2010-1395

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

TIANRUI GROUP COMPANY LIMITED and
TIANRUI GROUP FOUNDRY COMPANY LIMITED,

Appellants,

and

STANDARD CAR TRUCK COMPANY, INC. and
BARBER TIANRUI RAILWAY SUPPLY, LLC,

Appellants,

v.

INTERNATIONAL TRADE COMMISSION,

Appellee,

and

AMSTED INDUSTRIES INCORPORATED,

Intervenor.

ON APPEAL FROM THE UNITED STATES INTERNATIONAL TRADE COMMISSION
IN INVESTIGATION NO. 337-TA-655

RESPONSE OF APPELLEE INTERNATIONAL TRADE COMMISSION TO TIANRUI'S COMBINED PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION

TianRui's petition fails to meet the criteria for rehearing *en banc* under Fed. R. App. P. 35(a) and Fed. Cir. R. 35.[1] The panel majority's opinion–upholding a violation of Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, where respondents imported and sold cast steel railway wheels that were admittedly manufactured by a process using trade secrets that they had misappropriated from complainant Amsted–was consistent with and not contrary to controlling precedent. Indeed, the panel unassailably detailed at least three separate grounds explaining how Section 337 grants authority to the ITC over trade secret cases that may involve some conduct occurring outside of the United States. The panel specifically addressed the extraterritoriality issue raised again by TianRui in its rehearing petition, and explained why the ruling here is not in conflict with the cases cited by TianRui. Not only does the panel's decision follow the precedent of the Supreme Court and the Federal Circuit, it is also consistent with the decisions of other circuits in closely-analogous cases involving statutory regulation at U.S. borders.

Further, there is no question of exceptional importance warranting *en banc*

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[1] Nor has TianRui shown that the panel overlooked or misapprehended any points of law or fact that would support panel rehearing. *See* Fed. Cir. R. 40(a)(4). TianRui itself misapprehends the panel's findings to the extent TianRui states that the panel endorsed the ITC's application of Section 337 to "wholly" or "purely" foreign acts. *E.g.*, Pet. 2-3. Rather, the panel explicitly explained that Section 337 is relevant only to the extent foreign "unfair" activity results in the importation of goods causing domestic injury. Slip op. 14-15.

review. Rather, the ITC simply followed its longstanding and–until this juncture–noncontroversial, statutorily-consistent practice of exercising authority over imports that are manufactured using misappropriated U.S.-owned trade secrets, irrespective of where the trade secrets were improperly disclosed.[2] The panel's decision properly focuses on the "in the importation of articles" language of Section 337(a)(1)(A), which grants the ITC authority "to investigate and grant relief based in part on extraterritorial conduct insofar as it is necessary to protect domestic industries from injuries arising out of unfair competition in the domestic marketplace." Slip op. 3. The legislative history and the ITC's longstanding practice, left undisturbed by Congress when amending the statute, make it clear that the ITC's authority extends to unfair methods of competition in importation of goods manufactured abroad using misappropriated trade secrets.

ARGUMENT

I. THE PANEL'S DECISION IS CONSISTENT WITH SUPREME COURT AND FEDERAL CIRCUIT PRECEDENT

A. The Panel's Decision Does Not Disturb the Uniformity of the Courts' Decisions

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[2] TianRui's statement (Pet. 2) that the trade secrets were stolen from a Chinese company is inaccurate. Although TianRui "poached" employees from one of Amsted's Chinese licensees after TianRui's efforts to obtain its own license from Amsted failed, it is undisputed that Amsted owns all 128 of the trade secrets misappropriated and exploited by TianRui. *See* Slip op. 1, 3-4, 8. It bears note that, under the ITC's rules, only the owner or exclusive licensee of the intellectual property rights at issue may file a Section 337 complaint. 19 C.F.R. § 210.12(a)(7).

The panel recognized the essential legal principle set forth in the decisions relied on by TianRui–that there is a presumption against extraterritorial application of federal statutes, subject to a contrary intent expressed by Congress. Slip op. 12-13, 22-25. Exhaustively examining the language and purpose of Section 337(a)(1)(A), the panel provided three separate valid reasons why the presumption against extraterritoriality does not govern this case: the statute's focus on importation, an "inherently international transaction"; the ITC's application of the statute only to the extent the foreign "unfair" activity resulted in importation of goods into the United States causing domestic injury; and support in the legislative history for the ITC's interpretation of the statute as permitting it to consider conduct that occurs abroad. TianRui fails to discredit any of these reasons. At bottom, TianRui has not and cannot meet the showing necessary to warrant *en banc* rehearing. As the panel emphasized, the ITC does not purport to enforce principles of trade secret law in other countries, and nothing in this decision affects the ability of TianRui or any other foreign manufacturer to sell their products in their home market or in third country markets. *See* Slip op. 20-21.

First, the panel majority correctly noted that Section 337 is expressly directed at unfair methods of competition and unfair acts "in the importation of articles" into the United States, and therefore is "surely not a statute in which Congress had only 'domestic concerns in mind.'" Slip op. 13-14, *citing Pasquantino v. United States*,

544 U.S. 349, 371-72 (2005). Because Section 337 inherently involves an international transaction–importation–the panel properly found that such a law regulating conduct that occurs near international borders must also apply to some activity that takes place on the foreign side of those borders. Slip op. 13-14, *citing United States v. Bowman*, 260 U.S. 94, 99 (1922); *United States v. Villanueva*, 408 F.3d 193, 199 (5th Cir. 2005); *United States v. Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004). Accordingly, the panel properly found that the ITC has authority to find a Section 337 violation and grant relief where, as here, the overseas misappropriation of U.S.-owned trade secrets results in unfair acts "in the importation" of articles manufactured through exploitation of those trade secrets. *See Akzo N.V. v. ITC*, 808 F.2d 1471, 1488 (Fed. Cir. 1986) ("Properly viewed, § 337 . . . represent[s] a valid delegation of this broad Congressional power [to regulate commerce with foreign nations] for the public purpose of providing an adequate remedy for domestic industries against unfair practices beginning abroad and culminating in importation.").

TianRui criticizes the panel's analogy to the immigration-related border control statutes that were read to apply extraterritorially in *Villanueva* and *Delgado*. Pet. 7. Notwithstanding TianRui's effort to distinguish the thrust of those cases from the question here, an examination of the statutes in question in those cases shows those statutes actually addressed the improper conduct in encouraging,

inducing, or bringing an illegal alien to the country; the relevant statutory provisions did not, as TianRui and the dissent suggest, address crimes associated with the illegality of the alien's very presence in the country afterwards. *See Delgado*, 374 F.3d at 1344; *Villanueva*, 408 F.3d at 198 n.3. Thus, those cases are, as the panel found, instructive in finding that Section 337's function of preventing unfair acts in importation properly permits the ITC to provide a remedy against entry of articles that exploit trade secrets misappropriated outside of the U.S. borders. As with the border regulating statutes found to have extraterritorial reach in those cases, limiting the locus of the trade secret misappropriation actionable under Section 337(a)(1)(A) to disclosures occurring in the United States "would greatly curtail the scope and usefulness of the statute and leave open a large immunity" for misappropriations that are as easily committed abroad as at home. *See Villanueva*, 408 F.3d at 197-198, *citing Bowman*, 260 U.S. at 98.

The second basis for the panel majority's decision is similarly well-reasoned. The panel correctly noted that the unfair "foreign conduct" at issue here is only regulated with respect to such activity resulting in the importation of goods into the United States causing domestic injury. Slip op. 14-15. Contrary to TianRui's assertion (Pet. 2-4, 6), the ITC's exclusion order does not purport to regulate "purely" or "wholly" foreign conduct. Rather, as the panel explained, the ITC simply considers any foreign acts of misappropriation as an element of the claim

alleging a domestic injury, via importation, when determining whether to grant this wholly domestic remedy. Slip op. 14-15; *citing Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2884 (2010); *Small v. United States*, 544 U.S. 385, 388-89 (2005). The ITC's determination of misappropriation was merely predicate to its conclusion that there was a Section 337 violation from TianRui's unfair acts in importing its wheels into the United States. Slip op. 15. Furthermore, it logically cannot be the intended congressional result for domestic industries to be unable to obtain a remedy under the statute just because some acts of misappropriation occurred in a foreign country, despite resultant injury to the domestic industry. *Id.* As the panel explained:

> In cases in which misappropriated trade secrets are used in the manufacture of the imported goods, the misappropriation will frequently occur overseas, where the imported goods are made. To bar the ITC from considering such acts because they occur outside the United States would thus be inconsistent with the congressional purpose of protecting domestic commerce from unfair methods of competition in importation such as trade secret misappropriation.
> Slip op. 25.

The third aspect of the panel's discussion of extraterritoriality revolves around the legislative history and also withstands scrutiny. Contrary to TianRui's contention (Pet. 8-9), there is no "loophole" in the statute with respect to trade secrets stolen abroad. Rather, the statutory language and the legislative history of Section 337 indicate that Congress left no gap surrounding this type of conduct, but

instead intended the statute to cover trade secret misappropriation irrespective of where the improper disclosure occurred. Although TianRui asserts otherwise (Pet. 9), the panel majority did indeed cite to proper legislative history. Slip op. 17-20. First, Congress specifically endorsed and adopted the 1919 report of the Tariff Commission (predecessor to the ITC) to enact the Tariff Act of 1922 and define "unfair methods of competition" as "broad and flexible" enough to "prevent every type and form of unfair practice and is, therefore, a more adequate protection to American industry than any antidumping statute the country has ever had." *Id.*, *citing* Tariff Act of 1922, Pub. L. No. 67-318, § 316(a), 42 Stat. 858, 943, and U.S. Tariff Comm'n, *Dumping and Unfair Foreign Competition in the United States and Canada's Anti-Dumping Law* (1919).

Moreover, Congress re-enacted this legislation several times throughout the last century, including after a published ITC decision finding a violation of Section 337 based on trade secret misappropriation occurring in a foreign country (*i.e.*, France). *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product*, Inv. No. 337-TA-148/169, USITC Pub. 1624, 243-298 (Dec. 1984), *aff'd*, *Viscofan, S.A. v. ITC*, 787 F.2d 544 (Fed. Cir. 1986). *See Merrill Lynch v. Curran*, 456 U.S. 353, 382 n.66 (1982) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ."); *GPX Int'l Tire*

Corp. v. United States, No. 2011-1107, -1108, -1109, slip op. at 15 (Fed. Cir. Dec. 19, 2011) ("Even where the legislative history does not explicitly reference a prior interpretation, the Supreme Court has often found that Congress has ratified lower court and agency interpretations through statutory reenactment.").

Furthermore, Congress has specifically stated that the causes of action encompassed by Section 337(a)(1)(A) include trade secrets. *See, e.g.*, S. Rep. No. 100-71 at 127-28 (1987); H.R. Rep. No. 100-40 at 154-56 (1987). Also, regarding the domestic industry requirement for non-statutory intellectual property cases, including trade secret cases, Congress has stated that the injury requirement relates to the ITC's purpose of "adjudicat[ing] trade disputes between U.S. industries and those who seek to import goods from abroad." H.R. Rep. No. 100-40 at 157. Thus, Congress purposefully intended that Section 337(a)(1)(A) include trade secret causes of action, and contemplated that the ITC's authority over unfair acts in importation causing domestic injury would inherently encompass some foreign conduct. As the panel found, it simply would make no sense, in light of the statutory scheme, for domestic industries to be unable to obtain a remedy from the ITC just because some acts of misappropriation (*e.g.*, conveying of the trade secret or manufacture of the articles using the trade secret) occurred in a foreign country, but where domestic injury occurred from the resulting importation of such articles. Slip op. 25. Moreover, the legislative history of the 1988 amendments makes clear

that Congress did not intend to change the interpretation or implementation of the law as it applied to "importation." H.R. Rep. No. 100-576 at 633 (1988).

B. The Panel's Decision Is Not in Conflict With the Cases Relied On by TianRui

As the basis for its *en banc* rehearing request, TianRui alleges that the majority panel decision is contrary to three Supreme Court and one Federal Circuit case. Pet. 1. In actuality, the panel decision is not contrary to any of these cases. The three Supreme Court cases cited by TianRui discuss the extraterritoriality canon, but beyond that, the facts and statutes involved in those cases are readily distinguishable from those in this case. First, in *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248, 259 (1991) ("*Aramco*"), the Court held that the anti-discrimination provisions of federal employment law do not extend abroad. The Court found that the statute had a purely domestic focus, 499 U.S. at 255 (unlike Section 337, which is focused on importation), and rejected efforts to infer extraterritoriality "from boilerplate language which can be found in any number of congressional Acts, none of which have ever been held to apply overseas." *Id.* at 251. In contrast, as explained by the panel and summarized above, the specific language and legislative history of Section 337(a)(1)(A) demonstrate an intent for the statute to reach importation resulting from acts occurring abroad. Moreover, in *Aramco*, the Court noted that the agency had taken inconsistent positions as to whether the statute was

limited to domestic application. *Id.* at 257. In the instant case, however, the ITC has been consistent in its exercise of authority over cases involving trade secret misappropriation, irrespective of where the misappropriating acts occurred. *See, e.g.*, *Sausage Casings*; *Certain Apparatus for the Continuous Production of Copper Rod*, Inv. No. 337-TA-52, 1979 ITC LEXIS 99 (Nov. 1979).

In *Morrison*, the Court again declined to read extraterritorial reach from boilerplate language defining "interstate commerce." 130 S. Ct. at 2882. Specifically, the Court found Section 10(b) of the Securities Exchange Act of 1934, which "contains nothing to suggest it applies abroad," does not apply to stock transactions conducted upon foreign exchanges and markets. *Id.* at 2881-82. In addressing this issue, the Court explained that the presumption against extraterritoriality does not mean that a statute must say "'this law applies abroad,'" but instead allows a court to view the statute in context. *Id.* at 2883. In viewing Section 337(a)(1)(A) in context, the panel here adhered to the Court's approach.

Both the third Supreme Court case (*Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007)) and the Federal Circuit case (*In re Amtorg Trading Corp.*, 75 F.2d 826 (CCPA 1935)) relied on by TianRui address the reach of certain provisions of the patent statute. As the panel explained, its conclusion "in this case is not inconsistent with court decisions that have accorded a narrow construction to the extraterritorial application of U.S. patent law." Slip op. 22. Unlike the area of trade secrets,

Congress has chosen to legislate and hence circumscribe the domestic scope of the patent provisions at issue in those cases. The courts have thus declined to extend the reach of the patent law beyond the limits statutorily set by Congress. For example, in *Microsoft*, the Court rejected a patentee's attempt to expand the scope of a specific congressional amendment beyond that discussed in the clear language of the statute and legislative history. *See Microsoft*, 550 U.S. at 452-54. Moreover, *Microsoft* is distinct from the present case because it involved intellectual property protection relating to exportation, rather than the importation of articles causing domestic injury.

Although the *Amtorg* case arose under Section 337, it primarily addressed the scope of patent law, which at the time of the case did not prohibit use, sale of, or importation of a product made from a patented process. *Amtorg*, 75 F.2d at 832; *see* Slip op. 23. In other words, the same commercial activity relating to the accused product occurring in the United States at that time would not have given rise to a cause of action under the patent statute.[3]

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[3] Congress subsequently amended Section 337 to prohibit importation for use or sale of a product made abroad by a patented process. 19 U.S.C. § 1337a (1940); S. Rep. No. 76-1903 at 1-2 (1940); H.R. Rep. No. 76-1781 at 1-2 (1940). TianRui suggests (Pet. 10-11) that Congress could have addressed the extraterritoriality issue at hand here when it amended the statute to overule *Amtorg*. But Congress would have had no reason to do so, given that it already intended Section 337 to reach trade secret actions broadly and that *Amtorg* specifically involved only the process patent issue.

C. The ITC's Statutory Interpretation Is Entitled to Deference and Is Consistent With ITC Precedent

As the panel noted, even if it were to conclude that Section 337 is ambiguous with respect to its application to trade secret misappropriation occurring abroad, it would have upheld the ITC's longstanding and statutorily-consistent interpretation of the statute. Slip op. 20; *see, e.g., Enercon GmbH v. ITC*, 151 F.3d 1376, 1381 (Fed. Cir. 1998); *Watt v. W. Nuclear*, 462 U.S. 36, 55-61 (1983) (granting deference to historically consistent decisions of an agency).

In contrast to the facts of *Aramco*, the ITC's interpretation of Section 337 as reaching acts of trade secret misappropriation that may occur abroad is consistent with its past practice. *See, e.g., Sausage Casings*. In *Sausage Casings*, the ITC found trade secret misappropriation and a violation of Section 337 pursuant to the pre-1988 version of Section 337(a)(1)(A) based on "unfair acts" that occurred overseas, the nexus to the United States being importation. *See Sausage Casings*, at 253. The ITC in *Sausage Casings* explained that respondent Viscofan, a Spanish corporation with its headquarters and plants in Spain, "had access to and benefitted from significant amounts of confidential and proprietary Union Carbide technology, and that this access was gained by reprehensible means" via its French subsidiary. *Id.*; *see also Certain Coamoxiclav Products, Potassium Clavulanate Products, and Other Products Derived from Clavulanic Acid,* Inv. No. 337-TA-479, 67 Fed. Reg. 57850 (September 12, 2002) (investigation proceeded and settled where the asserted

trade secret process was stolen in the UK).

In its proffered amicus brief, LKQ claims that the court's decision results in a lack of notice to the public that this type of trade secret misappropriation is a violation of Section 337(a)(1)(A). LKQ's assertion is erroneous because, as discussed above, the legislative history and the consistent on-point ITC precedent, *i.e.*, *Sausage Casings*, gave clear notice to the public that misappropriation of U.S.-owned trade secrets that results in the importation of articles and injury to a domestic injury is actionable under Section 337(a)(1)(A), irrespective of where those trade secrets were stolen. *See* S. Rep. No. 100-71 at 127-28 (1987); H.R. Rep. No. 100-40 at 154-56 (1987).[4]

II. THIS PROCEEDING DOES NOT INVOLVE A QUESTION OF EXCEPTIONAL IMPORTANCE

There is no issue of exceptional importance raised here. The ITC reasonably interpreted its congressional mandate, consistent with legislative history and ITC

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[4] LKQ also challenges the panel's finding that a single federal standard rather than the law of a particular state determines what constitutes trade secret misappropriation for the purpose of applying Section 337. Slip op. 9. This issue, however, is beyond the scope of TianRui's petition and therefore outside the court's request for a response to TianRui's petition. In any event, the choice of law is not outcome determinative here. As the panel observed, it makes no difference to the substantive decision in this case whether the ITC or the court applied Illinois law or federal common law. Slip op. 10-12. Indeed, the ITC administrative law judge specifically found that he would have reached the same result on the merits both under Illinois law and under the similar framework established by ITC practice and common law. Slip op. 5-6.

precedent. As the panel explained "[t]here is nothing remarkable about concluding that Congress would have wanted Section 337 remedies to be available for acts of trade secret misappropriation occurring abroad." Slip op. 16 n.4. Notably, TianRui does not dispute that it misappropriated Amsted's trade secrets and used the same to manufacture cast steel railway wheels for importation into the United States, injuring a domestic industry. *See* Slip op. 7-8.

Given that the panel decision does not expand ITC authority under Section 337(a)(1)(A), but rather properly follows clear congressional intent as well as long-standing ITC precedent, TianRui's assertion that the number of future ITC cases will significantly increase (Pet. at 11) is unlikely to be borne out. TianRui's reliance on an alleged and speculative impact of this decision on U.S. trade policy is similarly misplaced. This is particularly so given that the panel's decision does not change existing practice. Moreover, it is the role of the Executive Branch, not the courts, to set and administer trade policy. *See Pasquantino*, 544 U.S. at 369; *Delgado*, 374 F.3d at 1351. Further, as noted by the panel, the ITC's exercise of authority under Section 337 is limited to goods imported into the United States.

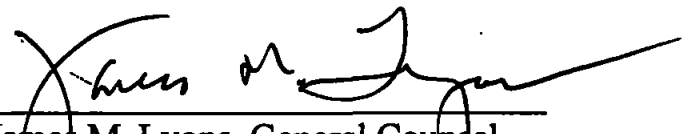
TianRui and the dissent also raise the specter that this decision will somehow arm the ITC with the unfettered discretion to expand the intended definition of unfair acts covered by Section 337(a)(1)(A). This concern is unfounded and beyond the

confines of the case before us. That is, this case involves solely an issue concerning the locus of trade secret misappropriation. It is undisputed that the ITC has authority over unfair acts involving trade secret misappropriation. *See* Slip op. 7-8. Indeed, Congress has explicitly expressed its intent that Section 337(a)(1)(A) apply to trade secret actions, as well as to various other traditional forms of unfair methods of competition and/or unfair acts, including false advertising, common law trademarks, antitrust violations, and other business torts. *See* S. Rep. No. 100-71 at 127-28 (1987); H.R. Rep. No. 100-40 at 154-56 (1987). Simply put, this case is not about any effort by the ITC to reach beyond one of the traditional types of unfair acts contemplated by Congress.

CONCLUSION

For the reasons discussed above, we ask that the court deny TianRui's petition for rehearing and petition for rehearing *en banc*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Clint A. Gerdine, hereby certify that, on this 27th day of December 2011, two copies of the attached **RESPONSE OF APPELLEE INTERNATIONAL TRADE COMMISSION TO TIANRUI'S COMBINED PETITION FOR REHEARING AND REHEARING EN BANC** were served by first class mail, postage prepaid, upon each of the following counsel:

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