

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN CARBON AND ALLOY
STEEL PRODUCTS**

Inv. No. 337-TA-1002

COMMISSION OPINION

On November 14, 2016, the presiding Administrative Law Judge (“ALJ”) in the above-identified investigation issued Order No. 38, an initial determination (“ID”) granting Respondents’ motion to terminate Complainant’s antitrust claim under 19 C.F.R. § 210.21 and, in the alternative, under 19 C.F.R. § 210.18. The Commission has determined to affirm in part, as modified by our reasoning below, and reverse in part the ID (Order No. 38). Specifically, the Commission has determined that antitrust injury standing is required for antitrust claims before the Commission. Complainant does not argue that it meets this requirement and, to the contrary, represents on review that it will not amend the complaint to plead or prove antitrust injury as Complainant contends that it is unable to prove antitrust injury. Accordingly, for the reasons discussed below, we affirm the dismissal of Complainant’s sole remaining claim, the antitrust claim. Commissioner Broadbent dissents and has filed a dissenting opinion.

I. BACKGROUND

By publication in the Federal Register on June 2, 2016, the Commission instituted this investigation based on a complaint filed by Complainant United States Steel Corporation of Pittsburgh, Pennsylvania (“U.S. Steel” or “Complainant”), alleging a violation of section 337 of

the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (“section 337”).¹ *See* 81 *Fed. Reg.* 35381-2 (June 2, 2016). Specifically, the Notice of Investigation states that the Commission will determine whether there is a violation of section 337(a)(1)(A) in the importation, the sale for importation, or the sale after importation into the United States of certain carbon and alloy steel products by reason of: (1) a conspiracy to fix prices and control output and export volumes under section 1 of the Sherman Act, the threat or effect of which is to restrain or monopolize trade and commerce in the United States; (2) misappropriation and use of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States; or (3) false designation of origin or manufacturer, the threat or effect of which is to destroy or substantially injure an industry in the United States. *Id.* The Commission later terminated the investigation with respect to U.S. Steel’s trade secret misappropriation allegations based on Complainant’s withdrawal of those allegations. *See Certain Carbon and Alloy Steel Products*, Comm’n Notice (Mar. 24, 2017). The Commission also terminated the investigation with respect to the false designation of origin allegations against non-defaulting Respondents based on motions for summary determination by those Respondents. The ALJ granted the motions and neither Complainant nor any other party petitioned for review of her order. *See Certain Carbon and Alloy Steel Products*, Comm’n Notice (Nov. 1, 2017).

The notice of investigation identified forty (40) respondents who are Chinese steel manufacturers or distributors, as well as some of their Hong Kong and/or United States affiliates. *See* 81 *Fed. Reg.* 35381-2 (June 2, 2016). The Commission found several of the distributor

¹ U.S. Steel filed an amended complaint on September 22, 2016. EDIS Doc. No. 591156. U.S. Steel’s amended complaint alleges, *inter alia*, a section 337 violation through “a conspiracy to fix prices and control output and export volumes, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.” Amended Complaint at ¶ 2.

respondents to be in default.² *See Certain Carbon and Alloy Steel Products*, Inv. No. 337-TA-1002, Comm'n Notice (Oct. 14, 2016), Comm'n Notice (Oct. 18, 2016), Comm'n Notice (Nov. 18, 2016). The notice of investigation also names the Office of Unfair Import Investigations as a party in this investigation. *See* 81 *Fed. Reg.* 35381-2 (June 2, 2016).

A. Summary of ID (Order No. 38)

On August 26, 2016, the manufacturing respondents³ (referred to, hereinafter, as "Respondents") filed a motion to terminate U.S. Steel's Sherman Act claim under 19 C.F.R. § 210.21. Respondents argued that U.S. Steel's amended complaint does not satisfy antitrust pleading requirements and must therefore be dismissed. U.S. Steel and the Commission Investigative Attorney ("IA") each filed a response in opposition to the motion to terminate.⁴

On November 14, 2016, the ALJ issued the subject ID (Order No. 38), granting Respondents' motion under 19 C.F.R. § 210.21 and, in the alternative, under 19 C.F.R. § 210.18.

² In light of these defaults, and as it relates to the false designation of origin claim only, the issue of remedy remains. Simultaneously with this opinion, the Commission is issuing a notice requesting briefing on the public interest, remedy, and bonding in connection with the false designation of origin claim.

³ The manufacturing respondents are: Baosteel America, Inc.; Shanghai Baosteel Group Corporation; Baoshan Iron & Steel Co., Ltd.; China Shougang International Trade & Engineering Corporation; Hebei Iron and Steel Group Co., Ltd.; Hebei Iron & Steel Group Hengshui Strip Rolling Co., Ltd.; Hebei Iron & Steel (Hong Kong) International Trade Co., Ltd.; Masteel Iron and Steel Co. Ltd.; Magang (Group) Holding Co. Ltd.; Anshan Iron and Steel Group; Angang Group International Trade Corporation; Angang Group Hong Kong Co. Ltd.; Wuhan Iron and Steel Group Corp.; Wuhan Iron and Steel Co., Ltd.; WISCO America Co., Ltd.; Jiangsu Shagang Group; and Jiangsu Shagang International Trade Co., Ltd. *See* Respondents' motion to terminate at 1 n.1, filed August 26, 2016, EDIS Doc. No. 589182.

⁴ Although the IA agreed that antitrust injury should be required, the IA argued before the ALJ that dismissal was not warranted as "U.S. Steel could allege facts that would establish predatory pricing and/or recoupment 'in the future.'" *See* Order No. 38 at 8 (citation omitted). In light of Complainant's representations to the Commission on review that it would not plead or prove antitrust injury, the IA ultimately took the position that no remand was necessary. *See, e.g.*, Transcript of Oral Argument (as corrected on May 5, 2017, EDIS Doc. No. 610791) at 224-25 (hereinafter, referred to as "Tr.").

The ALJ reasoned that U.S. Steel is required to show antitrust standing in order to state an antitrust claim under section 337(a)(1)(A). *See* Order No. 38 at 10. The ALJ found that “[b]y claiming an illegal restraint of trade . . . U.S. Steel merely satisfie[d] the pleading requirements under the threat or effect prong of section 337(a)(1)(A)(iii), but it has not properly alleged that the practices complained of constitute an unfair method of competition or unfair act under section 337(a)(1)(A).” *Id.* at 10-11. The ALJ explained that “the limitations on private antitrust litigants must apply under section 337 as they do in federal courts.” *Id.* at 10 (citing *Tianrui Group Co. Ltd. v. Int’l Trade Comm’n*, 661 F.3d 1322, 1333 (Fed. Cir. 2011) (“*Tianrui*”). The ALJ further explained that “[u]nder federal antitrust law, it is firmly established that a private complainant must show antitrust standing.” *Id.*

Having found that a showing of antitrust injury was required, the ALJ held that “[i]n the context of pricing practices challenged by rivals as depressing their profits, ‘only predatory pricing has the requisite anticompetitive effect.’” *Id.* at 21 (citing *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990) (“*ARCO*”). The ALJ concluded that because “U.S. Steel’s complaint does not allege predatory pricing or the facts necessary to show predatory pricing[,] . . . [t]he complaint therefore is fatally deficient as a matter of law.” *Id.* at 23. The ALJ found that “failure to plead antitrust injury is grounds for dismissal at the earliest possible stage of litigation.” *Id.* at 28. The ALJ concluded that “dismissal with prejudice is appropriate.” *Id.* at 30.

B. Proceedings before the Commission Related to Review of the ID

On November 23, 2016, Complainant and the IA filed petitions for review of the ID. Complainant U.S. Steel also requested oral argument before the Commission. On December 1, 2016, Respondents filed a combined response to the petitions for review. Also on December 1, 2016, Complainant filed a response to the IA’s petition for review.

On December 19, 2016, the Commission issued a Notice determining to review the ID and requesting written submissions in response to certain questions from the Commission. *See* 81 *Fed. Reg.* 94416-7 (Dec. 23, 2016). The parties filed initial written submissions and responsive submissions in response to the Commission's questions. On the same day that responsive submissions were filed, the International Center for Law & Economics, a non-party, filed comments regarding the Commission's determination to review the ID. On February 24, 2017, the Commission issued a notice setting the date for an oral argument to March 14, 2017. *See Certain Carbon and Alloy Steel Products*, Inv. No. 337-TA-1002, Comm'n Notice (Feb. 24, 2017).

On March 3, 2017, the Commission decided to seek further written submissions from the public and to reschedule the oral argument for April 20, 2017. *See* 82 *Fed. Reg.* 13133-4 (Mar. 9, 2017). Four non-parties filed written submissions in response to the Commission's March 3, 2017, Notice, namely, Maxell Corporation of America and Hitachi Maxell, Ltd. (collectively, "Maxell"); AK Steel Corporation ("AK Steel"); United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC ("USW"); and former Commissioner Daniel R. Pearson, then with the Cato Institute. The parties filed responses to the non-party submissions.

On April 20, 2017, the Commission heard oral arguments from the parties on the antitrust injury issue.

C. Summary of Party Arguments

As noted above, the Commission has received extensive briefing and oral argument on the issues under review.⁵ U.S. Steel argues the ALJ erred because a complaint alleging a violation of section 337 based on section 1 of the Sherman Act does not need to allege antitrust injury. It argues that section 337 is a protectionist statute and that “[t]he statutory history, Commission determinations, case law, and other authority show that the policy underlying Section 337(a)(1)(A)(iii) is to protect American companies and workers from any threatened or actual restraint of their trade and commerce in the United States caused by unfairly traded imports.” U.S. Steel’s Jan. 17, 2017 Br. at 3-4 (EDIS Doc. No. 601088); *id.* at 13, 20. It contends that “[a]ntitrust injury is about harm to consumers; it is fundamentally different from Section 337(a)(1)(A) injury, which addresses harm to American companies and workers.” *Id.* at 27. It further posits that any impact of an exclusion order on competitive conditions and consumers should be considered by the Commission “*after* a violation is found,” as part of the Commission’s public interest analysis. *Id.* at 4 (emphasis in original); *id.* at 8-9, 37-38.

Respondents and the IA, on the other hand, argue that U.S. Steel’s complaint must allege antitrust injury. Respondents argue that antitrust injury is required as a matter of law under Supreme Court precedent and that predatory pricing is required both to establish standing and to prove the substantive antitrust claim. Respondents assert that section 337(a)(1)(A)(iii) is “not merely a statute to protect competitors,” *i.e.*, a trade statute, “but also a statute to preserve competition,” *i.e.*, an antitrust statute. Respondents’ Feb. 1, 2017 Resp. Br. at 2-3 (EDIS Doc. No. 602530) (citing *Certain Welded Stainless Steel Pipe and Tube*, Inv. No. 337-TA-29, 1978 WL

⁵ Although the Commission briefly summarizes the party arguments here, as it does in all investigations, the Commission has fully considered all of the arguments in reaching its determination.

50692, *1, 17 (Feb. 22, 1978) (“*Steel Pipe*”)⁶. Respondents assert that “Section 337, when used as an antitrust law, must not be allowed to be used by competitors to undermine the antitrust laws’ fundamental purpose.” Respondents’ Jan. 17, 2017 Br. at 30 (EDIS Doc. No. 601087).

Respondents further assert that antitrust injury standing is a substantive element of a private antitrust claim, not a public interest factor. Respondents’ Feb. 1, 2017 Resp. Br. at 5 (EDIS Doc. No. 602530).

The IA asserts that Commission authority and the legislative history show that section 337 “embodied the goal of promoting fair trade, as well as that of protecting American industry.” IA’s Jan. 17, 2017 Br. at 3-4 (EDIS Doc. No. 601084) (citations omitted). The IA asserts that antitrust injury is required in cases based on a complaint by a private party (such as U.S. Steel) but would not be a required element for an investigation self-initiated by the Commission. *Id.* at 28-29.

II. DISCUSSION

The central issue presented is whether Complainant must plead and establish antitrust injury in a section 337 investigation predicated on section 1 of the Sherman Act. As explained below, the Commission determines, as did the ALJ, that when a complaint alleges a violation of the Sherman Act as the basis for “[u]nfair methods of competition [or] unfair acts” under section 337(a)(1)(A), the complaint must also allege antitrust injury.

A. Unfair Methods of Competition and Unfair Acts Under Section 337(a)(1)(A)

Our analysis must begin with the language of section 337 as our reviewing Court has held that the Commission “is a creature of statute, and must find authority for its actions in its enabling statute.” *Kyocera v. Int’l Trade Comm’n*, 545 F.3d 1340, 1355 (Fed. Cir. 2008). Section

⁶ President Carter disapproved the Commission’s issuance of remedial orders on policy grounds. *See Steel Pipe*, 43 *Fed. Reg.* 17789 (Apr. 26, 1978).

337(a)(1)(A) provides:

(a)(1) . . . [T]he following are unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provision of law, as provided in this section:

(A) Unfair methods of competition and unfair acts in the importation of articles . . . into the United States, or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is—

(i) to destroy or substantially injure an industry in the United States;

(ii) to prevent the establishment of such an industry; or

(iii) to restrain or monopolize trade and commerce in the United States.

19 U.S.C. § 1337(a)(1)(A). On the face of the statute, a violation of section 337(a)(1)(A) requires that there be “[u]nfair methods of competition [or] unfair acts in the importation of articles.” It also requires that the “threat or effect” of the unfair method of competition or unfair act be to destroy, substantially injure, or prevent the establishment of a domestic industry, or to restrain or monopolize trade and commerce in the United States. *See* 19 U.S.C. § 1337(a)(1)(A)(i)-(iii).

In this investigation, U.S. Steel alleges a violation of section 337(a)(1)(A) based on importation and sale of carbon alloy steel involving an unlawful conspiracy to fix prices and control output and exports between the respondents in breach of section 1 of the Sherman Act. *See* Amended Complaint at ¶¶ 71-99. U.S. Steel’s complaint identifies violation of the Sherman Act as the “[u]nfair methods of competition [or] unfair acts” under section 337. *See, e.g., id.* at ¶ 2, 71. Accordingly, the starting point of our analysis is the interpretation of “[u]nfair methods of competition [or] unfair acts,” a term which is not defined in the statute.

What is now section 337(a)(1)(A) dates back to section 316 of the Tariff Act of 1922. Similar to current statutory language at issue, section 316 declared “unfair methods of competition

and unfair acts in the importation of articles into the United States” to be unlawful. 19 U.S.C. § 174 (repealed 1930); Pub. L. 67-318, 42 Stat. 943 (Sept. 21, 1922). The legislative history indicates that Congress did not explicitly prescribe what conduct qualifies as “unfair methods of competition and unfair acts” under the newly enacted provision. Instead, “Congress intended to allow [the Commission] wide discretion in determining what practices are to be regarded as unfair.” *In re Von Clemm*, 229 F.2d 441, 444 (C.C.P.A. 1955). Specifically, in describing this provision, the Senate Committee Report on the 1922 Act stated that, “[t]he provision relating to unfair methods of competition in the importation of goods is broad enough to prevent every type and form of unfair practice and is, therefore, a more adequate protection to American industry than any antidumping statute the country has ever had.” S. Rep. No. 67-595, at 3 (1922); *see also* H.R. Conf. Rep. No. 67-1223 at 146 (1922). Senator Reed Smoot, the 1922 Act’s primary sponsor, explained that section 316 was intended to be “an antidumping law with teeth in it—one which will reach all forms of unfair competition in importation.” 62 Cong. Rec. 5874, 5879 (1922). When Congress subsequently enacted the Tariff Act of 1930, section 316 of the 1922 Act became section 337 of the new Act. While the legislative history of the 1922 Act reveals that “[u]nfair methods of competition [or] unfair acts” was intended to be a broad term, it does not resolve the issue currently before the Commission.⁷

Section 337 has been amended several times since 1930 but has maintained the “unfair methods of competition and unfair acts” language. Notably, “[p]rior to 1974 the Commission was barred, by judicial decision starting at least as early as 1930, from reviewing the validity of patents brought before it under section 337.” *Lannom Mfg. Co. v. Int’l Trade Comm’n*, 799 F.2d

⁷ Counsel for both Complainant and Respondents described the legislative history for section 337 on this issue as “sparse.” Tr. at 48 (Mr. Glass), 130 (Ms. Aranoff); *see also* Office of Unfair Import Investigations’ Jan. 17, 2017 Br. at 11 (EDIS Doc. No. 601084) (noting that legislative history “does not shed much light” on the issue).

1572, 1576 (Fed. Cir. 1986). The Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975), removed this bar, and expressly authorized the Commission to consider “[a]ll legal and equitable defenses . . . in all cases.” 19 U.S.C. § 1337(c). With certain narrow exceptions not relevant here, this provision entitles respondents to present the same defenses in a section 337 proceeding that are available in district court. See *Lannom*, 799 F.2d at 1577-78; *Kinik Co. v. Int’l Trade Comm’n*, 362 F.3d 1359, 1362-63 (Fed. Cir. 2004). In *Young Engineers*, the Federal Circuit observed that the 1974 amendment of section 337 permitting the presentation of all legal and equitable defenses in an instituted investigation reflected recognition by Congress that “essentially private rights are being enforced in the proceeding” and “any determination of unfair acts is dependent upon the private rights between parties in the position of complainant and respondent.” See *Young Eng’rs Inc. v. Int’l Trade Comm’n*, 721 F.2d 1305, 1315 (Fed. Cir. 1983).

Over the years, the Commission has interpreted “[u]nfair methods of competition [or] unfair acts” under section 337 to apply to a broad range of substantive law, such as trade secret misappropriation, common law trademark infringement, Lanham Act violations, and antitrust law.⁸ Consistent with the recognition noted above that “any determination of unfair acts is

⁸ The Commission has considered section 337 in the context of antitrust allegations. The Commission has issued opinions in several cases. See, e.g., *Watches, Watch Movements, and Watch Parts*, Inv. No. 337-19, TC Pub. 177 (June 1966); *Tractor Parts*, Inv. No. 337-22, TC Pub. 443 (June 1971); *Electronic Audio and Related Equipment*, Inv. No. 337-TA-7, USITC Pub. 768 (Apr. 1976); *Chicory Root-Crude and Prepared*, Inv. No. 337-TA-27, 1977 WL 52340 (Mar. 30, 1977); *Steel Pipe*, 1978 WL 50692 (Feb. 22, 1978); *Certain Airtight Cast-Iron Stoves*, Inv. No. 337-TA-69, USITC Pub. 1126 (Jan. 1981); *Certain Electrically Resistive Monocomponent Toner*, Inv. No. 337-TA-253, USITC Pub. 2069 (Mar. 1988). The Commission has also declined to review (thereby adopting) ALJ decisions. See, e.g., *Certain Rare-Earth Magnets and Magnetic Materials and Articles Containing Same*, Inv. No. 337-TA-413, USITC Pub. 3307 (May 2000). At least three investigations were terminated pursuant to a consent order or settlement agreements between the parties. *Angolan Robusta Coffee*, Inv. No. 337-TA-16, 41 *Fed. Reg.* 13418 (Mar. 30, 1976); *Color Television Receiving Sets*, Inv. No. 337-TA-23, 42 *Fed. Reg.* 39492 (Aug. 4, 1977); *Certain Precision Resistor Chips*, Inv. No. 337-TA-63, 45 *Fed. Reg.* 16360 (Mar. 13, 1980). A finding of violation on an antitrust claim was made in one investigation and the

dependent upon the private rights between parties,” when the Commission is asked to look to a body of established federal statutory law for defining an unfair act, the Commission is guided by the express congressional limitations on the scope of that federal law as applied in district court. *See Tianrui*, 661 F.3d at 1333. For example, when the Commission is asked to address an allegation of patent infringement in the importation of goods under section 337, the Commission follows substantive U.S. patent law.⁹ *See Certain Crawler Cranes and Components Thereof*, Investigation No. 337-TA-887, Comm’n Op. at 17-18 (May 6, 2015) (public version).

In *Crawler Cranes*, the complainant asserted a violation of section 337 based on the future infringement of patent claims covering methods of operating a mobile lift crane. Although the accused cranes were imported into the United States, the complainant conceded that the record contained no proof that the steps of the asserted method claims were yet performed in the United States as required to find infringement under the Patent Act. Nonetheless, the complainant argued that the Commission has broad authority under section 337 to address unfair acts including unfair acts in their incipiency and therefore is not bound to follow the same limits on patent infringement as exist in district court. The Commission declined the invitation to create a right under section 337 not recognized under U.S. patent law. The Commission explained that “Congress in enacting section 337 of the Tariff Act of 1930 (19 USCA § 1337) [did not intend] to broaden the field of substantive patent rights.” *Id.* at 17 (citation omitted). The Commission

recommended remedy was rejected by the President. *Steel Pipe*, Inv. No. 337-TA-29, 43 *Fed. Reg.* 17789 (Apr. 26, 1978). A violation finding was made in a second case but was rescinded upon reconsideration. *Tractor Parts*, Inv. No. 337-22, 36 *Fed. Reg.* 15077 (Aug. 12, 1971).

⁹ 19 U.S.C. § 1337(A)(1)(B) expressly identifies the importation of “articles that . . . infringe” a valid U.S. patent as an unlawful act. This provision was added to section 337 in 1988. Prior to 1988, patent infringement was addressed under the general “[u]nfair methods of competition [or] unfair acts” language of the statute.

therefore found no violation of section 337 based on the undisputed fact that there was no patent infringement under 35 U.S.C. § 271.

Similar to the example with patent law, the Commission has been guided by the express congressional limitations on federal law in other substantive areas when determining the scope of unfair acts under section 337(a)(1)(A). In *Certain Carbon Spine Board*, the Commission dismissed a section 337(a)(1)(A) claim predicated on trade dress infringement because the complaint failed to allege all necessary elements for trade dress infringement under the Lanham Act. See *Certain Carbon Spine Board, Cervical Collar, CPR Masks, and Various Medical Training Manikin Devices, and Trademarks, Copyrights of Product Catalogues, Product Inserts and Components Thereof*, Inv. No. 337-TA-1008, Comm'n Op. at 10-11 (June 14, 2017). In *Certain Hydroxyprogesterone Caproate*, the Commission declined to institute an investigation based on the Food, Drug and Cosmetic Act and stated that the "complaint does not allege an unfair method of competition or an unfair act cognizable under 19 U.S.C. § 1337(a)(1)(A)." The Commission explained that "the Food and Drug Administration ('FDA') is charged with the administration of the Food, Drug and Cosmetic Act." See *Certain Hydroxyprogesterone Caproate and Products Containing the Same*, Docket No. 2919, Comm'n Correspondence (Dec. 21, 2012). And in *Certain Universal Transmitters for Garage Door Openers*, the Commission applied the statutory limitations of the Digital Millennium Copyright Act (DMCA) to a section 337(a)(1)(A) claim predicated on that Act. See *Certain Universal Transmitters for Garage Door Openers*, Inv. No. 337-TA-497, Initial Determination, 2003 WL 22811119, *12-13 (Nov. 4, 2003), *aff'd*, Comm'n Notice (Nov. 24, 2003). The Commission determined under section 337(a)(1)(A) that it had jurisdiction over a claim for an alleged violation of the DMCA but rejected the requested temporary relief because it was unlikely Complainant would succeed on the merits

of its DMCA claim. *See Certain Universal Transmitters for Garage Door Openers*, Inv. No. 337-TA-497, Comm'n Order at 3-4 (Nov. 24, 2003).

The Federal Circuit has approved of the Commission's understanding of "[u]nfair methods of competition [or] unfair acts" as it relates to predicate federal substantive law. In *Tianrui*, the respondents argued on appeal that the Commission erred in finding that cognizable trade secret misappropriation under section 337(a)(1)(A) could take place overseas. *Tianrui*, 661 F.3d at 1333. The respondents argued against extraterritoriality by analogizing trade secret misappropriation to the domestic application of patent infringement under the Patent Act. The Federal Circuit rejected the analogy. The Court recognized that "the Commission's broad and flexible authority to exclude from entry articles produced using 'unfair methods of competition' cannot be used to circumvent express congressional limitations on the scope of substantive U.S. patent law." *Id.* But because there was "no parallel federal civil statute regulating trade secret protection," the Federal Circuit explained that "there is no statutory basis for limiting the Commission's flexible authority under section 337(a)(1)(A) with respect to trade secret misappropriation." *Id.* The Court's discussion is consistent with our declining to interpret section 337(a)(1)(A) in a manner contrary to express proscriptions of federal antitrust law.

The Commission has addressed the issue of antitrust injury in a section 337 proceeding, albeit in a slightly different context. Specifically, the Commission has found antitrust injury to be a required element of a Sherman Act allegation raised by a respondent. In *Certain Rare-Earth Magnets*, the Commission found that "a private party seeking to establish an antitrust violation must also show . . . that it has suffered an injury cognizable under the antitrust laws . . . [and this] 'antitrust injury' must be a result of the alleged anti-competitive conduct." *Certain Rare-Earth Magnets and Magnetic Materials and Articles Containing Same*, Inv. No. 337-TA-413, Final

Initial Determination at 128, 132 (Sept. 8, 1999) (Judge Luckern), *unreviewed*, Comm'n Notice (Oct. 25, 1999). Judge Luckern cited as support a Federal Circuit decision that "rejected an antitrust claim on the ground that any injury the antitrust claimant may have suffered was the result of . . . legitimate [activities] and not the result of conduct that violated the antitrust laws." *Id.* at 132 (citing *Eastman Kodak Co. v. Goodyear Tire & Rubber Co.*, 114 F.3d 1547, 1557 (Fed. Cir. 1997)).¹⁰

¹⁰ The only other Commission investigation in which antitrust injury doctrine was addressed was *Certain Electrically Resistive Monocomponent Toner*, Inv. No. 337-TA-253, USITC Pub. 2069 (Mar. 1988). In that case, the Commission found no section 337 violation based on an antitrust claim. Writing separately, two Commissioners suggested the doctrine's applicability under section 337 but did not decide whether the requirement was met on the record presented. *See id.*, Additional Views of Vice Chairman Anne E. Brunsdale and Commissioner Ronald A. Cass at 16 ("A second concern [with the final ID] is the possible absence of the sort of antitrust injury necessary to support an action under the antitrust laws."). The Commission views did not address this point -- for, against, or otherwise -- under the circumstances.

Complainant contends that the Commission implicitly decided that antitrust injury does not apply to section 337 when it found a violation of section 337 in the 1978 *Steel Pipe* investigation without mentioning antitrust injury. U.S. Steel's Jan. 17, 2017 Br. at 15 (EDIS Doc. No. 601088). This reading of the *Steel Pipe* decision strikes us as unreasonable. The Commission did not address antitrust injury in *Steel Pipe*, and there is no indication that the issue was even raised, which is not surprising given that the doctrine was still developing. The Supreme Court's *Brunswick* decision was handed down before *Steel Pipe* but *Brunswick* itself did not decide whether antitrust injury applied in district court to claims for injunctive relief (as opposed to damages actions) or to other substantive theories of antitrust violation. *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477 (1977). Subsequent decisions confirmed its importance to damages claims irrespective of the theory of liability. *See, e.g., J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) (Robinson-Patman Act); *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982) (Sherman Act); *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) (Sherman Act). However, the Court did not address until nine years later whether the antitrust injury requirement applied in a district court action seeking injunctive relief. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 109-10 (1986). *ARCO* in 1990 subsequently held that the antitrust injury requirement applied to *per se* violations of the Sherman Act. *ARCO*, 495 U.S. at 341-45. We are unpersuaded that the Commission's 1978 *Steel Pipe* decision, by not addressing antitrust injury, ruled on the issue before us.

The approach in *Rare-Earth Magnets* of looking to federal antitrust law in determining whether there is an antitrust violation is consistent with the Commission's general approach in prior investigations involving antitrust claims. *See, e.g., Chicory Root-Crude and Prepared*, 1977 WL 52340 at *4 ("The Commission has in previous investigations, both under the prior section 337 and under section 337 as it exists today, used the antitrust laws and the practice thereunder as a standard for 'unfair methods of competition and unfair acts.' [Footnote omitted.] The presiding officer recommends this in the instant investigation and we adopt such recommendation.").

In the current investigation, the predicate for U.S. Steel's claim under section 337 is antitrust law. Consistent with our approach in prior cases, we are guided by the express congressional limitations on the scope of that federal law as interpreted by federal courts. As explained below, we interpret "[u]nfair methods of competition and unfair acts" under section 337(a)(1)(A), when predicated on the Sherman Act, to require antitrust injury.

B. The Sherman Act and Antitrust Injury

As mentioned above, U.S. Steel alleges a violation of section 337 predicated on section 1 of the Sherman Act. Section 1 of the Sherman Act, as amended, provides that:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1. On its face, the language of the Sherman Act is very broad and could be interpreted to proscribe all contracts in restraint of trade. *See Leegin Creative Leather Products, Inc. v.*

PSKS, Inc., 551 U.S. 877, 885 (2007); *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 342-43 (1982). The Supreme Court has never taken such a literal approach to its language. Rather, in interpreting Section 1, the Supreme Court has been guided by the principle that “[t]he antitrust laws were enacted for ‘the protection of *competition*, not *competitors*,’” *see ARCO*, 495 U.S. at 338 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original)), and that the Sherman Act should be applied consistent with its purpose of protecting competition. *See Leegin*, 551 U.S. at 885-86; *Arizona*, 457 U.S. at 342-43. Thus, the Court has held that section 1 only addresses “unreasonable” restraints, *i.e.*, whether its anticompetitive effects outweigh its procompetitive effects. *Id.*

Per se and rule-of-reason analysis are two methods of determining whether a restraint is “unreasonable.” “The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1 [of the Sherman Act].” *Leegin*, 551 U.S. at 885 (citation omitted). “Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.” *Id.* (citation omitted). The *per se* rule, on the other hand, eliminates the need to study the reasonableness of an individual restraint in light of courts having considerable experience with the restraint at issue and knowing it to have “manifestly anticompetitive effects.” *Id.* at 886. “The *per se* rule is a presumption of unreasonableness based on ‘business certainty and litigation efficiency.’” *ARCO*, 495 U.S. at 342. For example, the Supreme Court stated, “[r]estraints that are *per se* unlawful include horizontal agreements among competitors to fix prices or to divide markets.” *See Leegin*, 551 U.S. at 886 (citations omitted); *see also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

Sections 4 (damages) and 16 (injunctive relief) of the Clayton Act provide the vehicle for private enforcement of the Sherman Act and other antitrust laws in district court. Section 4 provides a cause of action to “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.” 15 U.S.C. § 15. It thus requires a plaintiff to allege that the unlawful antitrust conduct caused the plaintiff’s injury.¹¹ See 15 U.S.C. § 15.

The Supreme Court has held that the injury a private litigant seeking to enforce the Sherman Act must demonstrate cannot simply be harm to its business but must instead be an “antitrust injury.” Antitrust injury is “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” *Brunswick*, 429 U.S. at 489. More specifically, the Supreme Court has explained that actions that are *per se* unlawful under the Sherman Act may nonetheless have *some* procompetitive effects, even though the actions may disadvantage particular private parties. *ARCO*, 495 U.S. at 342-43. Therefore, consistent with antitrust law’s statutory purpose of protecting competition, the Supreme Court has required that in order for a private party to have standing to bring an antitrust claim under the Sherman Act in district court, the plaintiff must allege that its injury “stems from a competition-reducing aspect or effect of the defendant’s behavior.” *Id.* at 344 (emphasis in original). This “antitrust injury” requirement “ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief.” *Id.* at 342. “Procompetitive or efficiency-enhancing aspects of practices that nominally violate the antitrust laws . . . should play no role” with respect to providing

¹¹ A private plaintiff can seek an injunction under section 16 of the Clayton Act “against threatened loss or damage by a violation of the antitrust laws.” 15 U.S.C. § 26. Antitrust injury is required in a private action seeking injunctive relief under section 16 of the Clayton Act. See *Cargill*, 479 U.S. at 116-18.

relief based on that violation. *Id.* at 344 (citation omitted). Antitrust injury, therefore, is an essential substantive element to ensuring the proper enforcement of the antitrust laws.¹² *See, e.g., ARCO*, 495 U.S. at 339-40; *Cargill*, 479 U.S. at 109-12, 110 n.5; *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 157 (2d Cir. 2016); *Somers v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013); *see generally*, IIA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 337 (4th ed. 2014).

The Supreme Court has explained that in the context of pricing practices, “only predatory pricing has the requisite anticompetitive effect” to satisfy the antitrust injury requirement. *ARCO*, 495 U.S. at 339 (citation omitted). The Supreme Court has articulated a two-prong test for “predatory pricing”: “[f]irst, a plaintiff . . . must prove that the prices complained of are below an appropriate measure of its rival’s costs” (“below-cost pricing”); and “[t]he second prerequisite . . . is a demonstration that the competitor had . . . a dangerous probability, of recouping its investment in below-cost prices” (“recoupment”). *See Brooke Grp., Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993) (citations omitted). Given that antitrust injury is a requirement of an antitrust claim brought by a private plaintiff in district court, the Commission finds that for a Sherman Act claim to constitute “[u]nfair methods of competition and unfair acts” under section 337(a)(1)(A), the private complainant must allege antitrust injury. As in district court, this requirement serves to “ensure[] that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant’s behavior . . . since it is inimical to the antitrust laws to award damages”—or in the case of a section 337 violation, receive an exclusion order or cease and desist order—“for losses stemming from continued competition.” *See ARCO*,

¹² The Supreme Court also noted that “[t]he need for . . . showing [antitrust injury] is at least as great” in the context of *per se* violations. *ARCO*, 495 U.S. at 344. The Supreme Court explained that “insofar as the *per se* rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust injury requirement is underscored.” *Id.*

495 U.S. at 334, 344 (citations omitted). Without a need to show antitrust injury, complainants could use section 337 to pursue results that are at cross purposes with the preservation of competition.

U.S. Steel argues that section 337 is a “trade statute” with “a protectionist focus” and therefore antitrust injury required in district court should not be applied at the Commission. *See* U.S. Steel’s Jan. 17, 2017 Br. at 3, 13, 20 (EDIS Doc. No. 601088). Contrary to U.S. Steel’s argument, section 337(a)(1)(A) is “not merely a statute to protect competitors but also a statute to preserve competition.” *See Steel Pipe*, 1978 WL 50692, *17. The “threat or effect” prong of section 337(a)(1)(A)(i), (ii), (iii) may be satisfied by either injury to the domestic industry *or* by a showing of restraint or monopolization of trade. For example, the Commission has explained that “[s]ection 337 directs the imposition of an exclusion order in a case where an unfair method or act has the effect or tendency ‘to restrain or monopolize trade and commerce in the United States’ *irrespective of whether a domestic industry is experiencing injury.*” *Certain Tractor Parts*, Inv. No. 337-22, USITC Pub. No. 443, A-45 (Dec. 1971) (emphasis added). Additionally, the protectionist focus of section 337 to which U.S. Steel alludes is protection from the harm of an “unfair act” in the importation of goods, here an alleged antitrust violation. When that alleged act does not cause the type of harm required for a private party to establish an antitrust violation, the complaining party has not demonstrated that the act is an “unfair act” required to invoke section 337. Congress and courts have defined the elements necessary for a plaintiff to show an antitrust claim in district court under the Sherman Act. As explained herein, in this case we do not interpret section 337 to exclude the limitations of the substantive law passed by Congress and/or interpreted by the courts.

Similarly, U.S. Steel suggests that because section 337(a)(1)(A) includes domestic industry injury language under subsections (i) and (ii) of the “threat or effect” prong there is no need to require a separate antitrust injury requirement for complaints based on antitrust law. *See, e.g.,* U.S. Steel’s Pet. at 16 (Nov. 23, 2016) (EDIS Doc. No. 595868); U.S. Steel’s Jan. 17, 2017 Br. at 20-21 (EDIS Doc. No. 601088) (citing *Spancion Inc. v. Int’l Trade Comm’n*, 629 F.3d 1331 (Fed. Cir. 2010)). We do not agree. “Unfair acts” and the “threat or effect” language are separate elements for showing a violation of section 337(a)(1)(A). Nor do we find that the omission of the domestic industry injury language in subsection (iii) of the “threat or effect” prong reflects a choice by Congress that antitrust injury is not applicable to antitrust claims under section 337.¹³ On the contrary, it would be “inimical to the antitrust laws” to award an exclusion order and/or cease and desist order for trade practices where the complainant’s losses resulted from behavior that constituted continued competition rather than a reduction in competition. *See ARCO*, 495 U.S. at 334. U.S. Steel’s approach would have the Commission create a new version of antitrust law for disputes between private parties that conflicts with established federal precedent and runs the risk of undermining the antitrust laws’ fundamental purpose.

¹³ On review, Complainant argues that under subsection (iii), “U.S. Steel must prove that the unfair act threatens to restrain or actually restrains U.S. Steel’s trade or commerce.” U.S. Steel’s Jan. 17, 2017 Br. at 24 (EDIS Doc. No. 601088). In other words, U.S. Steel reads the restraint of trade and commerce in the United States to refer to the restraint of *U.S. Steel’s* trade or commerce. But the plain language of subsection (iii) does not support this interpretation. It says nothing about injury either to a domestic industry or to a specific domestic company. The language of subsection (iii), which echoes that of the Sherman Act, further conveys an intention to protect competition and not simply competitors. *See Steel Pipe*, 1978 WL 50692, *17.

More generally, we note the arguments in the parties’ briefs and oral presentations on whether investigations based on the Sherman Act must be brought under subsection (iii), rather than subsections (i) or (ii), of section 337(a)(1)(A). Because we ground our decision in the meaning of “unfair methods of competition and unfair acts” in section 337(a)(1)(A), rather than the subsections thereof, we find it unnecessary to reach this question and therefore express no opinion on it.

Without the requirement of antitrust injury, the risk of providing relief against the pro-competitive effects or efficiency enhancing behavior of particular respondents is more acute in the context of section 337 because the Commission does not possess as much enforcement discretion as is available to other federal agencies. It is true that the Commission, like the Federal Trade Commission (FTC), has independent authority to institute and litigate investigations under section 337. See 19 U.S.C. § 1337(b)(1); see, e.g., *Certain Apparatus for Flow Injection Analysis and Components Thereof*, Inv. No. 337-TA-151, 1984 WL 63180, *1 (Nov. 1, 1984).¹⁴ However, unlike the FTC and the Department of Justice, which can exercise judgment akin to prosecutorial discretion (taking into consideration the effects on competition of the actions at issue), the Commission's discretion regarding whether to institute investigations based on properly-filed complaints is not unlimited. The Federal Circuit has noted the way in which private rights are at issue under section 337:

It is correct that a § 1337 proceeding is not purely private litigation "between the parties" but rather is an "investigation" by the Government into unfair methods of competition or unfair acts in the importation of articles into the United States. Significantly, however, any determination of unfair acts is dependent upon the private rights between parties in the position of complainant and respondent. The 1975 amendment of the statute which added the provision in § 1337(c), "All legal and equitable defenses may be presented in all cases" was a major change which reflects a recognition that essentially private rights are being enforced in the proceeding.

Young Eng'rs, 721 F.2d at 1315. Thus, we find the practices followed in the federal courts regarding antitrust injury to be a closer analogue to the current proceeding, rather than FTC practice as U.S. Steel has claimed.

¹⁴ We do not here address the standards that would apply in a self-initiated investigation.

U.S. Steel argues that the explicit requirement for the Commission to consider the effects on competition that is found in the public interest factors of section 337(d) means that the Commission should not also consider competitive effects under the rubric of antitrust injury. *See* U.S. Steel's Pet. at 16-17 (Nov. 23, 2016) (EDIS Doc. No. 595868). We do not agree. Section 337 bifurcates the violation and remedy phases of an investigation. *Bally/Midway Mfg. Co. v. U.S. Int'l Trade Comm'n*, 714 F.2d 1117, 1122-23 (Fed. Cir. 1983).¹⁵ After a violation is found and as part of the remedy phase of the investigation, section 337 requires the Commission to "consider[] the effect of [any] exclusion [order and/or cease and desist order] upon the . . . competitive conditions in the United States economy, . . . and United States consumers." *See* 19 U.S.C. §§ 1337(d)(1), (f)(1). This "public interest" analysis addresses a different question from the antitrust injury requirement. In the case of an exclusion order, it asks the Commission to consider the effect of excluding the violative products *from* the United States on competition and U.S. consumers (along with the other public interest factors). On the other hand, the antitrust injury requirement asks a tribunal to assess what effect on competition the accused products are having while they are *in* the market. Thus, the statutory public interest factors considered during the remedy portion of the investigation do not substitute for the requirement of antitrust injury.

We disagree that the Federal Circuit's decision in *Spancion* precludes the Commission from considering the effect on consumers and competition in the United States in the context of an antitrust injury inquiry, as U.S. Steel suggests. *See* Tr. at 32:25-33:14. Rather, *Spancion* provides that the Commission is not required to apply the *eBay* factors during the remedy phase of

¹⁵ We note that under Rule 210.50 (b)(1) the Commission may order the presiding ALJ to take evidence with respect to the public interest factors during the violation phase of a 337 investigation. *See* 19 C.F.R. § 210.50(b)(1). When the Commission has ordered the presiding ALJ to take evidence with respect to the public interest factors, the ALJ must issue a recommended determination containing findings of fact concerning the public interest. *See* 19 C.F.R. § 210.42(a)(1)(ii)(C).

an investigation before issuing an exclusion order “[g]iven the different statutory underpinnings for relief before the Commission in Section 337 actions and before the district courts in suits for patent infringement.” *Spansion*, 629 F.3d at 1359 (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). *Spansion* says nothing about standing or the substantive law required to establish “[u]nfair methods of competition and unfair acts” under section 337(a)(1)(A) during the violation phase of the investigation.

We are not persuaded by the argument that antitrust injury is inapplicable to U.S. Steel’s claim because antitrust injury arises in federal court actions under the Clayton Act and not the Sherman Act itself. *See, e.g.*, U.S. Steel Pet. at 15 (Nov. 23, 2016) (EDIS Doc. No. 595868); U.S. Steel’s Jan. 17, 2017 Br. at 16-18, 41-42 (EDIS Doc. No. 601088); Order No. 38 at 6-7, 24; Tr. at 9:16-19, 31:1-19. As explained above, the Commission addresses in this opinion what is required to establish an unfair trade practice under section 337(a)(1)(A). We further note that section 7 of the Sherman Act¹⁶ originally included similar “injury” language to section 4 of the Clayton Act. Specifically, section 7 of the Sherman Act formerly provided a private cause of action for persons injured by violations of the Sherman Act; whereas section 4 of the Clayton Act more broadly provides a private cause of action for persons injured by anything forbidden in the antitrust laws. *See State of New Mexico v. Am. Petrofina, Inc.*, 501 F.2d 363, 364 n.3 (9th Cir. 1974). Section 7 of the Sherman Act was repealed in 1955 because it was deemed “redundant” and thus unnecessary in view of the broader provision of section 4 of the Clayton Act. *See Pfizer, Inc. v. Gov’t of India*, 434 U.S. 308, 311 n.8 (1978). Section 7 was not removed because Congress intended to abolish an injury requirement for private causes of action under the Sherman Act. As the federal courts have recognized, antitrust injury is a requirement for a private party to bring a

¹⁶ *See* Act of July 2, 1890, ch. 647, § 7, 26 Stat. 210 (repealed 1955).

claim under the Sherman Act, consistent with the statutory purpose of protecting competition. Therefore, for purposes of deciding what is required to establish an unfair trade practice under section 337(a)(1)(A), the fact that the Clayton Act provides the vehicle for private parties to bring suit under the Sherman Act does not alter our conclusion. There is also nothing in the text of the private right of action language in the Clayton Act and section 337 that leads us to understand that Congress did not want the Commission to apply antitrust injury standing to a section 337 claim predicated on the Sherman Act. If Congress intended to create a forum for private parties to litigate an antitrust claim at the Commission, whose prosecution would be barred in federal district court as inimical to the antitrust laws, we would expect a clarity of expression that is missing in our statute. Such congressional intent is not expressed in our statute.

Moreover, requiring antitrust injury standing comports with the Commission's approach in intellectual property cases under section 337. For example, in patent investigations, the Commission follows the patent standing requirement imposed by courts rather than create its own, inconsistent standing requirement. *See* 19 C.F.R. § 210.12(a)(7); *SiRF Technology, Inc. v. Int'l Trade Comm'n*, 601 F.3d 1319, 1326 n.4 (Fed. Cir. 2010) (affirming violation finding in patent infringement investigation; noting that the "Commission 'strictly reads the federal standing precedent' into its rules") (citation omitted). We agree with the ID that "[t]here is no reason why showing standing would be excused with respect to alleged antitrust violations when it is required with respect to other types of unfair practices subject to section 337." Order No. 38 at 15.

Finally, Complainant contends that other remedies are not available if the antitrust injury requirement applies in this context. U.S. Steel's Jan. 17, 2017 Br. at 1-2 (EDIS Doc. No. 601088). However, the antitrust injury requirement is not a bar to antitrust actions at the

Commission. Rather, it ensures that antitrust claims asserted in section 337 are adjudicated in a manner that is not inconsistent with existing, clear federal antitrust law.

For the foregoing reasons, the Commission has determined to affirm the ALJ's finding that "antitrust injury" is required for section 337 investigations in which the alleged unfair method of competition or unfair act is based on a violation of the Sherman Act.¹⁷

C. Sufficiency of the Complaint

Having determined that U.S. Steel is required to show "antitrust injury," we find that U.S. Steel is also required to plead such "antitrust injury" in its complaint.¹⁸

In federal district courts, "[e]very private antitrust plaintiff, including those challenging an agreement as unlawful under [Sherman] § 1, must include in its complaint allegations of 'antitrust injury.'" *Energy Conversion Devices*, 833 F.3d at 689 (affirming dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to allege antitrust injury) (citations omitted). *See also In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d at 157 ("[A]ntitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this

¹⁷ U.S. Steel's claim that it has been harmed by a conspiracy to fix prices and control output and export volumes in violation of the Sherman Act is tied to underpricing by Chinese-produced carbon and alloy steel and to the impact it has had on U.S. Steel's trade, production, and financial performance. Amended Complaint ¶¶ 71-99, 223-241. The relevant antitrust injury U.S. Steel would need to allege and show is predatory pricing, as described above. *See, e.g., Brooke*, 509 U.S. at 222-26; *ARCO*, 495 U.S. 337-41; *Energy Conversion Devices Liquidation Trust v. Trina Solar Ltd.*, 833 F.3d 680, 688-91 (6th Cir. 2016). U.S. Steel does not appear to contest this point, and in any event, represents that it will not amend its complaint to plead or prove antitrust injury. *See, e.g., Tr.* at 42, 68-69 (Mr. Glass); U.S. Steel Feb. 1, 2017 Resp. Br. at 21. We do not opine on the form of antitrust injury that might be required if other types of claims are asserted under the antitrust laws.

¹⁸ Consistent with the recent Commission Opinion relating to Complainant's false designation of origin claim, "we agree with the ID that the Commission's decision to institute an investigation does not preclude an ALJ from reexamining the sufficiency of a complaint," but "we do not adopt the ID's discussion of the ALJ's authority under the APA in the context of Commission Rules 210.21(a) and 210.18." *See Certain Carbon and Alloy Steel Products*, Inv. No. 337-TA-1002, Comm'n Op. at 7 (Mar. 6, 2017) (citations omitted).

requirement[,] [it] must [be] dismiss[ed] [] as a matter of law. . . . To satisfy the antitrust standing requirement, a private antitrust plaintiff must plausibly allege that [] it suffered an antitrust injury.”) (citation omitted). In *Energy Conversion*, the Sixth Circuit found that plaintiff failed to allege recoupment (one of the elements of predatory pricing), which was necessary to satisfy the antitrust injury requirement. *Energy Conversion*, 833 F.3d at 689-91. The Sixth Circuit explained that:

To survive a motion to dismiss, a complaint must “state[] a plausible claim for relief,” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), which requires that the complaint “show[] that the pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2). If proof of recoupment is required to succeed on the claim, allegations of recoupment must appear in the complaint to show an entitlement to relief. During discovery, the plaintiff must show that there is factual support for each component of the claim or it will be rejected as a matter of law on summary judgment.

Energy Conversion, 833 F.3d at 688. The district court did not allow the plaintiff to amend its complaint to allege recoupment. *Id.* at 690-91. In affirming the district court’s denial of leave to amend, the Sixth Circuit reasoned that “plaintiff had ample notice of the issue”; “[i]ts lawyers were the same ones that pursued parallel litigation in the Northern District of California”; “[i]n that case, they filed a complaint that initially alleged recoupment”; and “[f]or reasons of their own, they amended the complaint and removed the allegation.” *See id.* at 691.

Thus, the Commission holds that Complainant is required to plead, in the complaint, allegations of “antitrust injury” standing. Under the Commission’s jurisprudence, complainants are typically allowed to amend the complaint for good cause. 19 C.F.R. § 210.14(b)(1) (“After an investigation has been instituted, the complaint or notice of investigation may be amended only by leave of the Commission for good cause shown and upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties to the investigation.”). We would

normally find that good cause exists under Commission Rule 210.14(b) to allow Complainant to amend its complaint. *See also* Fed. R. Civ. Proc. 15 (“The court should freely give leave when justice so requires.”). However, on review before the Commission, U.S. Steel has indicated that even if afforded the opportunity to amend its complaint to plead antitrust injury, it would not plead allegations of antitrust injury. Specifically, asked whether it would amend its complaint if the Commission applied the standard for antitrust injury required in federal court, U.S. Steel’s counsel responded unequivocally, “No” twice. Tr. at 68. Elaborating, counsel stated that the “standard is virtually impossible to satisfy in Federal Court. ... And the reality is that we couldn’t.” Tr. at 69. Accordingly, we affirm the ALJ’s dismissal of Complainant’s antitrust claim as modified by our reasoning above.

Finally, the Commission has determined to reverse the ALJ’s dismissal of Complainant’s antitrust claim with prejudice (*see* Order No. 38 at 30). Specifically, we dismiss Complainant’s antitrust claim for failure to allege a necessary element – antitrust injury – and without a determination of the merits of a properly pled claim. Accordingly, we dismiss without prejudice.

III. CONCLUSION

For the foregoing reasons, the Commission has determined to affirm in part, as modified by our reasoning, and reverse in part the ID (Order No. 38). The antitrust claim is dismissed.

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', with a stylized flourish at the end.

Lisa R. Barton
Secretary to the Commission

Issued: March 19, 2018

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN CARBON AND ALLOY
STEEL PRODUCTS**

Inv. No. 337-TA-1002

**DISSENTING OPINION OF COMMISSIONER MEREDITH M. BROADBENT
WITH RESPECT TO ORDER NO. 38**

The Commission instituted this investigation based on a complaint filed by Complainant United States Steel Corporation (“U.S. Steel”) to determine whether there is a violation of Section 337(a)(1)(A), 19 U.S.C. § 1337(a)(1)(A), in the importation, the sale for importation, or the sale within the United States after importation of certain carbon and alloy steel products by reason of, *inter alia*, a conspiracy to fix prices and control output and export volumes, the threat or effect of which is to restrain or monopolize trade and commerce in the United States. *See* 81 Fed. Reg. 35381-82 (June 2, 2016). U.S. Steel’s complaint, as amended, alleges that the conspiracy to fix prices and control output and export volumes is an unfair method of competition or unfair act that violates section 1 of the Sherman Act, 15 U.S.C. § 1 (“antitrust claim”). Compl. ¶ 71 (Sept. 22, 2016).

On November 14, 2016, the presiding Administrative Law Judge (“ALJ”) issued Order No. 38, an initial determination (“ID”) granting Respondents’ motion to terminate U.S. Steel’s antitrust claim. The ID held that U.S. Steel’s failure to plead antitrust injury as an element of its antitrust claim in its Section 337 complaint required the Commission, as a matter of law, to terminate the antitrust claim under Section 337(a)(1)(A). ID at 28-30. The Commission determined to review the ID on December 19, 2016. *See* Comm’n Notice (Dec. 19, 2016).

Having considered the ID, the written submissions of the parties and non-parties, and the views of the parties expressed at the Commission oral argument, I have determined that the ID incorrectly holds that U.S. Steel was required, as a matter of law, to plead antitrust injury in its complaint with respect to its antitrust claim asserted in this Section 337 investigation. Consequently, the ID should be reversed and vacated, and the antitrust claim remanded to the ALJ for further proceedings.

The ID noted two separate and independent requirements of Section 337(a)(1)(A) that are necessary to prove a violation, which were raised by Respondents' motion: (1) the unfair trade practice, *i.e.*, "unfair methods of competition and unfair acts in the importation of articles"; and (2) the "threat or effect" of that unfair trade practice under subsection 337(a)(1)(A)(iii), *i.e.*, "the threat or effect of [the unfair trade practice] is ... to restrain or monopolize trade or commerce in the United States." ID at 8-9. As to the latter requirement, the ID found that U.S. Steel's allegation of an illegal restraint of trade was sufficient to satisfy "the pleading requirements under the threat or effect prong of section 337(a)(1)(A)(iii)..." *Id.* at 10-11. As to the former, however, the ID found U.S. Steel "has not properly alleged that the practices complained of constitute an unfair method of competition or unfair act under section 337(a)(1)(A)." *Id.* at 11. The ALJ stated that "[t]he unfair trade practice prong requires standing to sue." *Id.* Simply put, even if U.S. Steel's complaint sets forth unfair trade practice allegations that sufficiently plead all elements of a *per se* Sherman Act violation under controlling Supreme Court precedent, the ID nevertheless holds that such unfair trade practices cannot fall within the scope of the statutory term "unfair methods of competition and unfair acts" of Section 337(a)(1)(A).

The ID reasoned that "the limitations on private antitrust litigants must apply under section 337 as they do in federal courts." *Id.* at 10 (citing *Tianrui Grp. Co. Ltd. v. Int'l Trade Comm'n*,

661 F.3d 1322, 1333 (Fed. Cir. 2011) (“*Tianrui*”). The ID further stated that “[u]nder federal antitrust law, it is firmly established that a private complainant must show antitrust standing.” *Id.* Thus, the ID held that “U.S. Steel must plead and prove (1) injury in fact to its business or property; (2) that the injury is proximate, *i.e.*, not too remote, and (3) that such injury is the kind that the antitrust laws were intended to prevent and ‘flows from that which makes defendants’ acts unlawful.’” *Id.* at 20 (citing 2A Areeda, ¶ 335a, at 76-77 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977))).¹ Because “U.S. Steel’s complaint does not allege predatory pricing or the facts necessary to show predatory pricing[,] . . . [t]he complaint therefore is fatally deficient as a matter of law.” *Id.* at 23.

The ID rejected U.S. Steel’s assertion that “the antitrust injury requirement ‘does not come from Section 1 of the Sherman Act, but from the private cause of action in Section 4 of the Clayton Act.’” *Id.* at 24 (citation omitted). Instead, the ID found that “[f]or purposes of the standing requirement, it does not matter whether a complaint is brought under section 1 or 2 of the Sherman Act or section 4 of the Clayton Act.” *Id.* The ID also rejected U.S. Steel’s argument that “because horizontal price-fixing is a *per se* violation of section 1 of the Sherman Act, standing to sue is not required.” *Id.* at 25. The ID reasoned that “[w]hile a *per se* rule ‘relieves plaintiff of the burden of demonstrating an anticompetitive effect, which is assumed, it does not excuse a plaintiff from showing that his injury was caused by the anticompetitive acts.’” *Id.* at 26-27

¹ Specifically, the ID found that “[a]ntitrust injury requires that the plaintiff be ‘adversely affected by an *anticompetitive* aspect of the defendant’s conduct,” and that “[i]n the context of pricing practices challenged by rivals as depressing their profits, ‘only predatory pricing has the requisite anticompetitive effect.’” *Id.* at 20-21 (citing *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990) (“*ARCO*”) (emphasis in original)). “To prove predatory pricing,” the ID continued, “a plaintiff must show that (1) the defendant’s prices are below its costs and (2) there is a ‘dangerous probability’ that the defendants will ‘recoup’ their investment in ‘below-cost prices’ once they have succeeded in forcing competitors from the market.” *Id.* at 22 (citing *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-25 (1993)).

(citing *Newman v. Universal Pictures*, 813 F.2d 1519, 1522-23 (9th Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988)). The ID further stated that “[t]he Supreme Court in *ARCO* specifically rejected the contention that standing need not be alleged in a case involving a *per se* violation of the Sherman Act.” *Id.* at 27. Rather, the ID continued, “insofar as the *per se* rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust injury requirement is underscored.” *Id.* at 28 (citing *ARCO*, 495 U.S. at 344). The ID therefore concluded that “U.S. Steel’s complaint must be dismissed without further proceedings, as a matter of established antitrust law.” *Id.* at 19.

DISCUSSION

To resolve the question of whether U.S. Steel is required to plead antitrust injury as a matter of law in order to state a Sherman Act § 1 claim constituting “unfair methods of competition and unfair acts” under Section 337(a)(1)(A), it is necessary to focus on the controlling language of the relevant statutes and how the courts have interpreted these statutes. Statutes pertinent to the ID’s holding are: Section 337(a)(1)(A) of the Tariff Act of 1930, Section 1 of the Sherman Act, and Sections 4 and 16 of the Clayton Act.

The Commission’s authority to investigate and address unfairly traded imports stems from its enabling statute, Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337. *Vastfame Camera, Ltd. v. Int’l Trade Comm’n*, 386 F.3d 1108, 1112 (Fed. Cir. 2010); *Sealed Air Corp. v. U.S. Int’l Trade Comm’n*, 645 F.2d 976, 987 (C.C.P.A. 1981). Section 337(a)(1)(A) declares unlawful “unfair methods of competition and unfair acts” in the importation or sale of articles, the threat or effect of which is, *inter alia*, to restrain or monopolize trade and commerce in the United States:

(a) Unlawful activities; covered industries; definitions

(1) Subject to paragraph (2), the following are unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provision of law, as provided in this section:

(A) Unfair methods of competition and unfair acts in the importation of articles (other than articles provided for in subparagraphs (B), (C), (D), and (E)) into the United States, or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is—

(i) to destroy or substantially injure an industry in the United States;

(ii) to prevent the establishment of such an industry;
or

(iii) to restrain or monopolize trade and commerce in the United States.

19 U.S.C. § 1337(a)(1)(A). As is clear from the language of this provision, a violation of Section 337(a)(1)(A) comprises two separate and independent elements: (1) “unfair methods of competition and unfair acts” in the importation or sale of articles; and (2) a “threat or effect” prong (also known as the injury requirement). *See* 19 U.S.C. § 1337(a)(1)(A)(i)-(iii); *Akzo N.V. v. Int’l Trade Comm’n*, 808 F.2d 1471, 1486 (Fed. Cir. 1986) (“[T]o prove a violation of § 337, the complainant must show both an unfair act and a resulting detrimental effect or tendency.”); *Textron, Inc. v. Int’l Trade Comm’n*, 753 F.2d 1019, 1028 (Fed. Cir. 1985) (“[S]ection 337 has consistently been interpreted to contain a distinct injury requirement of independent proof”). I agree with the ALJ, that the first element governs the issue of whether the statutory term “unfair methods of competition and unfair acts” requires that antitrust injury must be separately and specifically pleaded, in addition to U.S. Steel’s substantive allegations of a violation of Sherman Act § 1, in order to state an actionable claim under Section 337(a)(1)(A).

Courts have held that the language of this provision – “unfair methods of competition and unfair acts” -- is broad and flexible. For example, soon after the passage of the Tariff Act of 1930,

the Court of Customs and Patent Appeals confronted the issue of whether this statutory phrase required a showing of two separate elements before injurious imports could be stopped: an “unfair method of competition” as defined by the courts to require passing off, as well as an “unfair act in importation.” The Court rejected this construction stating:

We are of the opinion that when Congress used the phrase, in section 337(a) of the Tariff Act of 1930, 19 USCA 1337(a), “unfair methods of competition and unfair acts in the importation of articles into the United States,” it did not intend that before such methods or acts could be stopped, the act had to fall within the technical definition of unfair methods of competition as it has been defined in some of the decisions, but we think that if unfair methods of competition or unfair acts in the importation of articles into the United States are being practiced or performed by any one, they are to be regarded as unlawful, and this section was intended to prevent them.

In re N. Pigment Co., 71 F.2d 447, 455 (C.C.P.A. 1934). See also *In re Von Clemm*, 229 F.2d 441, 443-44 (C.C.P.A. 1955) (“As was noted in our decision in *In re Northern Pigment Co.*, . . . the quoted language [‘unfair methods of competition and unfair acts in the importation of articles’] is broad and inclusive and should not be held to be limited to acts coming within the technical definition of unfair methods of competition as applied in some decisions.”).

The *Northern Pigment* Court quoted extensively from its prior decision in *Frischer*, which examined the legislative history of Section 316 of the Tariff Act of 1922, the predecessor to Section 337, in finding that “it was the purpose of the law to give to industries of the United States, not only the benefit of the favorable laws and conditions to be found in this country, but also to protect such industries from being unfairly deprived of the advantage of the same and permit them to grow and develop.” *N. Pigment*, 71 F.2d at 454 (quoting *Frischer & Co. v. Bakelite Corp.*, 39 F.2d 247 (C.C.P.A. 1930)). Given both the “broad and inclusive term,” the context of the provision, and the purposes for which the statute was enacted, the Court concluded that the acts of

the respondents in importing iron pigment manufactured abroad using a patented method clearly fell within the term.² *Id.* at 455. *See also Tianrui*, 661 F.3d at 1331-32 (noting the “broad and flexible meaning” of the statutory term “unfair methods of competition” consistent with the purpose and legislative background of the statute supports the Commission’s interpretation of the scope of Section 337 to reach trade secret misappropriation occurring abroad); *Von Clemm*, 229 F.2d at 443-44 (citing *N. Pigment*, 71 F.2d. at 447)). The *Northern Pigment* Court observed that “[o]bviously one of the purposes of the enactment of the section, as well as the whole act, was for the encouragement of American industry. The proper application of the legislation here in controversy certainly would encourage and help a great many American industries.” *N. Pigment*, 71 F.2d at 456.

In construing the scope of the “unfair methods of competition and unfair acts” language, the Court relied upon the oft-cited 1922 Senate Report concerning the Commission’s newly conferred authority to investigate unfair methods of competition and unfair acts in the importation and sale of articles in the United States. The Court stated that “[t]he provision relating to unfair methods of competition in the importation of goods is broad enough to prevent every type and form of unfair practice and is, therefore, a more adequate protection to American industry than any

² As discussed in *Tianrui*, the Court of Customs and Patent Appeals later held in *In re Amtorg* that the use and sale of a product made by a patented process did not constitute infringement of a process patent because section 337 did not enlarge the substantive scope of U.S. patent law. *Tianrui*, 661 F.3d at 1333-34 (citing *In re Amtorg*, 75 F.2d 826 (C.C.P.A. 1935)). The *Amtorg* decision had the effect of reversing *Frischer*, *Orion*, and *Northern Pigment* only with respect to infringement of the process patents involved therein. However, the *Tianrui* Court noted that “[t]o the extent *Amtorg* construed the scope of the Commission’s jurisdiction over unfair methods of competition, Congress has subsequently rejected that construction in response to criticism by the Tariff Commission. . . . *Amtorg* thus has no effect on the scope of the Commission’s authority to regulate trade secret misappropriation relating to the production of goods imported into this country.” *Tianrui*, 661 F.3d at 1334.

antidumping statute the country has ever had.” *N. Pigment*, 71 F.2d at 454 (quoting *Frischer*, 39 F.2d at 511) (quoting S. Rep. No. 67-595 at 3 (1922))).

The broad scope of the unfair acts covered by the provision is also supported by statements of Senator Smoot, the 1922 Act’s primary sponsor, who explained that section 316 was intended to be “an antidumping law with teeth in it—one which will reach all forms of unfair competition in importation.” 62 Cong. Rec. 5874, 5879 (1922). He stated that section 316 “not only prohibits dumping in the ordinary accepted meaning of that word; that is, the sale of merchandise in the United States for less than its foreign market value or cost of production; but also bribery, espionage, misrepresentation of goods, full-line forcing, and other similar practices frequently more injurious to trade than price cutting.” *Id.*

Courts have recognized that the broad and inclusive scope of “unfair methods of competition and unfair acts” was intended by Congress to combat the myriad unfair practices in international trade that may involve materially different questions than those arising in domestic competition:

The importation of articles may involve questions which differ materially from any arising in purely domestic competition, and it is evident from the language used that Congress intended to allow wide discretion in determining what practices are to be regarded as unfair.

Von Clemm, 229 F.2d at 444. *See also Frischer*, 39 F.2d at 259-60 (noting that the conditions complainants face in combatting unfairly traded imports may be quite different from domestic competition); *In re Orion*, 71 F.2d 458, 466-67 (C.C.P.A. 1934).

Modern court decisions continue to recognize that Congress vested the Commission with “broad enforcement authority” to “prevent a diverse array of unfair methods of competition in the importation of goods.” *Suprema, Inc. v. Int’l Trade Comm’n*, 796 F.3d 1338, 1350 (Fed. Cir.

2015 (*en banc*). “Recognizing the challenges posed by the wide array of unfair methods of competition, Congress emphasized the broad scope of the enforcement powers granted to the Tariff Commission when it passed the 1922 Tariff Act.” *Id.* Tracing the history of Congress’s vigilance to encourage and protect U.S. domestic interests from unfairly traded imports since 1789, the Federal Circuit observed that Congress has addressed the menace of unfairly traded imports in a unique enforcement statute in Section 337 that is distinct from the statutory schemes designed to address domestic commercial unfair practices:

While Congress has addressed domestic commercial practices under various statutory regimes, such as antitrust (15 U.S.C. §§ 1-38), patent (35 U.S.C. §§ 1-390), and copyright 19 U.S.C. §§1-1332), it has established a distinct legal regime in Section 337 aimed at curbing unfair trade practices that involve the entry of goods into the U.S. market via importation. In sum, Section 337 is an enforcement statute enacted by Congress to stop at the border the entry of goods, *i.e.*, articles, that are involved in unfair trade practices.

Suprema, 796 F.3d at 1344-45.

The Federal Circuit in *Tianrui* further explained that although the scope of the Commission’s authority to remedy unfair acts in the importation of articles is “broad and flexible,” that authority must respect “express congressional limitations” when a federal statute forms the legal basis for the unfair acts under Section 337, such as substantive U.S. patent law applied under Section 337(a)(1)(B). 661 F.3d at 1333. In *Tianrui*, however, because there was no federal civil statute regulating trade secret misappropriation at the time of the decision, “there [was] no statutory basis for limiting the Commission’s flexible authority under section 337(a)(1)(A) with respect to trade secret misappropriation.” *Id.* Thus, *Tianrui* teaches that when a substantive statute is relied upon to establish the “unfair methods of competition and unfair acts” at issue, the scope of Section 337(a)(1)(A) cannot circumvent an “express congressional limitation” set forth in

that substantive statute. Absent such express Congressional limitation, restricting the Commission's consideration of unfair methods of competition and unfair acts in international trade "would be inconsistent with the congressional purpose of protecting domestic commerce from unfair competition in importation such as trade secret misappropriation." *Id.* at 1335. *See also Suprema*, 796 F.3d at 1352 ("Congress enacted a legal regime for enforcement against unfair trade acts by directing the Commission to base Section 337 relief on goods and the issuance of exclusion orders to bar their importation. Absent unconstitutionality, we must defer to that regime.") (citing *Beck v. Sec'y of Dep't of Health & Human Servs.*, 924 F.2d 1029, 1034 (Fed. Cir. 1991) ("Our duty is limited to interpreting the statute as it was enacted")).

The language of the statute, legislative history, and court decisions, inform my view that Section 337 is a broad and flexible international unfair competition statute designed to provide American industries with a powerful tool to combat a broad array of international unfair practices and schemes in the importation of articles that harm domestic commerce. Congress employed the broad and inclusive language of "unfair methods of competition and unfair acts" in Section 337(a)(1)(A), without providing a limiting definition, in order to capture within its scope any nefarious practices that distort domestic competition, whether or not such unfair practices are familiar to domestic courts, as for example involving state-owned enterprises or government-driven non-market economies. In the case at bar, U.S. Steel's complaint alleges a massive and complex conspiracy among Chinese producers, orchestrated by the Chinese government, to control prices and regulate production of carbon and alloy steel in the Chinese steel industry through the China Iron and Steel Association, including coordinated enterprise restructuring, standard-setting, oversight and coordination of pricing and production, information-sharing concerning competitively-sensitive data such as production schedules, raw

material costs and other financial data, and invoking the power of the Chinese government to discipline and enforce compliance. Compl. ¶¶ 72-99. U.S. Steel’s allegations reflect what the Administration has identified as a “statist economic model with a large and growing government role” and that “China has appeared to be moving further away from market principles in recent years.”³ The Chinese economy is heavily distorted by the close relationship between government and business, which has persisted even as the country has become more globally oriented. In many Chinese markets, the quantity of goods sold and price levels are affected as much by changes in central and regional government policy as by the supply and demand dynamics. For this reason, industries in China frequently behave in ways that may seem to defy common sense from a U.S. perspective. As U.S. Steel explained at the oral argument, “when you have a state sponsored industry the costs [of production] can be zero.” Oral Arg. Tr. at 242 (as corrected on May 5, 2017, EDIS Doc. No. 610791). As these complaint allegations illustrate, international competition can be much more complex than domestic commerce. In the rapidly evolving world of international trade, it is particularly important that Section 337, through its prohibition against “unfair methods of competition and unfair acts” in importation and sale, remain a powerful and flexible tool to protect American industries and workers as Congress intended, unless the federal statute establishing the unfair trade practice contains “express Congressional limitations” that restrict Commission action. Where, as here, no such express limitation in the Sherman Act has been shown, I find no legal justification for imposing the insurmountable hurdle of demonstrating

³ USTR, 2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program, at 4 (March 2018).

antitrust injury upon a typical U.S. company that is grappling with imports that benefit from the international unfair methods of competition that have been alleged in this case.⁴

I find that none of the authorities cited by the ID or in the submissions of the parties and non-parties compel the conclusion that the statutory term “unfair methods of competition and unfair acts” in Section 337(a)(1)(A) is restricted, as a matter of law, to a complaint that pleads “antitrust injury” where the “unfair methods of competition and unfair acts” alleged by U.S. Steel are prohibited by section 1 of the Sherman Act.⁵ Nor have the parties, or the ID, identified any “express congressional limitation” contained in section 1 of the Sherman Act that constrains Commission action on U.S. Steel’s complaint.

In this investigation, because U.S. Steel’s complaint alleges that the unfair acts of the Chinese respondents violate section 1 of the Sherman Act, the language of section 1 of the Sherman Act, and federal case law interpreting the text of this statute, provide the substantive legal standard for determining what constitutes “a conspiracy, in restraint of trade or commerce” sufficient to establish an “unfair method of competition” or “unfair act” under Section 337.

⁴ U.S. Steel explained at the hearing that in this state sponsored industry, where “costs can be zero,” it is difficult if not impossible for “an American company to prove that they are pricing below zero and it may be negative” and therefore no member of the U.S. steel industry, the United Steelworkers, or consumers could have standing to challenge these unfair practices. Oral Arg. Tr. at 241-43.

⁵ To be sure, Section 337 expressly provides for the Commission’s consideration of public interest concerns, including the public health and welfare, competitive conditions in the United States economy, production of like or directly competitive articles in the United States and U.S. consumers, after a violation is found in the context of the Commission’s determination of an appropriate remedy to prevent further unfair acts in connection with subject imports. 19 U.S.C. § 1337(d), (f), (g). However, the statutory scheme shows that these public interest considerations do not play a role in the determination of the elements of “unfair methods of competition and unfair acts” underlying a violation of Section 337(a)(1)(A). Moreover, the statutory framework provides that policy considerations relating to Commission action in Section 337 investigations are within the province of the President. 19 U.S.C. § 1337(j)(2).

Section 1 of the Sherman Act, as amended, declares illegal agreements in restraint of trade or commerce, and imposes criminal penalties for violations:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

See 15 U.S.C. § 1 (emphasis added). Horizontal price-fixing trade practices, as alleged here by U.S. Steel, are *per se* illegal under Section 1 of the Sherman Act. *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (“Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices or to divide markets.”) (citations omitted); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (“Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.”).

Pertinent to the ID’s determination that “antitrust injury” is required as a matter of law to sustain U.S. Steel’s antitrust claim, is the Clayton Act. Specifically, Sections 4 and 16 of the Clayton Act are remedial statutes that authorize private parties to sue in federal court for treble damages or an injunction when they have been harmed by a violation of the antitrust laws, such as conduct that violates the Sherman Act or other sections of the Clayton Act. *See, e.g.*, 15 U.S.C. §§ 15, 26; *ARCO*, 495 U.S. at 331-32 (action brought under § 4 of the Clayton Act, 15 U.S.C. § 15, and complaint alleged an unlawful maximum price-fixing scheme in violation of § 1 of the Sherman Act); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107 (1986) (action brought

under § 16 of the Clayton Act, 15 U.S.C. § 26, and complaint alleged an unlawful merger in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18). Under section 4 of the Clayton Act, “any person who shall be *injured in his business or property* by reason of *anything forbidden in the antitrust laws* may sue therefor . . . and shall recover *threefold the damages* by him sustained, and the cost of suit, including a reasonable attorney’s fee.” 15 U.S.C. § 15 (emphasis added). Under section 16 of the Clayton Act, “[a]ny person, firm, corporation, or association shall be entitled to sue for and have *injunctive relief* . . . against *threatened loss or damage* by a violation of the *antitrust laws*” 15 U.S.C. § 26 (emphasis added).⁶

The “antitrust injury” standing requirement stems, not from the substantive antitrust statutes like the Sherman Act, but rather from the Supreme Court’s interpretation of the injury elements that must be proven under sections 4 and 16 of the Clayton Act. *See ARCO*, 495 U.S. at 334 (“A private plaintiff may not recover damages under § 4 of the Clayton Act merely by showing ‘injury causally linked to an illegal presence in the market.’ Instead, a plaintiff must prove the existence of ‘antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.’”) (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)); *Cargill*, 479 U.S. at 117-18 (requiring antitrust injury in a private action seeking injunctive relief under section 16 of the Clayton Act); *id.* at 110 n.5 (“A showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4 [of the Clayton Act]”); *Brunswick*, 429 U.S. at 489, 489 n.14 (requiring antitrust injury in a private action seeking treble damages under section 4 of the Clayton Act). The Supreme Court further explained that “[t]he antitrust laws were enacted for the protection of *competition*, not *competitors*” and that “[t]he antitrust injury requirement ensures

⁶ The definition of “antitrust laws” appears in 15 U.S.C. § 12(a), and does not include Section 337 of the Tariff Act of 1930, as amended.

that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior." *ARCO*, 495 U.S. at 338, 344 (citations omitted) (emphasis in original).

Importantly, the Supreme Court has explained the critical distinction between antitrust injury, which derives from the injury language in the private remedy provisions of sections 4 and 16 of the Clayton Act, and the substantive antitrust statutory prohibitions (such as the unfair acts alleged in U.S. Steel's complaint, *i.e.*, a horizontal price-fixing conspiracy among Chinese competitors, and enforced by the Chinese government in violation of section 1 of the Sherman Act). See *ARCO*, 495 U.S. at 344 ("[P]roof of [an antitrust] violation and of antitrust injury are distinct matters that must be shown independently.") (citation omitted); see also *In re Nexium (Esomeprazole) Antitrust Litig.*, 842 F.3d 34, 59 (1st Cir. 2016) ("[T]he FTC's amicus brief highlights the importance of straightening out the conflation of antitrust violation and antitrust injury that crept into the district court's post-trial opinion and into some of the parties' arguments on appeal."); *Energy Conversion Devices Liquidation Trust v. Trina Solar Ltd.*, 833 F.3d 680, 689 (6th Cir. 2016) ("Th[e] [antitrust injury] requirement is not an element of a specific substantive prohibition such as [Sherman] § 1, but instead derives from the general antitrust damages right of action in § 4 of the Clayton Act.") (citations omitted); *id.* ("The requirement ensures that private plaintiffs bring claims 'of the type the antitrust laws were intended to prevent and that flow from that which makes defendants' acts unlawful.' And it ensures the plaintiff is a 'proper' enforcer of those laws.") (citations omitted).

To recover treble damages or to obtain injunctive relief under section 4 or 16 of the Clayton Act, respectively, in Article III federal courts, a private litigant must prove both antitrust injury, as a separate standing requirement under Clayton Act Sections 4 and 16, as well as the requisite

elements of the underlying substantive antitrust statute. *See, e.g., ARCO*, 495 U.S. at 339-40 (antitrust injury under Section 4 of the Clayton Act is a separate requirement from the antitrust claim involved); *Cargill*, 479 U.S. 488-491 (extending antitrust injury requirement of Section 4 of the Clayton Act, which is the source of this requirement, to Section 16 of the Clayton Act); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 482 (1982) (requiring antitrust injury to establish standing to maintain an action under section 4 of the Clayton Act for defendants' alleged violation of Sherman Act); *Garshman v. Universal Res. Holding Inc.*, 824 F.2d 223, 234 (3d Cir. 1987) ("If the complaint fails to allege violations of the underlying substantive prohibitions—in this case sections 1 and 2 of the Sherman Act—standing under sections 4 and 12 [*sic*, 16] of the Clayton Act is irrelevant."); *Eastman Kodak Co. v. Goodyear Tire & Rubber Co.*, 114 F.3d 1547, 1557-58 (Fed. Cir. 1997), *abrogated on other grounds*, *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448 (Fed. Cir. 1998) (affirming district court's grant of summary judgment on antitrust claims where Goodyear failed to allege sufficient antitrust injury under sections 4 and 16 of the Clayton Act).

For example, in *ARCO*, the complaint was brought under section 4 of the Clayton Act but also alleged the existence of a "vertical, maximum price-fixing scheme" in violation of section 1 of the Sherman Act. *See ARCO*, 495 U.S. at 332. The Supreme Court noted that "[s]ection 4 of the Clayton Act is a remedial provision that makes available treble damages to 'any person who shall be injured in his business or property by reason of *anything forbidden in the antitrust laws.*'" *Id.* at 331 n.1 (emphasis added); *see also Brunswick*, 429 U.S. at 485 ("Section 4, in contrast, is in essence a remedial provision."). The Supreme Court distinguished the antitrust violation from the requisite showing of antitrust injury, explaining that "a firm . . . [that] loses sales to a competitor charging nonpredatory prices pursuant to a vertical, maximum-price-fixing scheme . . . does not

suffer an ‘antitrust injury’ and that it therefore cannot bring suit under § 4 of the Clayton Act [], as amended, 15 U.S.C. § 15.” *See ARCO*, 495 U.S. at 332.

Thus, while sections 4 and 16 of the Clayton Act provide private remedies for antitrust violations in Article III federal courts, they do not limit or define the substantive elements of a violation of an antitrust statute. Rather, those private remedy provisions encompass “anything forbidden in the antitrust laws” or any “violation of the antitrust laws.” *See* 15 U.S.C. §§ 15, 26 (*i.e.*, sections 4 and 16 of the Clayton Act). Similarly, Section 337(a)(1)(A) requires underlying “unfair methods of competition” or “unfair acts,” for example, an antitrust violation. Under the Section 337(a)(1)(A) statutory scheme, a violation of section 1 of the Sherman Act for horizontal price-fixing among competitors that is orchestrated by the Chinese government, as alleged in this investigation, can alone qualify as the underlying “unfair method of competition” or “unfair act.”⁷

Further, Section 337(a)(1)(A) does not include the language of section 4 or 16 of the Clayton Act which forms the basis for the Supreme Court’s jurisprudence with respect to the “antitrust injury” requirement, *i.e.*, “injury ‘by reason of anything *forbidden* in the antitrust laws’” (under section 4) or “threatened loss or damage by a violation of the antitrust laws” (under section 16). *See Cargill*, 479 U.S. at 112. As explained in *Cargill*:

Like § 16, § 4 provides a vehicle for private enforcement of the antitrust laws. Under § 4, “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States, and shall recover threefold the damages by him sustained, and the cost

⁷ The ID notes that the alleged horizontal price-fixing among competitors is *per se* illegal under section 1 of the Sherman Act. *See* ID at 26 (“For the purpose of deciding this motion, I assume that the *Socony-Vacuum per se* rule is in effect and that the conduct alleged in the complaint constitutes an unreasonable restraint of trade that would be actionable under section 337 if U.S. Steel could demonstrate standing.”); *see also Socony-Vacuum*, 310 U.S. at 223 (“Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.”).

of suit, including a reasonable attorney's fee." 15 U.S.C. § 15. In [*Brunswick*], *supra*, we held that plaintiffs seeking treble damages under § 4 must show more than simply an "injury causally linked" to a particular merger; instead, "plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Id.*, 429 U.S., at 489.

The wording concerning the relationship of the injury to the violation of the antitrust laws in each section is comparable. Section 4 requires proof of injury "by reason of anything forbidden in the antitrust laws"; § 16 requires proof of "threatened loss or damage by a violation of the antitrust laws." It would be anomalous, we think, to read the Clayton Act to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred.

Cargill, 479 U.S. at 109, 112 (emphasis in original). Thus, while the "antitrust injury" standing requirement is directly tethered to the express language of Sections 4 and 16 of the Clayton Act regarding injury to business or property (Section 4) or threatened loss or damage (Section 16), there is no parallel or similar language set forth in Section 337(a)(1)(A). Respondents failed to cite any statutory authority or controlling precedent linking or tracking the injury language of Sections 4 and 16 of the Clayton Act to the substantive violation language of Section 337(a)(1)(A), *i.e.*, "unfair methods of competition and unfair acts."⁸ Thus, respondents' argument for an

⁸ Respondents have likewise failed to cite any Commission precedent construing the scope of "unfair methods of competition and unfair acts" of Section 337(a)(1)(A) to mandate engrafting the injury language of Sections 4 and 16 of the Clayton Act onto this statutory term as a matter of law. In their opening brief on review of the ID, Respondents mention only one Commission decision that was issued after the Supreme Court's decisions in *Brunswick* and *Cargill* in which the Court construed the injury language of Sections 4 and 16 of the Clayton Act. *See, e.g.*, Respondent's Opening Br. on Review of Order 38 Terminating Complainant's Antitrust Claim, at 21-23 (Jan. 17, 2016) ("Resp. Opening Br.") (noting the Commission's only decision post-*Cargill* is *Electrically Resistive Monocomponent Toner*, 0088 WL 1572171, where the Commission "resolved the investigation in the respondents' favor without addressing antitrust injury" and two Commissioners provided additional views in which they raise a concern that the ID did not address the issue of antitrust injury). The Views of the Commission in the *Toner* investigation, however, did not address this point. In their reply submission, Respondents note that "[i]n the context of an

antitrust injury requirement in Section 337(a)(1)(A), severed from its statutory moorings in Sections 4 and 16 of the Clayton Act, is unsupported. As such, in my view, respondents have failed to establish, as a matter of law, that the Clayton Act's "antitrust injury" standing requirement must be engrafted onto the "unfair methods of competition and unfair acts" language of Section 337(a)(1)(A).

The "antitrust injury" standing requirement is also distinct from prudential standing which was essentially undermined by the Supreme Court's *Lexmark* decision. See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (Mar. 25, 2014). As stated in *Lexmark*, standing under section 4 of the Clayton Act, *i.e.*, antitrust injury, "rest[s] on statutory, not 'prudential,' considerations." *Id.* at 1386. The Supreme Court explained that:

[In *Associated General Contractors*,] we sought to "ascertain," as a matter of statutory interpretation, the "scope of the private remedy created by" Congress in § 4 of the Clayton Act, and the "class of persons who [could] maintain a private damages action under" that legislatively conferred cause of action. We held that the statute

affirmative defense, one ALJ has recognized that a party must demonstrate antitrust injury to prove a violation of the Sherman Act." Respondents' Response on Review of Order 38 Terminating Complainant's Antitrust Claim, at 9 n.1 (Feb. 1, 2017) (Resp. Reply Br.) (citing *Certain Rare Earth Magnets and Magnetic Materials and Articles Containing the Same*, Inv. No. 337-TA-413, Final ID, 1999 WL 961281, at *67, 69 (Sept. 8, 1999) ("*Certain Rare Earth Magnets*"). The record of the *Magnets* case, however, shows that the ALJ misunderstood the respondents' equitable defense. At closing argument, in response to the ALJ's questions, counsel for the NEOCO respondents tried to clear up the ALJ's misconception of their affirmative defense stating that "this is not a case in which NEOCO has affirmatively asserted, either privately, through an Attorney General or the Department of Justice, that they have suffered an antitrust injury such that they would be entitled to prevail under the antitrust laws. This is the context of antitrust and patent misuse being asserted as an affirmative defense, which, as a principle of equity, should prohibit this court from enforcing the rights of the Complainants." Closing Arg. Tr. at 2183 (July 27, 1999) (EDIS Doc. No. 49537). The NEOCO Respondents' attempt to clarify their equitable defense was not successful, inasmuch as the ALJ mistakenly treated it as an antitrust counterclaim, finding that NEOCO had not established a Section 1 Sherman Act violation (see *Certain Rare Earth Magnets*, 1999 WL 961281, at *69), contrary to the mandatory removal provision applicable to counterclaims under 19 U.S.C. § 1337(c). No party petitioned for review of these errors, and the Commission did not address them in its notice of non-review. See Comm'n Notice (Oct. 25, 1999).

limited the class to plaintiffs whose injuries were proximately caused by a defendant's antitrust violations. Later decisions confirm that *Associated General Contractors* rested on statutory, not "prudential," considerations.

Id. (quoting *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 529, 532 (1983)).

The Supreme Court further explained that the proper inquiry to ascertain the class of plaintiffs whom Congress has authorized to sue is "to determine the meaning of the congressionally enacted provision creating a cause of action" and "[i]n doing so, [the Court] appl[ies] traditional principles of statutory interpretation." *Lexmark*, 134 S. Ct. at 1387-88.⁹ Thus, "antitrust injury," *i.e.*, the specific standing requirement as articulated by the Supreme Court, is distinct from the injury requirement under Section 337(a)(1)(A)(i)-(iii) that is applicable to "unfair methods of competition and unfair acts" under section 337(a)(1)(A). For private actions in federal district courts under Sections 4 and 16 of the Clayton Act alleging antitrust violations, the Supreme Court's interpretation of the nature and extent of injury required in sections 4 and 16 of the Clayton Act controls the class of plaintiffs authorized to sue in federal courts. In contrast, for complaints filed in the USITC under Section 337(a)(1)(A), the "threat or effect" standard delineated in subsections (i) through (iii) of this provision controls the nature and extent of injury or restraint of trade and commerce in the United States that complainants must show in order to pursue a Section 337(a)(1)(A) claim alleging "unfair methods of competition and unfair acts," such as a Sherman Act claim. *See Textron*, 753 F.2d at 1028-29 (Section 337

⁹ The *Lexmark* Court clarified that "[they] have on occasion referred to this inquiry as 'statutory standing' and treated it as effectively jurisdictional." *Lexmark*, 134 S. Ct. at 1387 n.4 (citations omitted). But while "[the statutory standing] label is an improvement over the language of 'prudential standing,' since it correctly places the focus on the statute . . . it, too, is misleading, since 'the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction. . . .'" *Id.* (citations omitted).

contains “a distinct injury requirement of independent proof” albeit there is “no precise and all-inclusive definition of ‘injury’ under section 337,” which “stems in large part from the diversity of practices covered by the statute.”¹⁰

Furthermore, the “antitrust injury” requirement is an additional standing requirement for private plaintiffs asserting antitrust claims in federal courts under sections 4 or 16 of the Clayton Act; it is separate and distinct from “injury-in-fact” or Article III constitutional standing.¹¹ See *Associated Gen. Contractors*, 459 U.S. at 535 n. 31 (“[T]he focus of the doctrine of ‘antitrust standing’¹² is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.”) (citations omitted); *ARCO*, 495 U.S. at 339 n.8 (distinguishing injury in fact from antitrust injury); *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 121 (2d Cir. 2007) (“Antitrust standing is distinct from constitutional standing, in which a mere showing of harm in fact will establish the necessary injury.”) (citation omitted); *In re Cardizem CD Antitrust*

¹⁰ Because antitrust injury standing is a separate requirement that is distinct from the substantive “unfair methods of competition and unfair acts” itself, neither *Tianrui* nor *Young Engineers* would mandate reading “antitrust injury” into the substantive violation under section 337(a)(1)(A) as the ID finds.

¹¹ “‘Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy’ required by Article III. ‘[T]he irreducible constitutional minimum of standing’ consists of ‘three elements.’ An appellant ‘must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the [appellee], (3) that is likely to be redressed by a favorable judicial decision.’” *Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168, 1171 (Fed. Cir. 2017) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)) (alteration in original).

¹² Antitrust injury and antitrust standing are closely related but not identical. “[A]ntitrust injury [is] a ‘necessary, but not always sufficient,’ component of antitrust standing.” *CBC Cos., Inc. v. Equifax, Inc.*, 561 F.3d 569, 571 (6th Cir. 2009) (quoting *Cargill*, 479 U.S. at 110 n.5); see also *Barton & Pittinos, Inc. v. SmithKline Beecham Corp.*, 118 F.3d 178, 182 (3d Cir. 1997) (“Antitrust injury is a necessary but insufficient condition of antitrust standing.”) (citation omitted).

Litig., 332 F.3d 896, 909 (6th Cir. 2003) (“A private antitrust plaintiff, in addition to having to show injury-in-fact and proximate cause, must allege, and eventually prove, ‘antitrust injury.’”) (citation omitted).

Typically, the Commission is not constrained by the standing requirements of Article III district courts.¹³ See *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm’n*, 194 F.3d 72, 74 (DC Cir. 1999) (“Agencies . . . are not constrained by Article III of the Constitution; nor are they governed by judicially-created standing doctrines restricting access to the federal courts.”) (citation omitted); *Ecee, Inc. v. Fed. Energy Regulatory Comm’n*, 645 F.2d 339, 349 (5th Cir. 1981) (“Administrative adjudications, however, are not an article III proceeding to which either the ‘case or controversy’ or prudential standing requirements apply; within their legislative mandates, agencies are free to hear actions brought by parties who might be without standing if the same issues happened to be before a federal court.”) (citations omitted). Thus, while “antitrust injury” is necessary to demonstrate “injury” or “damage” under section 4 or 16 of the Clayton Act (separate from a substantive antitrust violation), as indicated by *Lexmark*, those statutory provisions are not at issue in this investigation. Rather, the statutory authority for the Commission to hear U.S. Steel’s antitrust claim stems from Section 337(a)(1)(A) and Complainant’s alleged antitrust claim or unfair act is based on section 1 of the Sherman Act.¹⁴

¹³ On appeal before a federal court, however, a party seeking review of an agency’s final action must always supply the requisite proof of the “injury-in-fact” to establish standing, but other requirements of standing, including immediacy and redressability, may be relaxed. See *Phigenix*, 845 F.3d at 1171, 1172 n.2.

¹⁴ No party has argued, nor does the ID hold, that U.S. Steel’s antitrust claim under Section 337(a)(1)(A) must be brought under Section 4 or 16 of the Clayton Act. See, e.g., Oral Arg. Tr. at 47-48 (noting that Clayton Act does not apply to U.S. Steel’s complaint); *Id.* at 119 (agreeing that U.S. Steel’s substantive claim that the antitrust laws have been violated is a Sherman Act claim, not Section 4 or 16 of the Clayton Act). Nor has any party argued that there is any textual basis in Sherman Act Section 1 for requiring antitrust injury. See, e.g., Oral Arg. Tr. at 47 (noting that no

See Ritchie v. Simpson, 170 F.3d 1092, 1095 (Fed. Cir. 1999) (“[T]he starting point for a standing determination for a litigant before an administrative agency is not Article III, but is the statute that confers standing before that agency.”).

Moreover, that the “antitrust injury” standing requirement for private antitrust actions in district court under sections 4 and 16 of the Clayton Act is not required as a matter of law in Section 337 investigations is also consistent with the distinction, as recognized by the Federal Circuit, between the remedies available at the Commission and district courts.¹⁵ *See, e.g., Spansion Inc. v. Int’l Trade Comm’n*, 629 F.3d 1331, 1359 (Fed. Cir. 2010) (holding that the Commission is not required to apply the *eBay* factors before issuing an exclusion order “[g]iven the different statutory underpinnings for relief before the Commission in Section 337 actions and before the district courts in suits for patent infringement”) (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). As noted *supra*, section 4 of the Clayton Act is a remedial provision that makes treble damages available to private litigants in district courts. *See ARCO*, 495 U.S. at 331 n.1; *see also Brunswick*, 429 U.S. at 485 (“Section 4, in contrast, is in essence a remedial provision.”). Respondents have cited no authority for the proposition that the Commission is legally constrained to import the antitrust injury requirement derived from the

party has made any argument that there is a textual basis in Section 1 of the Sherman Act for antitrust injury).

¹⁵ Respondents acknowledge important distinctions regarding the treatment of imports in Section 337 investigations compared to district court actions that pertain to a Sherman Act antitrust claim. Namely, Section 337 “creates a different potential remedy” and in district court “you would have to get personal jurisdiction over the parties, as well, which may not be possible” whereas in the ITC there is *in rem* jurisdiction and personal jurisdiction is not required. While these would not “create a new sort of cause of action in a new substantive area of law, ... what it does do is create a different way of getting at a violation that might be more attractive in certain circumstances than going into district court.” Oral Arg. Tr. at 166. A further distinction, as noted at the oral argument, is that a government attorney from the USITC Office of Unfair Import Investigations participates in the investigation as a neutral third party to assist the ALJ and the Commission to fully develop the record, including serving discovery, filing motions, appearing at trial, questioning witnesses, and filing briefs before the ALJ and the Commission. *Id.* at 194.

Clayton Act's remedial statutory provisions (section 4 and 16) into the Commission's substantive violation determination or to displace the existing standing requirement of Section 337(a)(1)(A).¹⁶

In sum, I find that the ID incorrectly imports the "antitrust injury" standing requirement for private causes of action in district courts, under section 4 and section 16 of the Clayton Act, into the Section 337 (a)(1)(A) unfair trade practices provision, *i.e.*, "unfair methods of competition and unfair acts," of Section 337(a)(1)(A). *See* ID at 10-11, 23. Antitrust injury is a separate and distinct standing requirement derived from, and restricted as a matter of statutory interpretation to, section 4 or 16 of the Clayton Act in Article III district courts. It is not a required element of a Sherman Act section 1 violation alleged in U.S. Steel's complaint to constitute "unfair methods of competition and unfair acts" under the Section 337(a)(1)(A) as the ID finds. *See* ID at 9, 19. Inasmuch as antitrust injury standing is not required as a matter of law in this section 337 investigation, the ID's findings that hold otherwise should be reversed and vacated and the matter remanded to the ALJ for further proceedings.

¹⁶ I find unpersuasive respondents' policy argument that antitrust injury required by Sections 4 and 16 of the Clayton Act should be adopted for the same reasons that in patent-based investigations, the Commission, as a policy matter, looks to federal law regarding patent standing to determine patent ownership required by Commission Rule 210.12(a)(7). *Resp. Opening Br.* at 9 (citing *Certain Catalyst Components and Catalysts for the Polymerization of Olefins*, Inv. No. 337-TA-307, Views of the Commission, 1990 WL 710614, at *15) (June 7, 1990) ("*Catalyst Components*"). In *Catalyst Components*, the Commission noted that its Rules of Practice and Procedure require that every intellectual property complaint must show that at least one complainant is the owner or exclusive licensee of the subject property and determined that there was no reason for the Commission to interpret this rule in a way contrary to judicial precedent governing patent ownership. *See* 1990 WL 710614, at *14. The Federal Circuit has approved the Commission's practice of reading federal patent standing requirements into this rule. *See SiRF Tech., Inc. v. Int'l Trade Comm'n*, 601 F.3d 1319, 1326 n.4 (Fed. Cir. 2010). Respondents, however, fail to cite any Commission procedural rule governing complaint requirements for Sherman Act Section 1 antitrust claims that would require the Commission to read into such rule the antitrust injury requirement of the Clayton Act Sections 4 and 16. *See Resp. Opening Br.* at 9-10. Moreover, respondents have failed to cite any unfair act investigations in which the Commission was required to, or chose to, adopt the same standing requirements as in federal district courts, apart from the Commission's interpretation of its own procedural rule in the patent context. *See Resp. Opening Br.* at 9-10; *Oral Arg. Tr.* at 117-18.

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney, Monica Bhattacharyya, Esq., and the following parties as indicated, on **March 19, 2018**.



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