No. 2014-1478

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

SINO LEGEND (ZHANGJIAGANG) CHEMICAL CO. LTD.; SINO LEGEND HOLDING GROUP, INC.; SINO LEGEND HOLDING GROUP LTD.; PRECISION MEASUREMENT INTERNATIONAL LLC; RED AVENUE CHEMICAL CO. LTD.; SHANGHAI LUNSAI INTERNATIONAL TRADING COMPANY; RED AVENUE GROUP LIMITED; AND SINO LEGEND HOLDING GROUP INC. OF MARSHALL ISLANDS,

Appellants,

– v. –

INTERNATIONAL TRADE COMMISSION,

Appellee,

and

SI GROUP, INC.,

Intervenor.

Appeal from the United States International Trade Commission, Investigation No. 337-TA-849

NON-CONFIDENTIAL BRIEF FOR APPELLANTS SINO LEGEND (ZHANGJIAGANG) CHEMICAL CO. LTD., ET AL.

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November 10, 2014

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CERTIFICATE OF INTEREST

Counsel for Appellants Sino Legend Chemical Co., Ltd., *et al*., certifies the following:

1. The full name(s) of every party or amicus represented by us are:

Sino Legend (Zhangjiagang) Chemical Co., Ltd.
Sino Legend Holding Group, Inc.
Sino Legend Holding Group, Ltd.
Precision Measurement International LLC
Red Avenue Chemical Co. Ltd.
Shanghai Lunsai International Trading Company
Red Avenue Group Limited
Sino Legend Holding Group Inc. of Marshall Islands

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by us is:

Not applicable.

3. All parent corporations and all publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by us are:

Not applicable.

4. The names of all law firms and the partners and associates that appeared for appellants in the trial court or are expected to appear in this Court are:

Mayer Brown LLP
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Respectfully submitted,

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On pages 3-5, 7-12, 57, 62, and 63, confidential information has been redacted pursuant to the protective order issued by the International Trade Commission. Pages 7-12, 57, and 63 quote decisions of the Chinese courts that were filed under seal pursuant to the protective order. Pages 3-5 and 62 quote material from a labor contract that was filed under the protective order.

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STATEMENT OF RELATED CASES

No appeal in this case was previously before any court. No case is pending in this Court or any other that will directly affect or be directly affected by this Court's decision in the pending appeal.

JURISDICTIONAL STATEMENT

The United States International Trade Commission (the "ITC" or "Commission") instituted an investigation of appellants under Section 337 of the Tariff Act of 1930, codified as amended at 19 U.S.C. § 1337.

The Commission issued its limited exclusion order on January 15, 2014, triggering the 60-day presidential review period pursuant to 19 U.S.C. § 1337(c) & (j). The presidential review period thus expired on March 14, 2014. This petition was filed on May 12, 2014, within the 60-day period allowed by 19 U.S.C. § 1337(c).

This Court has jurisdiction under 28 U.S.C. § 1295(a)(6).

ISSUES PRESENTED

1. Whether 19 U.S.C. § 1337(a)(1)(A) applies extraterritorially to an alleged theft of trade secrets occurring wholly outside the United States.

2. Whether the ITC violated fundamental principles of comity by declaring irrelevant the judgment of a Chinese court in a case involving the same private parties that adjudicated the same claims of trade secret misappropriation at issue before the ITC.

3. Whether the ITC erred in issuing a ten-year limited exclusion order even though the contractual agreement prohibiting disclosure of the

alleged trade secrets lapsed after three years under the governing principles of Chinese law.

STATEMENT OF THE CASE

A. Factual Background.

Certain synthetic rubbers used in products such as tires are manufactured by "pressing together layers of various rubber compounds." A212. 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. A211-12.

Petitioner Sino Legend (Zhangjiagang) Chemical Co. Ltd. ("Sino Legend")[1], a chemical manufacturer located in Zhangjiagang, China (A207), developed a process for producing a type of phenolic resin for use as a "tackifier" that would be more cost-effective and of higher quality than those offered by competitors. A107, A211-12. Its development process, which began in late 2005, involved collaboration with another resin manufacturer, Sumitomo Bakelite Durez. As part of that relationship, Sino Legend representatives visited Sumitomo's facilities, where they learned about aspects of the resin production process that were later in-

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1 We refer collectively to all appellants as "Sino Legend." The other appellants were named in the investigation below based on allegations or findings of ownership, control, or involvement in some aspect of the manufacturing or importation. A170-76, A553-57.

corporated into Sino Legend's own process. A123-24, A783-84. Sino Legend began commercial production of the tackifier at issue in 2007. A143.

Intervenor 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 investigation. A304, A829. SI Group has not obtained any patents covering SP-1068 or the long-understood processes used in its production. A621.

SI Group initially served overseas customers by exporting SP-1068 from the United States, using foreign distributors. SI Group ultimately shifted its production model from exports to manufacturing entirely in China, forming a Chinese subsidiary, SI Shanghai Limited ("SI Shanghai"). C.Y. Lai served as General Manager when the SI Shanghai facility was "starting up." A597-98. In 2004, SI Shanghai began manufacturing SP-1068 in China. *Cf.* A598.

Also in 2004, Lai hired Jie (Jack) Xu to work for SI Shanghai. A598-99. Xu's employment contract, governed by Chinese law, imposed a duty to keep technical information or trade secrets confidential for three years [[[redacted]]]:

[[[redacted]]]

[[[redacted]

[redacted]]]

A1298 (emphasis in original). Xu was promoted to Plant Manager of the Chinese plant in June 2006. A598.

After Lai's employment with SI Shanghai ended in February 2005, he accepted an administrative consulting position with appellant Shanghai Red Avenue Chemical Co. Ltd. A597-98. Xu resigned from SI Shanghai to accept a job with appellant Sino Legend in early 2007. A602-03.

B. The Chinese Court Proceedings.

Nearly four years before SI Group filed its ITC complaint, it brought multiple actions in China involving the very same alleged misappropriation of trade secrets.

In November 2008, SI Group contacted the Shanghai Municipal Bureau of Public Security ("PSB") to request a criminal investigation into its allegations of trade secret misappropriation by Sino Legend. A4667-79. The PSB engaged a third-party technical appraisal agency, the Shanghai Municipal Science Advisory Service Center, to assist in the technical investigation by reviewing documents, obtaining and assessing product samples, and evaluating SI Shanghai's and Sino Legend's manufacturing processes. A4636, A4667. The PSB announced in September 2009 that it was terminating its criminal investigation for lack of evidence—as a Chinese court later put it, [[[redacted]]]—of criminal wrongdoing by Sino Legend. A4669.

Next, in February 2010, SI Shanghai filed a pair of complaints in the Shanghai No. 2 Intermediate People's Court asserting trade secret misappropriation. A4669.

The Chinese court held a full evidentiary hearing on SI Shanghai's claims on February 17, 2011. A4670. Sino Legend presented evidence that its manufacturing process did not involve the use of SI Shanghai's purported trade secrets. *Id.* For its part, SI Shanghai presented evidence that, it contended, supported its allegations of trade secret misappropriation. *Id.* SI Shanghai withdrew those complaints on March 8, 2011, shortly before the Chinese court was scheduled to resolve the case. *Id.*

Three weeks later, on March 31, 2011, SI Group and SI Shanghai filed a second pair of civil actions against Sino Legend in the same court. A4670-71. It asserted claims for misappropriation of twenty trade secrets, including all 17 of the individual claims and the overall process claim at issue in the present case. *Compare* A111-42 *with* A4634-35. SI Group provided a substantial amount of evidence, including 109 different documents and other written submissions. A4636-38. Sino Legend responded with 218 submissions. A4639-43.

Under procedures applicable to trade secret misappropriation claims in Chinese courts, the court engages an independent expert to provide advice regarding technical issues. *Cf.* A4540. The Shanghai court chose the MIIT Appraisal Institute—agreed to and confirmed by both parties—for this role. A4634, A4645. The court provided the parties with a list of fourteen possible MIIT experts, and the parties ultimately selected five independent experts with relevant technical expertise to serve on the expert appraisal panel. A4645. The MIIT panel then performed field investigations at the factory sites and interviewed the relevant employees. A4645-46. Subsequent to these investigations, the appraisal panel held a technical hearing, at which SI Group and Sino Legend both appeared to answer questions and present arguments. A4646. On May 14, 2013, the MIIT appraisal panel issued four reports to the court, which then served the reports on the parties. *Id.*

Unhappy with the MIIT reports, SI Group requested a second appraisal, but the court denied this request, explaining that it could not opine on the appraisal report separate from its adjudication of the merits of the case. A4647. SI Group subsequently sought to terminate the two civil actions on the ground that it wished to add a new defendant, Chengyi Lai. *Id.* The court also denied this request, explaining that [[[redacted]]] *Id.* The court noted that, if SI Group wished to bring a claim against Chengyi Lai, it could do so by way of a separate action. A4648.

The court emphasized that permitting another withdrawal of the lawsuits would be unfair to Sino Legend, particularly after SI Group had *already* withdrawn and then reinstituted legal proceedings; [[[redacted]]] A4648 (emphasis added).

The court heard argument on May 29, 2013. A4648. Although the court had issued subpoenas to SI Group and SI Shanghai, neither appeared. *Id.* As the court explained, [[[redacted]]] *Id.* The court nonetheless [[[redacted]]] *Id.*

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 (A4633). The court first held that Jack Xu had a binding non-disclosure agreement with SI Shanghai. A4649. Reviewing the July 6, 2004 "Labor Contract" between Xu and SI Shanghai, the court found that the confidentiality obligation lasted [[[redacted]]] *Id.*

Next, the court considered the claimed trade secrets pursuant to [[[redacted]]] A4674.

The MIIT appraisal report had concluded that nine of SI Group's twenty trade secrets were protectable, in whole or in part (Nos. 4, 6, 9, 10, 11, 12, 15, 16, 20). A4655. The balance, according to the independent report, were not protectable. *Id.* With respect to misappropriation, the MIIT report found that Sino Legend's process used claimed secrets 1, 3, 5, 8, and 19, as well as the part of 6 that was not protectable. A4661. It found that the other claimed secrets were not misappropriated. A4661-62. In sum, the appraisal report concluded that Sino Legend did not misappropriate any of the trade secrets that were protectable.

The court considered SI Group's objections to the independent appraisal report, but ultimately adopted the report's findings: the [[[redacted]]] A4680. Accordingly, [[[redacted]]] *Id.*

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 (A4507). Representatives of SI Group and SI Shanghai participated in the appellate proceeding. A4507. In fact, SI Group introduced the ALJ's initial determination from this case in urging the appellate court to reverse. A4553.

In a detailed opinion (the English translation spans 58 pages, (A4507-64), issued on October 12, 2013, the three-judge appellate court affirmed the determination and reasoning of the lower court. It first concluded that the trial court was correct to adopt the MIIT appraisal and hold that there was no misappropriation:

> [[[redacted]]]

A4560.

The court also rejected SI Group's efforts to dismiss the action below in order to add a new party. The court specifically found that SI acted in [[[redacted]]] by bringing the motion only after it learned that the MIIT expert report would be adverse to its position:

> [[[redacted]

> [redacted]]]

A4562 (emphasis added). The court also concluded that SI Group acted in bad faith in attempting to dismiss the lawsuit:

> [[[redacted]]]

Id. (emphasis added).

For these reasons, the appellate court found that the trial court acted appropriately when [[[redacted]]] A4562-63. Although a default judgment would have been appropriate in these circumstances, the trial court [[[redacted]]] A4563. Altogether, the appellate court concluded that [[[redacted]]] *Id.*

C. Proceedings Below.

Notwithstanding the pendency of its civil actions in China, SI Group filed a Section 337 complaint with the U.S. 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 at issue in the Chinese proceedings. *Compare* A111-42, *with* A4634-35.

The Commission instituted its investigation on June 20, 2012. A207; *see also Certain Rubber Resins and Processes for Manufacturing Same*, Institution of Investigation Pursuant to 19 U.S.C. 1337, 77 Fed. Reg. 38083 (June 26, 2012).

1. ALJ Robert K. Rogers, Jr., issued his final initial determination on June 17, 2013. The ALJ declined to accord comity to, or stay the proceedings in light of, the then-pending Chinese litigation, in which a deci-

sion was scheduled to be issued on June 17, 2013, and was issued on that date—the very same day the ALJ issued his initial determination.

The ALJ concluded that the Chinese proceeding was immaterial because it did not relate to "importation into the United States of the accused products and harm to the domestic industry as a result of that importation." A223. The ALJ also rejected Sino Legend's contention that Section 337 does not apply to conduct outside the United States, relying on this Court's decision in *TianRui Grp. Co. v. Int'l Trade Comm'n*, 661 F.3d 1322, 1328 (Fed. Cir. 2011). A223-24.

On the merits, the ALJ concluded that seven putative trade secrets were not protectable, but that another eleven were protectable and were misappropriated by Sino Legend. A919-20. He also found injury to the domestic industry. A920.

With respect to the appropriate remedy, Sino Legend explained that Article 9 of Xu's contract provided a three year limitation on his confidentiality obligations, which thus expired in 2010. A890. Sino Legend contended that any remedy must take into account its ability to lawfully obtain the alleged trade secrets upon the conclusion of Xu's confidentiality agreement. A890-92. The ALJ rejected this position, however (A912), concluding instead that confidentiality language contained within SI Shanghai's general handbook overrode the specific provision in Xu's employment agreement. A321. The ALJ recommended that the Commission issue a general exclusion order under Section 337(d) for a period of ten years. A912.

2. Sino Legend filed a petition for review on July 1, 2013, and SI Group filed a contingent petition for review the same day. A1083-84.

On July 16, 2013, Sino Legend provided notice of supplemental authority to the ITC, bringing to the ITC's attention the final decision and judgment of the Shanghai No. 2 Intermediate People's Court of the People's Republic of China. A4625. On October 19, 2013, Sino Legend filed an additional notice of supplemental authority, alerting the ITC to the Chinese appellate court's decision affirming the judgment. A4501.

The Commission issued its Opinion on January 15, 2014. The ITC rejected Sino Legend's contention "that 'abstention and international comity warrant dismissal of [SI Group's] trade secret claims' because a Chinese court has held that Sino Legend did not misappropriate [SI Group's] alleged trade secrets under Chinese law." A105. According to the Commission, "abstention and international comity do not relieve the Commission of its statutory responsibility to determine whether there is a violation of Section 337." *Id.* The Commission separately rejected the contention that comity should factor into its selection of a remedy: without any elaboration or explanation, the Commission stated that "the Chinese litigation does not preclude issuance of a remedy in this investigation which is an investigation." A187.

With respect to extraterritoriality, the ITC cited this Court's decision in *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." A105. It thus rejected Sino Legend's argument that Section 337 does not reach extraterritorial conduct of non-U.S. parties. *Id*.

The Commission ultimately concluded that twelve alleged trade secrets were non-protectable and thus could not form the basis for SI Group's allegations; the Commission thus reversed the ALJ's finding that five trade secrets were protectable. A116-17, A118-19, A121-26, A128-41. The Commission affirmed the ALJ's findings that five additional alleged trade secrets (A111-15, A117-18, A119-21, A126-28), as well as the overall process (A141-42), were both protectable and misappropriated.

The ITC issued a limited exclusion order for a period of ten years. It asserted that "the totality of asserted trade secrets would take at least 10 years to independently develop." A184. This determination rested on the

ALJ's conclusion that Jie Xu's labor contract imposed permanent confidentiality obligations. A321.

SUMMARY OF THE ARGUMENT

This case involves a foreign dispute that has no legitimate connection to the United States. In nonetheless adjudicating this matter—and in failing to defer to the result reached by a Chinese court involving the same parties and the same claims—the International Trade Commission exceeded its authority. Its decision should be reversed.

I. The Commission erred in applying Section 337 extraterritorially to an alleged misappropriation of trade secrets that occurred wholly outside the United States.

We recognize that a divided panel of this Court previously considered and rejected the argument that the presumption against extraterritorial application limits Section 337(a)(1)(A) to conduct occurring within the United States. *See TianRui Grp. v. Int'l Trade Comm'n*, 661 F.3d 1322 (Fed. Cir. 2011). But that decision is irreconcilable with intervening Supreme Court authority—the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013), which specified an analysis different from that applied by the *TianRui* majority and rejected arguments essentially identical to those accepted by the *TianRui* majority.

In light of this intervening authority, we respectfully suggest that this Court is not bound by the prior panel decision. Alternatively, the full Court should address the issue in order to eliminate the conflict with Supreme Court precedent.

Kiobel provides that a statute applies extraterritorially only when it "evinces the requisite clear indication of extraterritoriality." *Kiobel*, 133 S. Ct. at 1666. Here, the text of Section 337(a)(1)(A) is silent; it is wholly unlike statutes that reach abroad (including the neighboring provision in Section 337(a)(1)(B)), which expressly specify their extraterritorial effect. And Congress provided no other "clear indication" that Section 337(a)(1)(A) reaches conduct that occurs wholly outside the United States.

Because Section 337(a)(1)(A) does not overcome the presumption against extraterritorial application, it does not apply to the claims in this case, which assert that Sino Legend misappropriated trade secrets outside the United States. Instead, Section 337(a)(1)(A) only reaches unfair conduct that takes place in the United States and is tied directly to articles imported into the United States, such as prices charged in the US market for imported goods in violation of antitrust principles or trade secret theft that takes place within this country and is used to manufacture goods imported the U.S.

The policy rationale underlying the presumption against extraterritorial application of U.S. law—avoiding conflicts that inevitably would result from interference with the sovereign authority of other countries—is strongly implicated here. By applying Section 337 to a dispute between two Chinese companies involving the actions of Chinese employees in China, the Commission's decision reached far outside our borders to police business practices abroad. The legality of that conduct, which occurred wholly within China, is a matter for the Chinese courts to decide under the standards prescribed by Chinese law.

II. The ITC compounded its error by refusing to accord international comity to a final judgment of a Chinese court that, *in a lawsuit SI Group itself initiated*, addressed the same trade secret claims between the same parties.

SI Group brought several lawsuits in Chinese courts alleging misappropriation of the trade secrets at issue here. Under its standard practice, a Chinese court appointed a panel of independent appraisal experts to investigate the alleged trade secret misappropriation. After extensive site visits, interviews, and an adversarial hearing in which both SI Group and Sino Legend participated, the appraisal experts concluded that Sino Legend did not misappropriate any of SI Group's protectable secrets. Having considered SI Group's objections to those findings, a Chinese court adopted the report, and that decision was subsequently affirmed on appeal.

The ITC, however, rejected Sino Legend's request to afford comity to that Chinese judgment. In the ITC's view, its obligations under Section 337 render foreign judgments *irrelevant* to its investigations.

That ruling was error. Comity is a defense available in cases before the ITC, and courts routinely defer to foreign proceedings in adjudicating claims under other federal statutory regimes. The regular application of comity principles, moreover, serves important national interests in promoting amiable diplomatic relations. The ITC's categorical holding that Section 337 requires it in all instances to ignore the decisions of foreign governments, by contrast, creates needless conflict with foreign courts.

SI Group has no basis for objecting to an extension of comity to *this* Chinese judgment. After all, the judgment was the product of a legal proceeding that SI Group voluntarily initiated. Having asked a Chinese court to resolve this dispute, SI Group cannot escape the judgment merely because it dislikes the result. It would be profoundly unfair *not* to afford comity to the Chinese court's judgment under these circumstances.

III. Finally, the ITC committed legal error by issuing a ten-year exclusion order. The Commission reasoned that this was the period of time it would take for Sino Legend to lawfully obtain the trade secrets by independently developing them. The ITC discounted entirely Sino Legend's contention that it could lawfully obtain the trade secrets after three years, when Jie Xu's confidentiality obligations lapsed.

The Commission interpreted a provision in SI Shanghai's general handbook as imposing a *permanent* confidentiality obligation on Jie Xu. Under Chinese law, which expressly governs the contract, the specific three-year confidentiality term in the employment agreement itself controls over the general company handbook—indeed, that is what the Chinese courts specifically held in the case initiated by SI Group. (Applying U.S. law would produce the same result.) Thus, the ITC's view that Xu had a permanent obligation to SI Group is flatly wrong as a matter of law.

The conflicts between the Chinese and U.S. legal systems reflected in this case—the failure to afford comity to the Chinese courts' decisions and the differing results regarding the duration of the contractual confidentiality obligation—are a direct result of the extraterritorial application of Section 337, and provide a clear example of the discord that inevitably results when U.S. law is extended to conduct within the territory of another sovereign. That is why the Supreme Court in *Kiobel* applied a stringent standard—much more stringent than the *TianRui* majority—in determining whether Congress had clearly indicated its intent to apply U.S. law extraterritorially.

STANDARD OF REVIEW

The Court "reviews the Commission's legal determinations without deference and its factual findings for substantial evidence." *Motorola Mobility, LLC v. Int'l Trade Comm'n*, 737 F.3d 1345, 1348 (Fed. Cir. 2013); *see also Finnigan Corp. v. Int'l Trade Comm'n*, 180 F.3d 1354, 1362 (Fed. Cir. 1999) ("We review the Commission's legal determinations de novo."). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Crocs, Inc. v. Int'l Trade Comm'n*, 598 F.3d 1294, 1302 (Fed. Cir. 2010) (quotation omitted).

With respect to construction of Section 337 itself, because review is pursuant to the Administrative Procedure Act (*see* 19 U.S.C. § 1337(c)), the Court applies the framework established by *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984). *See Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340, 1355 (Fed. Cir. 2008). If "Congress has directly spoken to the precise question at issue," "the court 'must give effect to the unambiguously expressed intent of Congress.'" *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132 (2000)).

If the statute is "ambiguous," the Court must determine whether "the agency's interpretation is reasonable." *Id.* (quotation omitted).

ARGUMENT

I. Section 337(a)(1)(A) Does Not Apply Extraterritorially And Therefore Does Not Provide A Remedy When The Alleged Misappropriation Of Trade Secrets Occurred Outside The United States.

SI Group's theory in this case is straightforward: Sino Legend, a Chinese company, hired a Chinese employee, Jie Xu, from SI Group's Chinese subsidiary, and then allegedly misappropriated trade secrets in China and used them to manufacture products in China. In concluding that it had authority to adjudicate this dispute—and thus exclude the products at issue—the ITC exceeded its statutory authority.

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)). The doctrine "provides that '[w]hen a statute gives no clear indication of an extraterritorial application, it has none.'" *Id.* (quoting *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 248 (2010)).

A divided panel of this Court in 2011 held that "the presumption against extraterritoriality does not govern" claims under Section 337 based on trade secret misappropriation occurring outside the United States. *TianRui*, 661 F.3d at 1329. Judge Moore dissented, explaining that the presumption against extraterritoriality applied because the statute does not contain a clear indication of contrary congressional intent. *Id.* at 1338.

We respectfully submit that the decision in *TianRui* warrants reconsideration—either by the panel, or by the *en banc* Court[2]—in light of *Kiobel*, an intervening decision of the Supreme Court holding that the Alien Tort Statute, 28 U.S.C. § 1350, does not apply extraterritorially. Past panel precedent does not bind the Court where, as here, that precedent is irreconcilable with "an intervening … Supreme Court decision." *Teva Pharms. USA, Inc. v. Novartis Pharms. Corp.*, 482 F.3d 1330, 1338 (Fed. Cir. 2007).

The unambiguous guidance from the Supreme Court confirms that the strong presumption against the extraterritorial application of U.S. law

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[2] Both because of the intervening decision in *Kiobel*, as well as our separate arguments regarding the Commission's error in refusing to extend comity to a Chinese judgment (*see infra*, 47-61) and its erroneous remedy (*infra*, 61-64), we have not sought an *en banc* hearing. We nonetheless note that the Court may, if it believes appropriate, set a case for *en banc* hearing on its own initiative. *See*, *e.g.*, *Robert Bosch, LLC v. Pylon Mfg. Corp.*, 719 F.3d 1305, 1308 (Fed. Cir. 2013) (the Court "sua sponte granted a rehearing en banc").

applies to Section 337(a)(1)(A). Even if *Kiobel* were not sufficient by itself to undermine *TianRui*, the *en banc* Court should reconsider that precedent because it is starkly inconsistent with the long line of Supreme Court decisions culminating in *Kiobel*.

A. *Kiobel* prescribes a two-part inquiry different from the *TianRui* majority's analysis.

Kiobel held that a court determining whether the application of a federal statute is impermissibly extraterritorial must first examine whether the law in question "evince[s] a 'clear indication of extraterritoriality'"—based on the text and other tools of statutory interpretation. *Kiobel*, 133 S. Ct. at 1665; *see also id.* at 1666-69 (applying test). If it does not, and the statute therefore does not apply outside the United States, the court must assess whether the particular claims at issue "touch and concern the territory of the United States ... with sufficient force to displace the presumption against extraterritorial application." *Id.* at 1669.

TianRui did not undertake either of these inquiries. Rather, the majority based its decision that "the 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. The majority did not tie those observations to the two separate inquiries specified in *Kiobel*.

Evaluated under Kiobel's two-part test, it is clear that the claim in this case is impermissibly extraterritorial.

B. *Kiobel*'s analysis demonstrates that Section 337(a)(1)(A) does not apply extraterritorially.

The Supreme Court has long adhered to the "canon of statutory interpretation known as the presumption against extraterritorial application," which provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Kiobel*, 133 S. Ct. at 1664.

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." *Kiobel*, 133 S. Ct. at 1665-66, 1669.

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. The *Kiobel* Court—in stark contrast—emphasized the absence from the text and background of the Alien Tort Statute of the "requisite clear indication of extraterritoriality." 133 S. Ct. at 1666.

Judged against this standard, Section 337(a)(1)(A)—like the law before the Supreme Court in *Kiobel*—remains subject to the presumption against extraterritoriality. There simply is no clear indication of congressional intent to the contrary.

1. The statutory text is silent regarding extraterritorial application.

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 1339 (Moore, J., dissenting). Indeed, the *TianRui* panel did not point to any "statutory language that expresses the *clear* intent for it to apply to extraterritorial unfair acts." *Id.*

The *TianRui* majority observed that the focus of the statute "is on an inherently international transaction—importation"—and held that fact sufficient to overcome the presumption. *TianRui*, 661 F.3d at 1329. But *Kiobel* rejected that precise line of argument.

The Alien Tort Statute ("ATS"), 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. The ATS was designed to provide a remedy for "offenses against the law of nations," including "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004). And in applying the ATS today, the Supreme Court has held that claims must rest "on the present-day law of nations," which are those "norm[s] of international character accepted by the civilized world." *Id.* at 725. Thus, the very subject of the ATS is transnational—injuries to aliens resulting from violations of *international* law.

Yet the Supreme Court (subsequent to this Court's decision in *TianRui*) refused to afford extraterritorial reach to the ATS, notwithstanding its inherently transnational subject matter. *See Kiobel*, 133 S. Ct. at 1666-67. Although the text of the ATS legislates with respect to the "law of nations," 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." *Id.* at 1665. Instead, extending the ATS abroad would have the likely result of "generat[ing]" "diplomatic strife. *Id.* at 1669.[3]

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. Even when Congress legislates in the realm of foreign affairs, a statute does not apply extraterritorially unless there is a clear statement to that effect. The subject matter of Section 337(a)(1)(A) therefore provides no basis for extending its reach to conduct outside the U.S.

Moreover, as in *Kiobel*, the words Congress employed in Section 337—referring to "[u]nfair methods of competition and unfair acts *in the importation* of articles"—further undercut the claim of extraterritorial application. "[I]n the importation" is a restrictive term evidencing an intent to *limit* the provision's reach to conduct tied to the United States. Congress's use of that phrase, rather than a broader formulation such as "re-

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[3] The presumption is so strong that *Kiobel* applied it even though the ATS was specifically designed to reach piracy, which "typically occurs on the high seas," and the "high seas" are "foreign soil for purposes of the presumption against extraterritorial application." 133 S. Ct. at 1667. The Court found that Congress's clear intention to cover pirates—and thus reach extraterritorially in part—is not "a sufficient basis for concluding that other causes of action under the ATS reach conduct that does occur within the territory of another sovereign." *Id.*

lating to the manufacture or importation of imported articles," certainly does not demonstrate the requisite clear intent to apply the statute extraterritorially, subjecting to U.S. law acts performed in the territory of another sovereign nation as long as those acts are in some way related to the imported goods.

The *TianRui* majority also relied on the statutory requirement of domestic injury: "Because foreign conduct is used only to establish an element of a claim alleging domestic injury and seeking a wholly domestic remedy, the presumption against extraterritoriality does not apply." 661 F.3d at 1329. But, again, that statutory text fails *Kiobel*'s requirement of clarity.

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. 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.

That conclusion is strongly reinforced by Section 337(a)(1)(B), a neighboring provision of the same statute that authorizes the ITC to exclude goods imported into the United States that infringe a valid U.S. patent. In particular, (1)(B) covers 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." 19 U.S.C. § 1337(a)(1)(B)(ii). Because articles imported into the United States are "made" outside the United States, this provision expresses clear congressional intent 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, 834 (C.C.P.A. 1935), this Court's predecessor "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 (1)(B), 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.'" *Id.* (quoting H.R. Rep. No. 1781, 76th Cong., 3d Sess. 4 (1940)). Thus, (1)(B) was specifically designed to reach infringement of U.S. process patents that occurs abroad.

As Judge Moore explained in *TianRui*, this is powerful evidence that Section 337(a)(1)(A) does not reach conduct abroad:

> Congress could have legislated generally to grant extraterritorial application to any "unfair acts" in [Section] 337, but did not. Congress *only* changed the statute to create a remedy for extraterritorial use of process patents. This delicate legislative touch indicates 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 1340-41 (Moore, J., dissenting); *accord Morrison*, 561 U.S. at 265 ("when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms").

The *TianRui* panel also relied on out-of-circuit authority giving extraterritorial reach to a very different statute—8 U.S.C. § 1324(a), which criminalizes, in part, attempts to bring a person into the United States unlawfully. There, unlike here, Congress made plain its intent to render the statute extraterritorial: it specifically amended the statute to "change from the phrase 'brings into' to the phrase 'brings to'" in order to capture "activity taking place outside of the United States." *United States v. Villanueva*, 408 F.3d 193, 198 (5th Cir. 2005). The sharp contrast between the statute at issue there and Section 337(a)(1)(A) *supports* our showing that the text here falls far short of what *Kiobel* requires. *See also TianRui*, 661 F.3d at

1339 (Moore, J., dissenting) (noting the "express statutory language indicating … extraterritorial application").

The *TianRui* panel also attempted to bolster its holding by pointing to the Economic Espionage Act, which, in the panel's view, showed Congress has "recognized that misappropriation of U.S. trade secrets can, and does, occur abroad." *TianRui*, 661 F.3d at 1330 n.4. But the Economic Espionage Act is a model of what a clear textual indication of extraterritorial application looks like. 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 resident alien, or an act in furtherance of the offense was committed in the United States. *Id.*

That express extraterritorial application is plainly missing from Section 337(a)(1)(A). As Section 1837 shows, when Congress intends for U.S. law to apply abroad, the statute says so expressly. And, 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 conduct that has some domestic nexus.

The Economic Espionage Act is hardly unique; Congress has expressly extended scores of statutes extraterritorially—and 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 (restrictions relating to transactions outside the United States with nations that support terrorism).

In fact, many statutes discuss "extraterritorial jurisdiction" directly. *See*, *e.g.*, 18 U.S.C. § 1039(f) ("There is extraterritorial jurisdiction over an offense" relating to fraudulently obtaining certain phone records.); *id.* § 2285(c) ("There is extraterritorial Federal jurisdiction over an offense under this section"). When Congress wishes for a statute to reach abroad, it does not hide that intent.

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. When Congress wants to apply U.S. legal standards to govern the manufacture of goods abroad that are destined for U.S. import, it thus says so expressly.

Similarly, when Congress wishes to empower a regulatory agency to reach conduct abroad that results in domestic injury, it gives the agency that express power. For example, Congress has authorized the Securities and Exchange Commission to investigate and prosecute fraudulent conduct occurring outside the United States when, in part, the foreign conduct "has a foreseeable substantial effect within the United States." 15 U.S.C. § 78aa(b)(2). Congress has not accorded the ITC comparable authority with respect to trade secret misappropriation.

In sum, the statutory text here simply does not provide the clear textual evidence of extraterritorial application that *Kiobel* requires.

2. No legislative history provides the necessary clear indication of extraterritorial reach.

The *Kiobel* Court recognized that it is appropriate to inquire whether "the historical background against which [a statute] was enacted overcome[s] the presumption against application to conduct in the territory of another sovereign." 133 S. Ct. at 1666. It examined in great detail the historical context in which the ATS was enacted, but it did not find the requisite clear indication of extraterritoriality. *Id.* at 1666-68.

The *TianRui* panel cited a single sentence from a 1922 report of the U.S. Tariff Commission stating that 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.'" *TianRui*, 661 F.3d at 1331. But that sentence does not provide any clear indication that Section 337(a)(1)(A) reaches extraterritorially.

First, the statute *does* reach unfair acts that take place within the United States but are orchestrated by individuals outside the country. Other parts of the 1922 report demonstrate this point: "it would be unfair for 'individuals residing outside the jurisdiction of the United States' to engage in 'unfair price cutting, full line forcing, [or] commercial bribery' when importing their products into the United States." *TianRui*, 661 F.3d at 1341 (Moore, J., dissenting) (quoting U.S. Tariff Comm'n, *Sixth Annual Report* 4 (1922)); *see also* page 41, *infra*.

Indeed, the *TianRui* majority's analysis closely resembles arguments rejected by the Supreme Court in *Kiobel*, which rested on a similar ambiguous sentence cherry-picked from a 1795 Opinion of Attorney General Bradford. The Court stated that the "opinion defies a definitive reading and we need not adopt one here. … The opinion hardly suffices to counter the weighty concerns underlying the presumption." *Kiobel*, 133 S. Ct. at 1668. The same conclusion applies to the single sentence cited here.

Second, the sentence relied on in *TianRui* is not legislative history at all. *See TianRui*, 661 F.3d at 1341 (Moore, J., dissenting). It is a report of the Tariff Commission issued *after* Congress enacted Section 337. The report could not possibly express the intent of the Congress that enacted this statute. *See 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.") (emphasis omitted).

For these reasons, the one sentence in the 1922 Annual Report cited by the *TianRui* majority is far from the "clear indication of extraterritoriality" that the Supreme Court's test requires to extend (1)(A) abroad. *Kiobel*, 133 S. Ct. at 1669. *See TianRui*, 661 F.3d at 1341 (Moore, J., dissenting) ("Even if this sentence was clear on its face, I cannot conclude that this sentence in this report is sufficient to overcome the presumption against extraterritorial application of the statute.").

3. No deference is due to the ITC.

The *TianRui* panel's suggestion (*see* 661 F.3d at 1332) that administrative deference supports the extraterritorial reach of (1)(A) is flatly inconsistent with *Kiobel*'s holding that a clear expression of *Congress's* intent is needed to overcome the presumption against extraterritoriality. The operative question is whether "*Congress* intended causes of action recognized under [a statute] to have extraterritorial reach." 133 S. Ct. at 1665. An administrative agency cannot supply a clear expression omitted by Congress.

The Second Circuit recently recognized this principle in holding that a provision of Dodd-Frank does not reach conduct abroad: "Given 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). As another court held, "no regulation could supply, on Congress's behalf, the clear legislative intent required to overcome … the presumption against extraterritoriality." *Souryal v. Torres Advanced Enter. Sol'ns, LLC*, 847 F. Supp. 2d 835, 843 (E.D. Va. 2012) (internal quotation marks omitted).

Agency deference is unavailable for a related reason: an agency interpretation is entitled to deference *only* "if the statute is silent or ambiguous with respect to the specific issue." *Chevron*, 467 U.S. at 843. The presumption against extraterritoriality holds that a statute applies abroad only when it contains a "'clear indication of an extraterritorial application.'" *Kiobel*, 133 S. Ct. at 1664 (quoting *Morrison*, 561 U.S. at 265). Accordingly, if a court determines that a statute is "silent or ambiguous"—the only circumstances in which it could defer to an agency's reasoning—the court has necessarily resolved the extraterritoriality question. That is because a statute that is silent or ambiguous does not provide the "'clear indication of an extraterritorial application'" that is required. *Id.*

Moreover, the Commission has not engaged in any meaningful administrative interpretation of the statute. So far as we are aware, the ITC has never considered the holdings of *Morrison* or *Kiobel*, much less analyzed the presumption against extraterritorial application of U.S. law as it relates to Section 337(a)(1)(A).

TianRui pointed to a decision by an administrative law judge—not the ITC—in *In re Certain Processes for the Manufacture for Skinless Sausage Casings and Resulting Product*, Inv. No. 337-TA-148/169, 1984 WL 273789, at *98 (1984) (initial determination). But, as Judge Moore explained, "[t]he issue of extraterritoriality … was neither raised by the parties nor analyzed by the commission in *Sausage Casings*, which focused on whether the producer independently developed its process." *TianRui*, 661 F.3d at 1342 n.7 (Moore, J., dissenting). For this reason, "[t]here is no reasonable statutory interpretation deserving deference in *Sausage Casings*." *Id*. Accordingly, there is no reasoned construction of (1)(A) to which the Court could defer.

In short, the ITC has engaged in no meaningful statutory construction to which the Court may defer, but even if it had, deference is not appropriate in this context.

C. The claim in this case is extraterritorial and therefore beyond the ITC's statutory authority.

If a statute does not extend extraterritorially and "all the relevant conduct [regarding the particular claim] took place outside the United States," then the statute plainly cannot apply to that claim. *Kiobel*, 133 S. Ct. at 1669. But even the occurrence in the United States of *some* conduct relevant to the claim often is not a sufficient basis for a claim to proceed. The *Kiobel* Court explained that "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." *Id.*

The post-*Kiobel* application of this test by courts of appeals in the context of the Alien Tort Statute provides useful guidance for its application to Section 337(a)(1)(A). The Second Circuit concluded that in light of the statute's focus on violations of international law, the question whether a claim seeks extraterritorial application of the statute turns on "the site of the alleged violations of customary international law." *Mastafa v. Chevron Corp.*, __ F.3d __, 2014 WL 5368853, at *9 (2d Cir. 2014). The fact that other conduct not constituting the international law violation may have occurred in the United States is irrelevant. *Id.*; *see also Balintulo v. Daimler AG*, 727 F.3d 174, 189-92 (2d Cir. 2013).

The Eleventh Circuit reached the same conclusion, holding that the location outside the U.S. of the alleged violation of international law was dispositive of the extraterritoriality question. *Cardona* v. *Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1189-91 (11th Cir. 2014). The plaintiffs in that case alleged that the defendant's "corporate officers reviewed, approved, and concealed payments and weapons transfers to Colombian terrorist organizations from their offices in the United States." *Id.* at 1194 (Martin, J., dissenting). Nonetheless, the court held the claims extraterritorial because there was no allegation that any "act constituting a tort in terms of the ATS touched or concerned the territory of the United States with any force." *Id.* at 1191; *accord Baloco v. Drummond Co., Inc.*, __ F.3d __, 2014 WL 4699481, at *3-5 (11th Cir. 2014).

These courts applied *Kiobel* by identifying the conduct at the core of the statute's concern and holding that this core conduct must have occurred within the United States in order for the statute's application to be permissible and not extraterritorial. *Accord United States v. Chao Fan Xu*, 706 F.3d 965, 979 (9th Cir. 2013) (key question for determining whether application of RICO was extraterritorial was where the unlawful scheme was "executed and perpetuated").

Section 337(a)(1)(A) is focused on "[u]nfair methods of competition and unfair acts in the importation of articles." "Unfair methods" and "unfair acts" are the core of the statute's focus, and the location of that conduct is therefore determinative for purposes of the extraterritoriality inquiry.

Thus, 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, *Sixth Annual Report* at 4 (Section 337 applies to "unfair price cutting, full line forcing, [or] commercial bribery").

For example, in *In re Certain Angolan Robusta Coffee*, 1976 WL 41418, USITC Inv. No. 337-TA-16 (Feb. 25, 1976), the Commission considered "price-fixing arrangements for the sale of such coffee *in the United States* and boycotts and refusals to deal with *United States importers and traders* not participating in such price-fixing arrangements." *Id.* at *2 (emphasis added). *See also In re Chicory Root-Crude & Prepared Notice of Termination of Investigation*, 1977 WL 52340, USITC Inv. No. 337-TA-27 (Mar. 30, 1977) (predatory pricing in the United States).

There also would be no question of impermissible extraterritoriality if, for example, an entity misappropriates a trade secret *in the United States* and then uses that secret to produce a product abroad. That is because the conduct being regulated—the misappropriation of a trade secret that constitutes an "unfair practice"—will have occurred in the United States, subjecting it to the authority of U.S. law. *See TianRui*, 661 F.3d at 1337 (Moore, J., dissenting) ("[I]f TianRui came to the United States and stole Amsted's trade secrets here—then [Section] 337 could be used to bar import of any goods made with the stolen technology.").[4]

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[4] Of course, there might be a question in that situation whether the unfair practice was "in the importation of articles," but that would be a question regarding the scope of the statute with respect to conduct within the U.S. and not a question of extraterritorial application.

The *TianRui* majority did not apply the *Kiobel* standard for determining when a statute's application would be extraterritorial. It did state, however, that provision's requirement of a "domestic injury" resulting from "the importation of goods into this country" provided what it viewed as the requisite domestic connection. But that is simply another way of arguing that the reference to transnational commerce is sufficient to overcome the presumption against extraterritoriality, because the practical effect of the panel's argument would be worldwide extraterritorial application of the statute. And that result would circumvent *Kiobel*'s holding that extraterritoriality is permissible only if Congress clearly indicated its endorsement of that result.

D. Extending Section 337(a)(1)(A) to extraterritorial conduct risks severe foreign policy repercussions.

Kiobel held that the strong presumption against extending U.S. law to reach foreign conduct stems from the necessity of "avoiding diplomatic strife." 133 S. Ct. at 1669. "[T]he presumption 'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'" 133 S. Ct. at 1661. For these same reasons, the Supreme Court restrained the reach of U.S. courts to adjudicate conduct occurring abroad in *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014). The Court found personal jurisdiction unavailable, in part, because of "the risks to international comity" that an "expansive view of general jurisdiction" would "pose[]." *Id.* As the Court explained, "[c]onsiderations of international rapport" are important in determining the reach of U.S. law to conduct that occurs outside the country. *Id.*

Limiting the reach of U.S. abroad also safeguards U.S. interests. An expansive view of the reach of U.S. law "would imply that other nations" could do the same, and thus improperly "hale our citizens into their courts." *Kiobel*, 133 S. Ct. at 1669. "The presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches." *Id.*

These considerations weigh strongly against extraterritorial application of Section 337(a)(1)(A).

Although this case involves trade secret misappropriation, there is no reason why a similar theory could not be advanced based on alleged unfair practices regarding the prices paid in China for raw materials and other inputs used in manufacturing goods for importation into the U.S. Or commercial bribery or other similar practices in connection with the manufacturer's business. The range of conduct occurring in other countries that would be eligible for examination under U.S. legal standards would run the whole gamut of commercial activities—with a correspondingly significant intrusion on other nations' sovereignty.

Indeed, Judge Moore recognized the expansive implications of the panel majority's ruling:

> Suppose that goods were produced by workers who operate under conditions which would not meet with United States labor laws or workers who were not paid minimum wage or not paid at all—certainly United States industry would be hurt by the importation of goods which can be manufactured at a fraction of the cost abroad because of cheaper or forced labor. Would we consider these business practices unfair? Absent clear intent by Congress to apply the law in an extraterritorial manner, I simply do not believe that we have the right to determine what business practices, conducted entirely abroad, are unfair.

TianRui, 661 F.3d at 1338 (Moore, J., dissenting).

Such an extraordinarily expansive expansion of U.S. law plainly would create a very serious risk of retaliation by foreign nations. These policy questions are issues for Congress—not the courts—to resolve.

SI Group's contrary position turns on the assertion that worldwide adoption of U.S. trade secret laws is desirable, but, even if this is true, the way to promote this policy goal is through "the international marketplace for such ideas." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004). "Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat." *Id.*

Indeed, rigorous application of the presumption against extraterritorial reach of a statute produces good, considered policy. Congress can—and often does—react to such judicial decisions by crafting statutes with *limited* extraterritorial reach. Congress responded to *Morrison* by providing the SEC (but not private litigants) tailored authority to address some conduct that occurs outside the United States. *See* 15 U.S.C. § 78aa(b). Congress reacted to *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), by extending certain anti-discrimination laws to certain U.S. citizens abroad, but not to other employees. 42 U.S.C. § 2000e(f). And, perhaps most relevant here, Congress responded to this Court's decision in *In re Amtorg Trading Corp.*, 75 F.2d at 834, by extending Section 337(a)(1)(B) to foreign conduct infringing U.S. process patents, but not to other kinds of unfair acts.

Indeed, Congress is considering such legislation right now with respect to trade secrets. *See* Defend Trade Secrets Act of 2014, S. 2267, 113th Cong. (2d Sess. 2014).

This is not to say that, under existing law, companies like SI Group are without any Section 337 remedy. To the extent it had a protectable secret, SI Group could have "obtain[ed] a process patent," which, of course, would trigger Section 337(a)(1)(B). *TianRui*, 661 F.3d at 1343 (Moore, J., dissenting). The ITC's approach, by contrast, "gives additional incentive to inventors to keep their innovation secret," to the detriment of the "American consumer." *Id.*

In sum, Section 337(a)(1)(A) lacks the clear indication of extraterritorial effect necessary to extend U.S. law to conduct outside the United States, and doing so risks adverse policy consequences never contemplated by Congress. Whether the ITC *should* in fact have authority over trade secret misappropriation occurring abroad is a delicate policy question that must be left to the province of Congress.

II. The ITC Erred In Holding That A Prior Judgment Of A Chinese Court—Resolving The Same Claims Among The Same Parties—Is Irrelevant In A Section 337 Proceeding.

This case highlights the problems that result if Section 337(a)(1)(A) is extended to reach conduct abroad. Before SI Group initiated this ITC investigation, it brought several actions in China concerning the very same alleged trade secret misappropriation against the very same defendant. It first requested a criminal investigation but the authorities declined to take action. SI Group then instituted a pair of lawsuits but withdrew them. It then filed two more lawsuits. Ultimately, SI Group received an adverse judgment in the Chinese litigation, holding that there was no trade secret misappropriation. *See* pages 4-12, *supra*. Long-established comity principles bar SI Group from obtaining any relief in this action after rejection of the same misappropriations claims a lawsuit that it *voluntarily initiated*.

The ITC erred in holding that the Chinese litigation was *irrelevant* to the Section 337 proceeding. International comity principles apply to Section 337 proceedings, and the Chinese judgment—which was the product of SI Group's own decision to seek relief in Chinese courts—should have been considered and respected by the ITC.

A. The ITC erred in holding international comity principles categorically inapplicable to Section 337 proceedings.

International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). The doctrine requires courts to "defer to proceedings taking place in foreign countries," and grant "extraterritorial effect" to those "proceedings" "in the United States." *Int'l Nutrition Co. v. Horphag Research Ltd.*, 257 F.3d 1324, 1329 (Fed. Cir. 2001). Federal courts favor "granting comity" "as long as the foreign court abides by 'fundamental standards of procedural fairness.'" *Id.*[5]

[5] The comity doctrine is similar to the "first-to-file" rule long applied by this Court, which "generally favors pursuing only the first-filed action when multiple lawsuits involving the same claims are filed in different ju-

Notwithstanding the Chinese court's rejection on the merits of the very same misappropriation claims pressed before the ITC, the Commission held that "abstention and international comity do not relieve the Commission of its statutory responsibility to determine whether there is a violation of [S]ection 337." A105.[6]

That categorical rejection of comity principles is plainly incorrect.

To begin with, Section 337(c) provides: "All legal and equitable defenses may be presented in all cases." 19 U.S.C.A. § 1337(c). This Court has recognized comity as a "defense." *Int'l Nutrition Co.*, 257 F.3d at 1329. Comity principles therefore apply to Section 337 proceedings.

The ITC's determination, moreover, is squarely inconsistent with this Court's decision in *Young Engineers, Inc. v. U.S. International Trade*

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risdictions." *Merial Ltd. v. Cipla Ltd.*, 681 F.3d 1283, 1299 (Fed. Cir. 2012). This rule is designed "to avoid conflicting decisions and promote judicial efficiency." *Id.* Extending international comity to an earlier-filed lawsuit abroad advances these same ends.

[6] The ALJ also refused to consider the application of comity principles: "Respondents' alternative argument that the Commission should decline to exercise jurisdiction under the principles of comity and abstention, or stay the proceeding pending completion of the Chinese litigation, is entirely unpersuasive. 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."A223.

Commission, 721 F.2d 1305, 1313 (Fed. Cir. 1983). There, the Court held that *res judicata* is available as a defense in a Section 337 proceeding. The Court looked first to Section 337(c), holding that it "reflects a recognition that essentially private rights are being enforced in the proceeding." *Young Eng'rs*, 721 F.3d at 1315. If the Court were to hold *res judicata* principles inapplicable because "the Government is a party" or the available relief differs from that available in purely private litigation, the Court "would effectively negate a significant defense which otherwise could be determinative of private rights." *Id*. The Court thus rejected the contention that a different rule should control because "a [Section] 1337 proceeding is not purely private litigation 'between the parties' but rather is an 'investigation' by the Government." *Id*. at 1315.

Next, the Court observed that where "a complainant's infringement claim has been judicially settled" and a court has concluded that "there is a legal right in the respondent to do the act claimed to be infringing," there is "no legitimate basis for the Commission's finding that such acts are 'unfair.'" *Young Eng'rs*, 721 F.3d at 1315. A prior court determination, favorable for the respondent, may thus negate an essential element of a Section 337(a)(1)(A) claim.

Finally, the Court invoked important policy considerations. Given that "the evils of vexacious litigation and waste of resources are no less serious because the second proceeding is before an administrative tribunal," there was good reason to conclude that "[s]ome adaptation of claim preclusion appears desirable, indeed necessary, in its application to administrative proceedings." *Young Eng'rs*, 721 F.3d at 1315. The Court offered an example from the patent context: "[i]f a patent owner has unsuccessfully attacked an alleged infringer for the same infringing acts in a prior court proceeding, no substantive argument has been advanced as to why the patent owner should be given an opportunity to put forth the same charge of infringement again." *Id.*

These considerations apply with equal force to international comity principles, which in many ways resemble the *res judicata* doctrine. As we have shown, international comity is also long-recognized "defense," and therefore within the clear meaning of Section 337(c). *Int'l Nutrition Co.*, 257 F.3d at 1329.

Moreover, the determination by a foreign court as to whether conduct abroad was unlawful—like the parallel determination by a U.S. court—will typically be dispositive of whether that conduct is "unfair." *Young Eng'rs*, 721 F.3d at 1316. Once a court has concluded that certain practices are lawful in the country where the conduct actually occurred, it would be extraordinary—and contrary to the very purpose of comity—for the ITC to nonetheless deem that conduct "unfair" for purposes of Section 337(a)(1)(A).

International comity also rests on the very same efficiency and finality concerns implicated by *res judicata*. When a party brings an action and loses, it should not be able to get a second bite at the apple by suing in a different country. Not only does international comity produce "the proper respect for litigation in and the courts of a sovereign nation," but it also ensures "fairness to litigants" and "judicial efficiency." *Royal & Sun Alliance Ins. Co. of Canada v. Century Int'l Arms, Inc.*, 466 F.3d 88, 94 (2d Cir. 2006).

The opinion below does not explain why the ITC held comity principles inapplicable under Section 337. The Commission appears to have concluded that because Section 337 is a federal statute, the ITC may not afford comity to a decision by a foreign court. But U.S. courts regularly apply international comity, for example, in bankruptcy actions, which are creatures of federal law. *See Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 242, 246 (2d Cir. 1999) (holding that district court could dismiss complaint in favor of Brazilian liquidation proceedings "on the ground of comity"); *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 457 (2d Cir. 1985). Likewise, courts apply comity in antitrust proceedings. *See E&L Consulting, Ltd. v. Doman Indus. Ltd.*, 360 F. Supp. 2d 465, 470, 477 (E.D.N.Y. 2005).

While it is true that the reach of international comity is subject to limits imposed by "public policy" (*Int'l Nutrition Co.*, 257 F.3d at 1329), the ITC identified no public policy reason precluding application of comity principles under Section 337. To the contrary, comity furthers important public policy interests, because it maintains "amicable working relationships between nations." *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005).

Moreover, public policy limits the reach of comity in only the most narrow of categories—where its application is "repugnant to fundamental principles of what is decent and just." *Belize Telecom Ltd. v. Gov't of Belize*, 528 F.3d 1298, 1306 (11th Cir. 2008). There is hardly anything repugnant in holding SI Group bound by the result of a legal proceeding it voluntarily initiated.

And the ALJ's contention—that comity is inappropriate because a Section 337 case considers issues like "harm to the domestic industry" not present in the Chinese proceedings (A222-23)—is a red herring. The issue here is whether the Chinese court's finding of no trade secret misappropriation deserves deference. We have not, and do not, contend that the Chinese court has a role to play in aspects of Section 337 not addressed in a foreign court proceeding, such as the domestic injury element.

For all of these reasons, the ITC's categorical holding that international comity principles are inapplicable to Section 337 proceedings should be reversed.

B. The Chinese judgment, which resulted from SI Group's voluntary initiation of lawsuits in China, should be afforded comity.

Because the Commission found the Chinese judgment irrelevant, it did not address whether comity should be accorded to the particular Chinese judgment here. But SI Group itself *voluntarily initiated* the Chinese legal proceedings that it lost. Any suggestion that it should not be bound by those proceedings must be rejected. It would be profoundly unfair *not* to afford comity to the judgment under these circumstances.

International comity is appropriate where a foreign court "of competent jurisdiction" has heard and resolved the same claims between the parties in a manner that is consistent with "fundamental standards of procedural fairness." *Int'l Nutrition Co.*, 257 F.3d at 1329; *see also Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 898 (7th Cir.

1999) (applying "general principles" of abstention in cases involving "international comity"). These preconditions are plainly present here.

At the outset, the "federal and foreign proceedings" are "parallel." *Finova*, 180 F.3d at 898. "'Suits are parallel'"—and therefore are subject to dismissal or abstention on comity grounds—where, as here, "'substantially the same parties are litigating substantially the same issues simultaneously in two fora.'" *Id.* (quoting *Schneider Nat'l Carriers, Inc. v. Carr*, 903 F.2d 1154, 1156 (7th Cir. 1990)). Both the Chinese litigation and the ITC investigation involve the same parties—SI Group and Sino Legend. The two proceedings involve essentially identical claims regarding the alleged misappropriation of the same asserted trade secrets. SI Group even recognized the parallel nature of the cases before the Chinese court: on appeal from the Chinese judgment, it submitted the ITC proceedings as evidence that the lower Chinese court had erred in deciding in favor of Sino Legend. A4553.

And there is no basis for characterizing these particular proceedings in China as fundamentally unfair to SI Group—particularly because SI Group itself initiated them. This is not a situation in which a losing party was haled into a foreign court against its will.

SI Group's principal contention before the ITC was that the Chinese proceedings were unfair because SI Group did not participate during the trial. However, as the Chinese appellate court expressly found, SI Group unilaterally boycotted the trial and acted in bad faith.

Pursuant to the governing procedural rules, the Chinese trial court obtained independent expert reports from a neutral third party, the MIIT Appraisal Institute. A4634, A4645. Both SI Group and Sino Legend participated in choosing the experts on the appraisal panel. A4645. The panel then conducted on-site investigations and interviews and heard argument from both SI Group and Sino Legend. A4646. The appraisal panel prepared lengthy, detailed reports, to which both parties had the opportunity to submit written comments to the court. *Id.*

These reports showed that Sino Legend did not practice any of the protectable trade secrets. A4655, A4661-62. Following its receipt of the reports, SI Group asked for a new appraisal. A4647. The trial court deferred this request, explaining that it was an issue to be resolved in connection with the merits of the underlying claims. *Id.* SI Group then sought to dismiss the suit in order to add a new defendant; the effect of a dismissal would have been to vacate the appraisal report. A4647-48. The trial court rejected this tactic, because SI Group has *already* dismissed and refiled the lawsuit, and moreover could file a separate action against the additional defendant. A4648.

The trial court found it would have been unfair to Sino Legend to permit such actions by SI Group. A4648. And the appellate court determined that SI Group's requests were made [[[redacted]]] because SI Group took these actions only after learning that the appraisal report was not favorable. A4652; *see also* pages 4-12, *supra*.

After the trial court then subpoenaed the parties for trial, SI Group refused to attend. A4648. As the appellate court later explained, even though the trial court could have entered a default judgment at this point, the three-member trial court nonetheless cross-examined the experts based on SI Group's earlier written submissions. A4562-63; *see also* page 12, *supra*. And it independently concluded that the recommendations of the MIIT appraisal should be adopted. A4680. The trial court therefore issued a judgment in favor of Sino Legend. A4683-84.

SI Group appealed the judgment, and participated in the hearing before the appellate panel. A4507, A4553. That panel also rejected SI Group's arguments on the merits. A4560-63.

In sum, SI Group initiated legal action in China. When it learned it was likely to lose that action, it attempted to withdraw the litigation. Courts in this country "not only look with skepticism, but … flatly reject [a] due process complaint of a party who was given, and waived, the opportunity of making [an] adequate presentation" before a foreign tribunal. *Soc'y of Lloyd's v. Turner*, 303 F.3d 325, 331 n.20 (5th Cir. 2002) (quotation omitted). SI Group has no basis whatsoever to complain about the Chinese proceedings.

Before the Commission, SI Group also attacked the integrity of Chinese courts broadly, arguing that they are inadequate forums for adjudicating trade secret claims. But it was SI Group that voluntarily brought this action to a Chinese court. Any resulting error was, to say the least, invited. *See Chem. Eng'g Corp. v. Essef Indus., Inc.*, 795 F.2d 1565, 1572 (Fed. Cir. 1986) (a party may not "complain on appeal" of "invited error").

In any event, SI Group's assertion is wrong; there is no basis whatever for concluding that Chinese judgments are categorically unworthy of recognition by U.S. courts. Because foreign judicial systems differ markedly from the U.S. system, U.S. courts accord comity to foreign court decisions as long as the parties had a full and fair opportunity to pursue their claims and defenses. *See Hilton*, 159 U.S. at 202-03. A foreign decision will not be deemed unfair unless there were "*outrageous departures* from our own notions of 'civilized jurisprudence.'" *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 1003 (9th Cir. 2013) (emphasis added).

The judicial system in China easily meets the standard for affording comity. In fact, in *TianRui*, the court explained that, because "China has acceded to the Agreement on Trade–Related Aspects of Intellectual Property Rights," there is no "relevant difference between the misappropriation requirements of TRIPS article 39 and the principles of trade secret law applied" by the ITC. 661 F.3d at 1333.

Courts in the United States afford comity by recognizing Chinese courts' monetary judgments. *See Hubei Gezhouba Sanlian Indus. v. Robinson Helicopter Co.,* 425 F. App'x 580, 581 (9th Cir. 2011); *Folex Golf Indus., Inc. v. China Shipbuilding Indus.*, 2013 WL 1953628 (C.D. Cal. 2013).

Forum non conveniens decisions provide another example. Dismissal on these grounds requires the presence of an adequate alternative forum. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 245 n.11 (1981). The Supreme Court itself has indicated that Chinese courts satisfy this test: the Court found a "textbook case for immediate *forum non conveniens* dismissal" where it made no sense to "continu[e] litigation" in Pennsylvania "given the proceedings long launched in China." *Sinochem Int'l Co. v. Malay-*

sia Int'l Shipping Corp., 549 U.S. 422, 435 (2007). The merits of the claim, which accrued in China, was "best left for determination by the Chinese courts." *Id.* at 436.

And scores of lower courts have dismissed matters pursuant to *forum non conveniens* in favor of Chinese courts, demonstrating widespread recognition that these tribunals are adequate. *See*, *e.g.*, *King.com Ltd. v. 6 Waves LLC*, 2014 WL 1340574, at *3-6 (N.D. Cal. 2014); *Jacobs Vehicle Sys., Inc. v. Yang*, 2013 WL 4833058, at *7-9 (M.D.N.C. 2013); *Nalco Co. v. Chen*, 2013 WL 4501425 (N.D. Ill. 2013); *Tang v. Synutra Int'l, Inc.*, 2010 WL 1375373 (D. Md. 2010); *Quanzhou Joerga Fashion Co. v. Brooks Fitch Apparel Grp., LLC*, 2012 WL 4767180 (S.D.N.Y. 2012); *In re Compania Naviera Joanna S.A.*, 531 F. Supp. 2d 680 (D.S.C. 2007); *China Tire Holdings Ltd. v. Goodyear Tire & Rubber Co.*, 91 F. Supp. 2d 1106, 1111 (N.D. Ohio 2000); *Guimei v. Gen. Elec. Co.*, 91 Cal. Rptr. 3d 178, 187 (Ct. App. 2009). The contrary result—holding that Chinese courts are somehow institutionally deficient and thus unworthy of comity—would be extraordinary.

Finally, there is no basis for declining to apply comity principles because the ALJ excluded from the record materials relating to the Chinese litigation (*see* A185)—those decisions are subject to judicial notice. *Ermini* *v. Vittori*, 758 F.3d 153, 156 n.2 (2d Cir. 2014). In any event, the ALJ's decision not to admit the materials turned on his view that comity was irrelevant to the investigation (A185); because that conclusion was erroneous, the decision not to accept material establishing the Chinese proceedings was erroneous for the same reason.

Because a Chinese court adjudicated the same claims between the same parties in China, comity should be accorded to the Chinese court's determination. The ITC's failure to do so requires reversal.

III. The ITC Erred In Imposing A Ten Year Exclusion Order.

The Commission's selection of a ten-year limited exclusion order (A183-84) rests on a plain legal error, is arbitrary and capricious, and should therefore be set aside. The ITC's determination rests on a clear misinterpretation of a Chinese contract governed by Chinese law—indeed, a conclusion diametrically opposed to the Chinese court's interpretation of the same contract.

SI Group's theory of the case, which the Commission adopted, is that Jie Xu disclosed confidential secrets to Sino Legend, in violation of the non-disclosure obligations in his employment contract. In fashioning a remedy, the ITC considered the length of time it would take Sino Legend to independently develop the claimed processes, which it estimated to be ten years. A183-84. But the ITC neglected a critical fact: Xu's nondisclosure agreement lasted only three years, meaning that Sino Legend could lawfully gain knowledge of the processes after three years—not ten.

When an employee's non-disclosure agreement has a limited term, the employee may disclose secret information to a competitor after the term expires. In *ECT International, Inc. v. Zwerlein*, 597 N.W.2d 497, 480 (Wis. Ct. App. 1999), for example, a Wisconsin appellate court held that, "in imposing a one-year period, after termination of employment, during which an employee could not divulge trade secrets, [the employer] manifested an intent that after the expiration of that period a former employee is under no restrictions." *See also Silicon Image, Inc. v. Analogix Semiconductor, Inc.*, 2008 WL 166950, at *17 (C.D. Cal. 2008); *Baystate Techs., Inc. v. Bentley Sys., Inc.*, 946 F. Supp. 1079, 1093 (D. Mass. 1996).

It is undisputed that the confidentiality provision in Jack Xu's employment contract specified a three-year term limit. [[[redacted]]] A1298; *see also* A599. Notably, [[[redacted]]] A1306. After those three years expired, Xu could lawfully provide Sino Legend with any knowledge he held.

The Commission rejected this argument, however, based on its view that Xu's confidentiality obligation is *permanent*. A912. The ALJ reasoned that [[[redacted]]] A321. And, in turn, [[[redacted]]] A1330. The Commission held [[[redacted]]] *Cf*. A321.

That conclusion is wrong for several reasons. *First*, the Chinese court, applying Chinese law, found that Xu's obligation lasted only three years. A4650. The court explained:

> [[[redacted]]]

Id. Because the contract is governed by Chinese law (A1298), the Chinese court's interpretation controls.

Second, in addition to ignoring the Chinese judgment, the decision below ignores Chinese law, which provides that when a company's general policies conflict with a term in the employment contract, the *contract* controls. That is, "where the internal bylaws formulated by an employer conflict with the contents stipulated in the … employment contract," the employment contract must be given effect. A6963-64 (Article 16 of the Interpretation of the Supreme People's Court on Several Issues about the Application of Laws for the Trial of Labor Dispute Cases (II)).

Third, the ALJ's legal determination is also wrong under U.S. law. The well established rule that the specific controls the general applies in the context of employment contracts and policy manuals. Thus, a "specific agreement" in an employment contract "preempts the arguably inconsistent policy manual." *Grimes v. Allied Stores Corp.*, 768 P.2d 528, 529 (Wash. Ct. App. 1989). The parties' specific, tailored, hand-written three-year confidentiality agreement in the employment contract necessarily trumps the generic statement in a company-wide handbook.

Because the ALJ erred in concluding that Xu was subject to a permanent non-disclosure agreement, the remedy adopted below is wholly unsupportable. At most, Sino Legend should be subject to a three-year exclusion order from the date the order issued.[7]

CONCLUSION

The Commission's limited exclusion order should be vacated, and this matter should be remanded for dismissal of the complaint against appellants. If the limited exclusion order is not vacated, the Court should direct that its duration should be shortened to three years.

Respectfully submitted,

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Dated: November 10, 2014

[7] The ITC concluded that the duration of the exclusion order should run from the date of its entry rather than the time of the violation. A184 n.11.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 13,698 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: November 10, 2014

/s/ Andrew J. Pincus
Andrew J. Pincus

ADDENDUM