2016 WL 7174587 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

SINO LEGEND (ZHANGJIAGANG) CHEMICAL CO. LTD. et al., Petitioners,
v.
INTERNATIONAL TRADE COMMISSION and SI Group, Inc., Respondents.

No. 16-428.
December 6, 2016.

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

Brief of Respondent SI Group, Inc., in Opposition

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*i QUESTIONS PRESENTED

Did Petitioners waive an extraterritoriality defense, which is now the subject of their *certiorari* request, by neglecting the issue in their petition for review and related briefing to the U.S. International Trade Commission (ITC)?

Does 19 U.S.C. § 1337(a)(1)(A) ("Section 337"), which directs the ITC to adjudicate "unfair methods of competition and unfair acts in the importation of articles" that "substantially injure an industry in the United States," permit the ITC to adjudicate misappropriation of domestic trade secrets, including their unfair acquisition from a U.S. company and use in the manufacture and importation of competing products, that substantially injures its industry in the United States?

*II RULE 29.6 STATEMENT

The identity of the parent corporation or publicly held companies that own 10% or more of Respondent SI Group, Inc.'s stock is:

Schenectady International Group, Inc.

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*1 OPINIONS BELOW & JURISDICTION

SI Group adopts Petitioners' statements.

STATUTORY PROVISIONS INVOLVED

SI Group generally agrees with Petitioners' identification of Subsection (a)(1)(A) of Section 337 as the primary provision applied by the ITC. Pet. 1-2. But Petitioners omit the overall title of Section 337, which reads "Unfair practices in import trade." SI Group will refer to this title in addressing Petitioners' attempt to contrast Subsection (a)(1)(A) with Subsection (a)(1)(B).

STATEMENT

The Federal Circuit dismissed Petitioners' appeal in a judgment without opinion under Fed. Cir. R. 36. Pet. 1a. According to an information sheet provided with the Court's judgment, "a disposition of this nature is used only when the appellant has utterly failed to raise any issues in the appeal that require an opinion to be written in support of the court's judgment of affirmance." *Infra* at 1a.

Such was the case here. First, as SI Group explained to the Federal Circuit, Petitioners waived extraterritoriality by failing to brief it to the ITC Commission in the first instance. SI Group C.A. Br. 15-18. This rendered their appeal to the Federal Circuit not only meritless, but inappropriate for a full opinion.

Second, Section 337 was not applied extraterritorially, nor was the violation "wholly extraterritorial," as Petitioners contend. The Commission and ALJ found that ***2** the trade secrets were owned by U.S. parent company SI Group,

Inc. (hereinafter, "SI Group" or "SI Group (U.S.)"); that Petitioners unfairly accessed the trade secrets through two employees of SI Group's Chinese subsidiary (hereinafter "SI Shanghai") who trained in the U.S., requested U.S. batch records, and accessed U.S. computer systems; that at the time, the two employees had confidentiality agreements with SI Group (U.S.) to protect those trade secrets; and that Petitioners unfairly obtained the trade secrets through those employees in breach of their duty of secrecy to SI Group (U.S.) and then unfairly used those secrets in making and importing competing products into the United States. A164-67, A578, A585, A598-600, A605-06, A859-61, A781-82; A1663-64; *see also* A7295-96; A6667-68. Petitioners' extraterritoriality defense fails because Section 337 was not applied extraterritorially -- substantial relevant conduct occurred in the U.S. (including importation) and in violation of duties of secrecy to a U.S. company.

Third, Section 337 does not purport to regulate foreign activity nor does it implicate extraterritorial application of law. This is supported by the text of the statute, its legislative history, and its application by the ITC.

Fourth, the Section 337 violations caused harmful effects within the United States which touched and concerned the territory of the United States and therefore overcame any presumption against extraterritoriality.

Fifth, Petitioners' dire prediction about a possible increase of trade secret investigations by the ITC or expansion of its jurisdiction since *TianRui* is unsupported.

***3** And finally, contrary to the amicus brief submitted by the Chinese Trade Remedy and Investigation Bureau (TRB), comity does not counsel against the application of Section 337. TRB offers abstract comity arguments, but Petitioners failed to prove their comity defense in this case, and have since dropped it. This highlights that Section 337, as applied, does not offend principles of comity.

A. Statutory Background

SI Group generally agrees with Petitioners' statutory background, including that the Federal Circuit has long interpreted Section 337 as authorizing the ITC to address unfair trade practices, specifically trade secret misappropriation under Subsection (a)(1)(A) and infringement of various specified intellectual property rights under Subsections (a)(1)(B)-(E). Pet. 4.

B. Factual Background

1. SI Group's Innovation and Petitioners' Misappropriation

Founded in 1906 and headquartered in Schenectady, New York, SI Group developed its secret tackifier process over several decades at a cost of millions of dollars and thousands of man hours. A1813-18; *see also* A178, A6175, A6180-83. As SI Group expanded, it initially exported to China using Chinese distributors, but later hired people in China, including **C.Y. Lai.** A1818. SI Group eventually tasked Lai with helping to start a manufacturing plant in Shanghai. *Id.*

***4** At the time, Lai had a relationship with Ms. Zhang, owner of SI Group's then-distributor, Petitioner Red Avenue. *Id.* SI Group did not suspect until much later that she was founding a *manufacturing* company (Sino Legend) to compete directly with SI Group. A142-53; A1820.

Lai was required to sign an NDA not only with SI Shanghai but with SI Group (U.S.), A1727-30, because he would be allowed to access the technical details of the process. *Id.*; A284, A320, A563. When SI Shanghai began manufacturing in 2004, Lai was promoted to General Manager and hired **Jack Xu.** *Id.* All along, Lai was obtaining trade secret process information from SI Group's Rotterdam Junction, N.Y. facility, and keeping it in a store room in Shanghai. A562-64. Xu was ultimately promoted to Plant Manager in 2006. *Id.* In that position, Xu would also be allowed access to SI Group's

most sensitive trade secrets. A1819. Therefore, like Lai, Xu was required to and did sign an NDA with SI Group - the U.S. parent and owner of the trade secrets, A1634-35, as well as with SI Shanghai. *See also* A251-54; A320; A781-82, A6230-31.

Separately, Petitioners (including SI Group's former distributor Red Avenue and newly founded Sino Legend) had been secretly attempting to manufacture an acceptable competitive tackifier. A607, A1820. The evidence shows that at least six months before Xu left SI Group, Petitioners were colluding with both Lai (as a "consultant") and Xu, including through Xu's SI Group laptop while he was still an employee, from which Xu accessed SI Group's U.S. servers, to obtain SI Group's trade secrets. A604-08, A142, A631. Xu left SI Group in ***5** April 2007 to join Petitioners, A1819-20, and by December 2007, Petitioners had made their first successful tackifier. A631. *See also* A6175-76; A6370-94; A6462-63.

2. Early Chinese Litigation

SI Group sought relief in China but, as discussed below, all evidence from the Chinese litigation was ordered excluded by the ALJ, and that order was not appealed. *Infra* § B.5 at 8 et seq. Therefore, SI Group does not address excluded evidence that would have otherwise rebutted Petitioners' arguments regarding the Chinese police investigation and the early civil proceedings in China. Pet. 6-8.

It should be noted, however, that authoritative U.S. government studies, including several USTR special reports, recount how U.S. companies experience serious difficulty in securing impartial justice in Chinese trade secret cases. "It has been difficult for some U.S. companies to obtain relief… despite compelling evidence demonstrating misappropriation," A8029, due to "a systemic lack of effective protection and enforcement," A8025.

3. SI Group Seeks Relief from U.S. Importation at the ITC

In April 2012, Petitioners began importing large scale quantities of their competing SL-1801 tackifier into the United States. A855; A5104-06. SI Group promptly filed an ITC complaint on May 21, 2012. A5001.

***6** Throughout ITC discovery, Petitioners "*used every artifice in their arsenal to obfuscate and to delay revealing the truth about the products they [ ] imported into the United States*, and [sought] to prevent SI Group from using that information to update trade secrets they believe to be misappropriated." A15051 (emphasis added). But once discovery revealed the truth, the ALJ allowed SI Group to assert different trade secrets. A15051-53. Meanwhile, as Petitioners conceded, the Chinese court did not allow SI Group to update the trade secrets they believed to have been misappropriated. A4626. The two proceedings thus addressed different trade secrets.

The record is replete with unchallenged findings of Petitioners' foul play to conceal their misappropriation, e.g., by whiting out records and tearing out pages from key documents. A610-12; A814-15; A6690-91, A15051, A15079. These revelations, as well as the ITC staff attorney's February 2013 pre-hearing brief, which overwhelmingly favored SI Group, A6964-A7069, foreshadowed Petitioners' impending loss at the ITC.

4. Chinese Court Accelerates Proceedings

In the wake of these developments at the ITC, and public knowledge that the ALJ would issue a decision on or before June 25, 2013, A15099, the Chinese court suddenly accelerated its case. In contrast to the slow pace since February 2010, the Chinese court began in March 2013 to schedule submissions and hearings in rapid succession to culminate in a trial on May 29, 2013. A4645-48. [1]

***7** SI Shanghai sought to offer evidence of Lai's misappropriation, but the Chinese court held he would have to be sued separately and denied a resulting request to add him. A4647. Consequently, the trial would not include evidence of Lai's misappropriation.

The unexpected imbalance in which the Chinese court was suddenly about to hold trial led SI Shanghai and SI Group to move to withdraw from the case, yet the court denied that request and held trial *ex parte* despite their protest. A4626. This was a highly unusual, if not unprecedented procedural irregularity. *Id.*

The Chinese court quickly prepared an opinion and issued its judgment on June 17, 2013, the same day the ALJ issued his determination. A4684; A201.

Accordingly, despite Petitioners' contrary implication, the two proceedings were co-pending; and the decisions were issued the same day.

5. Evidence of the Chinese Proceedings Excluded from ITC

The ALJ's decision does not refer at all to the Chinese proceedings because, as Petitioners have acknowledged, the ALJ excluded all evidence of the Chinese proceedings for failure to establish relevance. A20018-19; A6860 n.57 citing A20038-40.

***8** The ALJ gave Petitioners an opportunity to argue the relevance of the Chinese proceedings. But Petitioners only argued that the Chinese proceedings were relevant on their defense of *alleged unclean hands, not extraterritoriality.* A20268-70. [2] *Nor did they ever challenge the ALJ's evidentiary ruling excluding all evidence from the Chinese proceedings.*

Despite the evidentiary ruling they never challenged, Petitioners exhaustively recount the Chinese trial and appellate court decisions in their Petition. Pet. 7-9. Those decisions have never been authenticated or admitted, and are not part of the ITC's evidentiary record. Petitioners later tried to slip them into the ITC record as purported notices of "new authority," but their attempt violated Commission rules, 19 C.F.R. § 210.43, and the ALJ's order excluding evidence of the Chinese proceedings, which they never challenged. Nor are those decisions entitled to judicial notice.

These issues were fully briefed to the Federal Circuit in the context of Petitioners' comity defense, Sino Legend C.A. Br. 60-61; SI Group C.A. Br. 62-67, which Petitioners lost and have now dropped. The Chinese decisions should be disregarded.

Also, as ITC counsel explained to the Federal Circuit: "The Chinese court here at [] pages 4553 to 4554 had the opportunity to take account of the Commission's decision, ***9** at least the ALJ's decision here; it was put aside as foreign evidence. Respectfully, we request that this Court put aside the determination in the same way as the Chinese put aside the U.S. determination." Oral Argument at 23:05, *Sino Legend v. ITC,* 623 F. App'x 1016 (Fed. Cir. 2015) (No. 2014-1478).

C. The ITC Decisions and Presidential Review

The ALJ issued an opinion, A201, after a 5-day hearing and reviewing thousands of pages of submissions, A209. Among other things, the ALJ found that Petitioners, including PMI as domestic importer/distributor, "acted in concert, to commit unfair acts in the importation of the accused products, which were produced using trade secrets misappropriated from Complainant in violation of 19 U.S.C. § 1337(a)(1)(A)." A781-82. *Appellants never challenged these findings.*

Following the ALJ's decision, the parties filed petitions for Commission review. A106. Petitioners barely mentioned the extraterritoriality issue on which they now seek to upend the entire case, A6859; *see also* A7684-85, *id.* n.37.

On September 9, 2013, the Commission issued a Notice of Commission Determination to Review the Final Initial Determination. A15081. The Notice stated: "After considering the ID and the relevant portions of the record, the Commission has determined to review the ID ***in its entirety***," and directed the parties to "*brief their positions on the issues under review.*" A15082 (emphasis added).

10** Pursuant to the order, Petitioners filed a ***100-page brief on Sept. 23, 2013, yet they did not even raise extraterritoriality. A7777 et. seq.

The Commission issued its final determination on January 15, 2014. A101.

The 60-day Presidential Review Period ended on March 14, 2014, without any disapproval of the Commission determination, thereby making the determination final. *See* 19 U.S.C. §1337(j).

REASONS FOR DENYING THE PETITION

A. Petitioners Waived the Extraterritoriality Issue and Certainly Did Not Develop It Enough to Support Supreme Court Review

At the ITC, Petitioners failed to adequately preserve the extraterritoriality as an issue. Their 98-page petition for Commission review of the ALJ's initial determination devoted just one paragraph to extraterritoriality, merely mentioning but not briefing the issue or pointing to any facts or evidence as to whether § 337 was being applied extraterritorially. A6859; *see also* A7684-85, *id.* n.37. Nor did the petition address *Kiobel v. Royal Dutch Petroleum Co.,* 133 S. Ct. 1659 (2013), which had issued months before. [3] A6859. Commission rules provide that "[a]ny issue ***11** not raised in the petition for review will be deemed to have been abandoned." 19 C.F.R. § 210.43(b).

Then, Petitioners further waived those issues by failing to address them in subsequent briefs after the Commission *granted* their petition for review.

In Sept. 2013, the Commission issued a notice, stating it "has determined *to review the [ALJ's decision] in its entirety*," and directing the parties to "*brief their positions on the issues under review.*" A15082 (emphasis added). Petitioners filed a *100-page brief* on Sept. 23, 2013, more than 5 months after *Kiobel* issued on Apr. 17, 2013, ***yet they did not even raise extraterritoriality***, much less cite *Kiobel.* A7777 et. seq.

Petitioners thereby waived and forfeited the extraerritoriality issue. SI Group C.A. Br. §§ LA at 15-18, 59-68; *United States v. Hui Hsiung,* 778 F.3d 738, 743, 747 (9th Cir. 2015), *cert. denied* 135 S. Ct. 2837 (2015) (extraterritoriality defense waived by knowing the argument but failing to fully brief it until post-trial); *Finnigan Corp. v. ITC,* 180 F.3d 1354, 1362-63 (Fed. Cir. 1999); *see also Stern v. Marshall,* 564 U.S. 462, 481-82 (2011) (finding waiver and forfeiture).

Petitioners' waiver cannot be excused especially after SI Group had previously pointed out their failure to fully brief the issue at the Commission petition stage. A7684-85. A litigant should not be able to simply bookmark an issue without factual development and briefing, then drop it entirely, and then make it the centerpiece of an appeal in the event of a loss, to upend a long, hard fought and otherwise fully litigated case. ***12** *Stern,* 564 U.S. at 481-82. Such submarine tactics deny complainants and the Commission fair notice when there is still an opportunity to develop a record on the issue in the first instance, and are highly prejudicial for later appeals. Confidence in the entire process is severely undermined if issues neglected before the Commission can later be presented on appeal as the linchpin of a case.

SI Group fully addressed these points in Federal Circuit briefing. SI Group C.A. Br. 15-18. That court's dismissal of the appeal without opinion under Fed. Cir. R. 36 was entirely appropriate in light of Petitioners' waiver and submarine tactic.

Accordingly, Petitioners waived the extraterritoriality issue. At the very least, they did not sufficiently develop, support or brief extraterritoriality in the first instance to make this case an appropriate vehicle for review.

B. The Federal Circuit and the ITC Faithfully Applied the Statute and this Court's Extraterritoriality Precedents

1. Section 337(a)(1)(A) Was Not Applied to Regulate Extraterritorial Conduct But Rather to Address Unfair Competition in Import Trade that Causes Domestic Injury

Petitioners argue that their unfair acts are beyond the reach of ITC authority by focusing solely on their misappropriation and arguing it was extraterritorial. Pet. 14. But as an initial matter, Petitioners fundamentally misconstrue the nature of the violation. A Section 337(a)(1)(A) violation is not "misappropriation" as such. ***13** Rather, as the ITC emphasized, Section 337(a)(1)(A) "governs the importation of articles derived from common law forms of unfair competition" where there is "actual substantial injury or the threat of substantial injury to a domestic industry." A110-11 (Commission). "In contrast to the [Uniform Trade Secrets Act], … Section 337 addresses unfair practices in import trade." A551-52 (ALJ).

In *TianRui Group Co. Ltd. v. Int'l Trade Comm'n,* 661 F.3d 1322 (Fed. Cir. 2011), the Federal Circuit recognized that the focus of Section 337(a)(1)(A) is on importation that causes domestic injury. The court correctly observed that "foreign 'unfair' activity … is relevant only to the extent that it results in the importation of goods into this country causing domestic injury," *id.* at 1329, and that an exclusion order under Section 337(a)(1)(A) only "sets the conditions under which products may be imported into the United States," *id.* at 1330. It does *not* affect products that are *not* imported. Because Section 337 does not regulate foreign activity, the presumption against extraterritoriality does not apply.

2. The Federal Circuit Correctly Relied on *Morrison* in Finding the Focus of Section 337, and the Object of its Solicitude, is on Importation that Causes Domestic Injury

TianRui also relied on *Morrison v. National Australia Bank,* 561 U.S. 247 (2010), and was correct to do so; *Morrison* was and remains the most applicable precedent. Indeed, the Court recently confirmed the *Morrison* analysis in *RJR Nabisco, Inc. v. European Cmty.,* 136 S. Ct. 2090, 2100-01 (2016).

***14** In *Morrison,* the Supreme Court addressed whether the Securities Exchange Act provides a cause of action to foreign plaintiffs for misconduct in connection with trading securities on exchanges. 561 U.S. at 248-49. Certain deceptive conduct in *Morrison* occurred domestically, some abroad; but the Court found the place where the misconduct originated was not dispositive. *Id.* Rather, the focus of the statute was on the ultimate purchases and sales of the securities. The Court explained:

… the focus of the Exchange Act is *not upon the place where the deception originated*, but upon purchases and sales of securities in the United States. Section 10(b) does not punish deceptive conduct, but only deceptive conduct "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered."

561 U.S. at 266 (emphasis added).[4] Similarly here, the focus of Section 337 is *not upon where any misappropriation originated*, but upon unfair methods of competition and unfair acts "in the importation of articles" resulting in domestic injury. 19 U.S.C. § 1337(a)(1)(A); A110-11.

Further, the Court in *Morrison* said that the "purchase-and-sale transactions are the objects of the statute's solicitude. It is those transactions that the statute seeks to 'regulate.' " 561 U.S. at 267. Here, *importation* ***15** resulting in domestic injury is the object of the statute's solicitude; *that* is what the statute seeks to regulate.

In view of these parallels with Section 337, the Federal Circuit was correct to rely on *Morrison* in stating:

> the foreign "unfair" activity at issue in this case is relevant only to the extent that it results in the importation of goods into this country causing domestic injury. In light of the statute's focus on the act of importation and the resulting domestic injury, the Commission's order does not purport to regulate purely foreign conduct. See *Morrison,* 130 S. Ct. at 2884 (focusing the extraterritoriality analysis on the "objects of the statute's solicitude").

TianRui, 661 F.3d 1322.

The Federal Circuit applied the Supreme Court's analysis in *Morrison* faithfully. In *Morrison,* the statute only contemplated domestic purchases and sales. Because the statute was being applied to foreign purchases and sales, the Supreme Court found such application beyond the reach of the statute's solicitude and impermissibly extraterritorial. In the context of Section 337, however, this same *Morrison* analysis leads to an opposite result. Section 337 contemplates importation resulting in domestic injury. Because the statute was applied only to importation resulting in domestic injury, it was exactly what the statute contemplates. Therefore, it was well within the reach of the statute's solicitude and was not impermissibly extraterritorial. The result in *TianRui* was well supported by *Morrison.*

***16 3. Petitioners' Attempt to Contrast Subsection (a)(1)(A) with Subsection (a)(1)(B) Is Misguided**

In seeking to argue that Subsection (a)(1)(A) does not reach products made abroad that are imported, Petitioners try to contrast this subsection with Subsection (a)(1)(B), which relates to patents. Pet. 17. In Petitioners' view, Subsection (a)(1)(B) clearly expresses "extraterritorial" scope, whereas Subsection (a)(1)(A) does not. Petitioners' arguments are unsupported.

Subsection (a)(1)(B) authorizes the ITC to prevent the "importation into the United States … of articles that … are made … by means of, a process covered by the claims of a valid and enforceable United States patent." Pet. 17. Petitioners argue that Subsection (a)(1)(B) "expresses clear congressional authorization" for extraterritorial application of process patents because "articles imported into the United States are necessarily 'made' outside the United States." Pet. 17.

Petitioners' argument is flawed. The text does not say "made abroad," but rather it simply says "made," by processes covered by U.S. patents. Therefore, according to its plain reading, Subsection (a)(1)(B) is indifferent as to where a product is made. There is therefore no distinction between Subsections (a)(1)(A) and (a)(1)(B) with regard to extraterritorial scope - they are both indifferent as to where a product is made.

The lack of any distinction is highlighted by the fact that both subsections originate from the same, indifferent predecessor statute. In particular, Section 316 of the Tariff Act of 1922 stated:

> ***17** (a) 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… are hereby declared unlawful….

Pub.L. No. 67-318, § 316(a), 42 Stat. 858, 943. Thus, the original act used the phrase "unfair methods of competition and unfair acts in the importation of articles" to cover all forms of unfair competition, including patent infringement. There was no distinction between products made by U.S. process patents versus other forms of unfair competition.

"When Congress subsequently enacted the Tariff Act of 1930, section 316 of the 1922 Act became section 337 of the new Act." *TianRui,* 661 F.3d at 1331. Still there was no distinction between patent infringement versus other forms of unfair competition.

The process patent language on which Petitioners rely was only added to the Tariff Act in response to the 1935 Court of Customs and Patent Appeals' decision in *In re Amtorg Trading Corp.,* 75 F.2d 826 (C.C.P.A. 1935). In *Amtorg,* the C.C.P.A. court departed from its precedent in finding that Section 337 only covered importation of *articles* that infringed U.S. patents and not importation of *products made by processes* that infringed U.S. patents. *Id.* at 831-32. This decision set up, for the first time, a distinction with respect to process patents.

***18** But, in response to *Amtorg,* Congress enacted then-Section 337a to clarify that "the importation … of a product made … by means of a process covered by the claims of any unexpired valid United States letters patent … have the same status for the purposes of section 337 of the Tariff Act of 1930 as the importation of any product or article covered by the claims of any unexpired valid United States letters patent." 19 U.S.C. § 1337a (1940); *see* 86 Cong. Rec. 8969 (1940). SI Group C.A. Br. 42-43. Thus, Congress simply erased the distinction that *Amtorg* created. Section 337 thereby reverted to the state as it was understood before *Amtorg,* where there was no distinction for process patents. *See also* SI Group C.A. Br. 42-43.

The Omnibus Trade and Competitiveness Act of 1988, Pub.L. No. 100-418, 102 Stat. 1107, later divided Section 337 into Subsections (a)(1)(A) through (a)(1)(E) corresponding to differing forms of IP, and Section 337a was incorporated into the patent subsection (a)(1)(B) as (a)(1)(B)(ii), but the act did not change its substance.

Despite the "made" language Petitioners rely on, the ITC interpreted the patent subsection as indifferent to where the product is made: "The statute, by its terms, does not limit coverage to articles of foreign manufacture." *Certain Sputtered Carbon Coated Computer Disks,* Inv. No. 337-TA-350, 1993 WL 854336, *4-*5 (Oct. 1993) (finding that the term "importation" includes "reimportation," i.e., "allegedly infringing articles manufactured in the United States, exported, and subsequently imported back into the United States").

Accordingly, nothing in the text, history, or application of Section 337 supports the notion that Subsections ***19** (a)(1)(A) and (a)(1)(B) are distinguished based on where the product is made. Both subsections have always focused on importation, and both continue to be indifferent as to where the product is made (or unfair acts occurred).

Petitioners also read too much into the phrase "in the importation" in Subsection (a)(1)(A). Pet. 20-21. In their opinion, that phrase represents 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" and therefore "conduct tied to the United States." *Id.* First, petitioners do not explain where they get the phrase, "and subsequent sale of goods." *Id.* Second, Section 337 has contained the phrase "in the importation" since its enactment. *See* 46 Stat. 703 (1930). The phrase, "in the importation" applied to process patents, including when Section 337a was in effect, and clearly did not have such a restrictive meaning back then. Third, the overall title of Section 337, which covers *both* Subsection (a)(1)(A) *and* (a)(1)(B), conspicuously reads "Unfair practices *in import trade.*" (emphasis added). Thus the phrase "in import trade" applies to *both* subsections, which undermines the significance Petitioners try to attach to the phrase "in the importation" in Subsection (a)(1)(A). [5]

Thus, Petitioners offer no cogent reason to adopt a "restrictive" reading of Subsection (a)(1)(A), in contrast to Subsection (a)(1)(B), where none is warranted.

***20 4. Petitioners' Legislative History Arguments Are Flawed**

Regarding the legislative history, Petitioners mainly criticize *TianRui* for citing a Commission report issued after Section 337 was enacted. Pet. 23-24. But the report was paraphrasing the prior testimony of Senator Smoot, the act's primary

sponsor, as is evident from comparing the report's language quoted in *TianRui* to Senator Smoot's statements. *Compare TianRui,* 661 F.3d at 1341, to 62 Cong. Rec. 5874, 5879 (1922). The examples in the Commission report quoted in *TianRui* are found in the Smoot testimony almost verbatim:

> We have in this measure an antidumping law with teeth in it - one that will reach all forms of unfair competition in importation. This section (316) not only prohibits dumping in the ordinary accepted meaning of that word… but also bribery, espionage, misrepresentation of goods, full-line forcing, and other similar practices frequently more injurious to trade than price cutting.

Id. Not only was the report clearly paraphrasing Senator Smoot, but some of the examples he listed would seem to imply unfair acts *abroad* (e.g., espionage). Indeed, Senator Smoot expressly said: "Such a law as I have suggested would assure American producers that they will not be subjected to unfair competition from countries abroad." *Id.* This testimony by the act's primary sponsor is clearly the basis for the Commission report cited in *TianRui,* and provides ample basis for the report's statement that Section 337 "make[s] it possible for the President ***21** to prevent unfair practices, even when engaged in by individuals residing outside the jurisdiction of the United States." *TianRui,* 661 F.3d at 1331 (quoting U.S. Tariff Comm'n, Sixth Annual Report 4 (1922)). The criticism of *TianRui* with respect to the legislative history analysis is unfounded.

5. To the Extent Other Conduct Is Relevant, Much of it Occurred Within and Through the United States, Foreclosing any Conclusion that Section 337 Was Applied Solely or Primarily to Extraterritorial Conduct

Petitioners rely on *Kiobel* in arguing that the "occurrence in the United States of some conduct relevant to the claim is not a sufficient basis for the claim to proceed." Pet. 25. In *RJR Nabisco, Inc. v. European Cmty.,* the Court addressed *Kiobel* by explaining: "Because 'all the relevant conduct' regarding those violations 'took place outside the United States,' we did not need to determine, as we did in *Morrison,* the statute's 'focus.' " 136 S. Ct. 2090, 2100-01 (2016) (citing *Kiobel,* 133 S.Ct. at 1670); *see also Balintulo v. Daimler AG,* 727 F.3d 174, 191 (2d Cir. 2013).

There is no dispute that Petitioners' importation caused SI Group to suffer substantial domestic injury. A164-67, A857-66 (extensive findings on domestic injury). This was more than sufficient domestic conduct to warrant consideration of the statute's focus. *RJR Nabisco,* 136 S. Ct. at 2100-01. Moreover, substantial *additional* relevant conduct was domestic as well, *supra* § B.3 at 16 et seq., foreclosing any conclusion that the statute was applied to wholly (or even mostly) to extraterritorial conduct.

***22** For example, Petitioners have not challenged the ALJ's determination that all the trade secrets at issue are owned entirely by SI Group, Inc. - the U.S. parent - and not its Chinese subsidiary. A253-54. Nor have they challenged that Lai and Xu obtained key batch records from SI Group's Rotterdam Junction (RJ) facility in New York. A578, A585, A598, A600. Xu also obtained key information by personally participating in training at SI Group's facility in Rotterdam Junction, NY. A559, A600. Xu also obtained key technical information from the manufacturing integration team ("MIT") SharePoint database at Complainant's headquarters in New York. A559, A600, A602. After he had begun communicating with Petitioners, Xu obtained further trade secrets by using SI Group's U.S. computer systems to request information from other SI Group sites around the world. A605-06.

Also, two out of the four products at issue in this case were based on formulas Petitioners themselves acknowledged SI Group never used in China and were only used in the United States. A243-44, A290-91, A578, A6773.

The foregoing highlights substantial conduct in and across borders with the U.S. relevant to the unfair methods of competition in import trade. Petitioners are therefore wrong to argue that all the relevant conduct occurred entirely abroad.

Section 337 was far from being applied to solely "extraterritorial" conduct. Therefore, the focus test of *Morrison* still applies.

*23 C. Even if the Court Were to Find the ITC's Application of Section 337 Regulates Foreign Conduct (Which It Does Not), the Presumption Against Extraterritoriality is Clearly Overcome In This Case

In citing *Kiobel* for the proposition that "some" conduct is not enough for a claim to proceed, Petitioners fail to acknowledge that there was not just "some" conduct, but *very substantial* relevant domestic conduct in this case, *supra* § B.3 at 10 et seq. and § B.5 at 21 et seq. *combined with importation that resulted in substantial domestic injury*, A857-66 (extensive findings on domestic injury). Taken together, Petitioners' violation of Section 337 clearly "touches and concerns the territory of the United States "with sufficient force to displace the presumption against extraterritorial application." 133 S. Ct. at 1669; SI Group C.A. Br. § I.D.2 at 30-34, A164, A167.

Kiobel's "touch and concern" test is also consistent with lower court decisions reaching foreign conduct that caused harmful effects in the United States. *See United States v. Philip Morris USA Inc.,* 566 F.3d 1095, 1130 (D.C. Cir. 2009); *Envtl. Defense Fund, Inc. v. Massey,* 986 F.2d 528, 531 (D.C. Cir. 1993); *Al Shimari v. CACI Premier Tech., Inc.,* 758 F.3d 516, 528 (4th Cir. 2014). "It has long been settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory." *Laker Airways Ltd. v. Sabena, Belgian World Airlines,* 731 F.2d 909, 922 (D.C. Cir. 1984). "Thus, legislation to protect domestic economic interests can legitimately reach conduct occurring outside the legislating territory intended to damage the protected interests within the territory." *Id.* at 923.

***24** Therefore, even if the Court were to view the ITC's application of Section 337(a)(1)(A) as regulating foreign conduct (which it does not), any presumption against extraterritoriality that might apply is overcome in this case.

D. Petitioners and TRB Overreach in Trying to Convince the Court that they Raise Important Questions Warranting Review

Petitioners and TRB offer several arguments to support their position that they raise questions important enough for Supreme Court review.

First, they attempt to portray *TianRui* as having been subjected to considerable criticism. But they struggle to support this position. Their first two citations are law review pieces by student authors; the third is neither peer reviewed nor a criticism of *TianRui*; and the fourth is a survey of cases including *TianRui,* generally lamenting the reach of U.S. law, but without taking issue with the *TianRui* analysis specifically. Pet. 28. Petitioners and TRB cite no criticism of *TianRui* by any noted law professors or other thought leaders.

1. The ITC Is Not Adjudicating Many Trade Secret Cases and the Number is Unlikely to Increase

Petitioners also try to portray this case as involving an important question by raising alarm about a purported "sharp increase in the number of trade secret investigations following *TianRui.*" Pet. 29. No such sharp increase exists, based on Petitioners' examples, and there actually seems ***25** to have been a drop-off since 2013. *Id.* Indeed, although Petitioners cite a 2013 article "predicting 'that number may grow,' " *id.*, it does not appear the rate of institution has been growing.

Moreover, in view of recent legislation, it is even more likely to see a further drop-off. Earlier this year, Congress enacted the Defend Trade Secrets Act of 2016, Pub.L. No. 114-153 (May 11, 2016) ("DTSA"). It covers theft of trade secrets "used in, or intended for use in, interstate or foreign commerce." 18 U.S.C. § 1836(b)(1) (2016). It confers jurisdiction in all "district courts of the United States," 18 U.S.C. § 1836(c), and offers a much wider choice of remedies, including

damages, 18 U.S.C. § 1836(b)(3), which are not available in ITC investigations. The attractiveness of the DTSA makes any increase in ITC trade secret investigations even less likely.

2. Petitioners' Foreign Policy Arguments are Flawed

Petitioners also try to elevate the importance of this case by fretting that applying Subsection (a)(1)(A) to products made abroad raises foreign policy risks with laws of other nations. Pet. 31-32. Yet those same purported risks are somehow acceptable to them in Subsection (a)(1)(B), which they say applies U.S. process patents to products made abroad. Petitioners fail to explain the difference. In each case, U.S. intellectual property law, rather than the law of the foreign country, is applied in one of several elements in assessing the "Unfair practices in import trade," 19 U.S.C. § 1337 (title). As noted above, there is no basis in the text, history or application of Section 337 to distinguish the two subsections; this includes with respect to foreign policy risks. *See supra* § B.3 at 16 et seq.

***26** Moreover, as with all of the § 337 subsections, foreign policy review of ITC decisions under Subsection (a)(1)(A) are commended to the President. 19 U.S.C. § 1337(j); S. Rep. No. 93-1298, at 199 (1974); *Certain Color Television Receiving Sets,* Inv. No. 337-TA-23, Comm'n Op., 1976 WL 41442, at *8 (Dec. 1976) (citing S. Rept. 93-1298). Presidential review provides the Executive an opportunity to evaluate foreign policy implications of each § 337 order and halt such order if warranted by "policy reasons," e.g., if it "could have a very direct and substantial impact on United States foreign relations." S. Rep. 93-1298, at 199. Here, the 60-day presidential review period ended on March 14, 2014 without any disapproval, thereby making the Commission's determination final. *See* 19 U.S.C. § 1337(j).

As SI Group explained in its appeal brief, the President has disapproved orders that raised foreign policy concerns. SI Group C.A. Br. 25-26. Notably, the President did not express concern about extraterritorial application of Section 337(a)(1)(A) in *TianRui* or here, so it must be presumed that the view is that it does not interfere with any foreign policy objectives. *Id.; see also Duracell, Inc. v. ITC,* 778 F.2d 1578, 1581-82 (Fed. Cir. 1985). [6]

Moreover, in *Kiobel,* this Court emphasized that a primary justification for the presumption against extraterritoriality is to guard against "*courts* … impinging on the discretion of the ***27** Legislative and Executive Branches in managing foreign affairs." 133 S. Ct. at 1664 (emphasis added) (quoting *Sosa v. Alvarez-Machain,* 542 U.S. 692, 732 (2004)). Here, the investigation was not by a *court* but by the ITC, and foreign policy considerations are reviewed by the President through the USTR, i.e., the Executive Branch. *See supra* (this section). Accordingly, any foreign policy concerns about courts impinging on the discretion of the Legislative and Executive Branches that might otherwise support a robust application of the presumption against extraterritoriality are avoided in Section 337 investigations.

Petitioners' other foreign policy arguments, particularly their abstract comity arguments, are addressed below, *infra* § D.3 at 28 et seq.

3. TRB's Abstract Comity Arguments are Undermined by the Actual Failure of Petitioners' Comity Defense

TRB's amicus brief is largely repetitive of the Petition, except TRB repackages an argument Petitioners have dropped. Specifically, TRB argues that the application of Section 337 raises comity issues, TRB Br. at 4-6, but Petitioners have dropped the defense from their Petition. TRB now only argues comity in the abstract.

The comity defense failed because the § 337 investigation here was dramatically different from the Chinese civil action for misappropriation and therefore the defense was meritless.

First, comity is an affirmative defense, SI Group C.A. Br. 48-49, and the legal standards for a *§ 337 violation* ***28** (as opposed to misappropriation as such) are dramatically different from a claim for *misappropriation* in China. In rejecting the comity defense when Petitioners offered only a "conclusory" argument, the ALJ explained in part:

> Although Respondents argue that civil cases have been filed in China and those cases address the alleged misappropriation at issue here, Respondents have failed to show that the civil cases in China address specific issues raised here - *importation into the United States of the accused products and harm to the domestic industry as a result of that importation.* … Respondents also fail to explain how this investigation causes "interference" with the Chinese proceeding.

A223-24 (emphasis added). In affirming the ALJ, the Commission indicated its agreement with these key differences between Section 337 versus whether Petitioners "misappropriate[d] Complainant's alleged trade secrets under Chinese law," stating that "abstention and international comity do not relieve the Commission of its statutory responsibility to determine whether there is a violation of Section 337.19 U.S.C. § 1337(c)." A106 n.1.

Beyond these important distinguishing characteristics of § 337, even the respective countries' laws of misappropriation are considerably different, as Petitioners themselves concede, Pet. 31 (citing China's element of "practical applicability" as one of several differences).

Federal Circuit briefing also showed that Petitioners failed to prove other requisites for comity, including that ***29** the foreign tribunal abides by fundamental standards of procedural fairness. SI Group C.A. Br. 49 (quoting *Hilton v. Guyot,* 159 U.S. 113, 202 (1895)). As noted above, authoritative U.S. government studies, including several USTR special reports, recount how U.S. companies experience serious difficulty in securing impartial justice in Chinese trade secret cases. "It has been difficult for some U.S. companies to obtain relief… despite compelling evidence demonstrating misappropriation," A8029, due to "a systemic lack of effective protection and enforcement," A8025. *See also* ITC C.A. Opp. to Reh'g at 1, 10-11, SI Group C.A. Br. 50-52; A7942; *S&D Trading Academy, LLC v. AAFIS, Inc.,* 494 F.Supp.2d 558, 573-574, 573 n.13 (S.D. Tex. 2007) (quoting USTR 2007 Special 301 Report). TRB's suggestion that TRIPS, which became effective in 1995, has raised Chinese trade secret standards, TRB Br. at 5, is undermined by these subsequent reports. The reports, combined with the Chinese procedural history in this case, *supra* at B.4 at 6-7, made it all the more important to hold Petitioners to their proofs.

TRB also did not address a number of factual points necessary for comity. SI Group C.A. Br. 55- 57. But these factual points need not be revisited because Petitioners have dropped the defense. In fact, Petitioners failed to (1) brief *any* of the relevant factual issues, A223-24; (2) challenge the ALJ's order excluding all evidence of the Chinese proceedings A20038, SI Group C.A. Br. 7-8, 59-60; or (3) seek leave to have the Chinese decisions entered into evidence. *Id.; supra* § B.5 at 8.

Finally, the ITC investigation and the Chinese civil action were co-pending, *supra* § B.4 at 7, so there was never a question of whether to afford comity in executing a foreign judgment.

***30** Accordingly, the ITC rejected Petitioners' comity defense and the Federal Circuit affirmed. Those decisions are not challenged here. Instead, TRB now argues comity as an abstract concept supporting its extraterritoriality argument. But TRB should not be heard to argue that Chinese courts should be afforded comity in the abstract particularly in a case where it was found that comity was not due. At the very least, it is just one more reason the petition presents a poor vehicle to review extraterritoriality in the context of a Section 337 violation.

And again, a Section 337 investigation is not a civil action for misappropriation. United States law does not rule the world, but as the Commission explained to the Federal Circuit, "[t]he United States government - and not a foreign tribunal - has the authority and obligation to decide what enters the United States, and under what conditions." ITC C.A. Opp. to Reh'g, at 1. TRB's abstract comity arguments should be rejected.

4. Petitioners' Argument that *TianRui* Will Lead to the ITC Exercising Unfettered Authority is Unfounded

Petitioners seek to raise alarm also by speculating that *TianRui* will lead to the ITC exercising unfettered authority under Subsection (a)(1)(A) to police foreign business practices far outside the areas it has traditionally covered. Pet. 32-33.

They first cite three examples of the ITC purportedly applying Subsection (a)(1)(A) outside the area of intellectual property. *Id.* at 32. These all date back decades, even before the 1988 amendments, and do not support their proposition.
***31** • The antitrust example was only a preliminary decision; the statute expressly authorizes the ITC to address unfair acts, "the threat or effect of which is … to restrain or monopolize trade and commerce in the United States," § 337(a)(1)(A)(iii); and the case was directed to alleged restraint of trade within the United States, not extraterritorial conduct. *Certain Elec. Audio & Related Equip.,* Inv. No. 337-TA-7, 1976 WL 41414, *8-*9 (USITC Feb. 10, 1976).

• False designation of origin is a traditional unfair competition claim, even covered by the Lanham Act, and relates to deceiving U.S. citizens *within* the United States, so the cause of action was not extraterritorial. *Certain Alkaline Batteries,* Inv. No. 337-TA-165, 1984 WL 63019, *18 (USITC Nov. 1, 1984). Nevertheless, this Court has held the Lanham Act is properly interpreted as applying abroad. *Steele v. Bulova Watch Co.,* 344 U.S. 280, 285-87 (1952).

• In the tort and contract example, the ITC did *not* analyze the alleged violation but only *assumed* one for the sake of argument, and dismissed on other grounds. *Certain Floppy Disk Drives & Components Thereof,* Inv. No. 337-TA-203, 0085 WL 1127250, *4-*5 (USITC Aug. 29, 1985).

Moreover, Petitioners cite nothing criticizing these three cases as examples of the ITC exceeding its authority. In any event, the present Petition is a poor vehicle to decide whether the ITC may have exceeded the scope of its authority in cases addressing subject areas not at issue here.

***32** Petitioners then warn that the ITC could extend the scope of its authority into other areas such as U.S. environmental, labor, conflict mineral trading, food and drug, human rights, or racketeering laws. Petitioners mainly cite articles pre-dating *TianRui* that *speculate* about theoretical areas of possible expansion (the other articles simply repeat the same speculation). Petitioners fail to cite even one actual example of the ITC allegedly expanding its authority into such areas since *TianRui* issued five years ago in 2011. Petitioners also fail to note that, in responding to the dissent, the majority in *TianRui* addressed such arguments.
The dissent's concern about the possible extension of Section 337 to other foreign business practices, such as the underpayment (or nonpayment) of employees, is unwarranted. At oral argument, the Commission explicitly disavowed any such authority. Moreover, in the analogous context of the Federal Trade Commission Act, the Supreme Court long ago responded to similar concerns by holding that the prohibition on "unfair methods of competition" does not encompass "practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."

661 F.3d at 1330 n.3 (citing *FTC v. Gratz,* 253 U.S. 421, 427 (1920)).

***33** Accordingly, there is no reason to fret that the ITC will expand Section 337 into new areas of law if the Court does not review *TianRui* through this case. Even if it were a legitimate concern (which it is not), the current case is not a proper vehicle to address speculation about a theoretical case that has never happened.

THIS CASE DOES NOT PROVIDE AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED BY PETITIONERS

This case does not provide a suitable vehicle for considering Petitioners' question presented because Petitioners waived the issue of extraterritoriality by failing to brief the relevant facts and issues in their submissions to the Commission. *Supra* § A at 10 et seq.

Petitioners did not brief multiple issues relevant to their question presented, including how they factually support their claim that their misappropriation allegedly occurred entirely (or even mostly) outside the United States. To be an appropriate vehicle, such issues should have been fully briefed so that there could be findings and a decision by the Commission; the Court should not make such findings in the first instance. *Adarand Constructors, Inc. v. Mineta,* 534 U.S. 103, 108-09 (2001) ("We ordinarily 'do not decide in the first instance issues not decided below.' ") (quoting *National Collegiate Athletic Assn. v. Smith,* 525 U.S. 459, 469-70 (1999)); *Roberts v. Galen of Virginia, Inc.,* 525 U.S. 249, 253-54 (1999) ("these claims do not appear to have been sufficiently developed below for us to assess them"); *see also Stern,* 564 U.S. at 481-82 (waiver and forfeiture).

***34** To the extent the Court believes Petitioners' question presented may be of interest, the Court and bar would be better served by waiting for another case that may arise where the domestic contacts are not as extensive or at least where the petitioner actually briefs the issue and a full decision is rendered on the extent to which its relevant conduct is, in fact, extraterritorial.

Petitioners argue that this case turns entirely on *TianRui* and therefore it presents an appropriate vehicle for review. Pet. 34. Petitioners are incorrect; this case does not turn entirely on *TianRui.* In *TianRui,* there was virtually no domestic conduct relevant to the misappropriation, so it expressly did "not affirm the exclusion order on that basis," 661 F.3d at 1328 n.1. Here, however, there was substantial domestic conduct relevant to the misappropriation beyond the importation and resulting domestic injury.

While Petitioners argue that their access through Xu's laptop necessarily occurred in China, Pet. 27, Xu and Lai in turn obtained their information *inter alia* by training at Rotterdam Junction NY in the U.S., by obtaining documents from RJ, and by obtaining U.S. trade secret information through email and from the U.S. "MIT" SharePoint database (including a "China Plant SharePoint folder"). A598, 600-01, A605-06; *see also supra* § B.1 at 13 et seq.; SI Group C.A. Br. at 19-22. Again, having failed to brief the issues on extraterritoriality at the trial level, Petitioners do not get to now pick isolated findings on other issues, claim that they establish the unfair acts were solely extraterritorial, and purport to hinge their petition to this Court entirely on *TianRui.*

***35** Contrary to Petitioners' assumption, Pet. 35-36, the Federal Circuit's summary affirmance does not mean it hinged its decision on *TianRui.* As discussed above, there were ample other bases to affirm, including waiver, the substantial relevant domestic conduct involved here, and how the violations touched and concerned the United States. SI Group briefed these points to the Federal Circuit, SI Group C.A. Br. at 15-22, 30-31, and as noted above, "a [summary] disposition of this nature is used only when the appellant has utterly failed to raise any issues in the appeal that require an opinion to be written in support of the court's judgment of affirmance." *Infra* at 1a. [7]

Accordingly, this case does not present an appropriate vehicle to review Petitioners' question presented.

*36 CONCLUSION

For the foregoing reasons, SI Group respectfully submits that this Court should deny the petition for *certiorari.*

Footnotes

1 As noted above and discussed in more detail below, the ALJ excluded evidence of the Chinese proceedings, so SI Group has refrained from citing evidence that would rebut Petitioners' arguments. For the same reason, the Chinese decisions should be ignored. To the extent the decisions are considered, however, SI Group cites those same decisions (and no more) solely to highlight the chronology and the circumstances of the hearing in China.

2 The ALJ ultimately found that Petitioners were the ones who had "come into this investigation with unclean hands and [] obfuscated discovery throughout this investigation." A814. *See also* A607, A908, A201, A4625, A4684.

3 Petitioners could have also cited *Kiobel* in a notice of new authority. They had no qualms about trying to slip their Chinese decisions into the record as purported notices of "New Authority" on July 16, 2013 (A4625) and on October 18, 2013 (A4501) -- three and six months after *Kiobel* issued, despite an order excluding such evidence. Their failure to submit *Kiobel* as new authority at that time confirmed their waiver.

4 *Morrison* thus recognized that protecting transactions of securities on domestic exchanges regardless of where the deceptive conduct occurred is not an extraterritorial application of law. *Id.*

5 As noted *supra* § A at 3, it appears Petitioners overlooked the title of Section 337 when quoting it in their petition, *see* Pet. 1.

6 Although Petitioners argue that the President rarely exercises this power, Pet. 23 n.4, it would only have to exercise its power once to express concern about foreign policy implications with how the ITC is applying Section 337(a)(1)(A).

7 Indeed, Petitioners asked the Federal Circuit to rehear the case *en banc*, and the court unanimously voted against rehearing, including Judge Moore, the dissenter in *TianRui,* Pet. 99a-100a, suggesting that she at least did not believe this case hinged entirely on *TianRui* such that it was an appropriate vehicle to revisit that decision.

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