likely better situated to influence trade policy than consumers, whose interests are generally larger in the aggregate, but less concentrated and therefore more difficult to organize (Olson 1971). In the international trade context, imposing a protectionist measure pursuant to a rent-seeking industry's request in a competitive market causes a loss in aggregate gains from trade (Sykes 1998, 71). This tends to be true domestically as well: the domestic consumers will generally lose more than the other domestic stakeholders (i.e., producers and sometimes the government, the latter of which could either gain or lose) will gain together (e.g., Anderson 1993, 115; Sykes 1998, 71). All of this is true when one incorporates into the assumptions that the form of protectionism being used is plainly visible.

Disguised protectionism, then, would seem to cause *additional* losses—at least for exporters, other aligned stakeholders, and perhaps the government entities spending resources to administer NTBs—beyond those that are accepted under plainly visible protectionism. These additional loses would tend to occur due to a lack of clarity and predictability, and the inability for exporters to plan for or around it in an optimal manner. But proposing an NTB that disguises protectionism may be a rational wealth-maximizing strategy for a domestic industry facing a competitive disadvantage. Some of the major organizational, economic, and political factors that incentivize or may facilitate the pursuit of disguised protectionism through NTBs in the United States are identified below.

First, the organizational advantage of domestic producers can translate into superior public influence on behalf of the industry. Perhaps the most important example of a domestic industry's organizational advantage in use is found in superior lobbying. Lobbying is the main way of influencing the US lawmaking process. Lobbying might be optimistically viewed as an efficient bargaining strategy that a variety of interest groups can successfully employ. But that characterization may not be realistic, particularly when the collective action problem becomes manifest. Where a large set of widely dispersed interests is not well organized and thus not strongly represented among lobbyists, the legislative process may give priority to an adverse set of interests that is smaller but better organized. The result is arguably Kaldor-Hicks inefficient because the set of interests with the higher overall threat value does not prevail. This deceiving matchup of economic interests (where the "small-but-concentrated" group of interests appears bigger than the "large-but-dispersed" group) frequently takes the form of "businesses versus consumers" in congressional lobbies. Consumers may have neither the necessary information to know when their interests are threatened, nor the organizational tools necessary to lobby effectively. Further, a consumer–stakeholder is unlikely to respond if he has so little to lose that the cost of organizing would outweigh his individual threat value. This tends to happen most at the lowest levels of

consumption, where the combination of wide consumer dispersion and small individual threat values is most predominant. In these scenarios, consumers may lose (perhaps unknowingly) to smaller but more concentrated business interests that lobby Congress more effectively (Lamb 2006, 166).

The same organizational advantage used to secure rents by lobbying Congress can similarly carry over to other activities. One example involves communicating with the executive branch of the US government. Industries that work closely with particular administrative agencies (e.g., because they are subject to routine regulation by an agency or because they regularly use an agency's resources to launch unfair trade investigations) are likely to take advantage of opportunities to communicate with the agencies. For example, these industries might regularly submit public comments for proposed rulemakings. In a more general sense, close proximity between an agency and a domestic industry may help the domestic industry to gain tactical know-how or other subtle advantages over its foreign competition. This factor can be significant when such routine communication leads agency staff members to view themselves as advocates for the industry (Rosenbaum 1999, 11).

Another example of the organizational advantage of domestic producers might be found in the ease of transmitting the domestic industry's message to the public through the media. Rent-seeking industries often use media campaigns cloaked with "consumer advocacy" rhetoric to boost their public image and to conceal the essence of the real economic struggles taking place, which pit the industries against their own consumers (Laband and McClintock 2001, 59). Media campaigns calculated to generate suspicion about imports are among the classic warning signs of impending protectionist trade measures (Brightbill, Chang, and Clarke 2006). Sure enough, this feature has been persistent in the Catfish Wars, where the CFA has used the media in order to reach the public and to strengthen its more formal political endeavors aimed at the policy-making process. The US industry appears to have found the strongest support for its "consumer health" narrative in televised news shows, to which the CFA or other domestic industry spokespersons have apparently pitched their side of the story. Such segments, which tend to be as captivating as they are misleading, cleverly knit populist sentiment for American workers into the "health scare" theme. They often dismiss implicitly (if not outright) the idea that a legitimate competitive gap exists between the US producers and overseas competition. Matter-of-fact assertions that a US industry "playing by the rules" cannot compete because overseas competitors are "cutting corners" on consumer safety, or something to this effect, are common (e.g., Today Show 2010; WSB-TV Atlanta 2007a, 2007b). These types of news stories have also spotlighted state government officials from major catfish farming states as "health advocates" scrutinizing imports pursuant to state police power, as opposed to attempting to circumvent the exclusively federal task of regulating international commerce—an activity which, if proven, would violate the US Constitution.[42]

A second incentive for a rent seeker to pursue disguised protectionism through NTBs involves cost. As indicated in the introduction to this article, the costs of rent-seeking strategies aimed at obtaining discreetly protectionist measures tend to be low when compared with the costs of seeking tariffs (Ray 1987) and other relatively visible forms of protectionism (Feinberg and Hirsch 1989). For example, filing an antidumping petition tends to be less costly than seeking a quantitative import restriction (Feinberg and Hirsch 1989). A wealth maximizing industry will presumably engage in rent seeking whenever the gains to be realized from the sought trade barrier are likely to outweigh the industry's expenditures. The low upfront costs of disguised protectionism (at least for the rent seekers themselves) are a distinguishing feature, illustrating the appeal to certain special interests—particularly small groups that are far from economic powerhouses in terms of overall size. The US catfish industry is a fitting example of such an industry.

Third, and somewhat related to the second point (although this example involves only the legislative context), is the presence of "riders" that essentially pass into law without scrutiny. The term "rider" carries a somewhat negative connotation. It refers to a provision that most legislators may see as trivial or even undesirable. Riders typically originate in proposals from legislators representing small sets of interests. Domestic producers may therefore be poised to influence the creation of protectionist riders by lobbying Congress. Riders do not necessarily reflect systemic flaws, however, since the lawmaking process depends on compromises among elected representatives. Also, minority interests might not receive fair representation under the law without riders. Given the high degree of diversity among interests in the United States, let alone the size of the country, the presence of riders in US legislation is unsurprising. Riders may be quite likely to exist in a voluminous appropriations bill such as the US Farm Bill. Notably, the US President is prohibited from issuing "line item vetoes," which might otherwise be used to strike down certain types of riders while enacting the remainder of a bill. The prohibition on line item vetoes is rooted in the Presentment Clause of the US Constitution.[43] The US Supreme Court ruled on this specific issue in 1998, holding that a statute which allowed the President to reject particular provisions within proposed legislation and to enact the rest into law was unconstitutional.[44] Thus, after Congress passes a bill and presents it to the President, the President must choose to either enact or veto the entire bill.

Fourth, in cases where imposing a NTB eventually proves to be a costly mistake in international trade policy, the legislation from which the problem derives is still the law of the land. This could mean that there are few practical ways to address a problematic situation. In some cases, a trade controversy is rooted entirely in a piece of legislation, and the only way to fix the problem is through new legislation that amends or repeals the old legislation. The 2002 FDCA amendment falls into this category.[45] However, in other situations, executive agencies may be able to make policy decisions that affect the trade problem at its source. For example, both US antidumping regulation and the USDA catfish inspection scheme depend in part on agency

discretion. Agency discretion is subject to the limits of the controlling law. The Tariff Act gives Commerce and the ITC limited discretion in antidumping investigations. The agencies are able to make limited decisions concerning how they make factual findings. But they lack the discretion to decide *not* to impose antidumping duties in the event that they each make positive findings.[46] The 2008 inspection law, in contrast, gives the USDA discretion that is much more comprehensive. For example, the USDA could define the term ''catfish'' narrowly, and this could eliminate the potential for *any* restriction on imports.[47]As previously noted, the other option—a proposal for repeal—is now before Congress with respect to the 2008 inspection law. Still, it suffices to say that existing legislation may limit the scope of problem-solving possibilities.

Unfortunately, laws disguising protectionism may not demonstrably harm even prominent domestic interests until postenactment (if anything near an accurate picture of a NTB's domestic welfare effects ever becomes visible), and this makes stopping the enactment of unwise trade policy a difficult task. Congress does have incentives not to pass legislation that jeopardizes US interests. Reductions in consumer welfare, obstacles to US firms' abilities to access foreign markets, and the threat of formal retaliation under the WTO's dispute resolution system are all risks that might deter the enactment of a proposed NTB. Then why would the US Congress pass (and the President sign) legislation that unreasonably carries these sorts of risks? In addition to characteristics of the collective action problem and the US lawmaking process discussed above, another problem appears to lie in Congress' inability to adequately perceive how certain NTBs jeopardize US interests. Such inadequate balancing upfront can happen not only because of the collective action problem itself, but also due to the low costs of pursuing low-visibility NTBs, the relative unimportance of rider provisions, and the presence of bad trade policy in already binding laws (which rent-seeking industries can build on over time).

A Coordinative Approach to Preventing and Responding to Disguised Protectionism

Rent seeking and the use of NTBs that disguise protectionism can pose considerable uncertainties, not all of which export industries can expect to overcome. But as a preliminary matter, prevention should be the first priority. A foreign export industry with a competitive edge in the market need not invest heavily into the rent-seeking game (through lobbying, campaigning, or other efforts designed to affect whether or how NTBs will be implemented), and it will not have the same incentives to do so as the rent-seeking industry. Routine planning and information gathering would seem to be of greatest importance, since these activities may prove to be preventative. Importantly, an export industry would like to know that it can switch to a roughly comparable export market in the event that unfavorable trade circumstances arise in one country. The Vietnamese catfish industry no doubt understands this point. The sharp sting that it experienced when antidumping duties were first imposed could have been mitigated in large part had the industry's ongoing vitality and growth been less dependent on the US export market (Thai 2005, 26). A broad portfolio of reasonably interchangeable export markets is one critical tool for spreading risk and limiting exporters' vulnerability to protectionist shifts in the trading climate. The first priority, of course, is aiming for prevention.

Moving beyond this preliminary observation, this section recommends a coordinative approach that foreign export industries should consider in their efforts to prevent and perhaps confront the unwanted effects of disguised protectionism: export industries should coordinate with US importer organizations and other consumer-oriented groups with closely aligned goals. As Thai (2005, 27-29) indicated in a report sponsored in part by Vietnam's Ministry of Industry and Trade (MOIT), foreign exporters stand to benefit from working with groups that represent the interests of US consumers. An export industry can exploit opportunities to combine with such groups carrying out activities that may be methodical and communication-driven (e.g., routine information-sharing used to improve transparency) or selectively collaborative (e.g., joint lobbying expenditures in a rent-seeking game used to improve the representation of procompetitive stakeholders). First, groups representing the interests of consumers can be critical informational resources. Second, they may serve as political resources, particularly if they are familiar with existing industry standards or are experienced in shaping public policy through lobbying or other activities.

A wide variety of consumer-oriented groups with which exporters can connect may exist. Importers, which likely represent the most-concentrated level of US consumers, are perhaps the most important stakeholders with which foreign exporters can connect. Consumers at levels beneath importers along the chain of consumption may also belong to other potentially helpful organizations. For example, wholesalers and retailers may be members of trade unions. Even nongovernmental organizations (NGOs) with consumer-oriented mission statements or goals may serve as valuable resources. These may not be consumer organizations per se (i.e., instead of being comprised of actual consumer–stakeholders, they may operate as think tanks, watchdog groups, or voluntary programs for producers), but their goals may be largely consumer-oriented. Export industries should seek these groups out to the extent that their consumer-oriented goals overlap.

Coordinating with groups that represent (directly or indirectly) the interests of US consumers can enable export industries to improve foresight of impending protectionist measures, and value NTBs ahead of time for what they are. In addition to improving transparency, such activities might improve the collective voices of stakeholders whose interests weigh in favor of free trade, making the option of carefully calculated participation in a rent-seeking game an attractive option. Improvements in the representative voice of similarly aligned stakeholders might include a greater degree of influence over US trade policy, an improved ability to access the US media and obtain favorable coverage, and perhaps even greater chances at winning over undecided consumers

otherwise susceptible to the biased information campaigns of rent seekers.

Improving Transparency

Most fundamentally, connections among groups representing foreign exporters and US consumers can help exporters to foresee NTBs and to reasonably evaluate the probable impact on future sales (Thai 2005, 27). Adequate anticipation of NTBs before they arise makes NTBs less surprising—and likely, less tolling—for foreign exporters. With better foresight, exporters can more accurately gauge the financial impact of an anticipated NTB. This would allow exporters to consider their options, such as lawfully adjusting price and output, preparing to expand sales in other markets, or seeking formal dispute resolution. Vietnamese shrimp producers have realized the importance of foreseeing NTBs, as VASEP's communication with closely aligned US interests and its close monitoring of the US shrimp market enabled it to predict the likelihood of an antidumping investigation well before it happened (Thai 2005, 22-23). Unlike the catfish industry, which had been blindsided by an antidumping investigation, the shrimp industry benefited from more fortunate circumstances due to adequate foresight. With a considerable amount of time to prepare for the antidumping investigation, and the benefit of having learned from the catfish case, Vietnamese shrimp producers (also members of VASEP) were positioned to properly respond to the antidumping questionnaires. Even the dumping margins turned out to be relatively small in the shrimp case, although this result was attributable to other case-specific factors.

Improving Representation and Public Image

Other potential benefits deriving from coordination between exporter and consumer-oriented groups may result from the opportunity to make more effective expenditures by coordinating activities such as lobbying and media relations. This can lead to an improved representative voice in the policy-making process and in the media.

Exporter organizations may be able to use consumer organizations as outlets for exporters' lobbying expenditures. This would tend to be a more important opportunity in situations where foreign exporters are heavily invested in the US export market and are therefore willing to spend a significant amount of resources to protect their interests.

Aside from lobbying, exporter and consumer-oriented organizations could benefit similarly from participation in administrative rulemakings. In a way, commenting is more independent and less collaborative than lobbying, because an organization's legal counsel must prepare the public comment. Still, exporter and consumer-oriented groups can benefit from mutual communication about proposed rulemakings. This could enable more groups to become more aware of situations in which their interests are affected, whether directly or indirectly. When stakeholders comment on proposed rulemakings through US counsel, they seek to ensure that agencies promulgate rules with due attention to their concerns. For example, a comment in a rulemaking regarding the surrogate country methodology could potentially impact Commerce's policy decisions. An informative comment (which might come from an exporter organization or even a consumer organization that recognizes how the issue bears on the prices consumers pay) might enable Commerce to make methodological adjustments that produce more reliable findings. This would benefit exporters by increasing transparency, and in turn, result in lower prices for consumers.

Export industries can also work with consumer-oriented organizations toward the goal of improving public image and disseminating accurate information about their products. Groups directly or indirectly representing the needs of US consumers—whether their goals primarily revolve around price competition, or on nonprice factors such as product quality and "fair trade" concerns—may possess some of the best means with which to provide public assurance about the industry's product. The NFI, which represents US seafood importers, processors, retailers, and other entities in the seafood industry, is one example of an organization capable of providing such support for reasons directly related to price competition. As an organization comprised of actual stakeholders on the US consumer side, NFI has a direct interest in maintaining trade relations with numerous seafood export industries in order to preserve consumers' cost savings when they are threatened by protectionism. Given its routine practice of cooperating with exporters and its high level of expertise regarding the FDA seafood inspection process, the NFI's value as a communication specialist for export industries is significant. Indeed, the NFI has been instrumental in challenging some of the US catfish industry's most inflammatory "health-related" allegations about imports (e.g., National Fisheries Institute 2010a, 2010b). Another consumer-oriented group that may provide an exceptional boost to the Vietnamese industry's public image in the US and elsewhere is the German-based NGO known as "Global G.A.P." (short for "global good agricultural practices"). Global G.A.P. is a voluntary organization that sets international standards for agriculture and aquaculture producers. The standards are designed to integrate issues such as public health, product quality, and environmental impact at the source of production. The Vietnamese catfish industry—a highly competitive export industry that is prone to being the target of misinformation campaigns when it causes domestic industries in importing countries to lose business—now has access to the Global G.A.P. certification system. The option of demonstrating compliance in order to obtain such certification will hopefully empower exporters in Vietnam and lessen the impact of unwarranted suspicion against imports (Thai 2011).

As previously noted, expenditures in the rent-seeking game on behalf of the free trade interests need not be heavy investments to be effective. In a similar vein, exporter and consumer organizations may not find it necessary to answer to every unqualified claim advanced by a rent-seeking industry in a media campaign; they just need to be effective when they do

communicate publicly. Exporters may feel an urge to respond when consumer scare tactics about "dangerous imports" are embodied in a rent-seeking strategy. For example, Vietnamese seafood producers may be justifiably eager to clear their names after learning about health-based allegations in the US media that are only attributable to the actions of a few competitors (i.e., *other* businesses, which might have nothing in common besides being non-US producers that export to the United States).

Still, the possibility remains that heated communication in the media, whether perpetuated by a specific firm, an industry (e.g., via a trade association), or an industry's overseas competitors, will do more harm than good. Thus, industry trade organizations such as VASEP and NFI might consider devising response methods in order to treat the topic of risk communication with care. Not long ago, beef exporters in the United States and the United Kingdom suffered unwarranted setbacks as a result of the "mad cow" scare in a situation where, unlike the Catfish Wars, a demonstrable human health problem actually existed. Exporters can reduce the odds that unwarranted health-based allegations will adversely affect their sales abroad by learning from case studies of past risk communication problems (e.g., Leiss and Powell 2004).

What is the best plan for an export industry concerned with preventing and responding to the threat of disguised protectionism? The answer will vary. On one hand, the inverse of the saying "desperate times call for desperate measures" may apply, counseling efficient export industries not to worry too much about circumstances resulting from the domestic industry's problems. Exporter and consumer organizations do not need to resort to measures of the same magnitudes as those employed by the rent-seeking industry, since a "free market" (assuming one exists) favors those businesses that compete best on the merits. On the other hand, few can afford to believe in the unwavering existence of a free market given today's international trade climate. To a certain extent, export industries holding a competitive edge over their domestic counterparts in importing countries must prepare for stormy weather, and be poised to react even when the forecast calls for free trade. If they do not, costly nonmarket distortions resulting from rent seeking and disguised protectionism could arrive swiftly and unexpectedly. Coordinating with consumer-oriented groups is one way in which export industries can weaken the potential anticompetitive grasp of disguised protectionism over their future profitability. Using a bit of initiative to implement such a strategy and keep tabs on export market conditions does not provide a guarantee of safety. But it would appear to be a safe bet—something likely to be desirable amid the uncertainty.

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1. See General Agreement on Tariffs and Trade (GATT), art. III, October 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187.
2. See GATT, art. X:1.
3. 21 U.S.C § 343(t) (2010).
4. See 21 U.S.C. § 393 (2010).
5. See Farm Security & Rural Investment Act, Pub. L. No. 107-171, 10816, Stat. 533 (2002) (codified as amended at 7 U.S.C. § 1638 (2010)).
6. See 19 U.S.C. § 1677(34) (2010).
7. 19 U.S.C. § 1673 (2010).
8. 19 U.S.C. § 1677(35)(A) (2010).
9. See generally Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, April 15, 1994, 1868 U.N.T.S 201.
10. 19 U.S.C. § 1673(1) (2010).
11. 19 U.S.C. § 1673(2) (2010).
12. 19 U.S.C. § 1673 (2010).
13. 19 U.S.C. § 1675.
14. See 28 U.S.C. § 1516a(b)(1)(B)(i) (in most cases, a final determination by Commerce is reversible only when "unsupported by substantial evidence on the record.").
15. See Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-44 (courts must defer to an agency's reasonable interpretation when the controlling legislation is silent or ambiguous on the specific issue being addressed).
16. See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. 47909-10 (Department of Commerce August 12, 2003; notice of antidumping order).
17. See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. 4886, 4992 (Department of Commerce January 31, 2003; notice of prelim. deter. LTFV sales).
18. 771(18)(B).
19. See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. 4886, 4990 (Department of Commerce January 31, 2003; notice of prelim. deter. LTFV sales).
20. See id.; See also Sparklers from the People's Republic of China, 56 Fed. Reg. 20588, 20589 (Department of Commerce May 6, 1991; final deter. LTFV sales); Silicon Carbide from the People's Republic of China, 59 Fed. Reg. 22585, 22587 (Department of Commerce May 2, 1994; notice of final deter. LTFV sales).
21. See 19 U.S.C. § 1677(c)(4) (2010).

22. See §1677(c)(1). The range of items to be assessed as factors of production are identified in § 1677(c)(3).
23. §1677(c)(1) (" . . . the administering authority shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses.").
24. §1677e(a) (identifying circumstances under which Commerce can use information available).
25. §1677e(b) (identifying circumstances permitting Commerce to use adverse inferences and identifying the range of sources from which Commerce may draw such inferences).
26. Id.
27. See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. 4886, 4991 (Department of Commerce January 31, 2003; notice of prelim. deter. LTFV sales); see also Stainless Steel Wire Rod From Germany, 63 Fed. Reg. 10847, 10848 (March 5, 1998; notice of prelim. deter. LTFV sales). The Tariff Act requires Commerce to find corroborative evidence when using facts available, to the extent that this is practicable. 19 U.S.C. § 1677e(c) (2010).
28. Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. at 4991.
29. Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. at 4992. See also final determination of sales at less than fair value: Synthetic Indigo from the People's Republic of China, 65 Fed. Reg. 25706, 25707 (Department of Commerce May 3, 2000).
30. See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. at 4990 (naming the respondents qualifying for separate rates); Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. at 4992 (one respondent, Vinh Long, did not qualify for a separate rate because it had not shipped to the United States during the period of investigation).
31. See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. at 4987 (53 exporters were contacted in investigation).
32. Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. at 4991-92.
33. See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam, 74 Fed. Reg. 56062-70 (Department of Commerce September 15, 2010; notice of preliminary results and partial rescission of sixth administrative review and sixth new shipper review).
34. Certain Frozen Fish Fillets From the Socialist Republic of Vietnam, 74 Fed. Reg. at 56067.
35. Certain Frozen Fish Fillets From the Socialist Republic of Vietnam, 74 Fed. Reg. at 56069.
36. See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 76 Fed. Reg. 15939, 15943 (Department of Commerce March 22, 2011; final results of sixth admin. review and sixth new shipper review and the accompanying unpublished Issues and Decision Memorandum at Comment 1, available at http://ia.ita.doc.gov/frn/summary/VIETNAM/2011-6564-1.pdf).
37. See Food, Conservation and Energy Act of 2008, H.R. 6124 §§ 11016-11017, 110th Cong. (2008) (codified as amended in scattered sections of 21 U.S.C.).
38. See S. 496., 112th Cong. (1st Sess. 2011).
39. U.S. Government Accountability Office, Federal Oversight of Food Safety: FDA has provided few details on the resources and strategies needed to implement its food inspection plan (2008).
40. See 21 U.S.C. § 601(w)(2).
41. See the bill summary and status of S. 496., 112th Cong. (1st Sess. 2011), available in the legislative information from the Library of Congress, at http://thomas.loc.gov/cgi-bin/bdquery/z? d112:SN00496:@@@P.
42. The Foreign Commerce Clause provides that state government bodies cannot regulate international trade, as this power belongs exclusively to the federal government. U.S. CONST. art.1 § 8, cl. 3. However, the power to protect public health and safety is reserved to the states. See U.S. CONST. amend. X. For an example of a Foreign Commerce Clause issue that has been resolved in the Catfish Wars, see Piazza's Seafood World, LLC v. Odom, 448 F.3d 744, 750 (5th Cir. 2006) (striking down a Louisiana labeling statute that prevented foreign fish from being labeled as "catfish" as facially discriminatory against foreign commerce).
43. U.S. CONST. art. 1, § 7, cl. 2.
44. Clinton v. City of New York, 524 U.S. 417, 421 (1998).
45. See 21 U.S.C § 343(stating that "[a] food shall be deemed to be misbranded" if the label states that the fish is a "catfish," but the fish is not within the taxonomic family Ictaluridae).
46. See 19 U.S.C. § 1673 (stating that upon positive findings on the elements of dumping and material injury antidumping duties "shall be imposed" in the size of the dumping margin).
47. See 21 U.S.C. § 601(w)(2) (providing that the law applies to "catfish, as defined by the Secretary.").

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Bio

William R. Schubert (JD 2010, Loyola University Chicago) is an attorney in the United States. His training includes emphasis in competition law and policy, among other areas of public and administrative law.