No. 16-428

In the Supreme Court of the United States

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

v.

INTERNATIONAL TRADE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, pursuant to 19 U.S.C. 1337(a)(1)(A), the United States International Trade Commission may order the exclusion of articles from entry into the United States when those articles were made with misappropriated trade secrets that had been disclosed and used abroad, and when importation and sale of the articles would destroy or substantially injure an industry in the United States.

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-2a) is unreported. The initial determination of the administrative law judge is unreported but is available at 2013 WL 4495127. The United States International Trade Commission's opinion affirming that determination in pertinent part (Pet. App. 12a-98a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on December 11, 2015. A petition for rehearing was denied on May 3, 2016 (Pet. App. 99a-100a). On July 20, 2016, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 30, 2016, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 1337 of Title 19 of the U.S. Code (Section 337 of the Tariff Act of 1930) renders "unlawful" various acts involving importation of articles into the United States. 19 U.S.C. 1337(a). Among those unlawful acts are "[u]nfair methods of competition and unfair acts in the importation of articles * * * into the United States, or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is" to "destroy or substantially injure an industry in the United States," to "prevent the establishment of such an industry," or to "restrain or monopolize trade and commerce in the United States." 19 U.S.C. 1337(a)(1)(A).[1] The "[u]nfair methods of competition and unfair acts" that Section 1337 proscribes include misappropriation of trade secrets. *Ibid.*; see, *e.g.*, *TianRui Grp. Co.* v. *International Trade Comm'n*, 661 F.3d 1322, 1324 (Fed. Cir. 2011).

Section 1337 also proscribes "[t]he importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles" that infringe various intellectual-property rights. 19 U.S.C. 1337(a)(1)(B)-(D); see 19 U.S.C. 1337(a)(1)(E). For example, it is unlawful to import into the United States "articles that * * * infringe a valid and enforceable United States patent or * * * [registered] copyright," or that "are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent." 19 U.S.C. 1337(a)(1)(B); see 19 U.S.C. 1337(a)(2).

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[1] A predecessor provision, enacted in 1922, contained substantially similar language. See Tariff Act of 1922, ch. 356, § 316, 42 Stat. 943.

The applicability of those prohibitions does not depend on any showing of an injurious effect on a United States industry.

If the United States International Trade Commission (Commission or ITC) finds that any activity prohibited by Section 1337 "exist[s]," the Commission must "deal[] with" that activity as "provided" in Section 1337. 19 U.S.C. 1337(a)(1). Pursuant to that provision, the Commission "shall investigate any alleged violation" of Section 1337; "shall determine * * * whether or not there is a violation"; and, if a violation exists, "shall direct that the articles concerned * * * be excluded from entry into the United States," unless exclusion is unwarranted in light of certain public-interest factors. 19 U.S.C. 1337(b)-(d); see 19 U.S.C. 1337(f) (providing that the Commission may also issue "an order directing" a violator to "cease and desist," on pain of payment of a civil penalty). If the ITC orders exclusion of articles from entry into the United States, the President—acting through the U.S. Trade Representative—may veto that order for "policy reasons" within 60 days of its issuance. 19 U.S.C. 1337(j)(2), (j)(4); see *Memorandum for the U.S. Trade Representative: Assignment of Certain Functions Under Section 337 of the Tariff Act of 1930*, 70 Fed. Reg. 43,251 (July 21, 2005).

b. In *TianRui*, the Federal Circuit analyzed Section 1337 in a case involving misappropriation of trade secrets from a U.S. company by a Chinese manufacturer. See 611 F.3d at 1324. After obtaining the secrets by hiring away employees of one of the U.S. company's Chinese licensees, the manufacturer imported into the United States articles made using the

stolen secrets, and it competed with the U.S. company in the U.S. marketplace. See *id.* at 1324-1326.

The court of appeals held that Section 1337 authorizes the Commission "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." *TianRui*, 661 F.3d at 1324. In so holding, the court closely examined the presumption against extraterritorial application of U.S. laws, "a canon of construction that is rooted in the 'commonsense notion that Congress generally legislates with domestic concerns in mind.'" *Id.* at 1328 (quoting *Smith* v. *United States,* 507 U.S. 197, 204 n.5 (1993)). In the course of that examination, the court analyzed this Court's decisions addressing that presumption, including *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244 (1991), and *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437 (2007). See 661 F.3d at 1328-1329, 1333-1335.

The court in *TianRui* concluded that the presumption did not "govern th[e] case." 661 F.3d at 1329. First, the court explained that "[t]he focus of section [1337] is on an inherently international transaction—importation." *Ibid.* Accordingly, as is true with respect to certain immigration statutes, Congress did not have purely "domestic concerns in mind," *ibid.* (quoting *Pasquantino* v. *United States*, 544 U.S. 349, 371-372 (2005)), and must have been "aware, and intended, that the statute would apply to conduct (or statements) that may have occurred abroad," *ibid.*; see *id.* at 1335. Second, the court determined that the "focus" of Section 1337 is "on the act of importation

and the resulting domestic injury," and that "foreign conduct is used only to establish an element of a claim alleging a domestic injury and seeking a wholly domestic remedy." *Id.* at 1329; see *id.* at 1330 (the "Commission's interpretation of section [1]337 does not * * * give it the authority to 'police Chinese business practices,'" but "only sets the conditions under which products may be imported into the United States"). Finally, the court in *TianRui* found that the history of Section 1337, including ITC interpretations of which Congress was aware when it reenacted the relevant portion of the provision, bolstered the court's understanding of the provision's scope. See *id.* at 1330-1332.

Judge Moore dissented. She would have held that the only "unfair act" in which the Chinese manufacturer had engaged occurred entirely abroad, and that Section 1337 does not apply to such an act. See *TianRui*, 661 F.3d at 1338-1339.

2. Respondent SI Group, Inc. is a U.S. company that manufactures and sells rubber resins known as "tackifiers," which are used to bond layers of tire materials together. See Pet. App. 16a. SI Group relies on trade secrets to protect its method for manufacturing the tackifiers. See *id.* at 20a-48a. In 2012, SI Group filed a complaint with the Commission alleging that petitioners were violating Section 1337 by importing into the United States tackifiers that had been manufactured using trade secrets misappropriated from SI Group. See *id.* at 4a. The ITC instituted an investigation. See *id.* at 13a.

a. The first step in the ITC's investigation was a proceeding before an Administrative Law Judge (ALJ), who held an evidentiary trial and made an

initial determination. The ALJ concluded that petitioners had misappropriated protectable trade secrets from SI Group by unfair means after hiring two former employees of SI Group's foreign affiliate, both of whom had violated confidentiality agreements with SI Group by disclosing to petitioners the exact chemical composition of SI Group's tackifiers. See 2013 WL 4495127, at *132-*140, *149-*150; see also, *e.g.*, *id.* at *53, *58, *64, *71, *74, *82, *87, *91, *94. He also concluded that petitioners had used those trade secrets in manufacturing tackifiers, and that the effect of importing those tackifiers into the United States was to injure substantially, and to threaten to destroy entirely, a U.S. industry. See, *e.g.*, *id.* at *157-*158, *202, *239-*245. He ruled that petitioners had violated Section 1337, and he recommended that the ITC issue an exclusion order lasting ten years. See *id.* at *267-*270, *274; see 19 U.S.C. 1337(d)(2). In so ruling, the ALJ—relying on the Federal Circuit's decision in *TianRui*—rejected petitioners' contention that Section 1337 cannot apply in a case in which the alleged trade-secret misappropriation occurs outside the United States. See 2013 WL 4495127, at *8-*13.

b. On *de novo* review, the ITC affirmed the ALJ's determination in relevant part. See Pet. App. 3a, 6a-7a, 18a; see also, *e.g.*, *id.* at 82a-84a.

First, the ITC found that petitioners had used "[u]nfair methods of competition and unfair acts" in their "importation, sale for importation, and sale after importation of certain rubber resins made using" SI Group's "trade secrets." Pet. App. 8a, 19a; see *id.* at 20a-48a (determining which of SI Group's asserted secrets are entitled to trade-secret protection). The ITC agreed with the ALJ that the evidence estab-

lished that former employees with access to SI Group's trade secrets had provided those secrets to petitioners, which had then "cop[ied]" SI Group's processes. *Id.* at 48a; see *id.* at 49a-62a.

Second, the ITC found that the importation and sale of petitioners' rubber resins had "the threat or effect of * * * destroy[ing] or substantially injur-[ing] an industry in the United States." 19 U.S.C. 1337(a)(1)(A); see Pet. App. 68a-75a. The ITC concluded that "the evidence supports a finding of actual substantial injury based on the strong evidence of [petitioners'] underselling and [SI Group's] reduced profitability" and "a causal nexus between the injury and the unfair acts of [petitioners]." Pet. App. 70a, 71a; see *id.* at 68a-71a (discussing price erosion due to petitioners' attempt to undercut Sino Group's prices in the U.S. marketplace). The Commission also concluded that "there is a threat to substantially injure or destroy [SI Group's] domestic industry," given substantial losses in revenue that SI Group had already suffered. *Id.* at 75a; see *id.* at 74a.

For those reasons, the ITC concluded that petitioners had violated Section 1337. See Pet. App. 84a, 98a. The ITC issued an exclusion order prohibiting for ten years "the unlicensed importation of rubber resins made using" the trade secrets if the resins in question "are manufactured by, for, or on behalf of [petitioners] or any of their affiliated companies." *Id.* at 9a; see *ibid.* (barring the resins in question "from entry for consumption into the United States"); *id.* at 91a-92a; see also *id.* at 93a-97a (finding that consideration of the statutory public-interest factors set forth in 19 U.S.C. 1337(d)(1) did not warrant non-issuance of an exclusion order). The President, through the

U.S. Trade Representative, did not disapprove of the exclusion order. See 19 U.S.C. 1337(j)(4).

3. Petitioners appealed the ITC's decision to the Federal Circuit, arguing that the ITC had applied Section 1337 extraterritorially and had thereby exceeded its authority. See Pet. C.A. Br. 22-23.[2] Pursuant to Federal Circuit Rule 36, the court of appeals summarily affirmed the ITC decision without opinion. Pet. App. 1a-2a. The court subsequently denied a petition for rehearing en banc. *Id.* at 99a-100a.

ARGUMENT

Petitioners argue that, because their misappropriation of trade secrets occurred outside this country, the ITC lacked authority to order the exclusion of their products from the United States under Section 1337. In *TianRui Group Co.* v. *International Trade Commission*, 661 F.3d 1322 (2011), the Federal Circuit correctly rejected the same argument. *TianRui* does not conflict with any decision of this Court or any other court of appeals. And this case is a poor vehicle for addressing the issue decided in *TianRui* because, *inter alia*, the court of appeals did not issue any opinion and its decision may have rested on grounds independent of *TianRui*'s holding. Further review is not warranted.

1. Congress has "authority to enforce its laws beyond the territorial boundaries of the United States." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)

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[2] In the court of appeals, petitioners also argued that (1) principles of comity precluded the ITC's issuance of a remedy in this particular case, Pet. C.A. Br. 47-61, and (2) the ITC's determination that the exclusion order should remain in effect for ten years was arbitrary and capricious, *id.* at 61-65. Petitioners do not press those arguments in this Court.

(*Aramco*); see, *e.g.*, *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 284 (1949). Because "Congress ordinarily legislates with respect to domestic, not foreign, matters," however, courts should "presume" when construing a statute that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (citations omitted). That presumption affords "a stable background against which Congress can legislate with predictable effects," *id.* at 261, and it "protect[s] against unintended clashes between our laws and those of other nations which could result in international discord," *Kiobel* v. *Royal Dutch Petroleum*, 133 S. Ct. 1659, 1664 (2013) (quoting *Aramco*, 499 U.S. at 248); see *Morrison*, 561 U.S. at 255.

To overcome the presumption against extraterritoriality, a statute must evince "the affirmative intention of the Congress clearly expressed." *Morrison*, 561 U.S. at 255 (citation omitted); see *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2101 (2016). No "express statement" or particular language is required, and "context can be consulted as well" as text. *RJR Nabisco*, 136 S. Ct. at 2102 (quoting *Morrison*, 561 U.S. at 265); see *Kiobel*, 133 S. Ct. at 1665-1666; *Foley Bros.*, 336 U.S. at 285-291.

When a statute does not apply extraterritorially, a party must allege domestic conduct that is within "the 'focus' of congressional concern." *Morrison*, 561 U.S. at 266 (citation omitted). If the alleged domestic conduct involves the acts that "the statute seeks to 'regulate,'" and if the parties who are allegedly injured are among those "that the statute seeks to 'protec[t],'" then the claim qualifies as a domestic application, even

if the case also involves some amount of foreign activity. *Id.* at 267 (citation omitted; brackets in original); see *id.* at 250-251, 266-267; see also *RJR Nabisco*, 136 S. Ct. at 2101.

2. The court below did not explain its reasoning in summarily affirming the ITC's decision in this case. In its prior decision in *TianRui*, however, the Federal Circuit correctly held that the presumption against extraterritoriality did not bar application of Section 1337 to conduct substantially similar to that involved here. See 661 F.3d at 1329-1335; pp. 3-5, *supra*.

a. "If the conduct relevant to the [pertinent] statute's focus occurred in the United States, then the case involves a permissible domestic application" of that statute "even if other conduct occurred abroad." *RJR Nabisco*, 136 S. Ct. at 2101. As the court of appeals recognized in *TianRui*, the "focus" of Section 1337(a)(1)(A)—and of Section 1337 more generally—is "on the act of importation and the resulting domestic injury." 661 F.3d at 1329. Importation of goods into the United States "occur[s] in the United States," *RJR Nabisco*, 136 S. Ct. 2101; see *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100, 122 (1923), as does any injury to "an industry in the United States," 19 U.S.C. 1337(a)(1)(A). Accordingly, the Commission's regulation of those matters is a "domestic application" of Section 1337, not an extraterritorial one, even if the conduct amounting to trade-secret misappropriation took place outside this country. See *RJR Nabisco*, 136 S. Ct. at 2101 n.5 (explaining that an extraterritoriality analysis may begin and end with a "focus" inquiry).

For purposes of this inquiry, a statute's "focus" is on "the objects of the statute's solicitude." *Morrison*, 561 U.S. at 267-268. A court therefore must identify

the "transactions that the statute seeks to 'regulate'" and the "parties or prospective parties * * * the statute seeks to 'protec[t].'" *Id.* at 267 (quoting *Superintendent of Ins. of N.Y.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 10, 12 (1971)) (brackets in original).

The object of Section 1337(a)(1)(A)'s "solicitude" is importation and injury—that is, the act and the consequence of bringing certain goods into this country. That provision is a trade statute, found in the Title of the U.S. Code on "Customs Duties" and in a Chapter entitled "Tariff Act of 1930." It seeks to regulate only "importation of articles * * * into the United States," and "the sale of such articles by the owner, importer, or consignee," that have the threat or effect of "destroy[ing] or substantially injur[ing]" U.S. industry or of "restrain[ing] or monopoliz[ing]" U.S. commerce. 19 U.S.C. 1337(a)(1)(A).[3] Its purpose is to protect "industry," "trade," and "commerce" in the United States from harm that may result from the importation of such articles. 19 U.S.C. 1337(a)(1)(A)(i)-(iii). And the remedies it affords for a violation are "exclu[sion]" of offending articles "from entry into the United States," or "an order directing" a violator to "cease and desist" from such importation and related activities. 19 U.S.C. 1337(d) and (e); see 19 U.S.C. 1337(f). Thus, Section 1337(a)(1)(A) does not seek to

[3] The focus of Section 1337(a)(1)(A) is consistent with the focus of the ensuing subsections of Section 1337(a)(1), which bar "[t]he importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles" that infringe various intellectual property rights. 19 U.S.C. 1337(a)(1)(B)-(D); see 19 U.S.C. 1337(a)(1)(E). Those provisions are aimed at preventing certain importation, not at regulating intellectual-property violations more generally.

regulate unfair competition generally, or to protect victims of unfair acts that are unrelated to importation.

This Court's decisions in *Morrison* and *RJR Nabisco* reinforce that conclusion. In *Morrison*, the Court considered the focus of Section 10(b) of the Securities Exchange Act of 1934, which "punish[es] deceptive conduct * * * 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'" 561 U.S. at 266 (quoting 15 U.S.C. 78j(b)). The Court concluded that the focus of the provision is "purchase-and-sale transactions," not "deceptive conduct," *id.* at 266, 267, since "Section 10(b) does not punish deceptive conduct" alone, "but only deceptive conduct 'in connection with'" a securities transaction, *id.* at 266 (quoting 15 U.S.C. 78j(b)); see *id.* at 266, 268 (explaining that Section 10(b) is given a domestic application if the securities transactions at issue in a case are "domestic" ones, but not if the transactions are foreign ones and the United States is merely "the place where the deception originated"). Similarly, Section 1337 does not punish "[u]nfair methods of competition and unfair acts" alone, but only unfair methods and acts "in the importation of articles * * * into the United States." 19 U.S.C. 1337(a)(1)(A).

In *RJR Nabisco*, this Court analyzed 18 U.S.C. 1964(c), a RICO provision that allows "[a]ny person injured in his business or property by reason of" a RICO violation to bring a private action for damages. See 136 S. Ct. at 2106. A plurality of the Court determined that the provision does not apply extraterritorially and that "Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to

business or property." *Id.* at 2111 (opinion of Alito, J.); see *id.* at 2106. That analysis logically implies that the focus of Section 1964(c) is injury to business or property, since if the focus were the RICO violation itself, a domestic injury might not have been necessary for a particular application of the provision to constitute a "domestic application." *Id.* at 2101. Like Section 1964(c), Section 1337(a)(1)(A) is concerned with remedying domestic injury—indeed, that provision does not apply at all unless some domestic injury has occurred or is "threat[ened]." 19 U.S.C. 1337(a)(1)(A).

Petitioners contend that the focus of Section 1337(a)(1)(A) is instead "[u]nfair methods of competition and unfair acts," Pet. 25 (citation omitted), which petitioners describe as "the wrong for which Congress sought to impose liability," Pet. 26. That is incorrect. Trade-secret misappropriation can trigger application of Section 1337(a)(1)(A) only insofar as that misappropriation involves importation and harms the U.S. marketplace. When Congress has sought to prevent unfair competition more generally, it has addressed that topic in enactments that have no nexus to importation. See, *e.g.*, 18 U.S.C. 1836(b).[4]

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[4] Petitioners rely (Pet. 26) on *Aramco*, in which the Court concluded that Title VII of the Civil Rights Act of 1964 does not apply "extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad." 499 U.S. at 246. But the Court did not undertake a "focus" analysis in that case. Petitioners also cite a number of decisions involving the Alien Tort Statute, but they do not explain why the focus of that statute, which confers "jurisdiction" over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," 28 U.S.C. 1350, has any bearing on the coverage of Section 1337(a)(1)(A).

b. Section 1337(a)(1)(A)'s focus on importation and domestic injury is a fully sufficient basis for finding that provision applicable here. But even if the Commission's order in this case were thought to constitute an extraterritorial application of U.S. law, Section 1337 contains the requisite clear indication that the law was intended to have this sort of effect. As the *TianRui* court explained, Section 1337 reflects Congress's clear intent to authorize examination of wrongful conduct (*i.e.*, misappropriation of trade secrets) outside the United States when the ITC determines whether particular goods may enter the United States. See 661 F.3d at 1329 (explaining that Congress did not have "only domestic concerns in mind") (citation and internal quotation marks omitted).

Section 1337(a)(1)(A) governs the "importation" of foreign goods "into the United States," and importation is "an inherently international transaction." *TianRui*, 661 F.3d at 1329. While importation itself takes place in the United States, it necessarily entails "bringing an article into the country from the outside." *Cunard S.S. Co.*, 262 U.S. at 122; see generally *United States* v. *Ramsey*, 431 U.S. 606, 616, 620 (1977) (stating that it is "the long-standing right of the sovereign" to "control, subject to substantive limitations imposed by the Constitution, who and what may enter the country"); *Buttfield* v. *Stranahan*, 192 U.S. 470, 493 (1904) (discussing the sovereign's prerogative to "determine what articles of merchandise may be imported into this country" and "the terms upon which a right to import may be exercised"). A sovereign's reasons for excluding goods that arrive at its borders will very often relate to some event involving the goods that occurred before their arrival and rendered

them unfit for entry into the sovereign's territory. Accordingly, when Congress authorized the ITC to regulate importation into the United States under Section 1337(a)(1)(A), Congress must have anticipated that the Commission would consider some foreign conduct in carrying out its duties. See *RJR Nabisco*, 136 S. Ct. at 2101-2103; *TianRui*, 661 F.3d at 1329; cf. *Kiobel*, 133 S. Ct. at 1669 (referring to conduct that "touch[es] and concern[s] the territory of the United States * * * with sufficient force to displace the presumption against extraterritorial application") (citation omitted).[5]

Petitioners argue that the statutory language ("in the importation of articles * * * or in the sale of such articles," 19 U.S.C. 1337(a)(1)(A)) "evidenc[es] an intent to limit the provision's reach to acts and methods related to the importation" itself or to the subsequent sale of goods—"*i.e.*, to conduct tied to the United States." Pet. 21. Petitioners contend that Section 1337(a)(1)(A) applies only if the relevant importation and/or domestic competition can be identified as "unfair" for reasons unrelated to any pre-importation conduct outside this country—"for example, if multiple manufacturers conspire to manipulate pricing within the U.S. of articles imported into the U.S. market in contravention of established competition law or use bribery within the U.S. to disadvantage domestic competitors." Pet. 26 n.6.

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[5] Section 1337's centrally important reference to importation is far from the kind of boilerplate reference to "foreign commerce," found in many statutes, that this Court has deemed insufficient (standing alone) to give a clear indication of extraterritorial effect. See *Aramco*, 499 U.S. at 251; see also Pet. 20.

That interpretation of Section 1337 cannot be squared with its language or history. See *RJR Nabisco*, 136 S. Ct. at 2102; *Morrison*, 561 U.S. at 265; see generally *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 315 (1933) (relying on the understanding of those "charged with the responsibility of setting [the] machinery [of the Tariff Act of 1930] in motion"). Petitioners do not explain why Congress would enact a statute regarding imports if Congress wanted to address only domestic cartels or domestic bribery. Nor do they explain why Congress, "which clearly intended to create a remedy for the importation of goods resulting from unfair methods of competition," would permit importation of goods produced using any form of unfair act so long as that act took place abroad, thereby creating "a conspicuous loophole for misappropriators" and other bad actors to exploit. *TianRui*, 661 F.3d at 1330; see *id.* at 1332-1333 (explaining that petitioners' interpretation "would invite evasion of section [1]337 and significantly undermine the effectiveness of the congressionally designed remedy"); U.S. Tariff Comm'n, *Sixth Annual Report* 4 (1922) (advising Congress that a predecessor to 19 U.S.C. 1337(a)(1)(A) with materially similar language "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").

Petitioners also rely (Pet. 17-18, 21-22) on Section 1337(a)(1)(B)(ii), which prohibits the "importation into the United States, the sale for importation, or the sale * * * after importation" of articles that "are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and en-

forceable United States patent." Petitioners seek to contrast that "clear indication of extraterritorial application" with the language of Section 1337(a)(1)(A). Pet. 21. But a clear "context[ual]" indication of extraterritoriality in one provision may overcome the presumption against extraterritoriality even if a different, related provision contains a more explicit statement along the same lines. *RJR Nabisco*, 136 S. Ct. at 2102-2103 (citation omitted). The circumstances of Section 1337(a)(1)(B)(ii)'s enactment further undermine petitioners' analysis. Congress enacted that provision to overturn the decision in *In re Amtorg Trading Corp.*, 75 F.2d 826 (C.C.P.A.), cert. denied, 296 U.S. 576 (1935), which ruled—contrary to earlier decisions—that importation of articles made outside the United States pursuant to a patented process did not constitute an "unfair act." See *id.* at 829-830, 834; see also Act of July 2, 1940, ch. 515, 54 Stat. 724 (19 U.S.C. 1337(a)(1)(B)(ii)); S. Rep. No. 1903, 76th Cong., 3d Sess. 1 (1940); H. Rep. No. 1781, 76th Cong., 3d Sess. 1-2 (1940). Congress chose the language in Section 1337(a)(1)(B)(ii) to "reject[]" a construction of Section 1337 that had limited the provision to wholly domestic unfair acts. *TianRui*, 661 F.3d at 1334.

Finally, petitioners contend (Pet. 18-20) that, because a variety of provisions other than Section 1337 contain express statements of extraterritorial effect, Section 1337(a)(1)(A) is insufficiently specific in that regard. That contention suffers from the same flaws as petitioners' argument with respect to Section 1337(a)(1)(B)(ii). Moreover, the provisions to which petitioners refer are not analogous to Section 1337—except insofar as Section 1337 itself "includes

important limitations" (Pet. 18) on its applicability by requiring a close nexus to the United States in the form of importation and U.S. injury.[6] See, *e.g.*, *TianRui*, 661 F.3d at 1330 n.4 (discussing the Economic Espionage Act of 1996, which imposes criminal liability, see 18 U.S.C. 1832(a)).

c. The Federal Circuit in *TianRui* relied on Section 1337's "focus," as well as on various indications that Congress intended the importation ban to apply to goods produced through unfair acts abroad. See 661 F.3d at 1329. Petitioners' contention (Pet. 14) that the Federal Circuit "[f]ailed [t]o [a]pply [t]his Court's [e]xtraterritoriality [t]est" is therefore perplexing. The court of appeals faithfully carried out the analysis set forth in *Morrison* and then reiterated by this Court, subsequent to the decision in *TianRui*, in *RJR Nabisco*. Indeed, the court of appeals specifically cited and relied on *Morrison* and a number of other decisions of this Court considering the presumption against extraterritoriality. See *TianRui*, 661 F.3d at 1328-1329, 1333-1335.[7]

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[6] Placing restrictions on importation, based in part on wrongs committed in the manufacture of the relevant goods, does not create the risk of "international discord" that partly animates the presumption against extraterritoriality. *RJR Nabisco*, 136 S. Ct. at 2100; see pp. 22-24, *infra*.

[7] Although petitioners state that "the rule adopted in *TianRui* and applied here has been subjected to considerable criticism," Pet. 28, *TianRui* has also received substantial scholarly approval. See, *e.g.*, James Pooley, *The Myth of the Trade Secret Troll: Why the Defend Trade Secrets Act Improves the Protection of Commercial Information*, 23 Geo. Mason L. Rev. 1045, 1060 n.116 (2016); Marisa Anne Pagnattaro & Stephen Kim Park, *The Long Arm of Section 337: International Trade Law as a Global Business Remedy*, 52 Am. Bus. L.J. 621, 646-648 (2015).

3. This Court's review is not warranted for several additional reasons.

a. This case is a poor vehicle for addressing the question presented because it is unclear whether the court below actually relied on *TianRui*. The court of appeals' nonprecedential judgment consists, in its entirety, of the words "AFFIRMED. *See* Fed. Cir. R. 36." Pet. App. 2a; see *id.* at 100a (denial of petition for rehearing, which also contains no explanation or analysis of the issues). Under Federal Circuit Rule 36, "[t]he court may enter a judgment of affirmance without opinion * * * when it determines that * * * an opinion would have no precedential value" and (*inter alia*) that "the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review." Fed. Cir. R. 36.

Petitioners assume (Pet. 35-36) that, in affirming the ITC's order, the Federal Circuit applied *TianRui* sub silentio. In the court of appeals, however, respondent SI Group and the ITC argued that petitioners had forfeited their extraterritoriality argument by not sufficiently raising it before the Commission. See SI Grp. C.A. Br. 15 (contending, as the lead argument in the brief, that petitioners had "waived and forfeited their extraterritoriality arguments" by failing to preserve those arguments sufficiently before the Commission); *id.* at 16-18; see also ITC C.A. Br. 48-49 (arguing that petitioners had "waived any argument regarding whether section [1]337(a)(1)(A) applies to unfair conduct that occurs abroad by failing to follow the Commission's rules" on presentation of arguments, and that petitioners "should not now be able to advance an argument that [they] did not adequately

present to the Commission"). Given the dispute between the parties as to whether petitioners' current argument was adequately preserved during the ITC proceedings, and the Federal Circuit's failure to resolve that dispute, it is unclear whether the question presented is properly before this Court.[8]

b. In any event, the question presented is not of great ongoing significance.

i. The issue of trade-secret misappropriation arises only rarely in the Commission's consideration of Section 1337 cases. Since October 11, 2011, when the Federal Circuit issued its decision in *TianRui*, the Commission has instituted approximately 239 Section 1337 investigations. Only nine of those investigations have involved any allegation of trade-secret misappropriation; the vast majority of them have involved allegations of patent infringement, which implicate a different subsection of Section 1337 than the subsection at issue in this case. See U.S. Int'l Trade Comm'n, *337 Info—Unfair Import Investigations Information System*, https://pubapps2usitc.gov/337external/ (last visited Dec. 6, 2016).[9] In the last three years, the Com-

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[8] The absence of a court of appeals opinion, and the way that the case was litigated before the Commission, also means that there has been no finding made that the trade-secret misappropriation in this case took place wholly outside the United States—a premise of the question presented. See Pet. i (asking whether Section 1337 permits the ITC to "adjudicate claims regarding trade secret misappropriation alleged to have occurred outside the United States"); see also, *e.g.*, Pet. App. 13a (noting that one of the petitioners—Precision Measurement International LLC—is a Michigan corporation).

[9] Petitioners state that the ITC has "pursued" ten investigations involving trade-secret misappropriation since *TianRui* was decided. Pet. 29. That number apparently includes at least one investi-

mission has instituted only three trade-secret-related cases; in the last two years, it has instituted only two such cases. See *ibid.* And, as petitioners acknowledge (Pet. 29), not all of the ITC's trade-secret-misappropriation cases involve conduct occurring outside of the United States.

Petitioners' assertion (Pet. 29) that "the statistics show a sharp increase in the number of trade secret investigations following *TianRui*" is simply mistaken. The sole authority that petitioners cite in support of that assertion—a 2013 law review article—indicates that the Commission instituted one trade-secret-related investigation in 2012 and four such investigations in 2013. See P. Andrew Riley & Jonathan R.K. Stroud, *A Survey of Trade Secret Investigations at the International Trade Commission: A Model for Future Litigants*, 15 Colum. Sci. & Tech. L. Rev. 41, 65 (2013) (cited in Pet. 29). But that article also states that the Commission instituted four such investigations in 1982, and that the Commission instituted between one and three such investigations in many years before 2012. See *ibid.*

There is no reason to believe that trade-secret misappropriation involving overseas bad acts is likely to become a greater part of the Commission's docket in the future, but there is some reason to believe that parties aggrieved by that conduct will increasingly seek relief under provisions other than Section 1337. On May 11, 2016, Congress enacted the Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376, creating a new private civil cause of action for trade-secret misappropriation. That cause of action expres-

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gation that was instituted before the decision in *TianRui*. See Pet. 29 n.9 (citing Commission proceeding dated September 6, 2011).

sly "applies to conduct occurring outside the United States if * * * the offender" is a U.S. person or entity or if "an act in furtherance of the offense was committed in the United States." 18 U.S.C. 1837; see 18 U.S.C. 1836(b). A prevailing plaintiff in such an action can obtain damages, which are not available in an ITC proceeding, as well as an injunction—and can even obtain (limited) punitive damages "if the trade secret is willfully and maliciously misappropriated." 18 U.S.C. 1836(b)(3). The availability of that alternative avenue of redress further reduces the practical significance of the question presented in this case.

ii. Petitioners predict (Pet. 32-34) that the ITC will attempt to extend Section 1337 beyond trade-secret misappropriation to practices abroad that might be thought to violate U.S. environmental laws, labor laws, food and drug laws, and the like. But petitioners identify no ITC proceeding, past or present, in which a violation of any such law has been characterized as an "unfair act[] in the importation of articles * * * into the United States." 19 U.S.C. 1337(a)(1)(A). As the Federal Circuit explained in *TianRui*, any such characterization would likely run afoul of this Court's statement in *FTC* v. *Gratz*, 253 U.S. 421 (1920), that a prohibition on "unfair methods of competition" does not encompass "practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." *Id.* at 427; see *TianRui*, 661 F.3d at 1330 n.3.

iii. Finally, petitioners' fears that the Commission's application of Section 1337 in trade-secret cases raises "foreign policy risks" (Pet. 31) are unfounded.

The ITC "does not purport to enforce principles of trade secret law in other countries generally, but only as that conduct affects the U.S. market. That is, the Commission's investigations, findings, and remedies affect foreign conduct only insofar as that conduct relates to the importation of articles into the United States." *TianRui*, 661 F.3d at 1332. Such ITC activity is unlikely to create tensions with other sovereigns, since it does not hinder anyone's ability to sell disputed articles outside the United States. *Ibid.* And it is fully consistent with other sovereigns' approach to importation of articles into their territories, which may be forbidden on a variety of bases that necessarily relate to conduct—in the design or manufacture of an article, for instance—that took place elsewhere.

If any risks do arise, Section 1337 itself protects against them. Under that provision, the Commission must consider various public-interest factors, including "the effect of [the] exclusion" of articles "upon the public health and welfare," before it decides to issue an exclusion order, and it may find on the basis of those factors "that [the relevant] articles should not be excluded from entry." 19 U.S.C. 1337(d)(1). And when the Commission issues an exclusion order, the President (acting through the U.S. Trade Representative) may "disapprove[]" that order "for policy reasons," including foreign-policy reasons. 19 U.S.C. 1337(j)(2); see, *e.g.*, S. Rep. No. 1298, 93d Cong., 2d Sess. 199 (1974) (explaining that "policy reasons" for disapproving an exclusion order might include a determination that the order "could have a very direct and substantial impact on United States foreign relations, economic and political").

Section 1337 thus reflects the Executive's "primacy" in handling "foreign relations" issues, *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (opinion of Rehnquist, J.), including its ability to assess the relevant country's sovereign interests and, if necessary, to deal with that country directly in an attempt to avoid any adverse consequences. See, *e.g.*, *Pasquantino* v. *United States*, 544 U.S. 349, 369 (2005) (by bringing wire-fraud prosecution based on defrauding Canada of tax revenue, "the Executive has assessed this prosecution's impact on * * * Canada, and concluded that it poses little danger of causing international friction"); see also *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 170-171 (2004) (explaining that "private plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government") (quoting Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 Antitrust L.J. 159, 194 (1999-2000)); see generally *RJR Nabisco*, 136 S. Ct. at 2107-2108 (opinion of Alito, J.). Where (as here) the Executive Branch has determined that an exclusion order does not raise any such difficulties, there is no cause for judicial concern and no need for judicial correction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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