TRADE SECRET ENFORCEMENT AFTER *TIANRUI*: FIGHTING MISAPPROPRIATION THROUGH THE ITC

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I. INTRODUCTION

Trade secrets have historically been difficult to enforce, and enforcement is even more difficult for U.S. companies when the violations occur in foreign countries over which the United States may not have jurisdiction. China, for example, has rates of intellectual property ("IP") infringement that are "among the highest in the world," yet provides little recourse for foreign IP owners.[1] Ineffective criminal regulations for IP infringement, as well as a lack of necessary judicial training and a tendency to award insufficient damages, make China a difficult forum in which to litigate.[2] Even when a U.S. court enters a judgment against a Chinese company that misappropriated or infringed a U.S. company's IP, "[t]he prospects are not promising for having a judgment entered by a U.S. court enforced by a court in China."[3]

In a recent significant case, the Court of Appeals for the Federal Circuit upheld the U.S. International Trade Commission's ("ITC") determination that the United States can block goods originating from a respondent that misappropriated trade secrets to make the items, even if the acts of misappropriation occurred entirely abroad and the misappropriated trade secrets are not being practiced by any U.S. entity.[4] This avenue for blocking infringing products from entering the United States, based on the newly announced qualifications for a § 337[5] complaint, has increased the chances

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1. CONGRESSIONAL-EXEC. COMM'N ON CHINA, 109TH CONG., ANNUAL REPORT, at 16 (2006), http://www.cecc.gov/pages/annualRpt/annualRpt06/CECCannRpt2006.pdf.

2. *Id.*

3. Thomas L. Duston, Domestic Trade Secret Enforcement for Foreign Misappropriation, Intellectual Property Owners' Annual Meeting: Trade Secrets and Asian Practice Committees (Sept. 10–12, 2006) (on file with Marshall, Gerstein & Borun LLP).

4. *See* TianRui Group Co. Ltd. v. Int'l Trade Comm'n, 661 F.3d 1322, 1325 (Fed. Cir. 2011).

5. Tariff Act of 1930 § 337, 19 U.S.C. § 1337 (2006).

for domestic trade secret owners to meet the ITC's jurisdictional requirements and prevail in an unfair competition investigation.[6]

Part II of this Note assesses the historical and modern landscape of trade secret enforcement. Section II.A lays out the unique traits of trade secrets that make them difficult to enforce, and Section II.B describes the functions and authority of the ITC that may make it a more viable forum than district courts for enforcing trade secret owners' rights. Part III discusses the facts and significance of the Federal Circuit's decision in *TianRui Group Co. Ltd. v. International Trade Commission*, in which the ITC and, subsequently, the Federal Circuit addressed two important questions of first impression—whether the ITC has authority over the unfair methods of competition caused by the alleged trade secret misappropriation occurring entirely abroad, and whether the importation of infringing goods would injure a domestic industry when the complainant was not using the trade secret domestically.[7] Part IV analyzes the legal environment for trade secret enforcement after *TianRui*. Section IV.A provides a comparison of jurisdictional requirements for district courts versus the ITC, and Section IV.B compares the features and availability of remedies in these two different forums. Part V predicts that trade secret filings before the ITC will increase after *TianRui* due to the ITC's liberal interpretation of the domestic industry requirement.

II. BACKGROUND

A. DIFFICULTIES WITH PROTECTING TRADE SECRETS AND REMEDYING MISAPPROPRIATION

Comment (b) to § 757 of the *First Restatement of Torts* defines a trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."[8] Whereas the U.S. Patent and Trademark Office ("USPTO") will grant a patent only if the application describes a new, useful, and novel invention,[9] trade secret protection may extend to information that would not qualify for a patent.[10] For example, negative know-how—that is, what does *not* work—may be protectable as a trade secret, though such information would generally not be

6. TianRui Group Co. Ltd. v. Int'l Trade Comm'n, 661 F.3d at 1325.
7. *Id.* at 1324.
8. RESTATEMENT (FIRST) OF TORTS § 757 (1939).
9. *See* 35 U.S.C. §§ 101–103 (2006).
10. Michael Risch, *Why Do We Have Trade Secrets?*, 11 MARQ. INTELL. PROP. L. REV. 1, 11 (2007).

patentable. Therefore, in some respects, a trade secret may be more desirable than a patent because a trade secret may cover a broad subject matter. Furthermore, there is no formal requirement for obtaining and maintaining a trade secret. Melvin F. Jager explains:

> There are no bureaucratic delays and no multiyear waits for government grants, such as those for patents. Trade secret rights . . . can be established by the explicit conduct or agreement of the interested parties. A trade secret right starts upon the creation of the idea in some concrete form, and continues as long as secrecy is maintained. Trade secret rights thus have immediacy and controllability. They also have the advantage of being perpetual, again, as long as secrecy is maintained.[11]

The caveat to these benefits, however, is the volatility of trade secrets—the requirement that secrecy be maintained means that once a secret gets out, its secrecy status can never be reclaimed and thus the owner loses recourse for the information's use. The danger of losing the secrecy status of a trade secret has increased with the advent of the Internet and a global workforce that has become highly mobile due to the increased collaboration between U.S. and foreign companies:

> A more mobile workforce, increased use of contractors and consultants, and increased outsourcing of infrastructure all provide opportunities for trade secret information to leave the company's control. Information technology itself contributes to the mobility of information. Increasingly, information is stored in easily copied computer files, and Internet connectivity and high-density media such as CD-ROMs make these files easy to transport. A disgruntled employee can literally walk out the door with the company in his pocket.[12]

In the case of a former employee improperly taking trade secrets from the old company to a new one, a trade secret owner may be able to enjoin the new company from using such information, but third parties not in privity with the plaintiff may only be held liable for misappropriation if they "knew or had reason to know" that the trade secret they disclosed or used was acquired by improper means.[13] Innocent users of a misappropriated trade

11. MELVIN F. JAGER, 1 TRADE SECRETS LAW § 1:1 (2012).

12. R. Mark Halligan & Richard F. Weyand, *The Sorry State of Trade Secret Protection*, THE TRADE SECRET OFFICE (Jan. 24, 2013, 11:34 PM), http://www.thetso.com/Info/sorry.html.

13. Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CALIF. L. REV. 241, 250–51 (1998).

secret can only be enjoined from or punished for using a trade secret improperly disclosed to it once such party has been notified of the wrong.[14]

B. OVERSEAS MISAPPROPRIATION PRESENTS ADDITIONAL JURISDICTIONAL HURDLES

Generally, trade secrets are not protected by any federal statutory scheme but are rather a matter of state law. Most states, for example, have codified the Uniform Trade Secrets Act ("UTSA").[15] Depending on the circumstances surrounding misappropriation, a trade secret owner might in addition have standing to make claims under the Computer Fraud and Abuse Act[16] or the Economic Espionage Act.[17] The Computer Fraud and Abuse Act may confer liability if a misappropriator causes damage to a computer involved in interstate commerce,[18] while the Economic Espionage Act explicitly outlaws trade secret misappropriation.[19]

Trade secret misappropriation occurring abroad is more difficult to regulate than cases occurring on U.S. soil. Cases implicating foreign misappropriation usually involve foreign defendants and are generally brought in U.S. district courts based on diversity of citizenship.[20] However, the issue of U.S. jurisdiction over purely foreign acts and entities presents unique challenges to U.S. trade secret owners, who historically have been hard-pressed to find an effective way to prevent the misappropriator from gaining an unfair advantage when a lack of complete diversity precludes a finding of proper subject matter jurisdiction.

Richtek Technology Corp. v. UPI Semiconductor Corp. elucidates the jurisdictional hurdles facing domestic victims of foreign trade secret misappropriation.[21] The Taiwanese company Richtek (and its wholly-owned U.S. subsidiary) alleged that uPI, another Taiwanese company, had hired

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14. *Id.* at 251.

15. Uniform Law Commission, *Acts: Trade Secrets Act*, available at http://www.uniformlaws.org/Act.aspx?title=Trade%20Secrets%20Act.

16. 18 U.S.C. § 1030 (2008); *see* CHARLES DOYLE, CONG. RESEARCH SERV., R42681, STEALING TRADE SECRETS AND ECONOMIC ESPIONAGE: AN OVERVIEW OF 18 U.S.C. 1831 AND 1832 1 (2013).

17. 18 U.S.C. § 1831, *et. seq.* (1996), as amended by PL 112-269, 126 Stat 2442 (2013); *see* DOYLE, *supra* note 16, at 2.

18. *See, e.g.*, Therapeutic Research Faculty v. NBTY, 488 F. Supp. 2d 991, 997 (E.D. Cal. Jan. 25, 2007) (quoting Charles Schwab & Co. v. Carter, 2005 WL 351929, at *3 (N.D. Ill. Feb. 11, 2005)).

19. 18 U.S.C. §§ 1831(a), 1832.

20. *See* 28 U.S.C. § 1332 (2012).

21. Richtek Tech. Corp. v. UPI Semiconductor Corp., No. C 09-05659 WHA, 2011 WL 445509 (N.D. Cal. Feb. 3, 2011).

Richtek's employees, who took with them documents and information containing proprietary trade secrets, and that uPI subsequently imported products incorporating these secrets into the United States.[22]

The district court dismissed all of Richtek's claims for trade secret misappropriation due to a lack of subject matter jurisdiction, in part because the misappropriation did not occur domestically.[23] Had there been complete diversity of citizenship, Richtek could have filed its district court complaint based on 28 U.S.C. § 1332.[24] However, domestic trade secret owners are often precluded from this opportunity to file in district court because many foreign companies have U.S. subsidiaries, and § 1332 requires *complete* diversity of citizenship, such that a U.S. company cannot name both a foreign company and its U.S.-based subsidiary.[25] Such was the problem in *Richtek*, where the Taiwanese plaintiff had a wholly owned U.S. subsidiary in California, and the accused infringers had offices in both foreign countries and California.[26] Fortunately, the ITC does not require complete diversity between the complainant and the respondent because it has *in rem* jurisdiction over goods physically present in the United States.[27] And *TianRui* further confirms the ITC's broad jurisdiction in adjudicating trade secret misappropriation cases against foreign defendants, making it an attractive alternative forum for U.S. trade secret owners.

C. THE ITC AS AN AVENUE FOR ENFORCEMENT OF IP RIGHTS AGAINST FOREIGN INFRINGERS

The Tariff Act of 1930 § 337 (19 U.S.C. § 1337) gave the ITC the authority to investigate alleged acts of unfair competition by entities importing goods into the United States.[28] The ITC is an administrative agency consisting of six administrative law judges ("ALJ") who administer § 337's provisions and work in concert with Customs and Border Protection ("CBP"), the Federal Trade Commission ("FTC"), the Department of Justice

22. *Id.* at *3.

23. Certain DC-DC Controllers and Products Containing the Same, USITC Inv. No. 337-TA-698 (July 13, 2010) (Order No. 39).

24. 28 U.S.C. § 1332 (2006).

25. *See id.*

26. Certain DC-DC Controllers and Products Containing the Same, Inv. No. 337-TA-698 (July 13, 2010).

27. *See, e.g.*, Neil Edward L. Santos, III, Dennis S. Fernandez, & Nilesh D. Patel, *What IP Holders Ought to Know about the ITC and the District Courts*, 7 J. HIGH TECH. L. 173, 174 (2007).

28. 19 U.S.C. § 1337 (2006).

("DOJ"), and the Patent and Trademark Office ("USPTO").[29] After a complaint is filed, the Chief Administrative Law Judge chooses an administrative law judge to hear evidence and issue an initial determination recommending action.[30] A § 337 investigation also entails the involvement of an ITC investigative attorney from the Office of Unfair Import Investigations ("OUII"), who investigates on behalf of the Commission and represents the public interest.[31] Upon issuance of an initial determination by the ALJ, the parties may petition for Commission review of the determination, and then the Commission will have sixty days to decide whether to review and adopt, modify, reverse, or choose not to review the decision.[32] During the course of a § 337 investigation, the respondent has the right to request a stay of parallel litigation in a district court.[33]

Section 337 enumerates illegal practices with regard to infringing a U.S. patent, copyright, trademark, mask word, or boat hull design. For these types of statutorily protected IP, a complainant does not have to prove injury to its industry but must show, pursuant to §§ (2) and (3),that the asserted IP relates to an industry in the United States (the technical prong) and that it has invested significant resources in the exploitation of its IP (the economic prong).[34] Trade secrets, on the other hand, are subject to the provisions of § 1337(a)(1)(A), which defines illegal actions amounting to unfair competition.[35] This section prohibits "[u]nfair methods of competition and unfair acts in the importation of articles" into the United States, or the sale of such articles by the owner, importer, or consignee, the threat or effect of which is (1) to destroy or substantially injure an industry in the United States, (2) to prevent the establishment of such an industry, or (3) to restrain or monopolize trade and commerce in the United States.[36] A complainant bringing this type of claim thus must show that it has a domestic industry which is subject to injury by an infringer's actual or threatened importation of infringing goods.[37]

29. Michael Bednarek, *IP: A prescription for success in ITC Section 337 proceedings*, INSIDE COUNSEL (Sept. 4, 2012), http://www.insidecounsel.com/2012/09/04/ip-a-prescription-for-success-in-itc-section-337-p.

30. *Section 337 Investigations: Answers to Frequently Asked Questions*, U.S. INT'L TRADE COMM'N, 24 (Mar. 2009), http://www.usitc.gov/intellectual_property/documents/337_faqs.pdf (last visited Nov. 17, 2012).

31. *Id.*

32. *Id.*

33. 28 U.S.C. § 1659(a) (2006).

34. 19 U.S.C. § 1337(a)(1)(B)–(E) (2006).

35. 19 U.S.C. § 1337(a)(1)(A).

36. *Id.*

37. *Id.*

The Commission discussed the meaning of a "domestic industry" for trade secrets in *Certain Floppy Disk Drives and Components Thereof*.[38] The complainant in *Floppy Disk Drives* did not practice its asserted trade secrets in the United States but sought to exclude the respondent's products that used the allegedly misappropriated trade secret.[39] Although the respondent argued that the complainant could not show the existence of a domestic industry without proving that it domestically exploited the trade secrets at issue, the Commission disagreed. In reaching its conclusion, the Commission gave weight to the complainant's assertion that it would have exploited said trade secrets had the respondent not physically misappropriated the documents containing them.[40]

1. Historical Enforcement of Trade Secrets in the ITC

The ITC requires a showing of four elements to prove trade secret misappropriation: (1) existence of a trade secret, (2) ownership of the trade secret or a proprietary interest, (3) disclosure of the trade secret in confidence or acquisition of the trade secret by unfair means, and (4) use or disclosure of the trade secret causing injury to complainant.[41] To establish the first element, the ITC looks to the six factors from comment (b) of § 757 of the *First Restatement of Torts*: (1) extent to which the information is known outside the business, (2) extent to which the information is known inside the business, (3) extent of measures taken to protect the secrecy of the information, (4) value of the information to competitors, (5) amount of time and effort or money expended, and (6) ease or difficulty in proper acquisition or duplication.[42]

The majority of § 337 complaints allege unfair acts of competition relating to patent and trademark infringement—more than ninety percent of § 337 complaints are based upon patents alone.[43] Still, the ITC had been used sparingly to enforce trade secret rights, which led to a limited body of ITC precedent. The Commission's *Sausage Casings* decision in 1984 announced that misappropriation of trade secrets is an act of unfair competition that § 337 is intended to regulate: "There is no question that misappropriation of

38. Certain Floppy Disk Drives and Components Thereof (*Floppy Disk Drives*), USITC Inv. No. 337-TA-203 (Aug. 29, 1985) (commission opinion).

39. *Id.* at 4.

40. *Id.*

41. Certain processes for the Manufacture of Skinless Sausage Casings and Resulting Products, Inv. Nos. 337-TA-85, 1984 ITC LEXIS 137, at *50–51 (Dec. 1984).

42. RESTATEMENT (FIRST) OF TORTS § 757 (1939).

43. *See Section 337 Investigations*, *supra* note 30.

trade secrets, if established, is an unfair competition or unfair act which falls within the purview of § 337."[44]

However, a successful § 337 complaint requires more than just a showing of trade secret misappropriation; a complainant must also prove that it has a domestic industry subject to injury by the importation of infringing articles.[45] In 1989, the Commission in *Certain Grain Oriented Silicon Steel* refused to institute an investigation because the complainant alleged infringement of a process patent, the use of which it had discontinued long before filing the complaint.[46] The facts thus failed to establish a domestic industry based on a lack of domestic exploitation of the IP at issue.[47] Meanwhile, the Commission has defined a trade secret owner's domestic industry as "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."[48] However, it was unclear whether a similar result to *Certain Grain Oriented Silicon Steel* would be reached in a trade secret case when the complainant does not exploit the trade secret in the United States.[49] The Commission's *TianRui* decision is thus very important in this regard because it interprets the domestic industry requirement for trade secret owners more expansively than that for patent owners.

III. THE FEDERAL CIRCUIT'S *TIANRUI* DECISION

Trade secrets are protected by state law, as there is no federal protection scheme.[50] Thus, plaintiffs without completely diverse citizenship must allege a federal question in order to be heard in federal court.[51] A trade secret owner who can neither show complete diversity with a misappropriator nor allege a federal question may turn to the ITC to exercise its statutory right under § 337 against an act of unfair competition.[52] *TianRui* provides both the background and the newest holdings of ITC jurisdiction over unfair

44. Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product (*Sausage Casings*), Inv. No. 337-TA-148/169, 1984 ITC LEXIS 137, *165–66 (July 31, 1984).

45. *See* 19 U.S.C. § 1337(a)(1)(A)(i) (2006).

46. Certain Grain Oriented Silicon Steel (*Silicon Steel*), Docket No. 1479.

47. *Id.*

48. *Id.*

49. *See* Gary M. Hnath & James M. Gould, *Litigating Trade Secret Cases at the International Trade Commission*, 19 AIPLA Q. J. 87, 99 (1991).

50. *See* Uniform Law Commission, *Acts: Trade Secrets Act*, *available at* http://www.uniformlaws.org/Act.aspx?title=Trade%20Secrets%20Act.

51. *See, e.g.*, Richtek Tech. Corp. v. UPI Semiconductor Corp., No. C 09–05659 WHA, 2011 WL 445509, at *3 (N.D. Cal. Feb. 3., 2011).

52. *See* 19 U.S.C. § 1337 (2006).

competition. This Section navigates the Commission's Initial Determination and the subsequent Federal Circuit decision in *TianRui*, and highlights the Federal Circuit's holding on two unique questions.

Section 337(a)(1)(A) of the Tariff Act 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."[53] Pursuant to ITC procedures,[54] the ALJ issued an initial determination recommending action after the complainant Amsted Industries Inc. ("Amsted") filed a complaint alleging a § 337 violation by TianRui Group Co. Ltd. ("TianRui"). The complaint alleged that TianRui hired nine employees with knowledge of Amsted's confidential ABC process from Amsted's Chinese licensee, after failing to obtain a license for the process from Amsted.[55] The majority of the nine employees were bound by contractual agreements not to disclose the process. Amsted further alleged that TianRui then imported wheels incorporating the misappropriated process into the United States.[56]

Relying on the ITC's past use of tort or commercial law in investigating trade secret misappropriation, the ALJ in this case applied Illinois trade secret law to find a violation by TianRui.[57] TianRui's first defense was that Congress intended for § 337 to apply only domestically, and though TianRui admitted that it had used the trade secrets, the alleged misappropriation occurred in China. TianRui thus argued that the ITC had no jurisdiction over the matter.[58] The ALJ disagreed, holding that extraterritorial acts were relevant to the extent that they revealed a domestic injury with a domestic remedy.[59]

Secondly, TianRui argued that since Amsted had discontinued its use of the ABC process in the United States, there was no domestic industry to be injured and thus this § 337 requirement was not fulfilled.[60] The ALJ rejected this argument and ruled that the misappropriation need only cause injury to Amsted's domestic operations, whether or not Amsted actually *used* the

53. 19 U.S.C. § 1337(a)(1)(A)(i).

54. *Section 337 Investigations: Answers to Frequently Asked Questions*, U.S. INT'L TRADE COMM'N 24 (Mar. 2009), *available at* http://www.usitc.gov/intellectual_property/documents/337_faqs.pdf (last visited Nov. 17, 2012).

55. *See* TianRui Group Co. Ltd. v. Int'l Trade Comm'n, 661 F.3d 1322, 1324 (Fed. Cir. 2011).

56. *Id.* at 1325.

57. *Id.*

58. *Id.*

59. *See id.*

60. *Id.*

misappropriated process.[61] The initial determination thus explicitly rejected the "technical prong" requirement for § 337(a)(1)(A), showing the ALJ's willingness to find the existence of a domestic industry even when a domestic complainant is not practicing its asserted trade secrets in the United States.[62] The ALJ found complainant Amsted's U.S. manufacturing plants that used a different secret process (the "Griffin" process) to be a domestic industry (in the manufacture of cast steel railway wheels) subject to injury.[63]

The Commission declined to review the ALJ's finding that TianRui had violated § 337, adopting this part of the initial determination into the Commission's final opinion.[64] The Commission then decided that the appropriate remedy was a limited exclusion order "prohibiting the entry of unlicensed cast steel railway wheels or products containing same manufactured using the ABC Trade Secrets, by or on behalf of Respondents, or their affiliated companies, parents, subsidiaries, licensees, contractors, or other related business entities, or successors or assigns."[65] Respondent TianRui then appealed to the Federal Circuit, but to no avail.[66]

The ALJ's Initial Determination looked to statutory history to determine the requirements for showing a domestic industry subject to injury, and the Federal Circuit opinion echoes this analysis. The Initial Determination noted:

> The Commission has a long history that predates the *Sausage Casings* investigation, and which extends beyond it, of looking to "the realities of the marketplace," when determining the domestic industry in a trade secrets investigation or other investigation based on unfair acts other than traditional forms of intellectual property (such as patents).[67]

The opinion rehearses the 1988 statutory amendments to § 337 that came after *Sausage Casings*. These amendments created the "relation back" requirement of statutory IP to the domestic industry,[68] yet also created a

61. *Id.* at 1327.

62. Certain Cast Steel Railway Wheels, Certain Processes for Manufacturing or Relating to Same and Certain Products Containing Same, USITC Inv. No. 337-TA-655, at 79 (Nov. 20, 2001) (initial determination).

63. *Id.* at 80.

64. *Id.*

65. Certain Cast Steel Railway Wheels, Certain Processes for Manufacturing or Relating to Same and Certain Products Containing Same, USITC Inv. No. 337-TA-655, at 1 (Nov. 20, 2001) (exclusion order).

66. *See TianRui*, 661 F.3d at 1337.

67. Certain Cast Steel Railway Wheels, Certain Processes for Manufacturing or Relating to Same and Certain Products Containing Same, USITC Inv. No. 337-TA-655, Initial Determination at 77 (Nov. 20, 2001).

68. Tariff Act of 1930 § 337(a)(1)(A), 19 U.S.C. § 1337(a)(1)(B)–(E) (2006).

provision without this requirement for other acts of unfair competition.[69] The opinion thus explains:

> While injury need no longer be shown in an investigation based on [statutory IP], the complainant must prove a domestic industry related to the asserted intellectual property right. Such a specific domestic industry showing *need not be made in an investigation instituted under section (a)(1)(A)*, yet, the complainant must still prove that there is a domestic industry subject to injury.[70]

Thus in *TianRui*, the Federal Circuit found that Amsted had shown a domestic industry subject to injury despite the fact that it no longer used the misappropriated ABC process domestically because Amsted submitted evidence that TianRui's railway wheels could compete with Amsted's wheels in the United States.[71]

A. *TIANRUI* ON APPEAL IN THE FEDERAL CIRCUIT

Amsted is a U.S. company that manufactures steel railway wheels.[72] Although it owns two secret processes for making these wheels—the "ABC process" and the "Griffin process"—it no longer uses the ABC process in its domestic manufacturing.[73] TianRui manufactures steel railway wheels in China and sought but failed to obtain a license from Amsted to use the ABC process.[74] Subsequently, TianRui hired nine employees trained in the ABC process from Datong, one of Amsted's licensees in China.[75] Datong's employee code of conduct had advised all nine of these employees that the ABC process was proprietary and confidential information that they had a duty not to disclose, and all but one of these employees had signed confidentiality agreements with Datong.[76] TianRui then marketed and imported TianRui wheels made using the ABC process into the United States. Amsted filed a complaint before the ITC, alleging that the new TianRui employees misappropriated Amsted's trade secrets by disclosing to TianRui information and documents pertaining to the secret ABC process.[77]

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69. *Id.*

70. Certain Cast Steel Railway Wheels, Certain Processes for Manufacturing or Relating to Same and Certain Products Containing Same, USITC Inv. No. 337-TA-655, Initial Determination at 79 (emphasis added).

71. *TianRui*, 661 F.3d at 1324.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 1326.

On appeal, the Federal Circuit analyzed two issues—(1) whether the ITC has § 337 statutory authority over the unfair acts of competition caused by the alleged trade secret misappropriation that occurred in China; and (2) whether the importation by TianRui of wheels manufactured using the trade secrets would injure a domestic industry, even though Amsted discontinued the ABC manufacturing process in its United States operations.[78]

1. *Extraterritoriality Analysis*

Citing *EEOC v. Arabian Am. Oil Co.*,[79] the Federal Circuit acknowledged that there has traditionally been a presumption against extraterritorial application of U.S. laws, absent a contrary Congressional intent.[80] However, the court rejected TianRui's argument that the ITC may not apply § 337 extraterritorially for three reasons.[81] First, the court reasoned that importation, the activity being regulated in § 337, is "an inherently international transaction," since by definition it necessarily takes place between different countries.[82] Second, the court held that since the alleged activity that took place in China is only relevant to the extent that it caused injury to a domestic industry, the ITC did not apply § 337 to purely extraterritorial conduct but rather to conduct that affects a domestic industry and has a domestic remedy.[83] Finally, the court found that § 337's legislative history is consistent with the ITC's initial interpretation of the statute as allowing a consideration of foreign conduct.[84] Congress intended to honor the ITC's recommendation from a 1919 report and enacted § 337 to remedy the lack of enforcement authority or remedies for unfair competition through importation when such practices occur abroad.[85] Through this reasoning, the court legitimized the Commission's examination of the alleged acts occurring in China for purpose of finding a § 337 violation.[86]

2. *Domestic Industry Analysis*

The Federal Circuit held in *TianRui* that a plaintiff alleging injury of its domestic injury need not practice the misappropriated trade secret at issue.[87]

78. *Id.* at 1325.
79. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).
80. *TianRui*, 661 F.3d at 1328.
81. *Id.* at 1329.
82. *Id.*
83. *Id.*
84. *Id.* at 1330.
85. *Id.* at 1331.
86. *Id.* at 1332.
87. *See id.* at 1335.

Looking to the language of the § 337 provision itself, the court noted that "there is no express requirement in the general provision that the domestic industry relate to the intellectual property involved in the investigation."[88] Although TianRui emphasized the Senate's proposal to require trademarks and trade secrets to link the injured domestic industry to the protected intellectual property, the court found that this proposal was retracted and never became law, rendering this legislative intent argument ineffective.[89] Instead, the court decided that only "statutory intellectual property" (e.g., patents) had to be related to a domestic industry under a § 337 unfair competition claim, but that trade secret misappropriation claims could fulfill the injury requirement upon a showing that the misappropriation harmed a domestic industry, whether or not the plaintiff used such misappropriated trade secret domestically.[90]

3. Discussion

The *TianRui* decision was both the ITC's and the Federal Circuit's first ruling on whether a complainant must practice an asserted trade secret in the United States in order to establish the existence of a domestic industry, and whether the ITC has § 337 jurisdiction over a complaint alleging trade secret misappropriation that occurred entirely overseas.

An important difference between the facts of *TianRui* and the previous case of *Floppy Disk Drives* is that the complainant in *Floppy Disk Drives* alleged that it *would* have practiced its trade secrets domestically if not for respondent's alleged misappropriation of the actual documents containing them, whereas Amsted in the *TianRui* case had not manifested any current or future intention to practice its trade secrets domestically (although it had in the past).[91] Amsted had licensed out its ABC process trade secret to several Chinese firms.[92] Absent actual use of the asserted IP, significant licensing activities for statutory IP may establish the existence of a domestic industry[93] under § 337(a)(2), but the Federal Circuit in *TianRui* did not consider whether Amsted's trade secret licensing activities constituted exploitation of its ABC process for purpose of establishing domestic industry for non-statutory IP.

88. *Id.*
89. *Id.* at 1336.
90. *Floppy Disk Drives*, *supra* note 38.
91. *Id.*; *TianRui*, 661 F.3d at 1324.
92. *TianRui*, 661 F.3d at 1324.
93. 19 U.S.C. § 1337(a)(3)(C) (2006).

IV. LEGAL ENVIRONMENT FOR TRADE SECRET ENFORCEMENT AFTER *TIANRUI*

The *TianRui* decision signals the ITC's willingness to acknowledge the existence of a domestic industry, even in the absence of a domestic company practicing the asserted trade secrets, so long as the domestic industry is harmed by the use of that trade secret. Further, *TianRui* marks a favorable atmosphere for domestic plaintiffs who had previously been unable to establish jurisdiction over foreign misappropriators in state or district courts. In addition, the possibility of obtaining a general exclusion order at the ITC, which excludes accused products regardless of source, rather than only the products of the named respondents, may provide recourse for a trade secret owner whose information has become public and cannot be reclaimed as secret.[94] Although foreign misappropriators can argue forum non conveniens as a reason for the ITC to dismiss the case, the ITC still presents domestic complainants with a better chance of at least overcoming the jurisdictional hurdles, and the case will not be subject to transfer since the ITC is the sole agency with the authority to regulate imported products that infringe IP.[95] Respondents may have difficulties trying to prove that a foreign venue provides a better alternative forum, especially where the suggested foreign venue has insufficient expertise or willingness to punish trade secret violations, as in China. The following Sections illuminate jurisdictional hurdles present in any trade secret case involving a foreign defendant and then reassess these hurdles in light of *TianRui*.

A. JURISDICTION

The *TianRui* ruling was a novel declaration of the breadth of the ITC's power to look to acts of misappropriation occurring entirely abroad. In holding that the Commission has jurisdiction over a defendant who performed all the acts of misappropriation abroad—or, more precisely, over accused products imported into the United States made by such a defendant—the Federal Circuit created a favorable environment in the ITC for domestic trade secret holders seeking to establish both personal jurisdiction and subject matter jurisdiction over foreign defendants who typically argue that a U.S. court lacks one or both of these jurisdictional powers.

94. *See* 19. U.S.C. § 1337(d)(2)(A).

95. Dorothy R. Auth & R. Trevor Carter, *Selecting Forum and Venue for your Patent Litigation*, PATENT LAW CENTER (March 2011), *available at* http://patentlawcenter.pli.edu/wp-content/uploads/2011/03/SELECTING-FORUM-AND-VENUE-FOR-YOUR-PATENT-LITIGATION.pdf (last viewed Jan. 30, 2013).

1. *District Court Jurisdiction*

a) District Court Subject Matter Jurisdiction

In cases where a trade secret was misappropriated abroad, obtaining subject matter jurisdiction in a district court proves more onerous than showing subject matter jurisdiction in the ITC. Trade secret matters are most commonly heard in federal court when they are adjudicated simultaneously with a federal claim under the court's supplemental jurisdiction, such as in cases where the plaintiff alleges not just trade secret misappropriation but also patent or copyright infringement.[96] Since trade secrets are protected by state rather than federal law, plaintiffs without complete diversity of citizenship with defendants must allege a federal question in their complaint—such as patent infringement—and then convince the district court to exercise its supplemental jurisdiction over trade secret claims.[97] This discretional nature of supplemental jurisdiction creates uncertainty for plaintiffs in district court.

In *Richtek*, Richtek, a Taiwanese company, alleged facts similar to those alleged by TianRui.[98] Richtek alleged that its former employees had stolen Richtek's documents and information containing "invaluable trade secret and confidential information," which aided the Taiwanese defendant, uPI, in designing power-management products that directly competed with Richtek's products.[99] Richtek further alleged that uPI sold these products, based on Richtek's misappropriated trade secrets, to customers in the United States.[100] The defendants moved to dismiss based on the district court's lack of personal jurisdiction and subject matter jurisdiction.[101]

Although Richtek argued that the district court had federal question jurisdiction over its patent and copyright claims and supplemental jurisdiction over its trade secret claims, the district court dismissed Richtek's trade secret claims.[102] The court held that exercising jurisdiction over the trade secret claims would be improper since the "contract and trade secret claims predominate over the infringement claims in the pleadings," and this predominance would become "more overwhelming" by forcing the court to

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96. JAMES POOLEY, TRADE SECRETS, § 10.07(2) (1997).
97. *See, e.g.*, Richtek Tech. Corp. v. UPI Semiconductor Corp., No. C 09–05659 WHA, 2011 WL 445509, at *3 (N.D. Cal. Feb. 3, 2011).
98. *Id.* at *1.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*

undertake the "nightmarish task" of supervising foreign discovery over claims residing in the realm of state rather than federal law.[103]

The fact that the alleged misappropriators were Taiwanese and allegedly misappropriated the trade secrets while living in Taiwan weighed heavily in the court's decision to deny supplemental jurisdiction and suggested instead that the parties litigate in Taiwan.[104] However, the fact that the misappropriation happened overseas was not the sole reason for the court's conclusion that it lacked subject matter jurisdiction over the trade secret claims; rather, the court emphasized the fact that relevant evidence was written in Chinese and, as such, discovery would be "a time- and resource-intensive undertaking."[105] Since *Richtek* was decided before *TianRui*, the Federal Circuit's *TianRui* decision is that much more significant, since it chose not to dismiss a case with similar facts but rather to uphold the ITC's exercise of subject matter jurisdiction over TianRui[106] despite the potential discovery burden.

b) District Court Personal Jurisdiction

Richtek, discussed in Section II.B, *supra*, did not fare any better in its attempt to show personal jurisdiction over defendants. The district court stated that it lacked personal jurisdiction over fourteen Taiwanese citizens because Richtek had failed to establish specific jurisdiction based on the Ninth Circuit's three-prong test.[107] The three prongs include:

> (1) the non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the form, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice.[108]

A major advantage of filing a § 337 complaint in the ITC is that it need not employ such tests to ascertain personal jurisdiction over foreign importers or manufacturers of accused goods. The ITC's *in rem* jurisdiction over imported products is analogous to a district court's personal jurisdiction over a defendant, discussed in Section II.B, *infra*.

103. *Id.* at *4.
104. *Id.* at *4–5.
105. *Id.* at *4.
106. *TianRui*, 661 F.3d. at 1332.
107. *Richtek Tech. Corp.*, 2011 WL 445509, at *7.
108. Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir. 1987).

2. *ITC Jurisdiction*

a) ITC Subject Matter Jurisdiction

The ITC generally has jurisdiction over unfair trade practices in the course of importation into the United States.[109] However, the Commission has interpreted "importation" broadly, finding that the ITC has jurisdiction even in cases where the unfair acts did not directly occur in the course of importation, so long as a "nexus" exists between the alleged unfair practice and importation. In *Certain Welded Stainless Steel Pipe and Tube*,[110] eight domestic complainants alleged that eleven Japanese respondents were violating § 337 by selling imported welded steel pipe and tube at unreasonably low prices, with the intent to restrain or monopolize trade and commerce in the United States.[111] The foreign manufacturers argued that the Commission lacked jurisdiction over their activities.[112] In the respondents' view, they were not involved "in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either" since they sold the accused articles not directly to U.S. consumers but rather to foreign trading companies who then exported the products to the United States.[113] The Commission rejected this argument and instead found the requisite nexus between the unfair act and importation since the manufacturers *intended* for their accused products to enter and be sold in the United States.[114]

Conversely, Saxon and Newhouse note that "[a]n owner of property about to be imported into the United States can still 'turn the ship around' at the last minute and take his property home, or to anyplace else in the world."[115] Thus, Hnath and Gould posit that the Commission would have subject matter jurisdiction over a foreign company that both manufactures an accused product *and* sells that product to another foreign company while intending the product to enter and be sold in the United States.[116] If this interpretation is correct, then the Commission's subject matter jurisdiction could extend even to "innocent" importers that had no hand in or even

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109. *See* 19 U.S.C. § 1337 (2006).

110. Certain Welded Stainless Steel Pipe and Tube, USITC Inv. No. 337-TA-29 (Feb. 22, 1978).

111. *Id.* at 1.

112. *Id.* at 3.

113. *Id.*

114. *Id.* at 11–12.

115. Janet Saxon and Paul Newhouse, *Section 337 Jurisdiction and the Forgotten Remedy*, 9 CAMPBELL L. REV. 45, 50 (2012).

116. *See* Hnath & Gould, *supra* note 49, at 91.

knowledge of a seller's incorporation of misappropriated trade secrets into a product. The ITC's wide-ranging subject matter jurisdiction is particularly advantageous to domestic entities whose trade secrets were misappropriated entirely abroad and disclosed to other foreign entities.

TianRui clarified § 337's applicability to foreign acts of trade secret misappropriation. Both the complainant TianRui and dissenting Judge Kimberly Moore argued that the Commission had overstepped its subject matter jurisdiction by looking to acts of misappropriation occurring entirely in China; they alleged that § 337 was being incorrectly applied to purely extraterritorial conduct.[117] However, the Federal Circuit clarified that the ITC has power to examine and grant relief based on foreign conduct, to the extent it must do so to shield domestic industries from unfair competition.[118] The foreign conduct that took place in China is only relevant to the extent that it harmed a complainant's domestic industry, so the ITC would not apply § 337 to purely extraterritorial conduct but rather to domestically relevant factors.[119]

b) ITC "Personal" Jurisdiction

Whereas a trade secret plaintiff filing in a district court faces the possibility that the court will dismiss the case due to a lack of personal jurisdiction over a foreign defendant, the nature of a § 337 investigation focuses on goods for import, rather than the manufacturer of those goods. Thus, a foreign company that imports goods into the United States need not have any presence or other contacts with the United States in order to be subject to its jurisdiction; the *in rem* nature of § 337 investigations and remedies means that an exclusion order operates against the goods, so getting the goods to the U.S. border automatically confers jurisdiction over them.

Whereas district court litigation requires certain "minimum contacts" with the forum state,[120] complainants in a § 337 investigation may name as a respondent an entity whose contacts with the United States would not be sufficient under the district court test for personal jurisdiction.[121] Trade secret liability may even be imposed on an initially unaware respondent if it receives notice that the secret information was misappropriated yet still continues to use or disclose the information, or to import or sell an article incorporating

117. *TianRui*, 661 F.3d at 1325, 1338.
118. *See Richtek Tech. Corp.*, *supra* note 21.
119. *Id.*
120. Burger King v. Rudzewicz, 471 U.S. 462, 478 (1985).
121. Certain Composite Diamond Coated Textile Machinery Components, USITC Inv. No. 337-TA-160, Commission Memorandum Opinion at 2 (Feb. 6, 1984).

that information.[122] Section 758 of the Restatement (First) of Torts limits a respondent's obligations and provides that an innocent party, who in good faith paid value for the trade secret or relied on the secret such that imposing liability would be inequitable, would not be subject to liability under § 337.[123] The ALJ in *TianRui* looked to § 757 of the Restatement (First) of Torts to define a trade secret according to Illinois state law;[124] however, the Federal Circuit disagreed with the ALJ's application of Illinois law, so it is unclear whether the Restatement is a proper source for determining liability for innocent trade secret users.[125]

c) The Related Jurisdictional Requirement of Domestic Industry

Although the ITC does not need to analyze questions of personal jurisdiction due to the *in rem* nature of imported goods, the Commission's authority to issue a § 337 remedy is still contingent upon a trade secret owner's showing that it has a domestic industry subject to injury by acts of unfair competition.[126] In the recent decision *Certain DC-DC Controllers*,[127] the ITC, citing to *TianRui* , agreed with the ALJ that Richtek had successfully shown the existence of a domestic industry as defined in § 337(a)(1)(A). The ALJ based this finding on Richtek's significant investment in physical facilities in the United States, personnel costs for U.S. employees, and the devotion of research and development time related to the DC-DC controllers at issue.[128] Ultimately, however, Richtek failed to demonstrate that said domestic industry was subject to injury—an additional requirement of § 337(a)(1)(A)—which resulted in the ALJ denying its motion for summary judgment.[129] To ascertain whether a respondent has caused substantial injury, the Commission considers lost sales, underselling by respondents, a drop in complainant's profits or workforce, and declining profitability and revenue.[130] Complainants may also fulfill the injury requirement upon showing that the

122. RESTATEMENT (FIRST) OF TORTS § 758 (1939).

123. *Id.*

124. *TianRui*, 661 F.3d at 1325.

125. *See id.* at 1327.

126. *See* 19 U.S.C. § 1337(a) (2006).

127. Certain DC-DC Controllers and Products Containing the Same, USITC Inv. No. 337-TA-698.

128. Certain DC-DC Controllers and Products Containing the Same, USITC Inv. No. 337-TA-698, at 7–8 (July 13, 2010) (Order No. 39).

129. *Id.* at 9.

130. *Id.* at 6–7 (citing Certain Electric Power Tools, Battery Cartridges and Battery Chargers, USITC Inv. No. 337-TA-284, at 246 (July 9, 1989) (unreviewed initial determination)).

imported infringing products will cause *future* injury, if there are, for example, foreign cost advantages, production capacity, and underselling potential.[131]

This broad interpretation of the definition of a domestic industry increases the chance for trade secret owners to successfully establish subject matter jurisdiction before the ITC, rather than having to engage in multi-part jurisdictional tests and convince a district court judge to exercise jurisdiction over a foreign defendant having performed illegal acts abroad. Generally, any imported goods that compete with domestic goods will invoke the ITC's authority, and "the traditional prerequisites of establishing a nexus between the foreign conduct and United States trade sufficient to find personal and subject matter jurisdiction in a United States tribunal over the foreign entity are unnecessary."[132]

While a complainant alleging trade secret misappropriation must still show that an established domestic industry is subject to injury, this requirement appears to be a low bar under *TianRui*. In *TianRui*, the Commission, and subsequently the Federal Circuit, found that Amsted had fulfilled the injury requirement by simply submitting evidence indicating that the imported TianRui wheels could directly compete with wheels domestically produced by Amsted.[133] "That type of competition" is sufficient to show a domestic industry subject to injury,[134] indicating that injury is a somewhat trivial hurdle for complainants alleging standard fact patterns of trade secret misappropriation and subsequent importation of products incorporating them.

B. REMEDIES

In district courts, a trade secret owner may seek monetary damages for the actual loss caused by the misappropriation, any additional unjust enrichment by the misappropriator,[135] and in exceptional cases (e.g., where the plaintiff can show malice), punitive damages or attorney's fees.[136] By contrast the ITC does not grant monetary damages, so § 337 complainants seeking recompense must file a complaint in a state or district court. Colleen

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131. *Id.* at 248.

132. Kerry L. Bundy & Timothy J. Cruz, *Should US Trade Secret Laws Extend to Foreign Countries*, LAW360, http://www.faegrebd.com/webfiles/Should%20US%20Trade%20Secret%20Laws%20Extend%20To%20Foreign%20Countries.pdf (last visited Feb. 5, 2013).

133. *TianRui*, 661 F.3d at 1337.

134. *Id.*

135. Uniform Trade Secrets Act § 3(a) (1985).

136. *See, e.g.*, Roton Barrier, Inc. v. Stanley Works, 79 F.3d 1112, 1120 (Fed. Cir. 1996).

Chien notes that parallel litigation is not uncommon in patent cases.[137] Her 2008 empirical study showed that at least sixty-five percent of ITC cases involved patents that were also at issue in district court litigation between the same parties.[138] She notes that her findings "undermine to some degree the argument for the necessity of the ITC: that without it, parties would not have their cases heard."[139] However, she acknowledges that the ITC's remedies may serve part of a "broader enforcement strategy"[140] and may also be more popular with complainants naming foreign respondents. In fact, eighty-five percent of ITC patent cases involved at least one foreign respondent, compared to only sixty-seven percent of district court cases.[141]

After a finding of a § 337 violation, the ITC may issue a general exclusion order or limited exclusion order against foreign entities and a cease and desist order against illegal activities by U.S. entities.[142] A limited exclusion order is the default remedy for a finding of a § 337 violation.[143] The duration of a limited exclusion order in a trade secret investigation is based upon a "reasonable research and development period," or an "independent development time" for the trade secret(s) at issue.[144] A limited exclusion order is only useful for preventing infringing products from entering the United States if they are manufactured by the respondent named in a § 337 complaint, and a cease and desist order is only valid against U.S. entities.

The ITC's appeal to domestic IP owners wronged by foreign entities is not unique to patent holders; after *TianRui*, the gateway to the benefits of a § 337 investigation has been opened to cases involving trade secret misappropriation that occurs entirely abroad and where a complainant is not exploiting the trade secret at issue. Despite the unavailability of damages in the ITC, the Commission's authority to issue exclusion orders offers perhaps an even more attractive injunctive remedy than what is available in district courts.

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137. Colleen V. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at the International Trade Commission*, 50 WM & MARY L. REV. 63, 92 (2008).

138. *Id.*

139. *Id.* at 93.

140. *Id.* A broader enforcement strategy may include filing multiple suits in both district courts and the ITC, enhancing IP protections at the manufacturing stage, and establishing local enforcement mechanisms.

141. *Id.* at 94.

142. 19 U.S.C. § 1337(d) (2006).

143. McDermott Will & Emery, FAQ RE § 337 ACTIONS (Jan. 1, 2010), http://www.itc337update.com/other-topics/337-background/faq-re-337-actions/.

144. Certain Apparatus for the Continuous Production of Copper Rod, Inv. No. 337-TA-52, at 67 (Nov. 1979) (commission opinion).

1. *District Court Injunctions and ITC Exclusion Orders*

A trade secret owner whose secret has been misappropriated and incorporated into products competing with its own must strive to eliminate the competing products from the market as soon as possible to avoid substantial losses of revenue.[145] James Pooley notes that "[b]ecause exclusivity is the hallmark of value, and because damages are difficult to identify and measure (and sometimes to collect), a victim's most effective remedy is to prevent violation of its rights."[146]

At the ITC, while a limited exclusion order excludes products only from respondents, a general exclusion order is a swift way to prevent offending products made by other manufacturers from entering the U.S. market.[147] In order to obtain a general exclusion order, however, a complainant must show either that there is a risk that the respondent would circumvent a limited exclusion order, or that the source of the infringing products is too difficult to determine.[148] The Commission's decision to issue a general exclusion order must be founded upon "substantial, reliable, and probative evidence."[149]

In a recent § 337 patent-based case, the Commission issued Crocs a general exclusion order preventing knockoffs of its shoes from entering the country. This order "effectively eliminated the infringing shoes overnight and preserved the market for Crocs."[150] True to the heightened standards for getting a general as opposed to limited exclusion order, Crocs had shown that the infringing shoes were being exported from untraceable sources located in numerous countries, making circumvention of a limited exclusion order quite likely.[151]

District court injunctions may be limited or general as well. Courts have the discretion to issue one of two types of injunctions: a use injunction or a production injunction.[152] A use injunction would permanently enjoin a defendant from using the misappropriated information, noting that a process "substantially derived" from plaintiff's trade secrets would also constitute an impermissible "use" under such an injunction.[153] The alternative to a use

145. JAMES POOLEY, TRADE SECRETS, § 7.02(2)(a) (1997).
146. *Id.*
147. *See* 19 U.S.C. § 1337(d) (2006).
148. *See FAQ re § 337 Actions*, *supra* note 143.
149. 19 U.S.C. § 1337(g)(2)(B).
150. Donald R. Dinan, *The ITC remains hot for IP protection*, LEXOLOGY (Feb. 13, 2012), http://www.lexology.com/library/detail.aspx?g=e64ced60-2888-4e2a-86c9-57725971c23f.
151. Certain Foam Footwear, USITC Inv. No. 337-TA-567, 71 Fed Reg 27,514–27,515 (May 11, 2006) (notice of decision not to review initial determination).
152. *See, e.g.*, Wyeth v. Natural Biologics, Inc., 395 F.3d 897 (8th Cir. 2005).
153. *Id.*

injunction is a production injunction, which enjoins a defendant from manufacturing certain products for a certain amount of time. However, district courts are resistant to granting such a broad remedy, such that "normally the misappropriator is only barred from using the particular secrets he or she has taken" rather than being slapped with an "extreme" production injunction.[154]

For example, in *General Electric v. Sung*, a jury found that Iljin, the defendant, misappropriated 487 pages of General Electric's documents containing trade secrets.[155] The court noted that "[t]rade secret protection, however, extends not only to the misappropriated trade secret itself but also to materials 'substantially derived' from the trade secret."[156] Thus, the court was tasked with determining whether an injunction should be limited to the misappropriated documents or extended to cover Iljin's process developed through using those documents.[157]

Courts must also determine whether an injunction should encompass all of a defendant's manufacturing activities or only those related to the use of a misappropriated trade secret. Pooley states that "[w]here the defendant has shown defiance or evaded prior court orders, a court may enter a broad order shutting down the business."[158] However, "in practice these 'product injunctions' are relatively rare, and imposed only in the extreme circumstances noted."[159] A production injunction is appropriate "in circumstances where a use injunction would be ineffective in eliminating the competitive advantage gained by the misappropriator."[160] The court elaborated on the rationale behind this test, explaining that "where the misappropriated trade secrets are 'inextricably connected' to the defendant's manufacture of the product, a use injunction is ineffective because the misappropriator cannot be relied upon to 'unlearn' or abandon the misappropriated technology."[161] An "inextricable connection" is found "where the trade secrets form such an integral and substantial part of a comprehensive manufacturing process or technology that, absent the misappropriated trade secrets, the defendant would not be able independently to manufacture or design a comparable product."[162] In *Sung*,

154. O2 Micro v. Monolithic Power Sys., 399 F. Supp. 2d 1064, 1070 (N.D. Cal. 2005).
155. General Electric Co. v. Sung, 843 F. Supp. 776, 778 (D. Mass. 1994).
156. *Id.*
157. *Id.* at 779.
158. JAMES POOLEY, TRADE SECRETS, § 10.07(2) (1997).
159. *Id.* at § 7.02(2)(d).
160. General Electric Co. v. Sung, 843 F. Supp. 776, 779 (D. Mass. 1994).
161. *Id.* at 780.
162. *Id.*

the court found this type of inextricable connection. Iljin had received from Sung stolen documents, including "a veritable blueprint of [General Electric's ("GE")] saw grade diamond process, a process that took GE over twenty years to develop."[163] The evidence further indicated that Iljin would not have been able to manufacture any saw grade diamond absent these stolen documents, thus inextricably connecting Iljin's manufacture of saw grade diamond to the stolen GE trade secrets and warranting a production injunction.[164] In addition, the Eighth Circuit held that "[t]he defendant's demonstrated untrustworthiness can . . . be a factor in issuing a product injunction."[165] Thus, the concern that a defendant will violate a narrower form of injunctive relief may lead both the ITC and district courts to issue a broader injunctive relief, i.e., a general exclusion order at the ITC and a production injunction at district courts, respectively.

An ITC limited exclusion order is analogous to the district court production injunction. By enforcing a limited exclusion order at the border and preventing a product from entering the U.S. market at all, the ITC effectively issues a production injunction by excluding any product made by the named respondent which incorporates the infringed or misappropriated IP.[166] The advantage of filing an initial complaint with the ITC as opposed to a district court is that the "inextricable connection" test is not required for the issuance of a limited exclusion order. Rather, a limited exclusion order requires only a showing of a § 337 violation.[167] In addition, even the more favorable district court injunctive relief—a production injunction—is comparable only to the less desirable ITC remedy, a limited exclusion order. Both a limited exclusion order and a production injunction act only against a specific manufacturer.[168] A general exclusion order, on the other hand, prohibits entry of a certain offending product, regardless of its manufacturer.[169] A general exclusion order thus provides an immensely useful remedy for domestic trade secret owners, because a general exclusion order would work against third parties having no involvement or even knowledge

163. *Id.*
164. *Id.*
165. *See* Wyeth v. Natural Biologics, Inc., 395 F.3d 897 (8th Cir. 2005) (issuing a post-trial product injunction since the court did not trust defendant to stop using the misappropriated process nor to obey a court order allowing it to exercise discretion).
166. 19 U.S.C. § 1337(g)(2) (2006).
167. *See id.* § 337(d)(1).
168. *Id.*; 19 U.S.C. § 1337(d)(2).
169. *Id.* § 337(g)(2).

of the complainant's trade secret, even after the information has lost its secrecy status.[170]

Hnath and Gould may be understating the power of a general exclusion order when they call the provisions of this remedy "attractive" to complainants.[171] However, potent as a general exclusion order may be, no complainant has ever been able to meet the standards for obtaining one in a trade secret misappropriation case.[172] Hnath and Gould speculate that a complainant might need to provide a unique feature through which its products could be identified, as U.S. Customs and Border Protection ("CBP") would otherwise have difficulties determining whether a certain import was made using a misappropriated process.[173] A complainant may also have difficulty proving potential circumvention of a limited exclusion order or establishing a pattern of violation that makes it difficult to identify the infringing products' origin, especially in cases where the alleged misappropriator is a foreign company and evidence may be impractical to obtain or interpret if in a different language. This difficulty may be partially offset by the accelerated proceeding at the ITC, which generally also translates into accelerated discovery periods and shortens the duration a complainant must wait for relief from the alleged unfair acts of competition. However, as detailed *infra*, conducting foreign discovery remains a daunting task.

2. Foreign Discovery at the ITC May Affect the Attainability of Remedies

District courts and the ITC share essentially the same modes of discovery—interrogatories, requests of admissions, requests for documents, and depositions.[174] However, one advantage of the ITC is its nationwide service of ITC subpoenas for deposition or trial testimony, as well as testimony, documents, and plant inspections of third parties.[175] Furthermore, the ITC may prove more effective than a district court with respect to overseas discovery, as § 337 respondents have a greater incentive to comply with discovery requests. Commission Interim Rule 210.36 provides:

> (b) *Failure to comply with order compelling discovery.* If a party or an officer of a party fails to comply with an order including, but not limited to, an order for the taking of a deposition or the production

170. *Id.* § 337(g)(2).
171. *See* Hnath & Gould, *supra* note 49.
172. *Id.* at 111.
173. *Id.* at 111–13.
174. *See id.*
175. See Certain Apparatus for the Continuous Production of Copper Rod, USITC Inv. No. 337-TA-52 (Mar. 23, 1979) (commission order).

> of documents, an order to answer interrogatories, an order issued pursuant to a request for admissions, or an order to comply with a subpoena, the administrative law judge, for the purpose of permitting resolution of relevant issues and disposition of the investigation without unnecessary delay despite the failure to comply, may take such action in regard thereto as is just.[176]

The rule then provides examples of sanctions available to the ALJ, which include construing the evidence adversely to the offending party, taking certain matters as established, limiting the evidence the offending party may present, or rendering an initial decision against the offending party.[177] These major repercussions for non-compliance provide compelling reasons for even foreign companies to tender the requested information. Thus, the ITC is likely to see more cases where a foreign respondent performed all the acts of misappropriation abroad because of the potential dire consequences resulting from non-compliance of a discovery order in combination with *TianRui*'s cementation of the ITC's jurisdiction over such cases.

After *TianRui*, complainants may also rely on the ITC's efficacy in obtaining foreign discovery to achieve—for the first time—the higher showing required for a general exclusion order. *TianRui* expanded the ITC's authority to look at purely foreign conduct to determine whether there was an unfair act of competition (such as trade secret misappropriation). In looking for acts of unfair competition abroad, perhaps domestic complainants will also be able to uncover evidence that a respondent plans to evade a limited exclusion order, a factor which helps sway the court in favor of a general exclusion order. The chance of uncovering evidence of evasion is greatly increased merely by the fact that an ITC complainant can discover information from a party over which a district court would not even have the jurisdiction to require any compliance with discovery.

3. *ITC Cease and Desist Orders*

Aside from exclusion orders, the Commission can also order a § 337 violator to "cease and desist from engaging in the unfair methods or acts involved," which may include manufacture and sale of infringing articles.[178] The ITC enumerated two requirements for issuing a cease and desist order in *Certain Large Video Matrix Display Systems and Components Thereof*, which include "(1) a finding of jurisdiction over the subject matter . . . and (2) a finding of in personam jurisdiction over the persons whose acts are sought to be

176. 19 C.F.R. § 210.36(b) (1994).
177. Genentech, Inc. v. Int'l Trade Comm'n, 122 F.3d 1409, 1418 (Fed. Cir. 1997).
178. 19 U.S.C. § 1337(f) (2006).

enjoined."[179] This remedy is useful in cases where a respondent has already stockpiled a significant number of accused articles in the United States, perhaps at one of its subsidiary companies. Since an exclusion order is enforced at the border, it would be ineffective to prevent unfair competition by articles already having entered the United States. However, the *in personam* requirement for cease and desist orders makes this remedy unavailable in cases where foreign companies are engaging in manufacturing activities abroad.

C. ENFORCEMENT OF REMEDIES

When the ITC issues an exclusion order, enforcement is carried out by CBP agents, at no expense to plaintiffs.[180] Conversely, plaintiffs in district courts are not afforded such free service. In *Sung*, the district court provided GE with the right to appoint an auditor to ensure Sung's compliance with the ITC's order not to manufacture saw grade diamond for seven years,[181] with the caveat that this right of audition came at GE's expense.

On the other hand, the Government Accountability Office ("GAO") has identified some weaknesses in the enforcement of exclusion orders. A March 2008 report by the GAO identified "procedural weaknesses" with CBP's enforcement of issued exclusion orders.[182] To enforce an exclusion order, CBP posts "Trade Alerts" informing ports about new orders and also creates electronic alerts about incoming shipments potentially containing infringing goods that should be examined.[183] The GAO reported that CBP's enforcement of exclusion orders has been "limited and declining."[184] U.S. companies and their attorneys have expressed frustration at the lack of rigorous enforcement:

> Representatives said companies spend millions of dollars in legal fees to win a U.S. International Trade Commission ruling for their products, but that the effectiveness of the ruling is weakened by poor enforcement at CBP. Private sector representatives also stated that CBP's enforcement of the orders is not transparent because

179. Certain Large Video Matrix Display Systems, USITC Inv. No. 337-TA-75, 213 U.S.P.Q. 475, 488 (June 19, 1981).

180. 19 C.F.R. § 12.39 (2007).

181. General Electric Co. v. Sung, 843 F. Supp. 776, 782 (D. Mass. 1994).

182. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-157, INTELLECTUAL PROPERTY: FEDERAL ENFORCEMENT HAS GENERALLY INCREASED, BUT ASSESSING PERFORMANCE COULD STRENGTHEN LAW ENFORCEMENT EFFORTS 23 (2008).

183. *Id.* at 23–24.

184. *Id.* at 25.

> CBP does not notify companies of any exclusions that have occurred, impeding their ability to follow through on the matter.[185]

The GAO has identified further problems with enforcement procedures, noting a lack and delay of Trade Alert postings and updates.[186]

The deficiency of CBP's enforcement efforts has led some attorneys to suggest methods of aiding CBP officials with enforcement.[187] Such affirmative steps include providing officials with information identifying the ports and expected entry times likely to be used by violating importers and creating "advanced testing methods" for recognizing violating imports in collaboration with CBP officials.[188] Inevitably, engaging in these enforcement activities will have a cost to the plaintiff, so in deciding whether the ITC or district court will provide the most favorable remedy, the level of supplemental enforcement activities should factor into that decision.

Despite the shortcomings of CBP's enforcement of ITC exclusion orders, potential trade secret complainants are unlikely to be deterred from using the ITC as a forum for investigating foreign misappropriators since trade secret owners are likely to face similar jurisdictional or enforcement problems with district court injunctions.[189] U.S. courts have taken care in their decisions to explain that no remedies are intended to regulate purely extraterritorial conduct or to intrude on the sovereignty of foreign states to enforce their own laws.[190] A court lacking jurisdiction over a defendant would not be able to effectively enforce a remedy, even if it allowed litigation to get to that stage. Indeed, the presumption against U.S. laws regulating sovereign foreign conduct is what necessitated the Federal Circuit's extraterritoriality analysis in *TianRui*.[191] The Federal Circuit acknowledged that U.S. laws typically apply "only within the jurisdiction of the United States,"[192] yet *TianRui* acknowledged that unfair competition claims under § 337 may rebut

185. *Id.*

186. *Id.* at 26.

187. Christopher F. Corr & Monisha Deka, *Avoiding 3 Problems With ITC Section 337 Remedies*, LAW360 (Feb. 2009), http://www.whitecase.com/files/Publication/36cdb811-8316-4614-a38d-2f3b331c0bcb/Presentation/PublicationAttachment/6f3066ac-3cd1-4440-a7a8-57951d1ce620/article_Avoiding_3_problems.pdf.

188. *Id.*

189. *See, e.g.*, General Electric Co. v. Sung, 843 F. Supp. 776, 782 (D. Mass. 1994) (putting the financial responsibility on plaintiff General Electric to ensure defendant's compliance with an injunction).

190. *See, e.g.*, TianRui Group Co. Ltd. v. Int'l Trade Comm'n, 661 F.3d 1322, 1330 (Fed. Cir. 2011).

191. *Id.* at 1328.

192. *Id.* (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).

this presumption and allow the ITC to scrutinize foreign conduct and choose to implement a domestic remedy against foreign unfair conduct.

Meanwhile, federal courts that issued IP-related injunctions may also start enforcing a more hardline stance with regard to foreign entities. In May 2012, the Federal Circuit in *Merial Ltd. v. Cipla, Ltd.* upheld a district court's contempt finding against an India-based company that failed to appear for a court proceeding, despite the defendant Cipla's allegation that the district court lacked personal jurisdiction over it.[193] Cipla violated a district court injunction prohibiting "any act that . . . *causes or induces* infringement" of the '329 patent."[194] Judge Lourie ruled that "where a foreign party, with the requisite knowledge and intent, employs extraterritorial means to actively induce acts of direct infringement that occur within the United States, such conduct is not categorically exempt from redress under [35 U.S.C.] § 271(b)."[195] Although this case involved patent infringement rather than trade secret misappropriation, it is perhaps indicative of the trend of injunction enforcement. The Federal Circuit's ruling may signal to foreign companies that they must contest U.S. jurisdiction over their actions sooner in the course of litigation, rather than electing not to appear and relying on an *ex post* finding of a lack of jurisdiction, since an incorrect prediction can lead to contempt charges after the fact.[196]

Similarly, a U.S. District Court for the Eastern District of New York indicated its strong stance against overseas violations of U.S. court-issued injunctions in an antitrust case, which prompted the first ever settlement by a Chinese company in a U.S. cartel case.[197] In *In Re Vitamin C Antitrust Litigation*, U.S. plaintiffs alleged violations of U.S. antitrust law by Chinese corporate defendants. The defendants had fixed the price (allegedly per the Chinese government's requirements) of Vitamin C exported from China to the United States at above market prices.[198] Although the defendants argued that the court could not enforce injunctive relief against a foreign corporation, Judge Brian Cogan ruled that a U.S. district court can (and will) enforce such injunctions:

193. Merial Ltd. v. Cipla Ltd., 681 F.3d 1283, 1303 (Fed. Cir. 2012).

194. Merial Ltd. v. Cipla Ltd., No. 3:07–CV–125 (CDL), 2011 WL 2489753, at *12 (M.D. Ga. June 21, 2011) (contempt order).

195. Merial Ltd. v. Cipla Ltd., 681 F.3d 1283, 1302–03 (Fed. Cir. 2012).

196. *See id.*

197. *See, e.g.*, In re Vitamin C Antitrust Litig., Nos. 06–MD–1738 (BMC)(JO), 05–CV–0453, 2012 WL 2016824 (E.D.N.Y. June 4, 2012).

198. *Id.* at *6.

> In this case, however, plaintiffs are not asking this Court to enjoin uniquely foreign behavior or to force China to change its domestic policies with respect to price-fixing. Instead, plaintiffs ask this Court to enjoin private companies from engaging in behavior that takes place on foreign soil but is directed toward the United States. This is indisputably permissible.[199]

Subsequent to this ruling, the plaintiffs settled with Aland, the defendant. Note that the *TianRui* court used similar language in its extraterritoriality analysis, concluding that importation is an inherently international act and that the court looks to foreign conduct only to the extent that such activities are directed toward the United States.[200]

Notwithstanding this favorable case for domestic plaintiffs, the terrain for district court enforcement of injunctions abroad is by no means firm, and U.S. companies may still have more luck with enforcement by CBP. As discussed *supra*, whereas complainants that have prevailed in the ITC have the advantage of having CBP enforce an exclusion order at the U.S. border, district courts have either imposed the costs of auditing compliance on the plaintiff, or worse, have left the plaintiff with no mechanism for enforcement because of extraterritoriality problems. Additionally, to comply with an exclusion order, the respondent bears the burden to show that it is not attempting to import products that use a misappropriated trade secret, whereas the burden to ensure compliance with a district court injunction lies with the plaintiff, as shown in *Sung*.

Finally, to disincentivize circumvention of injunctions, a district court may punish a violation of an injunction by issuing monetary penalties or imprisonment.[201] Similarly, the ITC may deter repeated attempts to violate an exclusion order by issuing a seizure and forfeiture order, whereby the articles in violation of § 337 are seized, forfeited to the United States, and disposed of under Customs laws.[202] Enforcement of injunctive remedies in both the ITC and district court is far from seamless, but the remedies in theory provide domestic trade secret owners with strong recourse against wrongful misappropriation.

199. *Id.*
200. *TianRui*, 661 F.3d at 1329.
201. 19 C.F.R. § 210.75(b)(6) (2008).
202. 19 U.S.C. § 1337(i) (2006), as implemented by 19 C.F.R. § 12.39(c) (2007).

V. WILL THERE BE AN UPSWING IN TRADE SECRET MISAPPROPRIATION COMPLAINTS AT THE ITC?

The *TianRui* court clarified that a complainant could show the existence of a domestic industry even without exploiting the asserted trade secret in the United States and established that the ITC has § 337 jurisdiction over a complaint alleging trade secret misappropriation that occurred entirely overseas.[203] These newly announced standards may disrupt the status quo by inviting a relatively larger volume of trade secret cases in the ITC, just as changing standards in the past disturbed the balance of venue choices for non-practicing entities.

After the 2006 *eBay v. MercExchange* decision, patentees had a more difficult standard for obtaining a permanent injunction in district court.[204] Prior to *eBay*, the Federal Circuit automatically issued permanent injunctions against patent infringers, absent extraordinary circumstances.[205] In the *eBay* decision, the Federal Circuit announced a four-part test for courts to consider before issuing a permanent injunction. From then on, a patent holder must show: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."[206]

By undermining a patentee's ability to obtain a permanent injunction in district court, the Federal Circuit made the ITC a comparatively more attractive venue for non-practicing entities, since they could obtain exclusion orders—having the same effect as a permanent injunction—without submitting to this four-part test and instead showing a technical prong and an economic prong (including licensing activities) of the plaintiff's IP.[207] As may be expected, complaints filed in the ITC by patent holders increased in the years following *eBay*.[208] The percentage of complainants relying on licensing to establish ITC jurisdiction grew from thirteen percent of § 337

203. *Id.*

204. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

205. Benjamin Petersen, *Injunctive Relief in the Post-eBay World*, 23 BERKELEY TECH. L.J. 193, 194 (2008).

206. *eBay*, 547 U.S. at 391.

207. Petersen, *supra* note 205, at 194.

208. USITC, FACTS AND TRENDS REGARDING USITC SECTION 337 INVESTIGATIONS (June 18, 2012), http://www.usitc.gov/press_room/documents/featured_news/337facts.pdf.

complainants in 2000, to twenty-six percent in 2009, and to thirty-five percent in the first eight months of 2010.[209]

A historical high of sixty-nine § 337 investigations were instituted in 2011.[210] However, even prior to *eBay* and *TianRui*, the ITC was an attractive forum for IP holders for numerous reasons. The span of an entire ITC investigation is usually just twelve to eighteen months, compared to forty-four months for a district court case.[211] Further, as long as a complaint complies with ITC rules and has an adequate basis for further investigation, the Commission has a statutory obligation to institute an investigation upon the filing of a complaint and certification under oath.[212] Although this means that an investigation is not automatically commenced upon filing of a complaint, the standard for successfully starting an investigation is not particularly high. The relative ease with which a complainant can cause the Commission to institute an investigation is another advantage of the ITC over a district court. Discovery may begin once a § 337 is instituted and before respondent has even been given a chance to answer, whereas a district court may throw out a plaintiff's trade secret claim and preclude any discovery on the matter.

1. *Cases Similar to* TianRui *Are Already Being Filed*

Although the Federal Circuit handed down its *TianRui* decision fairly recently, two U.S. companies have already filed § 337 complaints based on a foreign entity's misappropriation of trade secrets outside of the United States. In January 2012, the ITC instituted an investigation based upon a complaint by Twin-Star, which alleged that its former employee in China had misappropriated its trade secrets (entirely abroad), formed a new company based upon them, and imported and sold electric fireplaces that directly competed with those of Twin-Star.[213]

Similarly, the New York-based company SI Group filed a § 337 complaint in May 2012, alleging trade secret misappropriation and

209. *See* Robert Farm & Ashley Miller, THE RISE OF NON-PRACTICING ENTITY LITIGATION AT THE ITC: THE STATE OF THE LAW AND LITIGATION STRATEGY, 2 (Nov. 8, 2010), *available at* http://www.utcle.org/eLibrary/preview.php?asset_file_id=27870.

210. USITC, NUMBER OF INVESTIGATIONS INSTITUTED BY CALENDAR YEAR, http://www.usitc.gov/intellectual_property/documents/cy_337_institutions.pdf (last visited Feb. 1, 2013).

211. U.S. Courts, FEDERAL COURT MANAGEMENT STATISTICS, www.uscourts.gov/fcmstat/index.html (last visited Jan. 18, 2013).

212. 19 U.S.C. § 1337(b)(1) (2006).

213. Certain Electric Fireplaces, Components Thereof, Manuals for Same, and Products Containing Same, Certain Processes for Manufacturing or Relating to Same, and Certain Products Containing Same, USITC Inv. No. 337-TA-826.

subsequent importation to the United States of offending products by multiple companies based both domestically and abroad. In particular, the complaint stated that Sino Legend "deliberately poached a key employee" from SI Group (Shanghai) Co. in China.[214] Sino Legend then imported into the United States tackifiers made using SI Group's trade secrets, which would compete directly with SI Group's domestic tackifier market.[215] SI Group thus sought an exclusion order for "all products imported, sold for importation, and/or sold after importation, into or within the United States, comprising or made with tackifiers manufactured by or on behalf of Sino Legend using a process that included SI Group Trade Secrets."[216] In view of these allegations and demand for relief, the ITC launched an investigation on June 20, 2012, with trial scheduled to start in February 2013.[217]

Notably, SI Group stated that it had already sought relief from the Chinese government by filing a "report for crime" in 2008 and commencing Chinese civil proceedings in 2010. However, SI Group alleged in its ITC complaint that the Chinese courts "have not taken action to stop the misappropriation."[218] Thus, this case exemplifies how U.S. plaintiffs frustrated with a lack of foreign options for relief may turn to the ITC for a more certain domestic remedy. The ITC's willingness to look to foreign conduct in determining whether to issue an exclusion order—a standard made clear by the *TianRui* ruling—offers another legal option for U.S. companies who have been unsuccessful in their efforts to engage the legal systems of foreign countries, which may not enforce IP rights as rigorously as the U.S. government. Already, attorneys have recommended the ITC as the "best, fastest, and easiest tool" to prevent unfair competition by foreign entities.[219] Trade secret misappropriation cases will likely take up a more substantial portion of the ITC's docket, as it becomes clear that the ITC is an appropriate adjudicative body for such disputes.[220]

214. Certain Rubber Resins and Processes for Manufacturing Same, Inv. No. 337-TA-849.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *See, e.g.*, Daniel Quick, *OESA Legal Corner: Using the ITC to Stop Trade Secret Misappropriation at the Border*, OESA (Feb. 2012), http://www.oesa.org/Publications/OESA-News/February-2012/OESA-Legal-Corner.html.

220. Daniel C. Winston & Margaret E. Ives, *Strategies For Fighting Global Trade Secret Theft*, LAW360, http://www.choate.com/uploads/113/doc/ives-winston-law360-strategies-for-fighting-global-trade-secret-theft.pdf/ (last visited Feb. 1, 2013).

VI. CONCLUSION

The Federal Circuit in *TianRui* widened the avenues for domestic victims of foreign trade secret misappropriations by explicitly allowing the examination of entirely foreign conduct, and concurrently rejecting the contention that a § 337 claimant must domestically exploit the asserted trade secrets. Not only can domestic trade secret owners now block the importation of products made using misappropriated trade secrets that they are not currently exploiting in the United States, but the ITC may issue general exclusion orders to be enforced by CBP against a type of product made by foreign companies besides the named respondent. This makes the ITC an immensely important forum where complainants may reclaim control over their market share even after a trade secret has lost its secrecy status. In some cases, an ITC exclusion order may be the *only* remedy to prevent a misappropriator from unfairly competing with domestic goods. The effectiveness and availability of ITC remedies for U.S. companies may make domestic companies more willing to continue their collaboration with foreign companies, especially in China, since they should now be more secure in their ability to combat and prevent trade secret misappropriation when a foreign entity with unscrupulous motives seeks to gain an unfair advantage.