No. 16-428

IN THE

Supreme Court of the United States

SINO LEGEND (ZHANGJIANGANG) CHEMICAL CO. LTD.,

Petitioners,

v.

INTERNATIONAL TRADE COMMISSION & SI GROUP, INC.,

Respondents.

CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I declare that the ***Amicus Curiae*** in case **16-428** contains **2,306** words, excluding parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the **31st** day of **October 2016.**

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INTERNATIONAL TRADE COMMISSION & SI GROUP, INC.,

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

BRIEF OF THE TRADE REMEDY AND INVESTIGATION BUREAU OF THE MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS[1]

INTEREST OF THE *AMICUS CURIAE*

The Ministry of Commerce of the People's Republic of China ("MOFCOM") is a component of the central Chinese government in charge of domestic and international trade affairs as well as international economic cooperation. As the highest administrative authority concerning business, MOFCOM is authorized to regulate trade between China and other countries, including all affairs related to fair trade. The Trade Remedy and Investigation Bureau ("TRB") is a branch within MOFCOM charged with, among other things, guiding Chinese enterprises to respond to Section 337 investigations initiated by the U.S. International Trade Commission ("ITC").

The decision in this matter below demonstrating the ITC's continued reliance and expansion of the errant decision in *TianRui Grp. Co. v. ITC,* 661 F.3d 1322 (Fed. Cir. 2011), to bar products from entering the United States for conduct that not only occurred completely within China's borders by Chinese citizens working at Chinese companies, but also conduct that was adjudicated in China to have been lawful, necessitates the TRB to submit this brief to express the urgency needed for this Court to grant the Petition for *Certiorari* to correct the errors below.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. All parties consented to the filing of this brief.

SUMMARY OF ARGUMENT

The TRB is disappointed by recent actions of the ITC. In wrongly interpreting Section 337 of the Tariff Act to allow the ITC to bar imports into the United States based on alleged actions conducted, and adjudicated, wholly within the borders of China, the ITC has impugned the sovereignty of China and refused to accord the comity expected of a trade partner.

The Petition for *Certiorari* should be granted and the decision of the ITC reversed for three important reasons. First, comity and the avoidance of international discord counsel against an interpretation of Section 337 that seeks to expand the reach of U.S. trade secret law beyond the borders of the United States. Second, the ITC decision is at odds with the presumption that U.S. laws do not extend beyond the borders of the United States absent clear Congressional intent otherwise. Finally, the Federal Circuit in *Tianrui* failed to properly analyze the issue of extraterritoriality under guiding principles from this Court and thus reached the wrong conclusion.

Reversal of the holding in *Tianrui* that Section 337 of the Tariff Act reaches alleged trade secret misappropriation occurring entirely outside the United States will alleviate the immediate concerns of the TRB and provide certainty in the international legal system.

ARGUMENT

The displeasure of the TRB with what has unfolded in this, and other, recent ITC cases involving alleged trade secret violations should not go unnoticed. In this matter, there is no dispute that the alleged actions occurred entirely within China, by Chinese citizens, while working at Chinese companies. The alleged acts of misappropriation where first raised by Complainant's Chinese subsidiary in China. Both criminal and civil proceedings were instituted in China for these alleged misdeeds. The alleged conduct and actors in question were ultimately vindicated. However, Complainant, unhappy with the failure of proof in China, sought institution of a Section 337 proceeding in the United States based on the same conduct already adjudicated in China. The ITC conducted an investigation, ignored the rulings in China to the contrary, and determined that not only could the ITC bar products based on this conduct, but also that some of Complainant's justify a limited exclusion order of Petitioner's products.

The ITC based its authority to ban imports based on trade secret misappropriation occurring in China on the split-panel decision in *Tianrui Grp Co. v. ITC,* 661 F.3d 1322 (Fed. Cir. 2011)(holding the ITC correctly concluded that it could investigate and grant relief based in part on extraterritorial conduct). The Federal Circuit decision was wrongly decided and this case presents the ideal opportunity for this Court to address these issues of international importance.

I. Comity Counsels Against the Extraterritorial Application of U.S. Trade Secret Laws for Actions Occurring Entirely Within China

Comity between nations is "based on international law, by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory." *Lauritzen v. Larsen,* 354 U.S. 571, 578 (1953). International comity touches many aspects of U.S. law and is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or other persons who are under the protection of its laws." *Hilton v. Guyot,* 159 U.S. 113, 164 (1895). "Thus, as . . . observed in other contexts, providing a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct." *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2106 (2016). "Although 'a risk of conflict between the American statute and a foreign law' is not a prerequisite for applying the presumption against extraterritoriality, where such a risk is evident, the need to enforce the presumption is at its apex." *RJR Nabisco, Inc.,* 136 S. Ct. at 2107 (quoting *Morrison v. Nat'l Bank Aus. Ltd.*, 561 U.S. 247, 255 (2010)).

Comity underlies the presumption that U.S. laws do not have extraterritorial application so as "to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries." *RJR Nabisco, Inc,* 136 S. Ct. at 2100. "The

presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel v. Royal Dutch Petro. Co.,* 133 S. Ct. 1659, 1664 (2013).

"It is a basic premise of our legal system that, in general, 'United States law governs domestically but does not rule the world.'" *RJR Nabisco, Inc.,* 136 S. Ct. at 2100 (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)). To this end, "this Court ordinarily construes ambiguous statues to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.,* 542 U.S. 155, 164 (2004). Section 403 of the *Restatement (Third) of Foreign Relations Law of the United States* indicates that this interference exists "when the exercise of [] jurisdiction is unreasonable" in view of factors such as the citizenship or residence of the parties arises, the territory of the activity to be regulated, and the potential for conflict with foreign law. *See id.* The ITC's application of Section 337 in this matter is an unreasonable interference.

China, as is the U.S. and more than 100 other nations, is a member of the World Trade Organization. In accordance with the foundational treaty, the Agreement on Trade-Related Aspect of Intellectual Property Right ("TRIPS"), China harmonized its intellectual property laws to meet the terms of the treaty. As such, both the U.S. and China provide the same minimum standards for protection from trade secret misappropriation. In the matter below, the Chinese courts determined that no trade secret misappropriation occurred. The

ITC, however, refused to accept the judgment of the Chinese courts. The ITC's disregard for the sovereignty of China risks the very international discord underlying the presumption against extraterritorial application of U.S. law. *See Kiobel v. Royal Dutch Petro. Co.,* 133 S. Ct. 1659, 1664 (2013) ("This presumption 'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'")(quoting *EEOC v. Arab. Am. Oil Co.*, 499 U.S. 244, 248 (1991)). The ITC has created an environment prone to forum shopping that cannot be remedied by *forum non conveniens* if left unchecked.

If the decision in *Tianrui* is revisited and reversed, the problems created by the ITC's recent actions are remediated. For these reasons alone, the Court should grant the Petition for *Certiorari.*

II. There is No Indication U.S. Congress Intended for Section 337 to Apply Extraterritorially for Alleged Trade Secret Misappropriation Acts Occurring Entirely Outside the United States

In the United States there is a presumption that laws do not have extraterritorial application. This presumption is based on the "basic premise of our legal system that, in general, 'United States law governs domestically but does not rule the world.'" *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 210o (2016). "Absent clearly expressed congressional intent to the contrary, federal law will be construed to have only domestic application." *Id.* The question is not whether Congress would have wanted a statue to apply to foreign conduct if it had thought about it, but rather whether Congress has affirmatively and unmistakably instructed that the

statute will apply extraterritorially. *Id.* (internal quotations omitted).

This Court has developed a two-step inquiry for determining extraterritoriality. First, the inquiry is whether the presumption against extraterritoriality has been rebutted by "clear, affirmative indication that it applies extraterritorially." *Id.* If the statute is not expressed as extraterritorial, the second step is to determine "whether the case involves a domestic application of the statute" based on the statute's "focus." *Id.* In determining the statute's "focus," this Court instructed:

> If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in the U.S. territory.

Id. at 2101. Following this Court's two-step inquiry with the relevant portion of Section 337, it is clear that the statute does not apply extraterritorially.

Section 337 of Title 19 of the United States Code provides an *in rem* remedy for "unfair methods of competition and unfair acts in the importation of articles . . . into the United States." 19 U.S.C. 337(a)(1)(A). The ITC has interpreted this section to include acts of trade secret misappropriation. To the extent the statute reaches trade secret misappropriation, there is no explicit language or indication to suggest that this portion of the statute applies extraterritorially. The absence of explicit

language can be contrasted with other portions of the statute that directly make activities occurring outside the United States actionable. *See, e.g.,* 19 U.S.C. 337(a)(1)(B)(making "importation into the United States . . . articles that – (i) infringe a valid and enforceable United States patent" unlawful). The absence of explicit language means the presumption against extraterritoriality is unrebutted.

Turning to the second prong of the analysis, there is no question that the present case involves a "focus" that occurred solely in a foreign country. Accordingly, the ITC applied an "impermissible extraterritorial application" of the statute.

Whether, and to what extent, the U.S. Congress could seek to regulate alleged acts of misappropriation occurring outside the United States is not at issue. The issue is whether the canons of construction that counsel against judicial extension of statutes beyond the borders of the United States were improperly applied. A fair review of the statute demonstrates that in fact the Federal Circuit and ITC have incorrectly applied the precedent of this Court and must be reversed.

III. This Case Provides an Appropriate Vehicle to Review the Federal Circuit's Decision in *TianRui*

The entirety of the ITC's decision below rests on the premise that the Federal Circuit correctly decided that Section 337 applies extraterritorially when it comes to trade secret misappropriation acts occurring completely outside the borders of the

United States by foreign nationals working at foreign companies.

In *TianRui,* the majority did not follow this Court's two-part inquiry, but rather proffered its own three reasons why the presumption against extraterritoriality did not apply. *TianRui Grp. Co. v. ITC,* 661 F.3d 1322, 1329 (Fed. Cir. 2011). The majority argued that by virtue of regulating "importation" into the United States, Congress must have intended extraterritoriality by context; that the conduct regulated is only relevant when the domestic act of importation occurs; and that Congress intended that broad and flexible authority be vested in the ITC to consider conduct abroad if it related to competition in the domestic market.

The majority not only failed to apply the correct standard, but also ignored extraterritoriality must be "clearly expressed" by Congress. *See, e.g., EEOC v. Arabian Am. Oil Co.,* 499 U.S. 244, 248 (1991). By contrast, Judge Kimberly Moore in her dissent properly addresses the interpretation of this portion of the statute.

As noted by Judge Moore, there "is nothing in the plain language of the statute that indicates that Congress intended it to apply to unfair acts performed entirely abroad." She also noted that process patents were previously viewed outside the reach of Section 337 simply because the infringing activities occurred solely in foreign countries. In other words, the statute had previously been construed to be "not expressly include the authority to apply our laws to acts carried out abroad. *TianRui Grp. Co.,* 661 F.3d at 1341 (citing *In re Amtorg Trading Corp.,* 75 F.2d 826, 831-32 (CCPA 1935)). She also noted that the majority's reliance on

the legislative history was incorrect and "the legislatively, like the plain language of the statute, lack a clear indication that Congress intended section 337 to apply extraterritorially." *Id.* at 334.

The position of the majority is indefensible. "When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison v. Nat'l Bank Aus. Ltd.*, 561 U.S. 247, 255 (2010). Given that *TianRui* is the last word on the statutory construction of Section 337 and the wrong standard was clearly applied, it is critical that this Court address this issue.

CONCLUSION

The TRB urges this court, by granting the petition for a writ of certiorari, to make it clear that Section 337 clause cannot be applied extraterritorially, overrule the wrong conclusion reached by the Federal Circuit in *Tianrui*, and thus maintain a sound international legal order.

Respectfully submitted.

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