No.

In the Supreme Court of the United States

SINO LEGEND (ZHANGJIAGANG) CHEMICAL CO. LTD., ET AL.,

Petitioners,

v.

INTERNATIONAL TRADE COMMISSION & SI GROUP, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court held in three recent cases that "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016). See also *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247 (2010).

Section 337 of the Tariff Act of 1930, codified as amended at 19 U.S.C. § 1337, authorizes the International Trade Commission (ITC) to adjudicate "[u]nfair methods of competition and unfair acts in the importation of articles * * * into the United States" where such methods or acts cause injury to a domestic industry. 19 U.S.C. § 1337(a)(1)(A). The Federal Circuit holds that this statute permits the ITC to adjudicate cases of trade secret misappropriation—applying U.S. legal standards—even when, as here, the alleged acts of misappropriation occurred entirely in a foreign country. *TianRui Grp. Co.* v. *ITC*, 661 F.3d 1322 (Fed. Cir. 2011).

The question presented is:

Whether Section 337(a)(1)(A) permits the ITC to adjudicate claims regarding trade secret misappropriation alleged to have occurred outside the United States.

RULE 29.6 STATEMENT

In addition to the parties identified in the caption, the following are also petitioners in this Court: Sino Legend Holding Group, Inc., Sino Legend Holding Group Ltd., Precision Measurement Int'l LLC, Red Avenue Chemical Co. Ltd., Shanghai Lunsai Int'l Trading Co., Red Avenue Group Limited, and Sino Legend Holding Group Inc. of Marshall Islands.

None of the petitioners have parent corporations, nor do any publicly traded companies own 10% or more of the stock of any of the petitioners.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

Statutes, Rules and Regulations

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Miscellaneous

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) can be found at 623 F. App'x 1016. The Commission Determination of the International Trade Commission (App., *infra*, 3a-98a) is unreported, but is available in public redacted form at 2014 WL 7497801.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 2015. The court of appeals denied a timely petition for rehearing en banc on May 3, 2016. On July 20, 2016, the Chief Justice extended the time for filing a petition for a writ of certiorari until September 30, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1337 of Title 19 of the U.S. Code provides in relevant part:

> (a) Unlawful activities; covered industries; definitions
>
> (1) Subject to paragraph (2), the following are unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provision of law, as provided in this section:
>
> (A) Unfair methods of competition and unfair acts in the importation of articles (other than

> articles provided for in subparagraphs (B), (C), (D), and (E)) into the United States, or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is—
>
> (i) to destroy or substantially injure an industry in the United States;
>
> (ii) to prevent the establishment of such an industry; or
>
> (iii) to restrain or monopolize trade and commerce in the United States.

STATEMENT

Section 337(a)(1)(A) of the Tariff Act of 1980 contains no express statement that it applies extraterritorially. Yet the Federal Circuit holds that Section 337(a)(1)(A) reaches across the globe, permitting the International Trade Commission ("ITC") to apply U.S. law to regulate unfair business practices wherever they occur—as long as the alleged unfair business practice is in some way connected to the production of a good subsequently imported into the United States. See *TianRui Grp. Co.* v. *ITC*, 661 F.3d 1322 (Fed. Cir. 2011). That holding warrants review.

To begin with, the Federal Circuit's extraterritorial extension of Section 337(a)(1)(A) is wholly inconsistent with this Court's recent, repeated rulings on extraterritoriality. The Court has consistently instructed that the presumption against extraterritoriality dictates that a statute does not apply abroad "[a]bsent clearly expressed congressional intent to the contrary." *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016). Here, as Judge Moore explained in her dissent in *TianRui*, there is no

clearly expressed congressional intent to extend Section 337(a)(1)(A) to extraterritorial conduct. 661 F.3d at 1339.

Because "all the relevant conduct" (*Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013)) relating to the claimed wrongdoing targeted by the ITC—the alleged trade secret misappropriation—occurred outside the United States, it is outside the scope of Section 337(a)(1)(A).

Review of this question is essential because the Federal Circuit's error has enormous practical consequences. Its misreading of Section 337(a)(1)(A) allows the ITC to police the misappropriation of trade secrets worldwide, even where the acts alleged to violate Section 337(a)(1)(A) are legal under the laws of the country where they occurred.

That concern is far from academic: here, respondent first sued petitioners in China, but lost on the merits. The ITC's judgment in this case thus directly contradicts the reasoned judgment of Chinese courts. The ITC is exercising this authority with frequency; we have identified a number of other cases in which the ITC is adjudicating claims of extraterritorial trade secret misappropriation.

The decision's impact, moreover, is not limited to intellectual property law. Because the Federal Circuit and the ITC read Section 337(a)(1)(A) broadly to encompass *any* unfair business practices, the Federal Circuit's holding allows the ITC to adjudicate cases involving any number of issues—from false advertising to alleged violations of U.S. environmental or labor law principles—anywhere they arise. Further review by this Court is warranted.

A. Statutory Background.

Section 337(a)(1)(A) of the Tariff Act of 1930 authorizes the International Trade Commission to investigate and prohibit "[u]nfair methods of competition and unfair acts in the importation of articles." 19 U.S.C § 1337(a)(1)(A). The Federal Circuit and its predecessor court have long construed Section 337(a)(1)(A)'s substantive scope to afford the ITC "broad authority to address every type and form of unfair trade practice." *Suprema, Inc.* v. *ITC*, 796 F.3d 1338, 1350 (Fed. Cir. 2015) (citing *In re Von Clemm*, 229 F.2d 441, 444 (C.C.P.A. 1955)). Specifically, the ITC construes Section 337(a)(1)(A) to encompass claims of misappropriation of trade secrets, like those at issue here. See *TianRui*, 661 F.3d at 1326 (collecting ITC decisions).

The other subsections of Section 337(a)(1) address "[t]he importation into the United States" of "articles" that infringe specific intellectual property rights, including patents, trademarks, mask works, and exclusive rights in a protectable design. 19 U.S.C. § 1337(a)(1)(B)-(E). For example, Section 337(a)(1)(B)(ii) bars the importation of articles "made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent." 19 U.S.C. § 1337(a)(1)(B)(ii).

If the ITC determines that a violation of Section 337 has occurred, it has the power to order that the infringing articles "be excluded from entry into the United States," 19 U.S.C. § 1337(d)(1); to order that a violator "cease and desist" any practices in violation of the statute, *id.* § 1337(f)(1); to impose civil penalties for violations of its orders, *id.* § 1337(f)(2); and to seize infringing articles as forfeited, *id.*

§ 1337(i)(1). Appeals from the ITC's decisions under Section 337 are committed to the exclusive jurisdiction of the Federal Circuit. 28 U.S.C. § 1295(a)(6).

B. Factual Background.

Certain synthetic rubbers used in products such as tires are manufactured by "pressing together layers of various rubber compounds." Initial Determination, Certain Rubber Resins & Processes for Mfg. Same, Inv. No. 337-TA-849, 2013 WL 4495127, at *5 (USITC June 17, 2013) [hereinafter *Initial Determination*]. In order to improve the stability of these layered products, the synthetic rubbers contain so-called "tackifiers"—compounds that increase the strength of the adhesive bonds between the layers. App., *infra*, 16a.

Petitioner Sino Legend (Zhangjiagang) Chemical Co. Ltd. ("Sino Legend"),[1] a chemical manufacturer located in Zhangjiagang, China (App., *infra*, 13a), developed a process for producing a type of resin for use as a "tackifier" that would be more cost-effective and of higher quality than those offered by competitors. *Id.* 16a; *Initial Determination*, at *5-*6. Respondent SI Group, a chemical manufacturer in Schenectady, New York, has for some time produced resins like Sino Legend's, including SP-1068, the resin for which it sought protection in this case. App., *infra*, 8a, 13a. SI Group admits that "certain features of its process are not contained in its patents or published patent applications." *Id.* 17a.

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[1] For simplicity's sake, we refer to all of the petitioners collectively as "Sino Legend," except where otherwise indicated. We refer to respondent SI Group as "SI Group" and respondent International Trade Commission as "ITC."

SI Group initially served non-U.S. customers by exporting SP-1068 from the United States, using foreign distributors. SI Group ultimately shifted its production model from exporting to manufacturing entirely in China, forming a Chinese subsidiary, SI Shanghai Limited ("SI Shanghai"). C.Y. Lai, a Chinese national, served as General Manager when the SI Shanghai facility was "starting up." App., *infra*, 48a; *Initial Determination*, at *132. In 2004, SI Shanghai began manufacturing SP-1068 in China. Cf. *Initial Determination*, at *132.

Lai hired Jie (Jack) Xu, also a Chinese national, to work for SI Shanghai. App., *infra*, 48a; *Initial Determination*, at *132-*133. Xu's employment contract, governed by Chinese law, imposed a duty to keep technical information or trade secrets confidential in the event he left SI Shanghai. App., *infra*, 48a. Xu was promoted to Plant Manager of the Chinese plant in June 2006. *Initial Determination*, at *132.

After Lai's employment with SI Shanghai ended in February 2005, he accepted an administrative consulting position with petitioner Shanghai Red Avenue Chemical Co. Ltd. App., *infra*, 48a; *Initial Determination*, at *132. Xu resigned from SI Shanghai to accept a job with Sino Legend in early 2007. App., *infra*, 48a; *Initial Determination*, at *135.

While Lai and Xu were employed by Sino Legend in China, SI Group alleges that they worked with Sino Legend to misappropriate SI Group's trade secrets. App., *infra*, 48a.

C. Chinese Administrative And Judicial Proceedings.

Nearly four years before SI Group filed its ITC complaint, it brought multiple actions in China in-

volving the very same alleged misappropriation of trade secrets. All were unsuccessful.

Specifically, in November 2008, SI Group contacted the Shanghai Municipal Bureau of Public Security to request a criminal investigation into its allegations of trade secret misappropriation by Sino Legend. Fed. Cir. App. A4667-A4679. The Bureau announced in September 2009 that it was terminating its criminal investigation for lack of evidence of criminal wrongdoing by Sino Legend. *Id*. A4669.

Next, in March 2010, SI Shanghai filed a pair of complaints in the Shanghai No. 2 Intermediate People's Court asserting trade secret misappropriation. Fed. Cir. App. A4669. The Chinese court held a full evidentiary hearing on SI Shanghai's claims on February 17, 2011. *Id*. A4670. SI Shanghai withdrew its complaints on March 24, 2011, shortly before the Chinese court was scheduled to resolve the case. *Ibid*.

Less than one week later, on March 29, 2011, SI Group and SI Shanghai filed a second pair of civil actions against Sino Legend in the same court. Fed. Cir. App. A4670-A4671. They asserted claims for misappropriation of twenty trade secrets, including all seventeen of the individual claims and the overall process claim at issue in the present case. Compare App., *infra*, 20a-48a with Fed. Cir. App. A4634-A4635. SI Group provided a substantial amount of evidence, including 109 different documents and other written submissions. Fed. Cir. App. A4636-A4638. Sino Legend responded with 218 submissions. *Id*. A4639-A4643. With the agreement of both parties, the court selected an independent expert, which—after thorough investigation (*id*. A4645-A4646)—

concluded that Sino Legend did not misappropriate any protectable trade secrets (*id.* A4652-A4665).

The court—which was composed of three members—issued its decision on June 17, 2013. See Civil Judgment by Shanghai No. 2 Intermediate People's Court of the People's Republic of China (2011) HEZMW (Z) CZ No. 50 (Fed. Cir. App. A4633). The court began by rebuking SI Group for unfairly attempting to withdraw from the proceedings and for refusing to attend the trial without a valid reason. Fed. Cir. App. A4634. Applying Chinese law, the court determined that the independent expert's report was both factually and legally sound and therefore adopted its findings. *Id.* A4680. The court ultimately concluded that Sino Legend did not misappropriate any protectable trade secrets. *Id.* A4683.

SI Group and SI Shanghai then appealed to the Shanghai Higher People's Court, which affirmed the judgment. See Civil Judgment by Shanghai Higher People's Court of the People's Republic of China (2013) HGMS (Z) ZZ No. 93 (Fed. Cir. App. A4507). The appellate court found that SI Group acted in bad faith by attempting to add a co-defendant after learning the independent expert's report would be unfavorable, and by attempting to withdraw from the proceedings. *Id.* A4562. Although a default judgment would have been appropriate in these circumstances, the appellate court agreed that the independent expert was qualified and had conducted a reasonable appraisal (*id.* A4560), and therefore affirmed the lower court's decision. *Id.* A4563. And China's Supreme Court ultimately affirmed.

D. Proceedings Below.

Notwithstanding the pendency of its civil actions in China, SI Group filed a Section 337 complaint with the International Trade Commission in May 2012, which it amended on June 13, 2012. The complaint alleged misappropriation of seventeen alleged individual trade secrets, as well as the overall production process, all of which were already under review in the Chinese proceedings. Compare App., *infra*, 20a-48a with Fed. Cir. App. A4634-A4635.

The ITC instituted its investigation on June 26, 2012. App., *infra*, 13a. See also Certain Rubber Resins and Processes for Mfg. Same, 77 Fed. Reg. 38,083-01, Inv. No. 337-TA-849, (USITC June 26, 2012).

1. The Administrative Law Judge's decision. The ALJ rejected Sino Legend's contention that Section 337(a)(1)(A) does not apply to conduct outside the United States, relying on the Federal Circuit's decision in *TianRui*, 661 F.3d 1322. *Initial Determination*, at *12-*14. As the ALJ put it, "[i]n *TianRui*, the Federal Circuit addressed this specific issue." *Id.* at *12.

In *TianRui*, a domestic manufacturer filed a complaint with the ITC under Section 337(a)(1)(A), alleging that two Chinese companies misappropriated a secret process for manufacturing cast steel railway wheels. 661 F.3d at 1324-1325. The Chinese companies "moved to terminate the proceedings on the ground that the alleged misappropriation occurred in China and that Congress did not intend for section 337 to be applied extraterritorially." *Id.* at 1325. The ALJ rejected the companies' argument,

and the ITC issued a limited exclusion order. *Id.* at 1326.

The Federal Circuit affirmed by a divided vote. The *TianRui* majority acknowledged the presumption against extraterritoriality, but viewed the presumption as merely "a tool for ascertaining congressional intent." 661 F.3d at 1329. The majority then gave three reasons why the presumption "does not govern this case." *Ibid.* First, because Section 337(a)(1)(A) mentions importation, Congress could not have had only domestic concerns in mind. *Ibid.* Second, the fact that the Chinese companies' conduct "result[ed] in the importation of goods into this country causing domestic injury" meant that the conduct at issue was not wholly extraterritorial. *Ibid.* And third, the court looked to "legislative history," which showed that "Congress contemplated that * * * the Commission would consider conduct abroad." *Id.* at 1330, 1332.

Judge Kimberly Moore dissented. At the outset, she noted that "[t]he acts which arguably constitute misappropriation (theft of a trade secret) all occurred in China." *TianRui*, 661 F.3d at 1337 (Moore, J., dissenting). Judge Moore criticized the majority's failure to assess the provision's extraterritoriality based on the standard set forth by this Court in *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010). "In light of the plain language of the statute, the legislative history, the selective Congressional action to grant extraterritorial effect to process patents, and the contrast to other extraterritorial statutes," Judge Moore would have held that Section 337(a)(1)(A) "does not reach the misappropriation and use of trade secrets in China." *TianRui*, 661 F.3d at 1342.

The ALJ in this case found that *TianRui* was "binding precedent established by the Federal Circuit" and rejected Sino Legend's "argument that [he] should not follow *TianRui*." *Initial Determination*, at *13. Consequently, he held "that the Commission has subject matter jurisdiction over this investigation." *Id.* at *14.

On the merits, the ALJ concluded that seven of the claimed trade secrets were not protectable, but that another eleven were protectable and had been misappropriated by Sino Legend. *Initial Determination*, at *274; Fed. Cir. App. A919-A920. He also found injury to the domestic industry. *Initial Determination*, at *274. He therefore recommended that the ITC issue a general exclusion order under Section 337(d) for a period of ten years. *Id.* at *270.

2. The ITC Determination. Sino Legend and SI Group both filed petitions for review on July 1, 2013. App., *infra*, 14a.

The ITC issued its Commission Determination on January 15, 2014. With respect to extraterritoriality, the ITC cited *TianRui* in holding that "the question of whether there is a violation of Section 337 by reason of misappropriation of trade secrets is governed by (U.S.) federal common law, even where that misappropriation occurs abroad." App., *infra*, 14a-15a n.1. It thus rejected Sino Legend's argument that Section 337(a)(1)(A) does not reach extraterritorial conduct of non-U.S. parties. *Ibid.*

The ITC ultimately concluded that twelve alleged trade secrets were non-protectable and thus could not form the basis for SI Group's allegations; the ITC thus reversed the ALJ's finding that five trade secrets were protectable. App., *infra*, 33a, 38a, 40a,

42a, 47a. The ITC affirmed the ALJ's findings that five additional alleged trade secrets (*id.* 21a-22a, 24a, 26a, 28a-29a, 36a), as well as the overall process (*id.* 48a), were both protectable and misappropriated. Consequently, the ITC issued a limited exclusion order for a period of ten years. *Id.* 92a.

3. The Federal Circuit ruling. Sino Legend filed a timely petition for review in the Federal Circuit on May 15, 2014.

During oral argument, the panel repeatedly recognized that it was bound by *TianRui*'s resolution of the extraterritoriality question. See, *e.g.*, Oral Argument at 1:42, *Sino Legend* v. *ITC*, 623 F. App'x 1016 (Fed. Cir. 2015) (No. 2014-1478) ("Are you asking us to overrule *TianRui*?"); *id.* at 6:16 ("So where that leaves you is an argument as to whether *TianRui* was correct or not."); *id.* at 6:48 ("It seems to me that most of the briefing and most of the argument is based on *TianRui*, that it was wrong, it was wrongly decided.").

Two days later, on December 11, 2015, the Federal Circuit summarily affirmed the ITC's determination under Federal Circuit Rule 36. App., *infra*, 2a. Rule 36 permits the court to "enter a judgment of affirmance without opinion, citing this rule, when it determines that * * * an opinion would have no precedential value" and, among other things, where "the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review."

Sino Legend filed a timely petition for rehearing en banc in the Federal Circuit on February 24, 2016, which was denied by that court on May 3, 2016. App., *infra*, 100a.

REASONS FOR GRANTING THE PETITION

In *TianRui*, the Federal Circuit held that Section 337(a)(1)(A) permits the ITC to police the misappropriation of trade secrets even where that misappropriation occurs entirely abroad. That decision is wrong. The statute contains no indication that it applies extraterritorially. If the alleged misappropriation occurred in a foreign country, the ITC has no power to adjudicate it.

This issue is undeniably important. The ITC continues to use its authority under Section 337(a)(1)(A) to prosecute misappropriation abroad. Moreover, the broad substantive scope of Section 337(a)(1)(A) means that the Federal Circuit's decision allows the ITC to apply U.S. law to adjudicate a wide variety of claims asserting unfair business practices anywhere in the world. This power invites significant and unnecessary friction with the laws and institutions of other countries.

Finally, this case is a proper vehicle to review this important question. If *TianRui* is incorrect, the decision below cannot stand. Indeed, the Federal Circuit's use of a summary affirmance under that court's rules, and subsequent denial of en banc rehearing, shows that the Federal Circuit considers the extraterritorial application of Section 337(a)(1)(A) to be settled law. This Court should review that holding.

A. The Federal Circuit Failed To Apply This Court's Extraterritoriality Test In Holding That Section 337(a)(1)(A) Encompasses Claims For Trade Secret Misappropriation Wholly Outside The United States.

The Federal Circuit's interpretation of Section 337(a)(1)(A)—as stated in *TianRui* and applied by the decision below—gives the ITC the authority to adjudicate misappropriation of trade secrets anywhere in the world, as long as the misappropriation relates to a good imported into the United States. That holding was incorrect at its inception, and its flaws have become all the more apparent in light of this Court's intervening decisions.

It is by now axiomatic that federal statutes are presumed not to apply extraterritorially. This bedrock canon of statutory interpretation "reflects the 'presumption that United States law governs domestically but does not rule the world.'" *Kiobel*, 133 S. Ct. at 1664 (quoting *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 454 (2007)). Thus, "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *RJR Nabisco*, 136 S. Ct. at 2100.

This Court's cases prescribe a two-step framework for determining whether a statute may be extended extraterritorially. First, the Court asks "whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *RJR Nabisco*, 136 S. Ct. at 2101. Second, if it contains no such indication, then the Court considers whether "the conduct relevant to the statute's focus"—*i.e.*, the conduct the statute seeks to

regulate—"occurred in the United States" or "in a foreign country." *Ibid.* If the relevant conduct occurred abroad, "then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Ibid.*

The Federal Circuit's decision in *TianRui* did not expressly undertake either of these inquiries. Instead, the *TianRui* majority based its decision that "[t]he presumption against extraterritoriality does not govern this case" on a series of observations about the statutory language, the facts of the case before it, and the legislative history. *TianRui*, 661 F.3d at 1329. See also *id.* at 1329-1332.

Evaluated under the two-step inquiry mandated by this Court's precedents, it is clear that the application of the statute in this case is impermissibly extraterritorial.

1. Section 337(a)(1)(A) does not apply to extraterritorial conduct.

The "presumption against extraterritorial application" provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Kiobel*, 133 S. Ct. at 1664 (quoting *Morrison*, 561 U.S. at 255). To determine whether a statute rebuts the presumption, a court may consider "the text of the statute," the "historical background against which [it] was enacted," and any risk of "foreign policy consequences." *Id.* at 1665-1666, 1669.

From the outset, the *TianRui* majority applied the wrong legal standard by describing the presumption as merely "a tool for ascertaining congressional intent," and indicating that a clear statement of congressional intent is not required. 661 F.3d at 1329. In stark contrast, this Court's decisions have repeat-

edly insisted that Congress must have "affirmatively and unmistakably instructed" that a statute will apply to foreign conduct. *RJR Nabisco*, 136 S. Ct. at 2100; accord *Kiobel*, 133 S. Ct. at 1664; *Morrison*, 561 U.S. at 255.

Judged against this standard, Section 337(a)(1)(A) does not evince the requisite "clear indication of congressional intent" that it apply extraterritorially.

a. The statutory text provides no indication that it applies to foreign conduct. Section 337(a)(1)(A) authorizes the ITC to adjudicate:

> Unfair methods of competition and unfair acts in the importation of articles (other than articles provided for in subparagraphs (B), (C), (D), and (E)) into the United States, or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is—
>
> (i) to destroy or substantially injure an industry in the United States;
>
> (ii) to prevent the establishment of such an industry; or
>
> (iii) to restrain or monopolize trade and commerce in the United States.

19 U.S.C. § 1337(a)(1)(A). Far from offering a "clear indication" of extraterritorial application, there is "*nothing* in the plain language of the statute that indicates that Congress intended it to apply to unfair acts performed entirely abroad." *TianRui*, 661 F.3d at 1338, 1339 (Moore, J., dissenting) (emphasis added). Indeed, the *TianRui* majority did not point to any "statutory language that expresses the *clear* in-

tent for it to apply to extraterritorial unfair acts." *Id.* at 1339.

In contrast, where Congress has intended for laws regarding unfair business practices—including infringement of intellectual property—to apply extraterritorially, it has said so expressly.

For example, Section 337(a)(1)(B)—a neighboring provision of the *same statute*—authorizes the ITC to exclude goods imported into the United States that infringe a valid U.S. patent. In particular, Subsection (1)(B) covers the "importation into the United States" of articles made "by means of[] a process covered by the claims of a valid and enforceable United States patent." 19 U.S.C. § 1337(a)(1)(B). Because articles imported into the United States are necessarily "made" outside the United States, this provision expresses clear congressional authorization for the ITC to adjudicate whether processes that produce goods outside the United States infringe U.S. process patents.

This language is not accidental: in *In re Amtorg Trading Corp.*, 75 F.2d 826, 831-832 (C.C.P.A. 1935), the former Court of Customs and Patent Appeals "held that [Section] 337 could not be used to exclude from importation goods produced by a process patented in the United States but carried out abroad." *TianRui*, 661 F.3d at 1340 (Moore, J., dissenting). Congress responded by enacting what is now Subsection (1)(B)(ii), in order to provide a remedy for "owners of American process patent[s]" who are "helpless to prevent the infringement abroad of their patent rights." *Ibid.* (quoting H.R. Rep. No. 1781, 76th Cong., 3d Sess. 4 (1940)). Thus, Subsection (1)(B)(ii) was specifically designed to reach infringement of U.S. process patents that occurs abroad.

As Judge Moore explained in *TianRui*, the fact that "Congress *only* changed the statute to create a remedy for extraterritorial use of process patents" is powerful evidence "that Congress intended to give special treatment solely to process patents, and not to other categories of '[u]nfair methods of competition and unfair acts in the importation of articles.'" *TianRui*, 661 F.3d at 1340-1341 (Moore, J., dissenting); accord *Morrison*, 561 U.S. at 265 ("[W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms.").

Likewise, the Economic Espionage Act, which extends *criminal* liability to certain acts of misappropriation, expressly indicates that it applies extraterritorially. The statute provides—in a section titled "[a]pplicability to conduct outside the United States"—that "[t]his chapter also applies to conduct occurring outside the United States if" one of two conditions are met. 18 U.S.C. § 1837. Either the offender must be a U.S. citizen or permanent resident alien, or an act in furtherance of the offense must have been committed in the United States. *Ibid.*

These statutes are hardly unique. Congress has expressly extended scores of statutes extraterritorially—and it almost always includes important limitations. See, *e.g.*, 18 U.S.C. § 175c (use of smallpox as a biological weapon abroad); *id.* § 470 (counterfeiting activities outside the United States); *id.* § 1351 (fraud in foreign labor contracting outside the United States); *id.* §§ 2331-2339 (international terrorism outside the United States); *id.* § 3271 (trafficking in persons outside the United States by government employees); 22 U.S.C. § 2780 (transactions outside

the United States with nations that support terrorism).

A particularly instructive example is found in the food and drug laws, which prohibit adulteration or misbranding of foods, drugs, medical devices, and tobacco products sold in the United States. See 21 U.S.C. § 331. Congress specifically provided that "[t]here is extraterritorial jurisdiction over any violation of this chapter" *if* "such article was intended for import into the United States or if any act in furtherance of the violation was committed in the United States." *Id.* § 337a.[2]

These statutes confirm that when Congress wants to apply U.S. legal standards to govern the manufacture of goods abroad that are destined for U.S. import, it says so expressly. Section 337(a)(1)(A) contains no similar express language providing for extraterritorial application. It does not provide the clear indication of extraterritorial application that this Court's decisions require.

Indeed, as the Economic Espionage Act and many of these other laws show, when Congress extends U.S. law to regulate conduct abroad, it often moderates the extraterritorial effect by including limitations that carefully calibrate the scope of the statute—such as limitations to conduct involving U.S. persons or wrongful conduct occurring in part within the U.S. The *TianRui* majority's interpreta-

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[2] The *TianRui* court's reliance on statutes dealing with illegal immigration (see 661 F.3d at 1329) is misguided. As Judge Moore explained in dissent, "the illegal immigration cases present a completely different issue than § 337: an illegal alien's presence in the United States is, by definition, the prohibited act." *Id.* at 1339 n.2.

tion of Section 337(a)(1)(A) provides for no such limitations.

b. The *TianRui* court rested its contrary decision on the word "importation" in Section 337(a)(1)(A), which it construed as referring to an "inherently international transaction." *TianRui*, 661 F.3d at 1329. That term does not overcome the presumption against extraterritoriality for several reasons.

To begin with, this Court has consistently rejected the argument that the inherently transnational subject matter of a statute evinces congressional intent for it to apply extraterritorially. Indeed, even statutes "that expressly refer to '*foreign* commerce' do not apply abroad" automatically. *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 251 (1991).

The Alien Tort Statute, at issue in *Kiobel*, creates federal subject matter jurisdiction over suits by aliens for torts "in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Yet the Court explained that "nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach." *Kiobel*, 133 S. Ct. at 1665. *Kiobel* thus teaches that a court may not find clear congressional intent to extend a statute extraterritorially merely because the law deals with a subject that is, by nature, international.

Moreover, the particular use of the term "importation" actually confirms that Section 337(a)(1)(A) is focused on domestic conduct.

The provision grants authority to the ITC with respect to "[u]nfair methods of competition and unfair acts in the importation of articles." 19 U.S.C. § 1337(a)(1)(A). "[I]n the importation" is a restrictive

term evidencing an intent to limit the provision's reach to acts and methods relating to the importation and subsequent sale of goods—*i.e.*, to conduct tied to the United States. See *Importation*, Black's Law Dictionary (10th ed. 2014) ("The bringing of goods into a country from a foreign country.").

Congress's use of that phrase—rather than a broader formulation such as "unfair acts relating to the manufacture or importation of imported articles"—falls far short of the requisite clear intent to apply the statute extraterritorially. To the contrary, by limiting the provision's reach to acts "in the importation of articles," the provision is logically read to reflect Congress's intent to limit the reach of U.S. law—and not to apply U.S. law to conduct occurring in the territory of another sovereign nation, merely because that conduct is in some way related to imported goods.

That conclusion is supported by the broader language of Section 337(a)(1)(B)—covering the "importation into the United States" of articles made "by means of[] a process covered by the claims of a valid and enforceable United States patent." That express reference to the process by which the articles were made supplies the clear indication of extraterritorial application lacking in Section 337(a)(1)(A)'s much more limited text.

The *TianRui* majority also relied on the statutory requirement of domestic injury. *TianRui*, 661 F.3d at 1329. But Congress's decision to limit the remedy to situations in which there is injury to a domestic industry provides no clear indication that Congress intended the statute to apply to conduct occurring anywhere in the world. See, *e.g.*, *Morrison*, 561 U.S. at 263 (rejecting the argument that the domestic quota-

tion of stock prices based on foreign transactions meant that the Securities Exchange Act of 1934 applied extraterritorially). After all, purely domestic conduct—such as a price-fixing agreement among U.S. importers—might not injure a domestic industry if, for example, there was no relevant domestic industry. This restriction on the statute's scope provides no evidence that Congress intended it to apply extraterritorially.

c. The lack of any clear textual indication that Section 337(a)(1)(A) applies extraterritorially is dispositive. But it is also relevant that extending the trade secrets laws of the United States to misappropriation occurring in other countries would generate considerable international conflict—a factor that, while "not a prerequisite for applying the presumption against extraterritoriality," elevates "the need to enforce the presumption" to its "apex." *RJR Nabisco*, 136 S. Ct. at 2107.

As explained more fully below (see pages 29-30, *infra*), the risk of international friction weighs strongly against extraterritorial application of Section 337(a)(1)(A). The Federal Circuit's misreading of Section 337 allows the ITC to govern the misappropriation of trade secrets wherever it occurs, supplanting local laws and institutions.

That is why a component of the Chinese government filed an amicus brief in the Federal Circuit highlighting the intrusion on Chinese sovereignty resulting from the extraterritorial application of Section 337(a)(1)(A). See Amicus Br. of the Trade Remedy and Investigation Bureau at 1-2, *Sino Legend*, 623 F. App'x 1016 (expressing "disappointment and dis-

pleasure" with the ITC's assertion of jurisdiction over issues "resolved by China's competent courts").[3]

Moreover, although this case involves trade secret misappropriation, there is no reason why a similar theory could not be advanced based on any number of "unfair" practices—from violations of U.S. labor laws to environmental standards. Such an extraordinary expansion of U.S. law plainly impedes upon the sovereignty of other nations.[4] That cannot be what Congress intended.

d. The other considerations relied on by the *TianRui* majority—legislative history and administrative deference—are unpersuasive.

The *TianRui* court placed substantial emphasis on legislative history. But, aside from general statements about the breadth of Section 337(a)(1)(A)'s substantive prohibitions (661 F.3d at 1330-1331), the panel identified only a *single* statement referring to possible extraterritorial application: a sentence in a 1922 report from the U.S. Tariff Commission advis-

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[3] The Second Circuit recently accorded significant weight to the views expressed in a similar amicus filing. See *In re Vitamin C Antitrust Litig.*, No. 13-4791-cv, 2016 WL 5017312, at *2-*3, *10-*12 (2d Cir. Sept. 20, 2016). Indeed, the present case appears to be only the second case in U.S. courts in which a Chinese government entity has participated as amicus curiae. *Id.* at *2 n.5.

[4] These concerns are not alleviated by the statute's provision for presidential review, given that it (1) requires the President to intervene in the ITC's decision-making, (2) affords him only an all-or-nothing veto power, and (3) as of 2014, had only been invoked *six* times. Michael Buckler & Beau Jackson, *Section 337 as a Force for "Good"? Exploring the Breadth of Unfair Methods of Competition and Unfair Acts Under § 337 of the Tariff Act of 1930*, 23 Fed. Cir. B.J. 513, 517 (2014).

ing that the predecessor to Section 337 "make[s] it possible for the President to prevent unfair practices, even when engaged in by individuals residing outside the jurisdiction of the United States." *Id.* at 1331 (quoting U.S. Tariff Comm'n, *Sixth Annual Report* 4 (1922)).

That isolated statement—issued *after* Congress had enacted the relevant statutory section,[5] and issued by the Commission, not Congress—addresses only the location of the wrongdoer, not the location of the wrong. It is far from the "clear indication of extraterritoriality" that this Court has required.

The *TianRui* majority also suggested that the ITC's conclusion that Section 337(a)(1)(A) sweeps extraterritorially is entitled to deference. 661 F.3d at 1332. But, as the Second Circuit has explained, in light of "the strong presumption that statutes are limited to domestic application in the absence of clear expression of congressional intent to the contrary," it is "far from clear that an agency's assertion that a statute has extraterritorial effect, unmoored from any plausible statutory basis for rebutting the presumption against extraterritoriality, should be given deference." *Liu Meng-Lin* v. *Siemens AG*, 763 F.3d 175, 182 (2d Cir. 2014).

Indeed, the *TianRui* majority's reasoning drains the presumption against extraterritoriality of any meaning. An agency's interpretation is entitled to deference *only* "if the statute is silent or ambiguous." *Chevron, Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 843

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[5] Cf. *Sullivan* v. *Finkelstein*, 496 U.S. 617, 631 (1990) (Scalia, J., concurring) ("[*P*]*ost*-enactment history of a statute's consideration and enactment * * * is a contradiction in terms.").

(1984). But if a statute is ambiguous regarding extraterritoriality, then it necessarily contains no "clear indication of an extraterritorial application." *Kiobel*, 133 S. Ct. at 1664 (quoting *Morrison*, 561 U.S. at 255). An agency's judgment, therefore, cannot overcome the presumption against extraterritoriality.

2. The "relevant conduct" here occurred outside the United States.

If a statute does not extend extraterritorially—as is the case here—and "all the relevant conduct" regarding a particular claim "took place outside the United States," then the statute does not apply to that claim. *Kiobel*, 133 S. Ct. at 1669.

The occurrence in the United States of *some* conduct relevant to the claim is not a sufficient basis for the claim to proceed. As the Court explained in *Morrison*, and reiterated in *Kiobel*, "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Kiobel*, 133 S. Ct. at 1669. After all, "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Morrison*, 561 U.S. at 266.

The critical inquiry, therefore, is whether "the conduct relevant to the statute's focus" occurred in the United States or abroad. *RJR Nabisco*, 136 S. Ct. at 2101. If it occurred abroad, then the application of the statute is impermissibly extraterritorial.

The focus of Section 337(a)(1)(A)— the "object[] of the statute's solicitude," *Morrison*, 561 U.S. at 267— is "[u]nfair methods of competition and unfair acts."

19 U.S.C. § 1337(a)(1)(A). It is the location of the alleged unfair methods or acts that is therefore determinative for purposes of the extraterritoriality inquiry.

Indeed, this Court and the courts of appeals have concluded in a variety of contexts that the "focus" inquiry turns on the location of the wrong for which Congress sought to impose liability. See, *e.g.*, *Arabian Am. Oil Co.*, 499 U.S. at 248 (question under Title VII is location of the alleged wrongful employment practices, even though case involved U.S. citizens employed by American employer); *Warfaa* v. *Ali*, 811 F.3d 653, 660 (4th Cir. 2016) (inquiry under the Alien Tort Statute turns on the location of the conduct alleged to violate international law); *Doe* v. *Drummond Co.*, 782 F.3d 576, 592 & n.24 (11th Cir. 2015) (same), cert. denied, 136 S. Ct. 1168 (2016); *Mastafa* v. *Chevron Corp.*, 770 F.3d 170, 184 (2d Cir. 2014) (same). For Section 337(a)(1)(A), the "wrong" targeted by Congress is the "unfair acts" or "unfair methods" subject to the statute.[6]

Section 337(a)(1)(A)'s reference to unfair acts "in the importation of articles" does not indicate that "importation" is the statute's focus. Rather, as we have discussed (see pages 20-21, *supra*), this phrase limits the set of "unfair acts" to which the statute

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[6] Thus, for example, if multiple manufacturers conspire to manipulate pricing within the U.S. of articles imported into the U.S. market in contravention of established competition law or use bribery within the U.S. to disadvantage domestic competitors, Section 337(a)(1)(A) provides the ITC with a means to review those practices in connection with importation itself. See U.S. Tariff Comm'n, *supra*, at 4 (Section 337 applies to "unfair price cutting, full line forcing, [or] commercial bribery").

applies, but is not itself the target of the statutory prohibition.[7]

Here, there is no serious dispute that, as in *TianRui*, the relevant "unfair act[]"—misappropriation of trade secrets—occurred in China. Cf. *TianRui*, 661 F.3d at 1328 (asking "whether Section 337 applies to imported goods produced through the exploitation of trade secrets in which the act of misappropriation occurs abroad"). Indeed, SI Group argued before the Federal Circuit that Sino Legend "began colluding with both Lai and Xu, including through Xu's SI Group laptop, to obtain SI Group's SP-1068 trade secrets"—acts that necessarily occurred in China. See Nonconfidential Br. of Intervenor SI Grp., Inc., at 3, *Sino Legend*, 623 F. App'x 1016 (No. 2014-1478). Thus, the application of Section 337(a)(1)(A) to Sino Legend's conduct is impermissibly extraterritorial.

* * *

Because Section 337(a)(1)(A) does not apply extraterritorially, and because, here, the conduct that is the focus of that statute occurred in China, the statute does not apply in these circumstances. The Federal Circuit's contrary holding authorizes the ITC to grossly exceed its statutory authority.

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[7] This is in sharp distinction to the remaining provisions of Section 337, all of which impose liability for "[t]he importation" itself. 19 U.S.C. § 1337(a)(1)(B)-(E). Indeed, Section 337(a)(1)(A) excludes articles subject to those subsections from its ambit. *Id.* § 1337(a)(1)(A).

B. The Proper Reach Of Section 337(a)(1)(A) Is An Important Question Warranting This Court's Review.

The Federal Circuit's decision warrants review for three reasons.

To begin with, the rule adopted in *TianRui* and applied here has been subjected to considerable criticism. See, *e.g.*, Kerrilyn Russ, Comment, *On the Wrong Side of the Tracks: An Analysis of the U.S. Court of Appeals for the Federal Circuit's Non-Application of the Presumption Against Extraterritoriality*, 52 Washburn L.J. 685, 709-710 (2013); Viki Economides, Note, TianRui Group Co. v. International Trade Commission: *The Dubious Status of Extraterritoriality and the Domestic Industry Requirement of Section 337*, 61 Am. U.L. Rev. 1235, 1251-1252 (2012); Mark Wine, *Beyond* TianRui v. ITC: *How Far Will the US Courts Go?*, World Intell. Prop. Rev., Jan. 5, 2013; Manjit Gill, *Has U.S. Intellectual Property Law Reached Too Far?*, 19 ABA Sec. of Litig. 14, 15 (June 25, 2013).

Second, this case and *TianRui* are not at all unique. The ITC has prosecuted and continues to prosecute a significant number of cases involving trade secret misappropriation that occurred entirely abroad.

Third, the extraterritorial extension of the ITC's authority under Section 337(a)(1)(A)—which is not limited to cases of trade secrets—permits the ITC to apply U.S. law to a wide variety of business practices occurring anywhere in the world.

1. The ITC is adjudicating a significant number of cases that extend the trade secrets laws of the United States worldwide.

The Federal Circuit's expansion of the ITC's authority to prosecute the misappropriation of trade secrets is virtually unbounded. If conduct abroad relates to the manufacture of goods subsequently imported into the U.S., and there is a claim of domestic injury, the ITC may subject that conduct to U.S. misappropriation law—regardless of the legal principles applicable in the country where the conduct occurred. *TianRui*, 661 F.3d at 1329.

The ITC has not been shy about exercising this authority. Since *TianRui*, the ITC has pursued ten separate investigations involving the misappropriation of trade secrets.[8] Indeed, the statistics show a sharp increase in the number of trade secret investigations following *TianRui*. See P. Andrew Riley & Jonathan R.K. Stroud, *A Survey of Trade Secret Investigations at the International Trade Commission: A Model for Future Litigants*, 15 Colum. Sci & Tech. L. Rev. 41, 65 (2013) (predicting "that number may grow").

Including this case, *eight* involve misappropriation that arguably occurred abroad.[9] For example,

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[8] See *337 Info – Unfair Import Investigations Information System*, U.S. Int'l Trade Comm'n, https://pubapps2.usitc.gov/337external/ (accessed August 12, 2016) ("Advanced Search" → "Unfair Act Alleged: 'Trade Secret'").

[9] See, *e.g.*, Certain Stainless Steel Prods., Inv. No. 337-TA-933 (USITC Oct. 10, 2014); Certain Crawler Cranes & Components Thereof, Inv. No. 337-TA-887 (USITC July 17, 2013); Certain Opaque Polymers, Inv. No. 337-TA-883 (USITC June 21, 2013); Certain Robotic Toys & Components Thereof, Inv. No. 337-TA-

the complainant in *Certain Stainless Steel Products* made a virtually identical allegation to that at issue here: that an employee was recruited by the respondent to gain access to his knowledge of the complainant's trade secrets, all of which occurred abroad. Complaint (Public Version) ¶¶ 47-65, Certain Stainless Steel Prods., Inv. No. 337-TA-933 (October 10, 2014). The ITC will continue to apply U.S. trade secrets laws to conduct in other countries unless this Court intervenes.

That worldwide expansion of U.S. trade secrets laws risks significant conflict with the laws and institutions of other countries. Indeed, "the lack of a comprehensive international standard results in substantial variation among [national] legal systems with respect to trade secrets," including whether liability for misappropriation is civil or criminal, the scope of trade secrets, the duties that are imposed, and the available remedies. *Enquiries into Intellectual Property's Economic Impact*, Org. for Econ. Cooperation & Dev. 139 (2015), http://www.oecd.org/sti/ieconomy/Chapter3-KBC2-IP.pdf.[10] And, in many cases, these divergences "are a function of fundamental differences in cultural at-

869 (USITC Feb. 11, 2013); Certain Paper Shredders, Inv. No. 337-TA-863 (USITC Jan. 25, 2013); Certain Elec. Fireplaces, Inv. No. 337-TA-826 (USITC Jan. 19, 2012); Certain DC-DC Controllers & Prods. Containing Same, Inv. No. 337-TA-698 (USITC Sep. 6, 2011).

[10] These differences have persisted despite the ratification of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which sets only certain minimum standards for the trade secrets laws of party states. *Ibid.*; Robin J. Effron, *Secrets and Spies: Extraterritorial Application of the Economic Espionage Act and the TRIPS Agreement*, 78 N.Y.U. L. Rev. 1475, 1477 (2003) ("TRIPS acts merely as a floor").

titudes regarding ownership and use of valuable business information," which should not be disregarded lightly. Jerry Cohen & Alan S. Gutterman, *Trade Secrets Protection and Exploitation* 410 (1998).

China provides an excellent example. Chinese law requires that a trade secret possess "practical applicability," a requirement absent from the Uniform Trade Secrets Act. Compare Law on Countering Unfair Competition (adopted at the Third Meeting of Standing Comm. Eighth Nat'l People's Cong., promulgated Sept. 2, 1993, effective Dec. 1, 1993), art. 10 (China) with Unif. Trade Secrets Act § 1(4). Moreover, as this case illustrates (see pages 6-8, *supra*), Chinese institutions have their own practices for investigating and prosecuting violations of trade secrets laws. In any event, "[e]ven if Chinese trade secret laws were identical to our laws," *TianRui*, 661 F.3d at 1342 n.8 (Moore, J., dissenting), the protection of trade secrets in China would be appropriately left to Chinese courts.

The foreign policy risks of allowing Section 337(a)(1)(A) to run roughshod over the trade secrets laws of the other nearly 200 nations worldwide are substantial. Cf. *RJR Nabisco*, 136 S. Ct. at 2106 ("providing a private civil remedy for foreign conduct creates a potential for international friction"). Other states might seek to retaliate against the enforcement of U.S. trade secrets laws by prosecuting alleged domestic misappropriation by U.S. companies. Or they might elevate disputes over the use of Section 337(a)(1)(A) to international institutions—and not for the first time. See generally Tom M. Schaumberg, *A Revitalized Section 337 to Prohibit Unfairly Traded Imports*, 77 J. Pat. & Trademark Off. Soc'y 259 (1995).

This infringement of foreign sovereignty is unnecessary. Other nations, including China, offer protections for trade secrets—as SI Group was well aware when it initiated proceedings in China's courts. To the extent those remedies are inadequate, U.S. law provides a company in SI Group's position with "a ready-made solution to its problem: obtain a process patent." *TianRui*, 661 F.3d at 1343 (Moore, J., dissenting). And to the extent Congress wishes to extend U.S. trade secrets laws abroad, it may say so expressly. It has not done so here.

2. The Federal Circuit's construction of Section 337(a)(1)(A) gives the ITC unfettered authority to regulate a wide variety of business practices worldwide.

The consequences of the Federal Circuit's decision in *TianRui* are not limited to the extraterritorial extension of U.S. trade secret laws. As Judge Moore wrote in dissent, the majority's rule allows the ITC to scrutinize "all business practices of * * * importer[s]," even those that involve "entirely foreign acts." *TianRui* 661 F.3d at 1338 (Moore, J., dissenting). That cannot be right.

The Federal Circuit and its predecessor court have long interpreted Section 337(a)(1)(A) to afford the ITC "broad authority to address every type and form of unfair trade practice." *Suprema, Inc.*, 796 F.3d at 1350 (citing *In re Von Clemm*, 229 F.2d at 443). Indeed, the ITC already applies Section 337 to allegations of unfair business practices that have nothing to do with intellectual property. These include antitrust claims (see Certain Elec. Audio & Related Equip., Inv. No. 337-TA-7, 1976 WL 41414 (USITC Feb. 10, 1976) (Preliminary)); false designation of origin and unfair labeling (see Certain Alka-

line Batteries, Inv. No. 337-TA-165, USITC Pub. No. 1616 (USITC Nov. 1, 1984) (Final)); and even ordinary tort and contract actions, such as breach of fiduciary duty and fraud (see Certain Floppy Disk Drives & Components Thereof, Inv. No. 337-TA-203, 7 ITRD 2366 (USITC August 29, 1985) (Final)). The Federal Circuit's rule in *TianRui* thus endows the ITC with authority to apply U.S. law to a substantial range of conduct occurring entirely in other nations.

TianRui also gives a stamp of approval to an emerging trend: the use of Section 337(a)(1)(A) to apply American norms abroad regarding any number of issues. Commentators and advocates have suggested that Section 337(a)(1)(A) could be used to extend U.S. environmental laws,[11] labor laws,[12] laws regarding the trading of conflict minerals,[13] food and drug laws,[14] human rights laws,[15] and racketeering

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[11] See, *e.g.*, Jonathan J. Engler, *Section 337 of the Tariff Act of 1930: A Private Right-of-Action to Enforce Ocean Wildlife Conservation Laws?*, 40 Envtl. L. Rep. 10513 (2010) (conservation laws); Teague I. Donahey, *Expanding Horizon of Section 337 Jurisdiction*, Intell. Prop. Mag. 44 (July 2016) (endangered species).

[12] See, *e.g.*, Bryan A. Edens, *An Expanded Perspective: Child Labor Claims Under Section 337,* 23 337 Rep. 13, 13-14 (2007) (child labor laws); see also *TianRui*, 661 F.3d at 1338 (Moore, J., dissenting) (labor conditions and minimum wage laws).

[13] See, *e.g.*, Buckler & Jackson, *supra*, at 553.

[14] See, *e.g.*, Beau Jackson & Michael Buckler, *Unfair Trade Practice? Prove It Under Section 337*, Law360 (Oct. 21, 2015, 11:27 AM), http://www.law360.com/articles/713250/unfair-trade-practice-prove-it-under-section-337 (mislabeled food and adulterated drugs).

[15] See, *e.g.*, Schaumberg, *supra*, at 270.

laws.[16] Many of these laws may not apply extraterritorially by their own terms, let alone afford a private right of action to enforce them. And, in many of these domains, international norms may be far from settled.

Indeed, the expansion of the ITC's jurisdiction under Section 337(a)(1)(A) threatens to extend American laws where this Court has found no clear congressional intent to do so. Section 337(a)(1)(A) could be used to extend American employment laws (cf. *Arabian Am. Oil Co.*, 499 U.S. 244); American human rights laws (cf. *Kiobel*, 133 S. Ct. 1659); and American racketeering laws (cf. *RJR Nabisco*, 136 S. Ct. 2090). This Court should not read into Section 337(a)(1)(A) an unexpressed intent by Congress to go farther than it has in these numerous other statutes.

In short, the combination of the ITC's broad substantive authority and the *TianRui* court's sweeping understanding of the ITC's territorial jurisdiction is dangerous and unprecedented. Further review is warranted.

C. This Case Is An Appropriate Vehicle To Resolve Whether Section 337(a)(1)(A) Extends Extraterritorially.

This case is a proper vehicle to review the question presented. The decision below turns on the correctness of the Federal Circuit's holding in *TianRui*: if Section 337(a)(1)(A) does not permit the ITC to police acts of misappropriation of trade secrets that occurred entirely abroad, then there is no basis for the exclusion order entered by the ITC in this case.

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[16] See, *e.g.*, Wine, *supra*.

Moreover, the ITC's order plainly rested on the extraterritorial application of Section 337(a)(1)(A). The ITC expressly adopted the ALJ's factual findings, including that "Mr. Xu and Mr. Lai signed confidentiality and noncompetition agreements with [SI Group's] Shanghai subsidiary but left to work for [Sino Legend] where [Sino Legend] wrongfully took [SI Group's] SP1068 trade secrets by unfair means." App., *infra*, 48a.

And, as a matter of law, the ITC concluded that "the question of whether there is a violation of Section 337 by reason of misappropriation of trade secrets is governed by (U.S.) federal common law, even where that misappropriation occurs abroad," citing *TianRui*. *Id.* 14a-15a n.1.

Thus, the ITC's decision—approved by the Federal Circuit—rested on the conclusion that the misappropriation of trade secrets abroad falls within the scope of Section 337(a)(1)(A).[17]

The Federal Circuit's summary affirmance and subsequent denial of en banc rehearing indicates that the court now regards *TianRui* as settled law. The Federal Circuit saw no need to comment on, nor

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[17] The ALJ gave Sino Legend's extraterritoriality argument even more extensive consideration: "[Sino Legend] argue[s] incorrectly that, because the alleged misappropriation occurred outside of the United States, and the only connection to the United States is the importation of a small amount of products, the Commission does not have subject matter jurisdiction." *Initial Determination*, at *12. Because the Commission did not expressly overturn the ALJ's ruling on extraterritoriality, its decision incorporated the ALJ's holding with respect to that issue. *MEMS Tech. Berhad* v. *ITC*, 447 F. App'x 142, 148 (Fed. Cir. 2011) ("The unreviewed portions of the Initial Determination became the decision of the Commission.").

give any further consideration to, this Court's intervening decision in *Kiobel*. The Federal Circuit will not revisit this issue.

Finally, because appeals from the ITC's decisions under Section 337 are committed to the exclusive jurisdiction of the Federal Circuit (see 28 U.S.C. § 1295(a)(6)), there will be no further litigation or decisional law concerning this important question. This Court's intervention is plainly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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