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

On Petition for Rehearing *En Banc* of the Rule 36 Affirmance of Circuit Judges Reyna, Mayer, and Chen

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

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March 2, 2016

CERTIFICATE OF INTEREST

Counsel for *amicus curiae* certifies the following:

1. The full name of every party or *amicus* represented by me is:

   Trade Remedy and Investigation Bureau of the Ministry of Commerce of the People's Republic of China.

2. The name of the real party in interest represented by me is:

   Not applicable.

3. All parent corporations and any publicly held companies that own 10% or more of the stock of the party or *amicus curiae* represented by me are:

   None.

4. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by me in the trial court or agency or are expected to appear in this Court are:

   ADDUCI, MASTRIANI & SCHAUMBERG LLP: Tom M. Schaumberg, Seth A. Watkins, and Qian Sheng

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

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

Components of China's government agencies, such as the TRB, rarely appear in a U.S. court as *amicus*. The reason the TRB does so now is that the Chinese government has a substantial interest at stake in this case, as it relates to the judicial sovereignty of China. It is the TRB's view that the ITC does not have jurisdiction over conduct that occurs entirely in China, especially in the circumstances presented in this case, where the very same issues have been

[1] All parties to this appeal have consented to or, in the case of the ITC and SI Group, Inc., stated that they do not oppose the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

resolved by China's competent courts. The TRB expresses its disappointment and displeasure with this aspect of the adjudication to date. It is also the TRB's view that the astonishing ruling in this case – that the decisions of Chinese courts on the identical issue between the same parties are totally irrelevant and, therefore, can simply be ignored by the ITC – frustrates the respect properly due to the judicial sovereignty of any nation and treaty partner. Accordingly, the TRB urges this Court to grant the *en banc* rehearing petition that requests the full Court to respect comity and reject reliance on the incorrect decision in *TianRui Group v. International Trade Commission*, 661 F.3d 1322 (Fed. Cir. 2011).

Over fifteen years ago, China embraced the regulation of international trade through its membership in the World Trade Organization ("WTO"). In approving the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), China aligned its intellectual property laws with the standards of that multilateral trade treaty. China has enjoyed the rights and privileges of membership in the WTO since December 2001, and by virtue of that membership, is entitled to non-discriminatory treatment as a trading partner with the United States. The TRB therefore has a compelling interest in this appeal, which directly implicates Chinese law, judicial procedures and, trade with the United States.

The ITC Opinion and the panel's Rule 36 affirmance conflict with basic principles of international comity. After years of litigation *in China* over the same

alleged trade secrets, the Chinese courts rejected the allegations of the intervenor-complainant ("intervenor") and ruled in favor of the Chinese appellants. The subsequent ITC action represented an attempt by the intervenor to re-litigate the same issues before a United States tribunal. In holding that judicial resolution of the threshold issue by the courts in China could be disregarded, the ITC and the panel expanded the scope of Section 337 in ways that conflict with principles of international comity.

THIS APPEAL PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE THAT SHOULD BE REHEARD *EN BANC*

The Court should grant rehearing *en banc* to answer the following pivotal question: does the ITC have authority under Section 337 to re-litigate an alleged misappropriation of trade secrets that occurred in China and that has already been adjudicated on the merits in China? The Court should answer in the negative for reasons of comity and improper extraterritorial application of U.S. law. The ITC exceeded its jurisdiction and failed to respect China's judicial sovereignty and court judgments.

Consistent with settled international practice, the same dispute should not be resolved twice – by two countries – with diametrically opposed findings. Indeed, under the proper standards for comity, the ITC should never have initiated an investigation in these circumstances. Nor should the ITC's ALJ have made an

initial determination that disregarded and conflicted with the findings of the Chinese judges after judgment was rendered by the Chinese court.

The TRB, as the governmental agency authorized by the State Council in guiding Chinese enterprises to respond to a Section 337 investigation, has been astonished with the adjudication of this case to date. This Court should reject the approach taken by the ITC, and affirmed by the panel, that rewards – and therefore encourages – international forum shopping. Moreover, the Court should reject the mistaken expansion of the much-criticized split-panel decision in *TianRui*.[2] As Judge Moore pointed out in her dissenting opinion in *TianRui*, "there is no indication in § 337 that Congress intended it to apply to wholly extraterritorial unfair acts." *Id.* at 1342 (Moore, J., dissenting).

First, before invoking ITC procedures the intervenor had already been pressing the *same allegations* of trade secret misappropriation, unsuccessfully, for

[2] *See, e.g.*, *TianRui*, 661 F.3d at 1342 (Moore, J., dissenting) ("I conclude § 337 does not reach the misappropriation and use of trade secrets in China, even if the product of the misappropriated process is ultimately imported into the United States."); Viki Economides, Note, *Tianrui Group Co. v. International Trade Commission: The Dubious Status of Extraterritoriality and the Domestic Industry Requirement of Section 337*, 61 AM. U.L. REV. 1235 (2012) (arguing that *TianRui* ignored Supreme Court precedent on extraterritoriality); Kerrilyn Russ, Comment, *On the Wrong Side of the Tracks: An Analysis of the U.S. Court of Appeals for the Federal Circuit's Non-Application of the Presumption Against Extraterritoriality* [*TianRui Grp. Co. v. Int'l Trade Comm'n*, 661 F.3d 1322 (Fed. Cir. 2011)], 52 WASHBURN L.J. 685, 706 (2013) (criticizing *TianRui* as "logically-unsound").

nearly four years *in China*, including four unsuccessful civil litigations against the same parties. Second, the ITC's investigation was predicated on alleged acts of misappropriation that occurred exclusively *in China*. Third, the allegations concerned purported breaches of employment and non-disclosure contracts, and the terms of an employee manual, entered between an individual and a business *in China*, drafted in *Chinese* and subject to *Chinese law*. Fourth, a criminal investigation *in China*, provoked by the intervenor, had been terminated without any prosecution due to insufficient evidence.

Errors and further affronts to comity mounted as the ITC hearing progressed. The ALJ ruled that the prior and contemporaneous Chinese legal proceedings – on the same alleged trade secrets – were irrelevant and excluded all evidence thereof.

In the same vein, the ALJ's Initial Determination was mistakenly dismissive of the overarching issues of comity. The judge refused to delve into the substantive legal arguments and instead justified jurisdiction by simply concluding that it would be "ludicrous" not to proceed. A223. Contrary to settled principles of comity, the ALJ incorrectly deemed inconsequential the very consequential fact that the Chinese courts reached completely opposite conclusions from his on the alleged existence and theft of trade secrets. The sole stated basis for the ALJ's disregard of the judgments of courts in China on issues of Chinese law governing Chinese parties was that the Chinese proceedings did not concern "importation into

the United States . . . and harm to the domestic industry." *Id.* Under correct legal principles, however, there could be no legally cognizable harm to U.S. industry if no trade secrets were misappropriated in the first place, and that is precisely the conclusion that the Chinese courts reached.

The ITC Opinion perpetuated the ALJ's errors. Its analysis of comity was relegated to a brief footnote stating that the Commission's "statutory responsibility to determine whether there is a violation of Section 337" was all that mattered. A106. Following the ALJ's lead, the Commission neither accounted for the Chinese proceedings nor gave them the respect to which they were due.

The errors in the ITC's approach to extraterritorial application of Section 337 and to principles of comity were exacerbated by the practical impact of intervenor's forum shopping. In short, its strategy of re-litigating in the ITC devolved into an attempt to beat the clock and obtain a U.S. exclusion order before the Chinese judgment against it took effect. On the same day that the Shanghai No. 2 Intermediate People's Court of the People's Republic of China (comparable to a U.S. district court but with three-judge panels) issued its decision rejecting intervenor's allegations of wrongdoing, the ALJ issued an Initial Determination recommending that the Commission issue an exclusion order. The Commission did just that, even though in the interim a three-judge appellate court, the Shanghai Higher People's Court of the People's Republic of China (comparable to a U.S.

Court of Appeals), had affirmed the decision of the intermediate court. Notwithstanding intervenor's defeat on the foundational issues of Chinese law at all levels of the Chinese judicial system, the panel of this Court affirmed the ITC.

One need only consider the reverse situation where a United States court rejected, on the merits, claims that a United States company stole trade secrets in the United States from another United States company. The question would be whether a *Chinese* court could properly re-litigate the issues of misappropriation when the products were later imported into China. Under the ITC's holding that the panel of this Court affirmed, the answer is yes. But surely it would be difficult for the United States to accept such an outcome. Central to the orderly conduct of international trade and the stable conduct of international relations is the premise that courts of each nation respect the rulings of foreign courts, especially the judicial decisions of treaty partners on issues of their own domestic commercial law. *See, e.g.*, *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (emphasizing the importance of comity between nations).

Governing Principles of United States and International Law Favor Deference to the Chinese Judgment Against Intervenor

The United States and China are both obliged to respect the fundamental anti-discrimination measures embodied in TRIPS. Article 3.1 of TRIPS provides:

> Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual

> property, subject to the exceptions already provided in [*inter alia* the Rome, Paris and Berne Conventions] . . . .

Essential to this obligation is a basic commitment not to treat foreign nationals differently from one's own nationals when determining whether intellectual property merits protection. TRIPS was put in place, as stated in the agreement's preamble, "to reduce distortions and impediments to international trade . . . and to ensure that measures and procedures to enforce intellectual property rights ***do not*** themselves become barriers to legitimate trade" (emphasis added). Article 8.2 emphasizes the principle of "prevent[ing] the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade." Such central underpinnings have been frustrated by the ITC and panel decisions in this case.

Consistent with this Court's determination in *TianRui*, 661 F.3d at 1332-33, that U.S. and Chinese trade secret laws embody the same minimum standards under which misappropriation is found, there is all the more reason to respect the judgment that the courts in China reached on the threshold issues of trade secret protection in this case. The Chinese courts concluded that appellants had not misappropriated any protectable information. That should have been the end of the matter. But instead, the ITC and the panel of this Court permitted forum shopping that encroached on China's sovereignty in ways that unreasonably restrain trade.

This Court should grant rehearing *en banc* and reverse the ITC so that legitimate trade will not suffer.

Section 1337(a)(1)(A) Cannot Be Applied Extraterritorially

In order to maintain smooth international economic relations, nations accept the rule that one country cannot interfere with events that occur wholly in another country. Jurisdiction rests with the courts of the country where the events occur.

The extraterritorial application of 19 U.S.C. § 1337(a)(1)(A) in this case cannot be reconciled with *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), in which a unanimous Supreme Court held that there is a presumption against extraterritorial application of U.S. law. A statute applies extraterritorially only when it "evinces the requisite clear indication of extraterritoriality." *Id.* at 1666. Nothing in the text, history, or purpose of Section 1337(a)(1)(A), which applies to claims based on non-statutory unfair practices such as trade secret misappropriation, supports extraterritorial application. *Compare* 19 U.S.C. § 1337(a)(1)(B)(ii), which specifically applies extraterritorially to certain statutory intellectual property.

Kiobel does not stand alone in preventing the ITC from acting in the circumstances presented here. Extensive Supreme Court precedent counsels against the extraterritorial application of United States law in this case. *See, e.g.*, *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 248 (2010) ("[D]isregard of

the presumption against extraterritoriality has occurred over many decades in many courts of appeals . . . [T]his Court applies the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects."); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (superseded on other grounds) ("[W]e look to see whether 'language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control.' We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is 'the affirmative intention of the Congress clearly expressed,' we must presume it 'is primarily concerned with domestic conditions.'") (citations omitted); *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 175 (2004) (analyzing whether a statute "properly reflects considerations of comity"); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007) ("presumption that United States law governs domestically but does not rule the world").

CONCLUSION

This Court should grant rehearing *en banc* and hold that: (1) appellants were entitled to comity with respect to the decisions in the related Chinese proceedings and to have the ITC and this Court respect China's judicial sovereignty and court judgments and (2) Section 337(a)(1)(A) does not reach wholly extraterritorial acts.

Respectfully submitted,

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March 2, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel hereby certifies as follows:

1. The foregoing brief complies with the length limitation of Rule 40; and

2. The foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and with the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 14 point Times New Roman.

Dated: March 2, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2016, I electronically filed the foregoing *Amicus Curiae* Brief of the Trade Remedy and Investigation Bureau of the Ministry of Commerce of the People's Republic of China in Support of Rehearing *En Banc* by using the CM/ECF system. All parties to the appeal have been served through the CM/ECF system.

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