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## Session 8: International Issues

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We will look at four different takes on how the international law regime matters for U.S. firms. We will start with a recent Biden administration effort to limit the export of chip technology to China. We will then turn to two press releases from the Court of Justice of the European Union and then to the *Tianrui* case which raises issues about the circumstances under which the U.S. will block the importation of goods produced overseas. Finally, we will look at the Foreign Corrupt Practices Act (15 USC 78dd-1 to 15 USC 78dd-3) through the lens of a New York Times [story](#) on Walmart's practices in Mexico.



**FOR IMMEDIATE RELEASE**

October 7, 2022

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**BUREAU OF INDUSTRY AND SECURITY**

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**Commerce Implements New Export Controls on Advanced Computing and Semiconductor Manufacturing Items to the People's Republic of China (PRC)**

Washington, D.C.—The Department of Commerce's Bureau of Industry and Security (BIS) is implementing a series of targeted updates to its export controls as part of BIS's ongoing efforts to protect U.S. national security and foreign policy interests. These updates will restrict the People's Republic of China's (PRC's) ability to both purchase and manufacture certain high-end chips used in military applications and build on prior policies, company-specific actions, and less public regulatory, legal, and enforcement actions taken by BIS.

The export controls announced in the two rules today restrict the PRC's ability to obtain advanced computing chips, develop and maintain supercomputers, and manufacture advanced semiconductors. These items and capabilities are used by the PRC to produce advanced military systems including weapons of mass destruction; improve the speed and accuracy of its military decision making, planning, and logistics, as well as of its autonomous military systems; and commit human rights abuses. Finally, these rules make clear that foreign government actions that prevent BIS from making compliance determinations will impact a company's access to U.S. technology through addition to the Entity List.

"As I told Congress in July, my north star at BIS is to ensure that we are appropriately doing everything in our power to protect our national security and prevent sensitive technologies with military applications from being acquired by the People's Republic of China's military, intelligence, and security services," **said Under Secretary of Commerce for Industry and Security Alan Estevez**. "The threat environment is always changing, and we are updating our policies today to make sure we're addressing the challenges posed by the PRC while we continue our outreach and coordination with allies and partners."

"The PRC has poured resources into developing supercomputing capabilities and seeks to become a world leader in artificial intelligence by 2030. It is using these capabilities to monitor, track, and surveil their own citizens, and fuel its military modernization," **said Assistant Secretary of Commerce for Export Administration Thea D. Rozman Kendler**. "Our actions will protect U.S. national security and foreign policy interests while also sending a clear message that U.S. technological leadership is about values as well as innovation."

“BIS’s ability to determine whether a party is in compliance with our export control rules is a core tenet of our enforcement program,” **said Assistant Secretary of Commerce for Export Enforcement Matthew S. Axelrod.** “Where BIS is prevented by a host government from conducting our end-use checks in a timely manner, we will add parties to the Unverified List, and if the delay is extreme enough, the Entity List, to prevent the risk of diversion of any U.S. technology that could undermine our national security interests.”

The Department of Commerce briefed and consulted with close allies and partners on these controls. The Department will work closely with industry as we implement all elements of the Administration’s semiconductor agenda, to include ensuring compliance with these measures.

Summaries of the rules released today and relevant links to the rule text are provided below, along with additional background on BIS’s ongoing work to update its approach to export controls related to the PRC.

### ***Implementing Controls Related to Advanced Computing and Semiconductor Manufacturing:***

BIS’s rule on advanced computing and semiconductor manufacturing addresses U.S. national security and foreign policy concerns in two key areas. First, the rule imposes restrictive export controls on certain advanced computing semiconductor chips, transactions for supercomputer end-uses, and transactions involving certain entities on the Entity List. Second, the rule imposes new controls on certain semiconductor manufacturing items and on transactions for certain integrated circuit (IC) end uses.

Specifically, the rule:

- 1.) Adds certain advanced and high-performance computing chips and computer commodities that contain such chips to the Commerce Control List (CCL);
- 2.) Adds new license requirements for items destined for a supercomputer or semiconductor development or production end use in the PRC;
- 3.) Expands the scope of the Export Administration Regulations (EAR) over certain foreign-produced advanced computing items and foreign produced items for supercomputer end uses;
- 4.) Expands the scope of foreign-produced items subject to license requirements to twenty-eight existing entities on the Entity List that are located in the PRC;
- 5.) Adds certain semiconductor manufacturing equipment and related items to the CCL;
- 6.) Adds new license requirements for items destined to a semiconductor fabrication “facility” in the PRC that fabricates ICs meeting specified. Licenses for facilities owned by PRC entities will face a “presumption of denial,” and facilities owned by multinationals will be decided on a case-by-case basis. The relevant thresholds are as follows:

- Logic chips with non-planar transistor architectures (I.e., FinFET or GAAFET) of 16nm or 14nm, or below;
- DRAM memory chips of 18nm half-pitch or less;
- NAND flash memory chips with 128 layers or more.

7.) Restricts the ability of U.S. persons to support the development, or production, of ICs at certain PRC-located semiconductor fabrication “facilities” without a license;

8.) Adds new license requirements to export items to develop or produce semiconductor manufacturing equipment and related items; and

9.) Establishes a Temporary General License (TGL) to minimize the short-term impact on the semiconductor supply chain by allowing specific, limited manufacturing activities related to items destined for use outside the PRC.

The rule is effective in phases after being filed for Public Inspection with the Federal Register. The semiconductor manufacturing items restrictions are effective upon filing for Public Inspection (October 7, 2022), the restrictions on U.S. persons’ ability to support the development, production, or use of ICs at certain PRC-located semiconductor fabrication “facilities” is effective five days later (October 12, 2022), and the advanced computing and supercomputer controls, as well as the other changes in the rule, are effective 14 days later (October 21, 2022). Additionally, public comments on all of these changes are due to BIS no later than 60 days from the date of Federal Register publication. The text of the rule is available on the Federal Register’s website [here](#).

### ***Revisions to BIS’s Unverified List:***

BIS is also updating its regulations related to BIS’s Entity List to clarify that a sustained lack of cooperation by the host government that effectively prevents BIS from determining compliance with the EAR may lead to the addition of an entity to the Entity List.

The rule provides an example that stipulates that sustained lack of cooperation by a foreign government that prevents BIS from verifying the *bona fides* of companies on the Unverified List (UVL) can result in those parties being moved to the Entity List, if an end-use check is not timely scheduled and completed. All additions, removals, or revisions to the Entity List are still subject to the approval of the End-User Review Committee, which is made up of the Departments of Commerce, State, Defense, and Energy pursuant to existing rules.

The rule adds 31 new entities to the UVL and removes 9 entities that have met relevant requirements.

Consistent with this regulatory change, Export Enforcement has issued a policy memorandum *Addressing Foreign Government Prevention of End-Use Checks*. The memo is available online [here](#). The policy calls for adding parties to the Unverified List 60 days after checks are requested but host government inaction prevents their completion, and an additional 60-day process for adding UVL parties to the Entity List when there is a sustained lack of cooperation by a host government to facilitate completion of the checks.

Text of the rule, which includes the list of parties added and removed, is available on the Federal Register's website [here](#). The rule takes effect on October 7, 2022.

***Additional Background:***

The rules announced today are part of the ongoing review of BIS's export control policies towards the PRC announced by Under Secretary Estevez during Congressional hearings in July 2022 and follow several regulatory and enforcement actions taken over the past few months including:

- A series of company-specific restrictions placed in recent months on the trade and servicing of specific advanced integrated circuits essential for highly capable artificial intelligence applications.
- Implementation of [new multilateral controls](#) on advanced semiconductor and gas turbine engine technologies.
- Utilizing the Entity List vigorously to address national security and foreign policy concerns, including adding [seven PRC entities in the space, aerospace, and related technology sectors](#).
- Employing administrative and criminal enforcement authorities, including to address [illegal military technology exports](#) to the PRC.

BIS's actions today were taken under the authority of the Export Control Reform Act of 2018 and its implementing regulations, the EAR.

Under these authorities, BIS possesses a variety of tools to control the export of U.S.-origin and certain foreign-produced commodities, software, and technology as well as specific activities of U.S. persons, for national security and foreign policy reasons. These tools include issuing federal regulations, as well as using the licensing and regulatory process to take party-specific actions.

For more information, please visit BIS's website at: <https://bis.doc.gov>



Press and Information

Court of Justice of the European Union

**PRESS RELEASE No 112/19**

Luxembourg, 24 September 2019

Judgment in Case C-507/17

Google LLC, successor in law to Google Inc. v Commission nationale de l'informatique et des libertés (CNIL)

## **The operator of a search engine is not required to carry out a de-referencing on all versions of its search engine**

*It is, however, required to carry out that de-referencing on the versions corresponding to all the Member States and to put in place measures discouraging internet users from gaining access, from one of the Member States, to the links in question which appear on versions of that search engine outside the EU*

By an adjudication of 10 March 2016, the Commission nationale de l'informatique et des libertés (French Data Protection Authority, France) ('the CNIL') imposed a penalty of €100 000 on Google Inc. because of that company's refusal, when granting a de-referencing request, to apply it to all its search engine's domain name extensions.

Google Inc., having been given formal notice by the CNIL on 21 May 2015 to apply the de-referencing to all the extensions, had refused to do so and had confined itself to removing the links in question from only the results displayed following searches conducted from the domain names corresponding to the versions of its search engine in the Member States. Google Inc. requested the Conseil d'État (Council of State, France) to annul the adjudication of 10 March 2016. It considers that the right to de-referencing does not necessarily require that the links at issue are to be removed, without geographical limitation, from all its search engine's domain names.

The Conseil d'État has referred several questions to the Court of Justice for a preliminary ruling seeking to ascertain whether the rules of EU law relating to the protection of personal data<sup>1</sup> are to be interpreted as meaning that, where a search engine operator grants a request for de-referencing, that operator is required to carry out that de-referencing on all versions of its search engine or whether, on the contrary, it is required to do so only on the versions of that search engine corresponding to all the Member States or only on the version corresponding to the Member State of residence of the person benefiting from the de-referencing.

In today's judgment, the Court begins by recalling that it has already held<sup>2</sup> that the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.

The Court points out, next, that Google Inc.'s establishment in French territory carries on activities, including commercial and advertising activities, which are inextricably linked to the processing of personal data carried out for the purposes of operating the search engine concerned and, second, that that search engine must, in view of, inter alia, the existence of gateways between its various national versions, be regarded as carrying out a single act of data processing in the context of the

<sup>1</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) and Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46 (General Data Protection Regulation) (OJ 2016 L 119, p. 1, and Corrigendum OJ 2018 L 127, p. 2).

<sup>2</sup> Case: [C-131/12](#) Google Spain and Google see Press release [70/14](#).

activities of Google Inc.'s French establishment. Such a situation therefore falls within the scope of the EU legislation on the protection of personal data.

The Court emphasises that, in a globalised world, internet users' access — including those outside the EU — to the referencing of a link referring to information regarding a person whose centre of interests is situated in the EU is likely to have immediate and substantial effects on that person within the EU itself, so that a global de-referencing would meet the objective of protection referred to in EU law in full. However, it states that numerous third States do not recognise the right to de-referencing or have a different approach to that right. The Court adds that the right to the protection of personal data is not an absolute right, but must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. In addition, the balance between the right to privacy and the protection of personal data, on the one hand, and the freedom of information of internet users, on the other, is likely to vary significantly around the world.

However, it is not apparent from the legal texts that the EU legislature has struck such a balance as regards the scope of a de-referencing outside the EU, nor that it has chosen to confer a scope on the rights of individuals which would go beyond the territory of the Member States. Nor is it apparent from those texts that it would have intended to impose on an operator, such as Google, a de-referencing obligation which also concerns the national versions of its search engine that do not correspond to the Member States. What is more, EU law does not provide for cooperation instruments and mechanisms as regards the scope of a de-referencing outside the EU.

Thus, the Court concludes that, **currently, there is no obligation under EU law, for a search engine operator who grants a request for de-referencing made by a data subject, as the case may be, following an injunction from a supervisory or judicial authority of a Member State, to carry out such a de-referencing on all the versions of its search engine.**

**However, EU law requires a search engine operator to carry out such a de-referencing on the versions of its search engine corresponding to all the Member States** and to take sufficiently effective measures to ensure the effective protection of the data subject's fundamental rights. Thus, such a de-referencing must, if necessary, be accompanied by measures which effectively prevent or, at the very least, seriously discourage an internet user conducting a search from one of the Member States on the basis of a data subject's name from gaining access, via the list of results displayed following that search, through a version of that search engine 'outside the EU, to the links which are the subject of the request for de-referencing. It will be for the national court to ascertain whether the measures put in place by Google Inc. meet those requirements.

Lastly, the Court points out that, while EU law does not currently require a de-referencing to be carried out on all versions of the search engine, it also does not prohibit such a practice. Accordingly, the authorities of the Member States remain competent to weigh up, in the light of national standards of protection of fundamental rights, a data subject's right to privacy and the protection of personal data concerning him or her, on the one hand, and the right to freedom of information, on the other, and, after weighing those rights against each other, to order, where appropriate, the operator of that search engine to carry out a de-referencing concerning all versions of that search engine.

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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Pictures of the delivery of the judgment are available from "[Europe by Satellite](#)" ☎ (+32) 2 2964106

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**EU law does not preclude a host provider such as Facebook from being ordered to remove identical and, in certain circumstances, equivalent comments previously declared to be illegal**

*In addition EU law does not preclude such an injunction from producing effects worldwide, within the framework of the relevant international law which it is for Member States to take into account*

Mme Eva Glawischnig-Piesczek, who was a member of the Nationalrat (National Council, Austria), chair of the parliamentary party 'die Grünen' (The Greens) and federal spokesperson for that party, sued Facebook Ireland in the Austrian courts. She is seeking an order that Facebook Ireland remove a comment published by a user on that social network harmful to her reputation, and allegations which were identical and/or of an equivalent content.

The Facebook user in question had shared on that user's personal page an article from the Austrian online news magazine oe24.at entitled 'Greens: Minimum income for refugees should stay'. That had the effect of generating on that page a 'thumbnail' of the original site, containing the title and a brief summary of the article, and a photograph of Ms Glawischnig-Piesczek. That user also published, in connection with that article, a comment which the Austrian courts found to be harmful to the reputation of Ms Glawischnig-Piesczek, and which insulted and defamed her. This post could be accessed by any Facebook user.

Against that background, the Oberster Gerichtshof (Supreme Court, Austria) is asking the Court of Justice to interpret the Directive on electronic commerce.<sup>1</sup>

Under that directive, a host provider such as Facebook is not liable for stored information if it has no knowledge of its illegal nature or if it acts expeditiously to remove or to disable access to that information as soon as it becomes aware of it. That exemption does not, however, prevent the host provider from being ordered to terminate or prevent an infringement, including by removing the illegal information or by disabling access to it. However, the directive prohibits any requirement for the host provider to monitor generally information which it stores or to seek actively facts or circumstances indicating illegal activity.

By today's judgment, the Court of Justice answers the Oberster Gerichtshof that **the Directive on electronic commerce, which seeks to strike a balance between the different interests at stake, does not preclude a court of a Member State from ordering a host provider:**

- to remove information which it stores, the **content** of which is **identical** to the content of information which was previously declared to be unlawful, or to block access to that information, irrespective of who requested the storage of that information;
- to remove information which it stores, the **content** of which is **equivalent** to the content of information which was previously declared to be unlawful, or to block access to that information, **provided that** the monitoring of and search for the information concerned by such an injunction are limited to information conveying a message the content of which remains

<sup>1</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).



essentially unchanged compared with the content which gave rise to the finding of illegality and containing the elements specified in the injunction, and provided that the differences in the wording of that equivalent content, compared with the wording characterising the information which was previously declared to be illegal, are not such as to require the host provider to carry out an independent assessment of that content (thus, the host provider may have recourse to automated search tools and technologies);

- to remove information covered by the injunction or to block access to that information **worldwide** within the framework of the relevant international law, and it is up to Member States to take that law into account.

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of EU law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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**Tianrui Group Company Ltd. v. International Trade Commission**

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661 F.3d 1322 (Fed. Cir. 2011)

BRYSON, Circuit Judge: This appeal arises from a determination by the International Trade Commission that the importation of certain cast steel railway wheels violated section 337 of the Tariff Act of 1930, 19 USC 1337. The Commission found that the wheels were manufactured using a process that was developed in the United States, protected under domestic trade secret law, and misappropriated abroad. We are asked to decide whether the Commission's statutory authority over "[u]nfair methods of competition and unfair acts in the importation of articles . . . into the United States," as provided by section 337(a)(1)(A), allows the Commission to look to conduct occurring in China in the course of a trade secret misappropriation investigation. We conclude that the Commission has authority to investigate and grant relief based in part on extraterritorial conduct insofar as it is necessary to protect domestic industries from injuries arising out of unfair competition in the domestic marketplace.

We are also asked to decide whether the Commission erred by finding that the imported wheels would injure a domestic industry when no domestic manufacturer is currently practicing the protected process. In light of the evidence before the Commission regarding the marketplace for cast steel railway wheels, we affirm the Commission's determination that the wheel imports threaten to destroy or substantially injure an industry in the United States, in violation of section 337.

I

A

Amsted Industries Inc. is a domestic manufacturer of cast steel railway wheels. It owns two secret processes for manufacturing such wheels, the "ABC process" and the "Griffin process." Amsted previously practiced the ABC process at its foundry in Calera, Alabama, but it no longer uses that process in the United States. Instead, Amsted uses the Griffin process at three of its domestic foundries. Amsted has licensed the ABC process to several firms with foundries in China.

TianRui Group Company Limited and TianRui Group Foundry Company Limited (collectively, "TianRui") manufacture cast steel railway wheels in China. In 2005, TianRui sought to license Amsted's wheel manufacturing technology, but the parties could not agree on the terms of a license. After the failed negotiations, TianRui hired nine employees away from one of Amsted's Chinese licensees, Datong ABC Castings Company Limited. Some of those employees had been trained in the ABC process at the Calera plant in Alabama, and others had received training in that process at the Datong foundry in China.

Datong had previously notified those employees through a written employee code of conduct that information pertaining to the ABC process was proprietary and confidential. Each employee had been advised that he had a duty not to disclose confidential information. Eight of the nine employees had also signed confidentiality agreements before leaving Datong to begin working for TianRui. In the proceedings brought by Amsted before the International Trade Commission, Amsted alleged that the former Datong employees disclosed information and documents to TianRui that revealed the details of the ABC process and thereby misappropriated Amsted's trade secrets.

TianRui partnered with Standard Car Truck Company, Inc., (“SCT”) to form the joint venture Barber TianRui Railway Supply, LLC. SCT and Barber have marketed TianRui wheels to United States customers and have imported TianRui wheels into the United States. Other than Amsted, SCT and Barber are the only companies selling or attempting to sell cast steel railway wheels in the United States.

B

Amsted filed a complaint with the Commission alleging a violation of section 337 based on TianRui’s misappropriation of trade secrets. Section 337(a)(1)(A) prohibits “[u]nfair methods of competition and unfair acts in the importation of articles . . . into the United States, . . . the threat or effect of which is . . . to destroy or substantially injure an industry in the United States.”

TianRui moved to terminate the proceedings on the ground that the alleged misappropriation occurred in China and that Congress did not intend for section 337 to be applied extraterritorially. An administrative law judge at the Commission denied that motion based on his view that section 337 focuses not on where the misappropriation occurs but rather on the nexus between the imported articles and the unfair methods of competition. The administrative law judge also rejected TianRui’s argument that Chinese courts would provide a better forum for Amsted’s complaint.

At the merits stage, the administrative law judge analyzed the alleged misappropriation under Illinois trade secret law. \*\*\* He applied Illinois law because Amsted, SCT, and Barber all have their principal place of business in Illinois. He noted, however, that “the Illinois law relating to trade secrets does not differ substantially from the law applied in previous Commission trade secret investigations,” and he then applied general principles of trade secret law, including the six factors defining a trade secret set forth in the comments to section 757 of the Restatement (First) of Torts.

Following a 10-day evidentiary hearing, the administrative law judge found that TianRui had misappropriated 128 trade secrets relating to the ABC process from Datong. That conclusion was based on evidence that included an admission by TianRui’s expert that TianRui’s foundry used the asserted trade secrets; his only contention was that the trade secrets were not actually secret. In addition, the administrative law judge compared TianRui’s manufacturing specifications with secret Datong documents outlining the ABC process and found them essentially identical. In fact, some of the TianRui specifications contained the same typographical errors that were found in the Datong documents. The administrative law judge also relied on similarities in foundry layout between the Datong and TianRui plants. The administrative law judge summarized the evidence as to the appropriation of the trade secrets by saying that “there is overwhelming direct and circumstantial evidence that TianRui obtained its manufacturing process for cast steel railway wheel[s] through the misappropriation of [Amsted’s] ABC Trade Secrets.”

Besides contesting the Commission’s authority to apply section 337 extraterritorially, TianRui contended that Amsted did not satisfy the domestic industry requirement of section 337 based on the fact that Amsted no longer practiced the ABC process in the United States. Because none of Amsted’s domestic operations used the ABC process, TianRui argued that there was no “domestic industry” that could be injured by the misappropriation of trade secrets relating to that process.

The administrative law judge rejected that argument, holding that it was not essential that the domestic industry use the proprietary process, as long as the misappropriation of that process caused injury to the complainant's domestic industry. Applying that standard, the administrative law judge concluded that Amsted's domestic industry would be substantially injured by the importation of TianRui wheels.

The Commission decided not to review the administrative law judge's initial determination and issued a limited exclusion order. TianRui then appealed to this court.

## II

The main issue in this case is whether section 337 authorizes the Commission to apply domestic trade secret law to conduct that occurs in part in a foreign country. Section 337 authorizes the Commission to exclude articles from entry into the United States when it has found "[u]nfair methods of competition [or] unfair acts in the importation of [those] articles." 19 USC 1337(a)(1)(A). The Commission has long interpreted section 337 to apply to trade secret misappropriation. \*\*\* TianRui focuses on the fact that the disclosure of the trade secret information occurred in China. According to TianRui, section 337 cannot apply to extraterritorial conduct and therefore does not reach trade secret misappropriation that occurs outside the United States.

Amsted argues that the Commission did not apply section 337 extraterritorially, because trade secrets were misappropriated in the United States as a legal matter when railway wheels made by exploiting those trade secrets were imported into the United States and sold to customers or disclosed to the Association of American Railroads for certification purposes. \*\*\*

## A

At the outset, we reject Amsted's argument that Illinois trade secret law governs the section 337 inquiry in this case. The question of what law applies in a section 337 proceeding involving trade secrets is a matter of first impression for this court. We hold that a single federal standard, rather than the law of a particular state, should determine what constitutes a misappropriation of trade secrets sufficient to establish an "unfair method of competition" under section 337. \*\*\*

In any event, there is no dispute in this case pertaining to the substantive law of trade secrets. The administrative law judge's findings establish that TianRui obtained access to Amsted's confidential information through former Datong employees, who were subject to duties of confidentiality imposed by the Datong code of employee conduct, and that TianRui exploited that information in producing the subject goods. TianRui does not take issue with those findings, which are sufficient to establish the elements of trade secret misappropriation under either Illinois law or the generally understood law of trade secrets, as reflected in the Restatement, the Uniform Trade Secrets Act, and previous Commission decisions under section 337. Therefore, the choice of law issue, although it could be important in other cases, does not affect the outcome of this case.

In this case, TianRui argues that section 337 is inapplicable because Amsted's confidential information was disclosed in China. The legal issue for us to decide is thus whether section 337 applies to imported goods produced through the exploitation of trade secrets in which the act of misappropriation occurs abroad. To answer that question, we must

review the principles that apply to federal statutes that create causes of action based in part on conduct that occurs overseas.

B

It is a “longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” [EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 \(1991\)](#) (“Aramco”). That presumption expresses a canon of construction that is rooted in the “commonsense notion that Congress generally legislates with domestic concerns in mind.” [Smith v. United States, 507 U.S. 197, 204 n.5 \(1993\)](#). \*\*\*

The presumption against extraterritoriality does not govern this case, for three reasons. First, section 337 is expressly directed at unfair methods of competition and unfair acts “in the importation of articles” into the United States. \*\*\* The focus of section 337 is on an inherently international transaction—importation. In that respect, section 337 is analogous to immigration statutes that bar the admission of an alien who has engaged in particular conduct or who makes false statements in connection with his entry into this country. See, e.g., 8 USC 1101(f)(6), 1182(a). In such cases, the focus is not on punishing the conduct or the false statements, but on preventing the admission of the alien, so it is reasonable to assume that Congress was aware, and intended, that the statute would apply to conduct (or statements) that may have occurred abroad.

Second, in this case the Commission has not applied section 337 to sanction purely extraterritorial conduct; the foreign “unfair” activity at issue in this case is relevant only to the extent that it results in the importation of goods into this country causing domestic injury. In light of the statute’s focus on the act of importation and the resulting domestic injury, the Commission’s order does not purport to regulate purely foreign conduct. Because foreign conduct is used only to establish an element of a claim alleging a domestic injury and seeking a wholly domestic remedy, the presumption against extraterritorial application does not apply.

The dissent disregards the domestic elements of the cause of action under section 337 and characterizes this case as involving “conduct which *entirely* occurs in a foreign country.” That characterization accurately describes most of the events constituting the misappropriation, but the determination of misappropriation was merely a predicate to the charge that TianRui committed unfair acts in importing its wheels into the United States. In other words, the Commission’s interpretation of section 337 does not, as the dissent contends, give it the authority to “police Chinese business practices.” It only sets the conditions under which products may be imported into the United States.

Under the dissent’s construction of section 337, the importation of goods produced as a result of trade secret misappropriation would be immune from scrutiny if the act of misappropriation occurred overseas. That is, as long as the misappropriating party was careful to ensure that the actual act of conveying the trade secret occurred outside the United States, the Commission would be powerless to provide a remedy even if the trade secret were used to produce products that were subsequently imported into the United States to the detriment of the trade secret owner. We think it highly unlikely that Congress, which clearly intended to create a remedy for the importation of goods resulting from unfair methods of competition, would have intended to create such a conspicuous loophole for misappropriators.

Third, the legislative history of section 337 supports the Commission's interpretation of the statute as permitting the Commission to consider conduct that occurs abroad. \*\*\*

C

TianRui argues that the Commission should not be allowed to apply domestic trade secret law to conduct occurring in China because doing so would cause improper interference with Chinese law. We disagree. In the first place, as we have noted, the Commission's exercise of authority is limited to goods imported into this country, and thus the Commission has no authority to regulate conduct that is purely extraterritorial. The Commission 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. The Commission's activities have not hindered TianRui's ability to sell its wheels in China or any other country.

Second, TianRui has failed to identify a conflict between the principles of misappropriation that the Commission applied and Chinese trade secret law. Indeed, in its *forum non conveniens* motion TianRui argued that Chinese trade secret law would provide a "more than adequate" remedy for any alleged misappropriation. In addition, China has acceded to the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C. We cannot discern any relevant difference between the misappropriation requirements of TRIPS article 39 and the principles of trade secret law applied by the administrative law judge in this case. We therefore detect no conflict between the Commission's actions and Chinese law that would counsel denying relief based on extraterritorial acts of trade secret misappropriation relating to the importation of goods affecting a domestic industry.

Finally, even apart from the acts of importation, the conduct at issue in this case is not the result of the imposition of legal duties created by American law on persons for whom there was no basis to impose such duties. The former Datong employees had a duty not to disclose Amsted's trade secrets arising from express provisions in the Datong employee code and, in the case of most of the employees, from confidentiality agreements that they signed during their employment with Datong.<sup>7</sup> Thus, the question in this case is whether the disclosure of protected information in breach of that duty is beyond the reach of section 337 simply because the breach itself took place outside the United States. To answer that question in the affirmative would invite evasion of section 337 and significantly undermine the effectiveness of the congressionally designed remedy.

D

Our conclusion that section 337 authorized the Commission's actions in this case is not inconsistent with court decisions that have accorded a narrow construction to the extraterritorial application of U.S. patent law \*\*\*. By contrast, as we have noted, the statutory prohibition on "unfair methods of competition and unfair acts in the importation of articles . . . into the United States" naturally contemplates that the unfair methods of competition and unfair acts leading to the prohibited importation will include conduct that takes

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<sup>7</sup> TianRui does not argue that those duties were unenforceable for public policy reasons in any jurisdiction, and we do not presently address whether policy choices in a foreign jurisdiction can nullify a contractually imposed duty for the purposes of section 337.

place abroad. Because the statute applies to goods that are presented for importation, it would be a strained reading of the statute to bar the Commission from considering acts of trade secret misappropriation that occur abroad. In cases in which misappropriated trade secrets are used in the manufacture of the imported goods, the misappropriation will frequently occur overseas, where the imported goods are made. To bar the Commission from considering such acts because they occur outside the United States would thus be inconsistent with the congressional purpose of protecting domestic commerce from unfair methods of competition in importation such as trade secret misappropriation.

### III

TianRui's second ground for appeal focuses on the requirement of section 337 that the acts of unfair competition threaten "to destroy or substantially injure an industry in the United States." 19 U.S.C. § 1337(a)(1)(A)(i). TianRui contends that in trade secret cases, the domestic industry must practice the misappropriated trade secret in order for the Commission to be authorized to grant relief. Because Amsted has no domestic operations practicing the misappropriated ABC process, TianRui argues that its imported wheels cannot be held to injure or threaten injury to any domestic industry within the meaning of section 337.

Section 337 contains different requirements for statutory intellectual property (such as patents, copyrights, and registered trademarks) than for other, nonstatutory unfair practices in importation (such as trade secret misappropriation). The provisions that apply to statutory intellectual property require that an industry relating to the protected articles exists or is in the process of being established. 19 USC 1337(a)(2). Such an industry will be deemed to exist if there is significant domestic investment or employment relating to the protected articles. *Id.* § 1337(a)(3). In contrast, the general provision relating to unfair practices is not satisfied by evidence showing only that a domestic industry exists; it requires that the unfair practices threaten to "destroy or substantially injure" a domestic industry. *Id.* § 1337(a)(1)(A). On the other hand, there is no express requirement in the general provision that the domestic industry relate to the intellectual property involved in the investigation. Notwithstanding that textual distinction, TianRui contends that investigations involving intellectual property under the unfair practices provision require the existence of a domestic industry that relates to the asserted intellectual property in the same manner that is required for statutory intellectual property. \*\*\*

In sum, we conclude that the Commission did not err in defining the domestic industry in this case. The parties submitted evidence indicating that the imported TianRui wheels could directly compete with wheels domestically produced by the trade secret owner. That type of competition, the Commission concluded, is sufficiently related to the investigation to constitute an injury to an "industry" within the meaning of section 337(a)(1)(A). We hold that the Commission's conclusion in that regard is based on a proper construction of the statute and that its factual analysis of the effect of TianRui's imports on the domestic industry is supported by substantial evidence.

AFFIRMED.

MOORE, Circuit Judge, dissenting: The majority in this case expands the reach of both 19 USC 1337 (§ 337) and trade secret law to punish TianRui Group Company Limited (TianRui) for its completely extraterritorial activities. As a court, however, we must act



within the confines set out by the text of the law. Here, there is no basis for the extraterritorial application of our laws to punish TianRui's bad acts in China. As a result, I respectfully dissent.

The majority in this case holds that 19 USC 1337(a)(1)(A), which applies to “unfair acts in the importation of articles . . . into the United States,” allows the International Trade Commission (Commission) to bar imports because of acts of unfair competition occurring entirely *in China*. The majority states the issue: “The main issue in this case is whether § 337 authorizes the Commission to apply domestic trade secret law to conduct that occurs in part in a foreign country.” With all due respect, that is not the issue. The issue is whether § 337 authorizes the Commission to apply domestic trade secret laws to conduct which *entirely* occurs in a foreign country.

The facts of this case are not disputed. A Chinese company, Datong, had a license from a United States company, Amsted, to use in China a process which Amsted kept secret. TianRui, the Chinese company accused of violating § 337 in this case, hired several employees from its Chinese competitor, Datong. These employees disclosed the trade secrets to TianRui *in China* who used them *in China* to make railway wheels *in China*. The acts which arguably constitute misappropriation (theft of a trade secret) all occurred in China.

To be clear, I agree that trade secret misappropriation falls squarely within the terms of § 337: if TianRui carried out its acts of misappropriation in the United States—namely if TianRui came to the United States and stole Amsted's trade secrets here—then § 337 could be used to bar import of any goods made with the stolen technology. But, as the majority concedes, these are not the facts of this case, and to the extent there was a misappropriation of any Amsted trade secret that misappropriation occurred abroad. In this case, *none* of the acts which constitute misappropriation occurred in the United States. While TianRui is certainly not a sympathetic litigant—it poached employees to obtain confidential information—none of the unfair acts occurred in the United States and, as such, there is no violation of United States law which amounts to an unfair trade practice under the statute.

United States trade secret law simply does not extend to acts occurring entirely in China. We have no right to police Chinese business practices. Under the majority's rule today, if the United States government should decide that goods were being produced in a foreign country using what we consider to be unfair business practices, § 337 allows for their exclusion from the United States. The potential breadth of this holding is staggering. Suppose that goods were produced by workers who operate under conditions which would not meet with United States labor laws or workers who were not paid minimum wage or not paid at all—certainly United States industry would be hurt by the importation of goods which can be manufactured at a fraction of the cost abroad because of cheaper or forced labor. Would we consider these business practices unfair? Absent clear intent by Congress to apply the law in an extraterritorial manner, I simply do not believe that we have the right to determine what business practices, conducted entirely abroad, are unfair. According to the majority, its interpretation of § 337 does not give the Commission “the authority ‘to police Chinese business practices’”, “[i]t only sets the conditions under which products may be imported into the United States.” This holding could not be clearer—the Commission cannot police Chinese business practice *unless* the Chinese wish to import the goods into the United States. The act of importation opens the door to scrutiny of all business practices of the importer associated with the goods including those conducted

entirely within China. Section 337 simply does not authorize this level of scrutiny of entirely foreign acts.

I.

Section 337 provides that “[u]nfair methods of competition and unfair acts in the importation of articles . . . into the United States” which substantially injure a domestic industry are unlawful. 19 U.S.C. § 1337(a)(1)(A). The unfair act alleged to violate the statute is not the importation of the wheels into the United States. There is nothing inherently unfair about the wheels or the process by which they are imported in this case. Nor is the presence of the wheels in the United States somehow itself an unlawful act—a stark contrast to the illegal immigration cases relied on by the majority where the mere presence of the person in the United States *is* the unlawful act. The unfair act in this case is the alleged trade secret misappropriation. And both the majority and dissent agree that the conduct related to the misappropriation occurred entirely in China. Any “unfair act” in this case is wholly extraterritorial.

The question is thus whether § 337 contains a clear indication of congressional intent to extend its reach to wholly extraterritorial unfair acts. Analysis of § 337 must be carried out in view of the “longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” [EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 \(1991\)](#) (*Aramco*) (quoting [Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 \(1949\)](#)). “Unless there is the affirmative intention of Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions.” [Morrison v. Nat’l Austl. Bank Ltd., 130 S.Ct. 2869, 2877 \(2010\)](#) (internal quotations omitted). When applying this principle, “we 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.’” *Id.* (alteration in original) (quoting [Foley Bros., 336 U.S. at 285](#)).

I see nothing in the plain language of the statute that indicates that Congress intended it to apply to unfair acts performed entirely abroad. The majority points to no statutory language that expresses the *clear* intent for it to apply to extraterritorial unfair acts. As a result, this is a simple case: without any indication of a congressional intent to extend § 337’s coverage beyond places over which the United States has sovereignty or has some measure of legislative control, we must limit the reach of the statute to unfair acts in the United States. When the statute is silent as to extraterritorial application, the law is clear: “it has none.” Indeed, based on this presumption the Supreme Court has rejected extraterritorial scope for a number of statutes with much stronger textual support than § 337.

The majority claims that importation “is an inherently international transaction,” and analogizes imports to illegal immigrants, false statements during entry into the United States, the failure to pay an excise tax, and the Economic Espionage Act. In each of those circumstances, however, the courts were confronted either with express statutory language indicating their extraterritorial application or the Court held their was no extraterritorial application of the statute at issue.

The proper focus to determine whether there is “an affirmative intention of Congress clearly expressed” is the language of the statute. Section 337 limits the unfair acts to “unfair acts *in* the importation of articles” into the United States. The majority reads this limitation

out of the statute, and claims that Congress “clearly intended to create a remedy for the importation of goods *resulting from* unfair methods of competition.” Our predecessor court rejected essentially the same argument nearly eighty years ago, and held that § 337 could not be used to exclude from importation goods produced by a process patented in the United States but carried out abroad. [In re Amtorg Trading Corp., 75 F.2d 826, 834 \(CCPA 1935\)](#). \*\*\* Section 337 was enacted to solve the problem faced by domestic industry when individuals outside the United States imported products which, upon release into the domestic stream of commerce, gave rise to a domestic cause of action. Section 337 provided a means to prevent the unfair act at its source, during the act of importation, thereby avoiding an impossible multiplicity of suits. \*\*\*

In sum, there is no indication in § 337 that Congress intended it to apply to wholly extraterritorial unfair acts. In light of the plain language of the statute, the legislative history, the selective Congressional action to grant extraterritorial effect to process patents, and the contrast to other extraterritorial statutes, 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.

## II.

The problem underlying the majority’s analysis is that “[f]oreign conduct is generally the domain of foreign law.” [Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 455 \(2007\)](#) (internal quotations omitted). I sympathize with Amsted and, if the bad acts were carried out in the United States, would not hesitate to find for Amsted. My sympathy, however, is somewhat muted since Amsted had a readymade solution to its problem: obtain a process patent. The statute is clear that the extraterritorial acts in this case are subject to § 337 if the process is protected by a patent. In the alternative, Amsted could have also protected its intellectual property by keeping the various processes completely secret. Instead, Amsted chose to deny the public full knowledge of its innovation while simultaneously exploiting the trade secret by licensing it to a Chinese corporation for use in China.

By broadening the scope of trade secret misappropriation to the extraterritorial actions in this case, the majority gives additional incentive to inventors to keep their innovation secret. Of course, this also denies society the benefits of disclosure stemming from the patent system, which are anathema to trade secrets. Moreover, while Amsted (or more likely its Chinese licensee) will benefit from this decision, the burden of preserving Amsted’s trade secret now falls squarely on the American consumer who misses out on the opportunity for increased competition and concomitant lower prices offered by TianRui’s products.

I understand a restrictive approach to extraterritoriality is not immediately popular in this case. We must, however, work within the confines of the statute and the clear presumption against extraterritoriality. It is not our role to decide what the law should be but to apply it as we find it.

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## Session 9: Understanding Government Power

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In this session, we will look at the power of the government. One way that the government operates in a strong way is through criminal prosecutions. The first set of materials focuses on the Enron case and the ultimate destruction of Arthur Andersen, while the second set of materials looks at the issues that arose in connection with the sale of certain tax shelters by KPMG. The next reading is a speech by Deputy Attorney General Lisa O. Monaco on corporate criminal enforcement. We will then switch to the government as market participant taking a look at Operation Warp Speed.

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### § 1512. Tampering with a witness, victim, or an informant

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\*\*\* (b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

- (1) influence, delay, or prevent the testimony of any person in an official proceeding;
- (2) cause or induce any person to—
  - (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
  - (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
  - (C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
  - (D) be absent from an official proceeding to which such person has been summoned by legal process; or
- (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both.

\*\*\* (d) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(e) For the purposes of this section—

- (1) an official proceeding need not be pending or about to be instituted at the time of the offense; and
- (2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

