

Summer November 8, 2012

Reviewing the American University Law Review
on Extraterritoriality: A Critical Response to Viki
Economides, Note, *Tianrui Group Co. v. ITC*:
The Dubious Status of Extraterritoriality and the
Domestic Industry Requirement Requirement of
Section 337(Link)

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REVIEWING THE *AMERICAN UNIVERSITY LAW REVIEW* ON EXTRATERRITORIALITY: A CRITICAL
RESPONSE TO VIKI ECONOMIDES, NOTE, *TIANRUI GROUP CO. V. INTERNATIONAL TRADE
COMMISSION*: THE DUBIOUS STATUS OF EXTRATERRITORIALITY AND THE DOMESTIC INDUSTRY
REQUIREMENT OF SECTION 337

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TABLE OF CONTENTS

INTRODUCTION	1
DISCUSSION: THE FEDERAL CIRCUIT APPROPRIATELY UPHELD THE ITC’S EXCLUSION OF GOODS BASED ON A TRADE SECRET VIOLATION HAPPENING ENTIRELY WITHIN CHINA	2
A. THE SLOW FEDERALIZATION OF TRADE SECRET LAW	2
B. <i>InterDigital Communications LLC. v. ITC</i> HOLDS LICENSING ALONE CAN SATISFY THE DOMESTIC INDUSTRY REQUIREMENT.....	2
C. THE ITC BY ITS VERY NATURE IS INTERNATIONAL AND INTERNATIONAL ACTS REQUIRE EXTRATERRITORIAL FACTFINDING AND LEGAL APPLICATION	5
a. The <i>Chevron</i> deference counterweight	5
b. The international character and charter of the International Trade Commission	6
CONCLUSION.....	10

[A]nd therefore those skilled in war bring the enemy to the field of battle and are not brought there by him.²

I. INTRODUCTION

The world changed. United States manufacturers now produce the majority of their goods overseas.³ China has become a venue-of-choice for many of those industries.⁴ “Made in China” tags are ubiquitous.⁵ Simultaneously, intellectual property (IP) enforcement inside Chinese borders pales to that of the U.S.,⁶ granting Chinese industries a strategic advantage over American businesses and giving them an incentive to violate domestic IP laws.⁷ Accordingly, the U.S. International Trade Commission (ITC) has become a venue-of-choice for IP litigators, who seek to exclude companies’ imported goods—domestic companies and foreign companies

² SUN-TZU, *THE ART OF WAR* 127 (Samuel B. Griffith trans. 1963) (est. 443–251 B.C.E.).

³ See, e.g., Charles Duhigg & Keith Bradsher, *How the U.S. Lost Out on iPhone Work*, N.Y. TIMES, Jan. 22, 2012, at A1 (“Not long ago, Apple boasted that its products were made in America. Today, few are. Almost all of the 70 million iPhones, 30 million iPads and 59 million other products Apple sold last year were manufactured overseas.”).

⁴ See, e.g., Eduardo Porter, *The Promise of Today’s Factory Jobs*, N.Y. TIMES, April 4, 2012, at B4 (“Thirty years ago China made very little of anything. Today its factory output is almost 20 percent of world production and about 15 percent of manufacturing value added.”).

⁵ In one particularly embarrassing incident, the uniforms worn by the U.S. during the opening ceremony of the 2012 Olympic Games in London were “made in China,” sparking a minor outrage in the U.S. *Lawmakers Want ‘Made in China’ U.S. Olympic Uniforms Burned*, ABCNEWS.COM (13:44 EST, Jul 12, 2012), <http://abcnews.go.com/blogs/politics/2012/07/lawmakers-want-made-in-china-u-s-olympic-uniforms-burned/>. According to some, fifteen percent of the microchips purchased by the U.S. military in 2010 were counterfeit chips from China. See Cong. Hearing: Counterfeit Chinese Products, From Computer Chips to Fake Viagra, Flood Houston Market, HOUSTON CHRON., July 8, 2011, at A1; *Oversight of Intellectual Property Law Enforcement Efforts: Hearing Before the S. Comm. on the Judiciary* 112th Cong. 1 (June 22, 2011) (statement of Allen Gina, Assistant Comm’r, Office of International Trade, U.S. Customs and Border Protection).

⁶ See *id.* (“IPR infringement in China—including violations of copyrights, trademarks, patents, and trade secrets—remains a central area of U.S. concern in the bilateral trade relationship.”).

⁷ See China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy, Inv. No. 332-514, USITC Pub. No. 4199, at 5 (Nov. 2010):

Intellectual property rights (IPR) infringement in China reduces market opportunities and undermines the profitability of U.S. firms when sales of products and technologies are undercut by competition from illegal, lower-cost imitations. Intellectual property (IP) is often the most valuable asset that a company holds, but many companies, particularly smaller ones, lack the resources and expertise necessary to protect their IP in China. “Indigenous innovation” policies, which promote the development, commercialization, and purchase of Chinese products and technologies, may also be disadvantaging U.S. and other foreign firms and creating new barriers to foreign direct investment (FDI) and exports to China.

Id.

alike.⁸ The question arises, however, as to how far a Federal agency can reach into a foreign country to work.⁹

In Henry Kissinger's *On China*, Kissinger elucidates Chinese cultural differences with the west that carry through and inform Chinese foreign policy.¹⁰ In particular, he stresses, "Where the Western tradition prized the decisive clash of forces emphasizing feats of heroism, the Chinese ideal stressed subtlety, indirection, and the patient accumulation of relative advantage."¹¹ Kissinger suggests this reveals much about current Chinese foreign policy, particularly in the international business context.¹² He also argues that the "United States is obligated to exercise its maximum influence (in its polite expression) or pressure to bring about more pluralistic institutions where they do not exist."¹³

In this sensitive context, Chinese companies (and American subsidiaries) often escape the reach of the U.S.'s domestic laws due to complex diplomatic relations and a mismatch between international laws.¹⁴ Despite the reach of the Trade-Related Aspects of Intellectual Property Rights [TRIPS] agreement,¹⁵ the Chinese unevenly enforce IP protections, exposing non-Chinese businesses to corruption and theft of IP.¹⁶ Thus, certain Chinese companies can—and often do—

⁸ As the ITC itself said, "Existing law, apart from section [337], is wholly inadequate to protect domestic owners of patents from violation of their patent rights through the importation and sale of infringing articles." TWELFTH ANNUAL REPORT OF THE UNITED STATES TARIFF COMMISSION 21 (1928); *see also Lannom Mfg. Co. v. United States Int'l Trade Comm'n*, 799 F.2d 1572, 1577 (Fed. Cir. 1986).

⁹ *Compare Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010) (limiting the reach of U.S. domestic-directed security laws) *and* *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 441–42 (2007) (holding extraterritorial patent infringement outside of the reach of U.S. law because preloaded computer software is not a "tangible" copy capable of infringement upon importation) *with* *TianRui Grp. Co. v. Int'l Trade Comm'n*, 661 F.3d 1322, 1324 (Fed. Cir. 2011) (analyzing international activities in excluding goods in international trade) *and* *Zoltek Inc. v. U.S.*, 672 F.3d 1309, 1323 (Fed. Cir. 2012) (en banc) (allowing international violation of method laws to apply in the context of government contract and patent infringement).

¹⁰ *See generally*, HENRY KISSINGER, *ON CHINA* (2012).

¹¹ *Id.* at 23. He compares the game of chess to the Chinese game of "go"—in the former, victory is by direct confrontation, and it is absolute; in the latter, victory is by attrition, outmaneuvering your enemies, and surrounding their forces. *Id.* at 23–25.

¹² *Id.* at 25.

¹³ *Id.* at 520.

¹⁴ *Id.* at 490 ("[Chinese leaders] Hu and Wen presided over a country that no longer felt constrained by the sense of apprenticeship to Western technology and institutions. The China they governed was confident enough to reject, and even on occasion subtly mock, American lectures on reform.").

¹⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement], *available at* <http://www.worldtradelaw.net/uragreements/tripsagreement.pdf>.

¹⁶ *See* China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy, Inv. No. 332-514, USITC Pub. No. 4199, at 5 (Nov. 2010).

exploit a lack of domestic enforceability by blatantly violating U.S. domestic laws, unfairly giving foreign businesses an advantage over U.S.-based operations.¹⁷

Enter the ITC.¹⁸ The Commission prevents parties engaging in unfair competition from importing goods into the U.S..¹⁹ This includes both “Federal” IP—patents, copyrights, and trademarks—as well as state-law-based IP—such as trade secrets.²⁰ Thus, when a foreign company practices what would be an unfair violation under U.S. domestic laws, the U.S. Congress has reserved the right to exclude that company’s goods from the U.S..²¹

In order to prove a violation of section 337, a complainant proves: 1) the accused imported a product into the U.S.; 2) the product or act of importation “infringed” or “violated” the statutory definition;²² and 3) a domestic industry exists.²³ Additionally, for trade secrets they must prove that the respondent’s acts caused or threatened to cause injury to the domestic industry.

Recently, the Federal Circuit upheld the Commission’s decision to exclude goods based on a trade secret violation that largely happened abroad.²⁴ In that case, Amsted Industries—an American manufacturer of cast steel railway wheels—licensed a discontinued secret process to a Chinese foundry. Amsted also developed and used its own newer process domestically. Unfortunately, another Chinese manufacturer, TianRui Group Company Limited and TianRui Group Foundry Co. Ltd. (collectively, TianRui), hired a number of employees away from the licensed foundry and produced wheels with that product, violating domestic trade secret protection. TianRui then sought to import those wheels into the U.S. The ITC excluded those wheels, and the Federal Circuit upheld their exclusion.²⁵

The *American University Law Review* printed a critique of the opinion by Viki Economides, titled *TianRui Group Co. v. International Trade Commission: The Dubious Status*

¹⁷ *Id.*

¹⁸ Established in 1914 as the U.S. Tariff Commission, *see* Tariff Act of 1930, Pub.L. No. 71–361, 46 Stat. 590, the U.S. International Trade Commission (ITC) got its current name and strength from the Trade Act of 1974. Pub.L. No. 93–618, 88 Stat. 1978 (Jan. 3, 1974). Congress further strengthened the ITC by the Omnibus Trade and Competitiveness Act of 1988, Pub.L. No. 100–418, 102 Stat. 1107. *See* S.Rep. No. 100–71, at 128 (1987) (“The fundamental purpose of the amendments made by section 401 is to strengthen the effectiveness of section 337 in addressing the growing problems being faced by U.S. companies from the importation of articles which infringe U.S. intellectual property rights.”).

¹⁹ 19 U.S.C. § 1337(a)(1)(A) (2012).

²⁰ *See* Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product, Inv. No. 337-TA-148/169, USITC Pub. 1624, at 244 (December 1984) (“There is no question that misappropriation of trade secrets, if established, is an unfair method of competition or unfair act which falls within the purview of Section 337.”).

²¹ 19 U.S.C. § 1337(a)(1)(B)–(E) (2012).

²² *Id.*

²³ *Id.* § 1337(a)(2) (2012).

²⁴ *TianRui Grp. Co. v. U.S. Int’l Trade Comm’n*, 661 F.3d 1322, 1324 (Fed. Cir. 2011).

²⁵ *TianRui*, 661 F.3d at 1324.

of Extraterritoriality and the Domestic Industry Requirement of Section 337.²⁶ Ms. Economides criticized the opinion on two grounds: First, she argued that the Federal Circuit incorrectly applied the presumption against extraterritoriality;²⁷ and second, she argued that the Federal Circuit misapplied the domestic industry requirement.²⁸

Her critique remains incomplete, however, as the Federal Circuit correctly decided the case for at least two reasons. First, the Federal Circuit correctly applied the “extraterritorial presumption” canon of construction; and second, the recent Federal Circuit decision in *InterDigital Communications LLC v. ITC*²⁹ abrogates her argument that the domestic industry fails for businesses that only license the IP-at-issue. Furthermore, her argument misconstrues the domestic industry requirement as focusing only on the *specific IP in question*, rather than the more general question of whether the unfair act damages the company’s domestic industry directly. This Article explores and rebuts those two arguments in Parts II(A) and II(B).

II. DISCUSSION: THE FEDERAL CIRCUIT APPROPRIATELY UPHELD THE ITC’S EXCLUSION OF GOODS BASED ON A TRADE SECRET VIOLATION HAPPENING ENTIRELY WITHIN CHINA

A. The slow federalization of trade secret law

“The law governing protection of trade secrets essentially is designed to regulate unfair business competition.”³⁰ The tort of misappropriation of trade secrets seeks to provide a remedy for acts of unfair competition against companies acting in good faith.³¹ Trade secrets, once a purely state matter, are now nearly uniform, thanks to the Uniform Trade Secrets Act (UTSA), which normalizes Trade Secret law across state borders.³²

²⁶ 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).

²⁷ *Economides*, 61 AM. U. L. REV. at 1243.

²⁸ *Id.* at 1247.

²⁹ *InterDigital Commc’ns., LLC v. U.S. Int’l. Trade Comm’n*, — F.3d. — 2012 WL 3104597 (Fed. Cir. 2012) (holding that licensing activities alone can satisfy the domestic industry requirement).

³⁰ *Univ. Computing Co. v. Lykes–Youngstown Corp.*, 504 F.2d 518, 539 (5th Cir. 1974). See generally Andrew F. Popper, *Beneficiaries of Misconduct: A Direct Approach to IT Theft*, MARQUETTE INTELL. PROP. L. REV. (forthcoming winter 2012). The Author contributed research to this publication.

³¹ Trade secret law emanates from a provision of Roman law that sought to protect information Roman slaves might disclose to competitors. ROBERT P. MERGES, PETER S. MENELL, & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 33–35 (5th ed. 2010) (explaining that trade secret violations originated from Roman cause of action *actio servi corrupti* (literally, an action for corrupting the slave)).

³² Forty-six states have adopted the USTA in some form, and two have considered it. See *State Should Adopt Protections for Trade Secrets*, NEWBURY PORT NEWS (Massachusetts), October 19, 2011, <http://www.newburyportnews.com/opinion/x744038983/State-should-adopt-protections-for-trade-secrets>.

The U.S., as a party to the TRIPS Agreement, now provides national protection to trade secrets.³³ Recently, scholars have argued, in light of the EEA and TRIPS, the U.S. must federalize trade secret law to ensure international enforcement of IP rights.³⁴

B. *InterDigital Communications LLC. v. ITC holds definitively licensing can satisfy the domestic industry requirement*

The *American University Law Review* criticizes the Federal Circuit on two points.³⁵

First, Ms. Economides argued that when a complainant currently does not use a product, process, or other form of IP in the U.S., a complainant *per se* fails to establish a “domestic industry” for the purposes of an ITC investigation.³⁶ She analogized appellant Amsted’s not-currently-in-use, internationally licensed trade secret-protected manufacturing process to patent rights asserted by non-practicing entities.³⁷ She then claimed that prior ITC determinations “implied” that “absent a showing that the misappropriation barred the complainant from either entering into the industry or developing a competitive product, the complainant *must* show that the trade secret was in use at the time of the complaint.”³⁸ She argued that the licensing of the trade-secreted product alone did not constitute “use” under Commission and Federal Circuit precedent.³⁹

The Federal Circuit recently abrogated that argument in *InterDigital Communications, LLC v. ITC*.⁴⁰ In a dispute between largely non-practicing entity InterDigital Communications, LLC, and Nokia over 3G mobile handsets and royalties, the Federal Circuit settled that “licensing alone” satisfies the domestic industry requirement.⁴¹ Similar to the reasoning in *TianRui*, the Court held that section 337 does not require the complainant manufacture or use any

³³ *Id.* at 16 (Article 39). The Economic Espionage Act of 1996 and state law complete U.S. TRIPS obligations. See Robin J. Effron, *Secrets and Spies: Extraterritorial Application of the Economic Espionage Act and the TRIPS Agreement*, 78 N.Y.U. L. REV. 1475 (2003).

³⁴ David Almeling, *Guest Post: First Patent Reform, Now Trade Secret Reform?*, PATENTLY-O.COM (Oct. 12, 2011, 3:08 PM) <http://www.patentlyo.com/patent/2011/10/almeling-trade-secret.html>.

³⁵ See generally *Economides*, 61 AM. U. L. REV. at 1247–48 (arguing the Federal Circuit misapplied the domestic industry requirement and incorrectly applied the presumption against extraterritoriality).

³⁶ *Economides*, 61 AM. U. L. REV. at 1235.

³⁷ *Id.* at 1247.

³⁸ *Id.* (emphasis added).

³⁹ *Id.* Her argument goes too far. She is correct in a way; litigation expenses alone insufficiently establish “substantial investment in exploitation” of IP, and thus fail to establish a domestic industry. However, licensing of the IP will usually satisfy the domestic industry requirement, whether international or national. Compare *Mezzalingua Assocs., Inc. v. U.S. Int’l Trade Comm’n*, 660 F.3d 1322, 1324 (Fed. Cir. 2011) (holding litigation expenses incurred in asserting and defending the validity of the patent did not constitute a “substantial investment in exploitation” of a patent through licensing) with *InterDigital Commc’ns, LLC v. U.S. Int’l Trade Comm’n*, — F.3d. — 2012 WL 3104597 (Fed. Cir. 2012) (holding that licensing activities alone can satisfy the domestic industry requirement).

⁴⁰ — F.3d. — 2012 WL 3104597.

⁴¹ *Id.* (“That is, the domestic industry requirement is satisfied if there is a domestic industry based on “substantial investment in [the patent’s] exploitation” where the exploitation is achieved by various means, including “licensing.””).

of the actual covered articles or processes in this country.⁴² The Federal Circuit reversed the ITC based on the improper claim construction of the terms “code” and “increased power level” but left undisturbed the holding on the “domestic industry” requirement in that case.⁴³ It held plainly in the context of patents that “the domestic industry requirement is satisfied if there is a domestic industry based on ‘substantial investment in [the patent’s] exploitation’ where the exploitation is achieved by various means, including ‘licensing.’”⁴⁴ Thus, Ms. Economides’ entire argument—that licensing alone cannot qualify a company for the domestic industry requirement—falls by the wayside.⁴⁵

Applying administrative law principles, a reviewing court assumes that an administrative body is familiar with the record before it.⁴⁶ The panel in *TianRui* found that section 337 establishes a cause of action for, among other things, unfair trade practices that may “destroy or substantially injure an industry in the U.S.”⁴⁷ Considering the express language and legislative history of Section 337, as well as relevant case law, the Federal Circuit held importation of articles in direct competition with articles produced by a domestic industry—the ABC versus the Griffin process—sufficient to establish injury to “an industry” under Section 337.⁴⁸ Similarly, in *InterDigital*, the Federal Circuit held that a license-only complainant can assert a violation and seek exclusion orders. Therefore—as the *TianRui* majority correctly held—a complainant need not actually practice the misappropriated trade secret to obtain relief under Section 337.

Ms. Economides states that in trade secret misappropriation cases in particular, the relevant industry comprises “that portion of complainant’s domestic operations devoted to utilization of the confidential and proprietary technology at issue which is the target of the unfair acts or practices.”⁴⁹ She then argues this requires “resources devoted domestically to the use of the trade secret.”⁵⁰ Concluding the Federal Circuit had not addressed whether a domestic

⁴² *TianRui*, 661 F.3d at 1324.

⁴³ *Id.*

⁴⁴ *Id.* at 1327.

⁴⁵ One may argue that *InterDigital* applied to statutory IP, and thus whether licensing alone can establish domestic industry for non-statutory trade secret IP is an open question. This is a distinction without a difference. As Ms. Economides concedes, the first three factors of establishing a cause of action at the ITC are identical, and the jurisprudence for both applies with equal force. 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, 1240 (2012).

⁴⁶ See, e.g., *Opie v. I.N.S.*, 66 F.3d 737, 740 (5th Cir. 1995); *Nat’l Small Shipments Traffic Conf., Inc. v. Interstate Commerce Comm’n*, 725 F.2d 1442, 1455 (D. C. Cir. 1984) (a “presumption of procedural regularity and substantive rationality attaches to final agency action”).

⁴⁷ 19 U.S.C. § 1337(a)(1)(A)(i) (2012).

⁴⁸ *TianRui*, 661 F.3d at 1324.

⁴⁹ *Economides*, 61 AM. U. L. REV. at 1248 (citing *Certain Processes for the Manufacture of Skinless Sausage Casings & Resultant Prod.*, Inv. No. 337-TA-148/169, USITC Pub. 1624, at 341 (Dec. 1984) (Commission Determination and Action)).

⁵⁰ *Economides*, AM. U. L. REV. at 1248–49 (citation omitted).

industry could be established solely through overseas licensing activities, she analogized Amsted to a “non-practicing entity.”⁵¹

This conflates any domestic industry *that is immediately and currently making and using the specific IP in question* with the presence of a directly affected domestic industry for the party aggrieved in the investigation in general, being hurt unfairly in business by competition. Under the statute, however, the ITC can consider a plethora of other factors.⁵² Here, Amsted *had* made the process here in the U.S.—and it had invented another, better, secret process that it replaced at all of its U.S. factories.⁵³ It did, however, license to—and import from—other international factories, its preexisting trade secret that rivals subsequently misappropriated.⁵⁴ Under *InterDigital Communications, LLC v. ITC* alone these licenses establish a domestic industry, one that is hurt by—in direct customer competition—the trade secret violation. Arguing that the importation of competing steel-wheels would not somehow damage one of the only providers of steel wheels in the entire country, Ms. Economides’s critique commits the logical fallacy of piecemeal analysis. The introduction of competing products—of the same variety, in the same market, and sold to the same captive customers, many of whom were already using the same type of wheels originally made by Amsted—would necessarily detract from, and injure, the business of Amsted. Thus, the Commission and the Federal Circuit held correctly: Amsted has a domestic industry.

C. The ITC by its very nature is international and international acts require extraterritorial factfinding and legal application

Ms. Economides argues that the Supreme Court’s “presumption against extraterritoriality” “functions as an ‘overarching paradigm’ and canon of interpretation.”⁵⁵ To be sure, the “presumption” is canon of interpretation—but it is not, as Ms. Economides argues, an “overarching paradigm” or a “clear statement rule.”⁵⁶ It is a canon of construction, a guidepost only, and can be overcome by other evidence rebutting the presumption—it does not, as she claims, require the magic words of “‘boiler-plate’ language”⁵⁷ to overcome it.

a. The Chevron deference counterweight

None of Ms. Economides, the majority, the dissent, or the lower court discuss *Chevron* [*U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,]⁵⁸ deference.⁵⁹ As the agency charged

⁵¹ The term derogates. In particular, Amsted had practiced the process in the U.S. and has long been one of the primary manufacturers of durable goods—cast steel railway wheels—a U.S. employer, and an owner of domestic foundries. The analogy suffers.

⁵² “. . . . [T]he Commission, in each case ... may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports.” 19 U.S.C. § 1677(7)(B)(ii) (1988).

⁵³ *TianRui*, 661 F.3d at 1324.

⁵⁴ *Id.*

⁵⁵ *Economides*, 61 AM. U. L. REV. at 1244.

⁵⁶ *Id.* (citing *TianRui*, 661 F.3d at 1329 n2).

⁵⁷ *Economides*, 61 AM. U. L. REV. at 1244 (citing *EEOC v. Arabian Am. Oil Co.*, 449 U.S. 244, 250–51 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077). Obviously, this requirement was superseded, and in any case other cases have not required any “magic words” to overcome the presumption.

⁵⁸ 467 U.S. 837 (1984).

⁵⁹ *Id.* at 844.

with the administration of section 337, however, the ITC is entitled to appropriate deference in its interpretation of section 337.⁶⁰ Thus, *Chevron* deference acts as a counterweight to the presumption of extraterritoriality, and the courts properly defer to a reasonable construction by the ITC—particularly a construction coming from an organization whose charter is inherently international.

Under *Chevron*, the Federal Circuit determines “whether Congress has directly spoken to the precise question at issue.”⁶¹ “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁶² Where the statute is “silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”⁶³ The Federal Circuit upholds the ITC’s interpretation of section 337 if it is reasonable in light of the language, policies, and legislative history of the statute.⁶⁴

It flows logically that a proper analysis of the “presumption against extraterritoriality” balances a deferential *Chevron* standard against the presumption, effectively acting as a counterweight against the presumption. Particularly because the ITC’s mission and charter are international in nature, they deserve greater deference on questions of extraterritoriality than, say, the Securities and Exchange Commission in *Morrison*.

b. The international character and charter of the International Trade Commission

The long-standing “principle that importation is treated differently than domestic activity” guides the ITC.⁶⁵ Under section 337, Congress mandates the ITC investigate any violation.⁶⁶ Thus, the ITC investigates whether respondents’ actions constitute misappropriation of trade secrets.⁶⁷ As the *TianRui* majority recognized, the U.S.’s trade secret protections

⁶⁰ See *Chevron*, 467 U.S. at 844; *Enercon GmbH v. U.S. Int’l Trade Comm’n*, 151 F.3d 1376 (1998) (deferring to the ITC’s interpretation of section 337 as a reasonable construction); *Farrel Corp. v. U.S. Int’l Trade Comm’n*, 949 F.2d 1147, 1151 (Fed. Cir. 1991) (“While this court generally reviews ITC interpretations of statutory provisions *de novo*, some deference to constructions by the agency charged with its administration may be appropriate, particularly if technical issues requiring some expertise are involved.”); *Texas State Comm’n for the Blind v. U.S.*, 796 F.2d 400, 406 (Fed. Cir. 1986) (“The issue to be decided by this court is whether the statute is capable of more than one interpretation and whether the agency’s interpretation is reasonable.”).

⁶¹ *Chevron*, 467 U.S. at 842.

⁶² *Id.* at 842–43.

⁶³ *Id.* at 843 (footnote omitted).

⁶⁴ See *Corning Glass Works v. U.S. Int’l Trade Comm’n*, 799 F.2d 1559, 1565 (Fed. Cir. 1986).

⁶⁵ *Certain Baseband Processor Chips and Chipsets, Transmitter and Receiver (Radio) Chips, Power Control Chips, and Products Containing Same, Including Cellular Telephone Handsets*, Inv. No. 337-TA-543, USITC Pub. 4258 (June 19, 2007) (citing *U.S. v. 12 200-ft. Reels of Super 8mm. Film*, 413 U.S. 123, 125 (1973)).

⁶⁶ See *Farrel Corp. v. U.S. Int’l Trade Comm’n*, 949 F.2d 1147, 1152–52 (1991) (selecting the word “shall investigate” indicates Congress commanded the ITC to investigate every violation, regardless of character, and without discretion).

⁶⁷ See *Certain Mechanical Gear Couplings and Components Thereof*, Inv. No. 337-TA-343, USITC Pub. No. 10, at 8 (Mar. 23, 1993) (“the Commission retains an interest in determining

encompass extraterritorial actions in other Federal contexts.⁶⁸ Yet Ms. Economides argues that section 337—in the context of trade secrets—does not have extraterritorial reach.⁶⁹

As the *TianRui* majority so aptly discussed, the ITC by name deals with *international* trade.⁷⁰ The legislative history,⁷¹ the case law, and the statute itself all point to international acts that cause harm domestically, and Ms. Economides concedes that under the Tariff Act the President (via the ITC) has authority to exclude based on the activities of “*individuals residing outside the jurisdiction of the United States*.”⁷² Bad actors abroad (and some bad actors nationally with factories abroad) often damage *domestic industries*’ trade unfairly. Thus, the ITC frequently—if not exclusively—looks to facts and acts (to the extent possible with domestic discovery) occurring internationally.

Ms. Economides also argues that *Microsoft Corp. v. AT&T Corp.* holds the presumption limits extraterritorial application to limited statutory terms.⁷³ That case concerned the act of copying copies of software—holding only that—1) copies of software qualify as components for § 271(f) purposes, but actual computer code does not, i.e., pre-loaded software—and 2) hence companies do not violate § 271(f) when copying computer code internationally as long as they do not import copies of that product.⁷⁴ Thus, that decision is inapposite—it deals with the act of copying, and additionally holds any item substantially embodying a process excludable based on a violation of the method patent abroad⁷⁵—strong support for the *TianRui* majority here.

whether respondents’ products are manufactured or sold using trade secrets that were misappropriated from complainant.”)

⁶⁸ *TianRui*, 661 F.3d at 1330 n.4 (“Congress in 1996 enacted the Economic Espionage Act to fill a gap in federal protection of trade secrets. That Act prohibits trade secret theft and applies to foreign conduct if “an act in furtherance of the offense was committed in the United States.” Congress thus recognized that misappropriation of U.S. trade secrets can, and does, occur abroad, and that it is appropriate to remedy that overseas misappropriation when it has a domestic nexus.” (citations omitted)).

⁶⁹ *Economides*, 61 AM. U. L. REV. at 1243.

⁷⁰ *TianRui*, 661 F.3d at 1329 (finding that section 337, governing the “importation of articles,” necessarily involves an international transaction.). The majority aptly analogized immigration statutes, which, “by their very nature, pertain to activity at or near international borders.” *U.S. v. Villanueva*, 408 F.3d 193, 199 (5th Cir. 2005). Thus, “It is natural to expect that Congress intends for laws that regulate conduct that occurs near international borders to apply to some activity that takes place on the foreign side of those borders.” *Id.*

⁷¹ *Id.* at 1335 (analyzing the legislative history and determining its international character).

⁷² *Id.* at 1329–30. See *Economides*, 61 AM. U. L. REV. at 1242 n. 47 (citing U.S. TARIFF COMM’N, SIXTH ANNUAL REPORT 4 (1922) (finding the new provisions of section 337 “make it possible for the President to prevent unfair practices, *even when engaged in by individuals residing outside the jurisdiction of the United States*.”). Notably, in 1922 section 337 lacked the strength and reach it has today, as evidenced by the many amendments to the law.

⁷³ *Economides*, 61 AM. U. L. REV. at 1245.

⁷⁴ Ms. Economides admits as much in a footnote. “Because only copies of the software constituted components, and these copies were made abroad, section 271(f) was inapplicable.” *Economides*, 61 AM. U. L. REV. at 1246 n.78.

⁷⁵ See *Zoltek Corp. v. U.S.*, 672 F.3d 1309, 1323 (Fed. Cir. 2012) (en banc).

As she acknowledged, *Morrison v. U.S.* controls much of the question.⁷⁶ There, the Supreme Court analyzed an immigration statute, finding that it did not overcome the presumption against extraterritoriality.⁷⁷ Specifically, the Securities and Exchange Commission's reach did not extend to foreign exchanges, in part under a statutory analysis of the terms "operating in interstate *and* foreign commerce."⁷⁸ Here, however, the ITC's charter is *entirely* international—it applies to the *international* importation of goods. While the SEC primarily regulates domestic exchanges, the ITC solely regulates *international* trade. The two are disparate; the analogy fails.

Other Federal Circuit cases bolster this analysis. For instance, in *Zoltek Corp. v. U.S.*,⁷⁹ the Federal circuit upheld a patent infringement of a method that occurred extraterritorially in the context of government contracts without even mentioning the extraterritorial exception.⁸⁰ It found that a method infringed internationally still gave rise to a "use" upon importation of the resultant product.⁸¹ There, "although the process itself was partially practiced outside the U.S. in this case, the product resulting from the practice, which embodies the patented process, was imported into, or used in, the U.S. Therefore, the process has been "used" without a license or lawful right."⁸² Thus, a product that embodies a violated process constitutes "use" under section 337. ITC investigations necessarily reach extraterritorial concerns.

III. CONCLUSION

TianRui appropriately recognized the ITC's charter to seek out unfair trade practices and protect those American industries affected by them. Amsted's licensing of a competing trade secret to a foreign corporation provided ample evidence establishing a domestic industry—one that was undeniably injured domestically by the misappropriation of a valuable trade secret that allowed *TianRui* to compete in the domestic market. Likewise, the presumption against extraterritoriality is just that—a presumption—and parties overcome it when the statutory history speaks to preventing harm to companies from violations occurring abroad. Otherwise, we run the risk of depriving American businesses of their only enforcement tool for extraterritorial, international unfair acts.

⁷⁶ *Economides*, 61 AM. U. L. REV. at 1235.

⁷⁷ *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010).

⁷⁸ Securities Exchange Act of 1934 § 30, 15 U.S.C. § 78dd (2006).

⁷⁹ 672 F.3d 1309 (Fed. Cir. 2012) (en banc).

⁸⁰ *Zoltek*, 672 F.3d at 1323 ("In *Quanta Computer, Inc., v. LG Elecs., Inc.*, the Supreme Court held that in the patent exhaustion context, "methods . . . may be 'embodied' in the product. 55 U.S. 617, 628 (2008).")

⁸¹ *Zoltek*, 672 F.3d at 1323.

⁸² *Id.*