Section 337 of the Tariff Act of 1930: A Private Right-of-Action to Enforce Ocean Wildlife Conservation Laws?

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Editors' Summary

The Tariff Act of 1930, one of the oldest U.S. international trade statutes, has untapped potential to extend the reach of U.S. environmental conservation laws. Section 337 of the Act creates a private right-of-action against imported goods produced or traded using "unfair" methods as defined under U.S. domestic law. Today, §337 is used primarily by technology companies to fight the importation of goods found to infringe valid U.S. patents. But Congress always intended for §337 to have broader application. For example, on the environmental front, §337 would be a powerful weapon in banning the importation of fish caught in international waters using unsustainable fishing methods that are barred under U.S. law.

I. The Scenario

Imagine the following scenario:

A group of U.S. tuna fishermen find themselves at risk of losing their livelihood, due in large part to their compliance with U.S. environmental laws. The fishermen are obliged to abide by U.S. regulations that restrict the use of specific fishing practices which are very harmful to dolphins and other marine species—when fishing for bigeye tuna in international waters. The problem is that many fishing fleets in other Pacific countries, often fishing in international waters, are not limited by these restrictions. Consequently, imported tuna, caught using unfair and ecologically damaging methods, enters the United States at prices far below those that the U.S. fishing fleet can afford to charge, given compliance with U.S. regulation. These imports of cheap tuna threaten to destroy the U.S. tuna fishing industry.

The U.S. tuna fishermen, however, decide to fight back. On behalf of an existing regional Tuna Cooperative, to which they all belong, the fishermen bring a complaint to the U.S. International Trade Commission (USITC) in Washington, D.C. In that complaint, the Tuna Cooperative, joined by an array of oceans conservation NGOs acting as friends of the court, states that their industry is being injured by the unfair acts of foreign tuna fishing fleets, which catch fish using specifically identified environmentally harmful methods. The complaint is accompanied by documents, affidavits, and other evidence that foreign fleets are engaging in destructive fishing practices that are banned under U.S. law. The Tuna Cooperative also submits, under seal, confidential pricing data that shows that the unfairly caught tuna is undercutting the Cooperative's prices and causing substantial financial distress. As relief, the Tuna Cooperative requests a general exclusion order from the USITC, banning the importation of all tuna shipments—from whatever source—that cannot demonstrate that they were caught using sustainable methods. As defendants, the Tuna Cooperative names numerous Asian companies that it believes to be engaging in these unsustainable tuna fishing methods in international waters. The USITC reviews the Cooperative's complaint and determines to initiate an investigation.

For the next 15 months, the Tuna Cooperative's case is litigated before an administrative law judge in a highly publicized trial. The Tuna Cooperative, assisted by numerous national and international environmental organizations, using live witnesses, physical evidence, and expert reports, demonstrates that the defendants have engaged in a range of unfair and ecologically devastating fishing practices. The defendants, particularly Japanese fleets, backed by deep-pocketed industrial fishing interests, fight back in what becomes a morality play about the intersection of money and environmental degradation. The Tuna Cooperative, along

with its allies in the U.S. and global environmental movement, presents evidence that shows the unsustainable practices are widespread and that the defendants are just a small part of a much broader problem of unsustainable tuna fishing in international waters.

The judge then issues a highly anticipated determination, finding that the specific unsustainable fishing practices used by the defendants are unfair and illegal under U.S. law—as expressed through domestic legislation and the numerous international oceans conservation treaties ratified by the U.S. Senate—and that these unfair acts have caused substantial injury to the members of the Tuna Cooperative. On that basis, the judge recommends that the USITC order the general exclusion of all imports of tuna into the United States that cannot be shown to have been caught in accordance with U.S. law and U.S.-ratified sustainable fishing treaties. A few months later, the USITC affirms the administrative law judge's (ALJ's) decision over the vocal complaints of the defendants. The USITC orders the exclusion of all imports of tuna that cannot be established to have been caught using sustainable methods. The USITC's order, a watershed in the private enforcement of environmental protection laws and a key example of cooperation between a U.S. industry and the oceans conservation movement, then moves to the White House for approval or modification. If the White House takes no action, the order will go into effect within two months.

While the USITC's decision is pending at the White House, the defendants, along with a cross section of the global fishing industry, approach the Tuna Cooperative to negotiate a consent agreement, whereby the USITC case and exclusion orders would be stayed indefinitely, and a workable, enforceable regime of certification and compliance would be established. The parties, over the course of several months, work out a certification process involving all the stakeholders—the Tuna Cooperative, the defendants, and representatives of the U.S. government and certain key offending governments. Faced with the prospect of a closed U.S. market if they cannot certify their use of sustainable methods, the defendants and their respective governments, as well as nondefendant commercial fishermen who import tuna into the United States, become highly motivated to improve their fishing practices. The adoption of best fishing practices then becomes an economic imperative, even for countries that have not signed the multilateral conservation agreements to which the United States is a Party.

II. The Mechanism: The USITC and §337

The scenario above is, of course, fictional, but the U.S. legal mechanism that it describes—§337 of the Tariff Act of 1930, as amended—is very real. Section 337 is a broadly written statute that creates a private right-of-action against imported goods produced or traded using "unfair" methods as defined under U.S. domestic law. The unique remedy offered by §337 is an embargo on the continued importation of infringing goods found to have been made in violation of U.S. law. Today, §337 is primarily used by the patent bar to litigate intellectual property disputes in which imported goods are alleged to infringe U.S. patents. The growing importance of §337 is a direct consequence of globalization. Because of the rapid pace and efficiency of litigation at the USITC and the importance of the U.S. market to global producers, §337 has become a key arena for international intellectual property disputes. In many cases, both the complainant and the respondent in USITC investigations are foreign-based; it is not unusual, for example, for Japanese electronics companies to bring patent complaints at the USITC against Korean electronics companies.

Yet the powerful remedy offered under §337—closure of the border to goods found to incorporate practices deemed unfair under U.S. law—was never intended to be the exclusive legal playground of the patent bar. From the beginning, the U.S. Congress intended for §337 to offer a remedy for a broad range of unfair acts. The statute creates a mechanism that allows a complainant to create and animate a cause of action out of any "unfair act" that is prohibited under U.S. law—state or federal. Section 337 traces its origins to the Revenue Act of 1916, where Congress made it a misdemeanor for a foreign producer to import goods "with the intent of destroying or injuring an industry in the United States."[1] This largely toothless legislation was revised to become §316 of the Tariff Act of 1922, which created a private right-of-action for U.S. companies against importers engaged in "unfair methods of competition and unfair acts in the importation of articles to the United States."[2] The 1922 Act created the Tariff Commission and gave it the authority to adjudicate private complaints in a trial-like proceeding and, with the acquiescence of the president, to exclude imported products found to have been produced or imported using "unfair methods of competition."[3] Significantly, the statute did not define what constituted "unfair methods of competition." This broad, undefined language lives on in the modern version of the statute, which broadly creates a private right-of-action to prevent the importation of articles produced or imported using "[u]nfair methods of competition and unfair acts."[4]

In the beginning, most "unfair acts" litigation before the Tariff Commission did not involve patents. Most early investigations related to allegations of "unfair simulation," or

1. Revenue Act of 1916, ch. 463, §801, 39 Stat. 756, 798-799, is of historical interest because it also introduced the federal income tax, following the previous year's constitutional amendment that legalized such a tax. The Act was, in the main, a revenue act, and sought to lower tariffs on imported goods even as it instituted a new domestic system of taxation that was less reliant on import duties.
2. Tariff Act of 1922, ch. 356, §316, 42 Stat. 858, 943.
3. The 1922 Act specifically provides that:
   > unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.

   §316(a).
4. 19 U.S.C. §1337(a)(1)(A) (2007).

what would be considered trade dress infringement in modern parlance.[5]

Then, as now, §337 could only be invoked by or on behalf of a U.S. domestic industry. Congress' objective in passing §337 and its predecessors was to protect U.S. industries from "unfair competition," variously defined. As a federal court explained in 1929:

> The administration of a statute of this type involves primarily a study of the effect upon American industries of unfair foreign trade practices, and when a person is found guilty of any unfair trade practice tending to injure substantially or destroy *an American industry*, he should be prohibited from bringing goods into the United States . . . .

Having in mind that one of the express objects of the Tariff Act of 1922, as stated in its title, was *to "encourage the industries of the United States,"* it is very obvious that it was the purpose of the law to give to industries in the United States, not only the benefit of favorable laws and conditions to be found in this country, but also *to protect such industries* from being unfairly deprived of the advantage of the same and permit them to grow and develop.[6]

The nature of "unfair competition" that concerned U.S. industries in the 20th century related primarily to foreign cost advantages in the production of tangible goods (dealt with today under the anti-dumping and subsidies statute[7]). This concern about pricing advantages has, in the 21st century, largely been supplanted by U.S. industry concerns that relate to unfair practices involving intangible property, i.e., intellectual property. This shift in focus in U.S. international trade litigation toward intangible value points the way to an unexplored opportunity for the fisheries conservation movement. In order to take fuller advantage of that shift and to harness the power of §337, the conservation movement could promote its interests by seeking common cause with the U.S. fishing industry. It should come as no surprise, of course, that a complaint under §337 must be brought on behalf of a domestic industry; U.S. international trade statutes are designed to provide relief to domestic industries. To the extent, however, that the U.S. fishing industry is bound by more stringent environmental standards than its international competition, its interests should be well-aligned with that of the conservation movement: both would like to see the end of destructive fishing practices overseas, albeit for different reasons. For if the U.S. fishing industry, because it must internalize higher costs due to higher standards, is forced into relative or actual decline compared to its international counterparts, the achievement of meaningful conservation standards in the United States could be eclipsed by the shift of harmful fishing practices into unregulated international waters. Unless foreign fishing fleets are required to adhere to the same standards as the U.S. fleet, the destruction of marine species may simply shift abroad, providing something of a Sisyphean victory for the U.S. fisheries conservation movement. Indeed, some observers believe that this dynamic is well underway already.[8]

Section 337 represents an opportunity for the fisheries conservation movement, in concert with the U.S. fishing industry, to change this dynamic by harnessing the extraterritorial reach of the statute and the commercial importance of the U.S. market for global fishing fleets. The United States represents one of the largest markets for marine food products in the world. Access to this market represents tremendous potential leverage over foreign producers. A §337 complaint, brought by a clearly defined sector of the U.S. fishing industry, could provide an effective means to fight unfair fishing practices that harm both the environment and the economic well-being of the U.S. fishing industry. Under §337, all that is required for an act to be "unfair," and thereby justiciable, is that it be contrary to U.S. federal or state law. In other words, to the extent that a U.S. fishing fleet is barred from certain unfair fishing practices, but it can be shown that a foreign fleet is not and that, as a result, the U.S. industry is suffering or will suffer from economic harm, §337 provides for the closure of the border to imported fishery products produced using those "unfair" methods.

The prototype for a successful fisheries-based case can be found in trade secret litigation before the USITC under §337. The law of trade secret misappropriation is governed entirely by U.S. state law; there are no federal statutes that provide a cause of action for trade secret misappropriation.[9] What constitutes a "trade secret," and the elements necessary to prove a violation, is a question entirely governed by state law.[10] Trade secrets, moreover, relate to the *manner* in which a product is produced, not the nature of the product itself. There are no international agreements governing trade secrets, and trade secret misappropriation, as defined under U.S. state law, is not necessarily illegal in many countries. Yet, complainants have litigated numerous trade secret cases at the USITC over the years using §337, and have successfully obtained the exclusion of imported goods shown to have been made overseas using manufacturing techniques that were only "unlawful" according to U.S. state law.[11] In other words, trade secret plaintiffs before the USITC have

5. *See Revolvers*, §316, Docket No. 1, July 14, 1925; *Sanitary Napkins*, §316, Docket No. 3, Mar. 16, 1926. One case related to mislabeling (which misrepresented the quality of the imported good) and another considered the sale of a manufacturing byproduct at marginal cost. *See Briarwood Pipes*, 1926 and *Manila Ropes*, 1927. Cases on file with author.
6. Frischer & Co. v. Bakelite Corp., 39 F.2d 247, 259 (C.C.P.A. 1929).
7. *See* Tariff Act of 1930 tit. VII, ch. 497, 46 Stat. 590.
8. *See* Robert Gillett et al., Status of the United States Western Pacific Tuna Purse Seine Fleet and Factors Affecting Its Future (2001), *available at* http://www.soest.hawaii.edu/pfrp/soest_jimar_rpts/gpa_amer_samoa.pdf.
9. While the Economic Espionage Act makes the theft of trade secrets a federal crime, the definition of what constitutes a trade secret, and whether a trade secret is enforceable, is a question of state law. 18 U.S.C. §§1831, 1832 (2007).
10. Leggett & Platt, Inc. v. Hickory Springs Mfg. Co., 285 F.3d 1353, 1360 (Fed. Cir. 2002) (citing Group One Ltd. v. Hallmark Cards, Inc., 254 F.3d 1041, 1049, (Fed. Cir. 2001)) (applying the trade secret misappropriation law of Illinois).
11. *Certain Cast Steel Railway Wheels, Certain Processes for Manufacturing Processes for Manufacturing or Relating to Same and Certain Products Containing Same*, Inv. No. 337-TA-655, Initial Determination (unreviewed by the Commission) (Oct. 16, 2009); *see also Certain Processes for the Manufacture of Skinless Sausage Castings and Resulting Product*, Inv. No. 337-TA-148/169, USITC Pub. No. 1624, Comm'n Op. (July 13, 1984).

repeatedly obtained the extraterritorial enforcement of U.S. state trade secret laws.

The extraterritorial applicability and enforceability of U.S. law under §337 is well established, and has survived challenge under the General Agreement on Tariffs and Trade (GATT), the predecessor to today's World Trade Organization (WTO). As a general matter, the USITC routinely bars the entry into the United States of products made *overseas* using *U.S.* process patents. It is well established under U.S. law that the USITC has the authority to stop the importation of products made offshore using the patented processes that are only protectable as a matter of U.S. domestic law.[12]

Put another way, the USITC regularly applies U.S. law extraterritorially to create a domestic remedy for process patent infringement that involves acts of infringement that did not occur in the United States, and which are not necessarily illegal where the acts took place.[13] The extraterritorial reach of U.S. patent law is enshrined by statute; process patent owners have standing to sue for patent infringement anyone who imports items made offshore using the patented process.[14] Under §337, the USITC has the authority to close the U.S. border to further importation of products made overseas using processes that enjoy legal protection only in the United States, and the USITC has exercised this authority both in patent and trade secret cases.

A GATT panel, moreover, has found the extraterritorial application of U.S. process patents under §337 to be permissible under GATT, where the process patents at issue covered a "relatively simple manufacturing process used to produce automotive spring assemblies," which "could without major difficulties be produced by other foreign producers infringing [the patent] and subsequently imported for use in the United States."[15] To a generation of conservationists familiar with the early-1990s *Tuna Dolphin* cases and their progeny, where GATT panels restricted the application of border measures that were based on how a product was produced, this may come as something of a surprise.[16] The purpose of this Article, however, is not to delve into the highly disputed application of Article XX(b) of GATT 1994 (which created certain exceptions to permit countries to restrict the importation of goods on public policy grounds), but simply to point out that §337—and its extraterritorial aspects—has quietly enjoyed a highly successful life for many years and has withstood challenge at GATT. The willingness of countries, moreover, to assert their sovereign right to regulate the manner in which their food is produced—even when that food was produced abroad—has recently been demonstrated in a fairly muscular manner by the European Union in its refusal to acquiesce to a WTO panel requirement that it permit imports of hormone-treated U.S. beef.[17]

What is also indisputable is that Congress, in amending §337(a)(1)(A) in 1988, did not modify the statute's global reach and general applicability to all manner of unfair acts, whether those acts arose under the patent laws or not. Congress left untouched USITC jurisprudence—repeatedly affirmed by the executive branch in its adoption and enforcement of USITC exclusion orders—that §337 reaches "unfair acts" involved in the production of imported goods, even when those unfair acts take place abroad, and even when they do not involve patent rights.[18] The continued vitality under U.S. law of the extraterritorial reach of §337, and its clear applicability to unfair acts involved in the production processes used to make imported goods, was recently reaffirmed in the *Certain Railway Wheels* USITC case, in which Illinois trade secret law was invoked to bar the importation of articles made in China.[19] As a matter of U.S. law, the extraterritorial reach of §337, and not simply its patent-specific provisions, lives on and remains available to U.S. industries that are suffering injury by reason of unfair practices related to the production and importation of goods.

In sum, the potential utility of §337 for the U.S. conservation movement and the U.S. fisheries industry is clear. The statute offers the possibility of common cause between the goals of the conservation movement, particularly as they relate to discouraging unsustainable and unfair fishing practices, and the commercial interests of the U.S. fishing fleet, which are threatened by the importation of fish caught using unfair methods, as well as the interests of U.S. fishing communities that are currently under tremendous economic and social pressure by reason of artificially cheap imports of fish. By forcing foreign fleets, at least those that wish to sell into the U.S. market, to internalize sustainability costs, a §337 exclusion order could yield substantial social and economic benefits. It is possible that the current political environment, moreover, would lend itself to a new effort to promote trade policies that take into account multiple stakeholders, rather than the incumbent rigid ideological approach to restrictions on the fisheries industry that, perversely, frequently lends itself to the degradation of ocean life and the enrichment of those who practice the least sustainable fishing methods. As an additional benefit, as discussed in greater detail below, an

12. *See* Kinik v. ITC, 362 F.3d 1359 (Fed. Cir. 2004).
13. *Certain Diltiazem Hydrochloride and Diltiazem Preparations*, Inv. No. 337-TA-349, USITC Pub. No. 2902, 1995 WL 945191 (June 1995).
14. 35 U.S.C. §271(g) (2007).
15. Report of the Panel, *United States—Imports of Certain Automotive Spring Assemblies*, ¶¶ 59, 69, L/5333 (May 26, 1983), GATT B.I.S.D. 30S/107.
16. In those cases, an international panel ruled that under GATT, countries could not, for purposes of border measures, differentiate between products based on how they are produced, known as production process methods, when the final product is essentially the same. In that case, Mexico challenged the U.S. Marine Mammal Protection Act (MMPA), which set dolphin protection standards for the domestic American fishing fleet and for countries whose fishing boats caught yellowfin tuna in certain parts of the Pacific Ocean. Under the original MMPA, if a country exporting tuna to the United States—or intermediary countries where that tuna was processed—could not demonstrate that the tuna was caught using methods that met the dolphin protection standards set out in U.S. law, those exports were barred from entry to the United States. The GATT panel ruled in September 1991 that the United States could not bar the importation of tuna products where foreign environmental standards did not satisfy U.S. regulations, because GATT rules did not permit one country to enforce its own domestic laws in another country—even to protect animal health or exhaustible natural resources. The most recent example of this is the *Beef Hormones* case, in which the European Union barred the importation of U.S. beef produced using hormones. A WTO panel found the ban to be illegal. *See* Report of the Panel, *EC Measures Concerning Meat and Meat Products (Hormones),* WT/DS26 (Feb. 13, 1998).
17. *See id.*
18. *See Leggett & Platt*, *supra* note 10.
19. *See id.*

effort to enforce fair practices in fisheries management using §337 would involve a highly transparent and, potentially, very public trial that exposes both the unsustainable fishing practices at issue and the personal and economic costs to the United States of those practices.

III. The Commission Litigation Process

Those familiar with trial practice in U.S. district courts will find certain aspects of a §337 proceeding before the USITC to be familiar. Six Commissioners preside over a system of ALJs who try all cases brought to the USITC under the statute. The trial phase of an investigation, in particular, involves a bench trial that, while under the auspices of the Administrative Procedure Act,[20] owes much to federal trial practice, including a broad (but not especially strict) reliance on the *Federal Rules of Evidence*.[21] That said, many aspects of a §337 investigation are unusual and, in some cases, unique under U.S. law. One of the most significant differences is the existence of a third party to the litigation—the USITC's Office of Unfair Import Investigations (OUII), which, in principle, represents the public interest. The OUII is a full-fledged party and will submit briefs, participate in depositions, and examine witnesses in the course of a trial. For this reason, the involvement of a credible nongovernmental organization (NGO) in a §337 fisheries proceeding—acting, in effect, as a friend of the court and making arguments on public policy grounds—could be very important.

A USITC §337 investigation is commenced with the filing of a complaint on behalf of a U.S. industry.[22] It is not necessary that the "industry" represent the interests of more than one company, although a broader coalition would likely be very helpful in a case such as this, which would implicate significant public interests.[23] Section 337 cases proceed in accordance with a strict and rapid schedule; almost all proceedings conclude within 18 months of the filing of a complaint. The complaint lays out the basic legal and factual bases of the case. It would also be of vital importance that the plaintiff in a §337 fisheries case carefully refine the scope of its direct case, both because of the nature of pleadings at the USITC and because the amount of time available for trial will be very limited. As a practical matter, this would argue for limiting the scope of a case to a particular species of fish, with the complainant limited to a specific segment of the U.S. fishing industry. With respect to pleadings, parties will be precluded from arguing at trial issues of law and fact that they did not thoroughly introduce in their pretrial briefs. Similarly, the USITC will not accept arguments on review that were not raised before the ALJ. Improvisation is not rewarded at the USITC. For all these reasons, a tightly organized, legally focused case tends to fare much better at a 10-day trial before the USITC (the most a party can hope for) than improvised efforts.

Several months after the end of a trial, the ALJ issues an opinion, which is normally quite detailed. The parties can then appeal the ALJ's legal and factual findings to the full USITC, which reviews all ALJ decisions according to a de novo standard of review.[24] The USITC can adopt the ALJ's decision in part or in whole, issue its own opinion, or remand to the ALJ. At the end of the process, the USITC will issue its final determination.[25] In some ways, the relationship between the USITC and the ALJ resembles that between a magistrate in federal district court and a district judge. While the ALJ's opinion is technically advisory in nature, in practice, it carries great weight with the USITC, particularly with respect to factual findings. Unlike sometimes sclerotic federal district courts, a typical §337 investigation, soup to nuts from the initiation of an investigation to a final USITC decision (called a final determination in USITC parlance), takes 15 months, and never more than 18.

The Commission Review segment of USITC litigation, in which the USITC reviews the ALJ's decision, known as an Initial Determination (ID), is critical and is, in effect, equivalent to an appeal, or the review of a magistrate's opinion by a district court. The USITC is assisted in its review of ALJ decisions by an independent Office of General Counsel, which is fire-walled from the OUII, since the latter is nominally a party to the proceeding. In the review phase of an investigation, the parties typically submit briefs to the USITC for and against the ALJ's decision, addressing the merits of the ALJ's findings. If the USITC decides to take the case on review, it can (and frequently does) remand to the ALJ, or it may issue a new opinion of its own. If a violation is found, the USITC, and then the president, has the authority to tailor any remedy to take into account public interest considerations and even to decide not to issue any remedy at all.[26] If the USITC decides to issue an exclusion order—to bar the importation of accused products—that order does not become final until a 60-day period of presidential review has passed.[27] Once final, the USITC's decision (which owes no deference to the ALJ) may then be appealed by the losing party to the federal circuit.

In a §337 case involving fisheries conservation, it is likely that the USITC itself would play a very active role. The presidential review phase is also likely to be characterized by a significant lobbying effort on behalf of all parties with a stake in the outcome. The careful cultivation of political interests in such a case could play a significant role. To the extent that the congressional delegation from the state in which the complainant fishing industry is located can be persuaded that it has an interest in a positive outcome from the investigation—along with other similarly situated congressional delegations—this could substantially shape the outcome and the scope of the presidential review and any exclusion order that issues.

20. 19 C.F.R. §210.36 (2009).
21. 19 C.F.R. §210.37.
22. 19 C.F.R. §210.8.
23. 19 C.F.R. §§210.50, .61.
24. 19 C.F.R. §210.45(a) and (b).
25. 19 C.F.R. §210.45(c).
26. 19 C.F.R. §210.50(a).
27. 19 U.S.C. §1337(c); 19 C.F.R. §210.49; *see also* Duracell, Inc. v. U.S. Int'l Trade Comm'n, 778 F.2d 1578, 1580 (Fed. Cir. 1985).

The remedy offered by the USITC is unique in American jurisprudence: the USITC can order the closure of the U.S. border to prevent the further importation of goods found to be in violation of §337. Those USITC orders take the form of general exclusion orders, which bar the further importation of the accused goods, regardless of origin, or limited exclusion orders, which are limited to the goods imported by the respondent.[28] The USITC also typically issues cease and desist orders, enjoining respondents from engaging in specific conduct, such as the continued sale and marketing of products found to be in violation of §337.[29] Violations of USITC orders can and do lead to very significant civil penalties.[30] The USITC, however, in contrast to a federal district court, does not have the authority to award damages.

IV. Conclusion

Fisheries degradation continues apace, with tuna fishing practices in particular harming the global population of sea turtles, dolphins, rays, and other sea animals.. Efforts to reach a global agreement to ban unsustainable practices have made limited headway so far, due to opposition from certain countries. The use of §337 to enforce a ban on the importation of tuna or other species caught using unsustainable methods that are restricted under U.S. law would complement existing efforts at developing a global fisheries regime. Existing efforts focus largely on the supply side of the equation; a successful §337 case could address the demand side of the equation by cutting off access to the U.S. consumer for fishing fleets that do not use sustainable fishing methods.

Section 337 is an international trade statute that empowers U.S. commercial interests to seek redress from unfair acts abroad—even acts that are not necessarily illegal in the country where those acts occur. The right-of-action contained in the statute offers the potential for the U.S. fishing industry to persuade the global fishing industry to improve its practices outside U.S. waters by only permitting access to U.S. markets to tuna caught using sustainable fishing methods. There is no necessary tension, moreover, between the interests of an industry in the United States and those of the conservation movement when the U.S. industry is legally bound to conform to U.S. environmental or conservation laws and suffers a competitive economic disadvantage as a result. A USITC exclusion order directed at the importation of fish caught using "unfair acts" of unsustainable fishing practices could change the economic calculus from one that currently penalizes U.S. industry compliance by imposing higher costs to one that would reward global compliance through access to the U.S. market. A private case brought under §337—particularly one that relied on a U.S.-ratified multilateral agreement—would afford the defendant foreign fishing interests due process (as they would be able to participate in all aspects of the USITC trial), would treat all offending countries and fishing fleets equally, and could ensure that any remedies issued could be narrowly, but evenly, crafted. The political timing for such a case, moreover, is not likely to become more auspicious in the long run. Carefully litigated, with the participation of credible NGOs and conducted in consultation with the relevant U.S. agencies, such as the National Oceanic and Atmospheric Administration, a complaint brought under §337 against imports of tuna caught using unfair, unsustainable fishing practices could offer meaningful and rapid relief, both for the U.S. fishing industry and global marine species that remain under massive pressure from unsustainable fishing practices.

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28. 19 U.S.C. §1337(d)(2) states:
    > The authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that—(A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.
29. 19 U.S.C. §1337(f) states:
    > (1) In addition to, or in lieu of, taking action under subsection (d) or (e) of this section, the Commission may issue and cause to be served on any person violating this section, or believed to be violating this section, as the case may be, an order directing such person to cease and desist from engaging in the unfair methods or acts involved, unless after considering the effect of such order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such order should not be issued.
30. 19 C.F.R. §210.75(B).