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# [***In re Certain Carbon & Alloy Steel Prods.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5S3C-JW61-JWXF-24ND-00000-00&context=)

United States Court of International Trade

March 19, 2018, Issued

Inv. No. 337-TA-1002

**Reporter**

2018 Ct. Intl. Trade LEXIS 42 \*; 2018-1 Trade Cas. (CCH) P80,318

In the Matter of CERTAIN CARBON AND ALLOY STEEL PRODUCTS

**Core Terms**

***antitrust***, Steel, unfair act, unfair methods of competition, importation, ***anti trust*** law, ***antitrust*** claim, district court, articles, pricing, investigations, sections, Notice, patent, standing requirement, requires, Complainant's, allegations, parties, practices, federal court, Respondents', ***antitrust*** violation, matter of law, competitors, citations, commerce, violation of section, conspiracy, predatory

**Judges:** **[\*1]**Lisa R. Barton, Secretary to the Commission. DISSENTING OPINION OF COMMISSIONER MEREDITH M. BROADBENT.

**Opinion by:** Lisa R. Barton

**Opinion**

**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*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:56C5-S2P0-008G-Y4V7-00000-00&context=). 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**[\*2]** 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), as amended, [*19 U.S.C. § 1337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) ("section 337").[[1]](#footnote-0)1*See* [*81 Fed. Reg. 35381*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5JXC-4M60-006W-83TW-00000-00&context=)-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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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****[\*3]*** *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*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5JXC-4M60-006W-83TW-00000-00&context=)-2 (June 2, 2016). The Commission found several of the distributor respondents to be in default.[[2]](#footnote-1)2*See* [*Certain Carbon and Alloy Steel Products, Inv. No. 337-TA-1002, Comm'n Notice, 2016 ITC LEXIS 1539 (Oct. 14, 2016)*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:5KYJ-74G0-014D-B38V-00000-00&context=), [*Comm'n Notice, 2016 ITC LEXIS 1250 (Oct. 18, 2016)*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:5M06-M0G0-014D-B38W-00000-00&context=), [*Comm'n Notice, 2016 ITC LEXIS 1365 (Nov. 18, 2016).*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:5M8P-JN30-014D-B3C0-00000-00&context=) The notice of investigation also names the Office of Unfair Import Investigations as a party in this investigation. *See* [*81 Fed. Reg. 35381*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5JXC-4M60-006W-83TW-00000-00&context=)-2 (June 2, 2016).

**A. Summary of ID (Order No. 38)**

On August 26, 2016, the manufacturing respondents[[3]](#footnote-2)3 (referred to, hereinafter, as "Respondents") filed a motion to terminate**[\*4]** 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]](#footnote-3)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*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:56C5-S2P0-008G-Y4V7-00000-00&context=). 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). *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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=)." *Id.* at 10-11. The ALJ explained that "the limitations on private ***antitrust*** litigants must apply under [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) as they do in federal courts." *Id.* at 10 (citing [*Tianrui Group Co. Ltd. v. Intl Trade Comm'n, 661 F.3d 1322, 1333 (Fed. Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:83CR-YKH1-652G-21GT-00000-00&context=) ("*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**[\*5]** 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, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=) ("ARCO")). The All 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 All 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**[\*6]** the Commission. *See* [*81 Fed. Reg. 94416*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5MFW-K170-006W-80K2-00000-00&context=)-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, 2017 ITC LEXIS 289 (Feb. 24, 2017)*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:5N0J-PWH0-014D-B3J8-00000-00&context=).

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*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5N23-0BM0-006W-82T0-00000-00&context=)-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**[\*7]** 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]](#footnote-4)5 U.S. Steel argues the ALJ eared because a complaint alleging a violation of [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) based on *section 1* of the Sherman Act does not need to allege ***antitrust*** injury. It argues that [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) is to protect American companies and workers from any threatened or actual restrain 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 ***antitrust*** injury is about harm to consumers; it is fundamentally different from [*Section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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**[\*8]** 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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 ITC LEXIS 63, 1978 WL 50692, \*1, 17 (Feb. 22, 1978)*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:5SFB-V600-02P2-R3J4-00000-00&context=) ("*Steel Pipe*")[[6]](#footnote-5)6). Respondents assert that "[*Section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) "embodied the goal of promoting**[\*9]** 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), the complaint must also allege ***antitrust*** injury.

**A. Unfair Methods of Competition and Unfair Acts Under** [***Section 337(a)(1)(A)***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=)

Our analysis must begin with the language of [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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 Wireless Corp. v. Int'l Trade Comm'n, 545 F.3d 1340, 1355 (Fed. Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4TP4-8KD0-TX4N-G00F-00000-00&context=). [*Section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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**[\*10]** 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). On the face of the statute, a violation of [*section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=).

In this investigation, U.S. Steel alleges a violation of [*section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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**[\*11]** [or] unfair acts" under [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). *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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GMF1-NRF4-44J0-00000-00&context=) (repealed 1930); [*Pub. L. 67-318, 42 Stat. 943 (Sept. 21, 1922)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C9D-VND0-01XN-S388-00000-00&context=). 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, 43 C.C.P.A. 56 (C.C.P.A. 1955)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-64K0-003S-M0HS-00000-00&context=). 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);**[\*12]** *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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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]](#footnote-6)7

[*Section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=)." [*Lannom Mfg. CO. v. Int'l Trade Comm'n, 799 F.2d 1572, 1576 (Fed. Cir. 1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-JV40-0039-V4N6-00000-00&context=). The [*Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:3SF5-SWF0-0001-40H9-00000-00&context=), 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). 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**[\*13]** district court. *See* [*Lannom, 799 F.2d at 1577-78*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-JV40-0039-V4N6-00000-00&context=); [*Kinik Co. v. Int'l Trade Comm'n, 362 F.3d 1359, 1362-63 (Fed. Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4C11-SMF0-003B-92PJ-00000-00&context=). In *Young Engineers*, the Federal Circuit observed that the 1974 amendment of [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-K8J0-0039-V30M-00000-00&context=).

Over the years, the Commission has interpreted "[u]nfair methods of competition [or] unfair acts" under [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) to apply to a broad range of substantive law, such as trade secret misappropriation, common law trademark infringement, [*Lanham Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GMK1-NRF4-40C3-00000-00&context=) violations, and ***antitrust*** law.[[8]](#footnote-7)8 Consistent with the recognition noted above that "any determination of unfair acts is 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:83CR-YKH1-652G-21GT-00000-00&context=). For example, when the Commission is asked to address an allegation of patent infringement in the importation**[\*14]** of goods under [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), the Commission follows substantive U.S. patent law.[[9]](#footnote-8)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**[\*15]** 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=)) [did not intend] to broaden the field of substantive patent rights." *Id.* at 17 (citation omitted). The Commission therefore found no violation of [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). *In Certain Carbon Spine Board*, the Commission dismissed a [*section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) claim predicated on trade dress infringement because the complaint failed to allege all necessary elements for trade dress infringement under the [*Lanham Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GMK1-NRF4-40C3-00000-00&context=). *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, 2017 ITC LEXIS 823 (June 14, 2017)*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:5NT6-J840-014D-B3V7-00000-00&context=). In *Certain Hydroxyprogesterone Caproate*, the Commission declined to institute an investigation based on the Food, Drug and Cosmetic Act and stated**[\*16]** 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=)." 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) claim predicated on that Act. *See* [*Certain Universal Transmitters for Garage Door Openers, Inv. No. 337-TA-497, Initial Determination, 2003 ITC LEXIS 673, 2003 WL 22811119, \*12-13 (Nov. 4, 2003)*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:4B65-M600-001S-B08W-00000-00&context=), *aff'd*, Comm'n Notice (Nov. 24, 2003). The Commission determined under [*section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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**[\*17]** 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) could take place overseas. [*Tianrui, 661 F.3d at 1333*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:83CR-YKH1-652G-21GT-00000-00&context=). 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) with respect to trade secret misappropriation." *Id.* The Court's discussion is consistent with our declining to interpret [*section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) in a manner contrary to express proscriptions of federal ***antitrust*** law.

The Commission has addressed the issue of ***antitrust*** injury in a [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) proceeding, albeit in a slightly different context. Specifically, the Commission**[\*18]** 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, 1999 ITC LEXIS 342, \*194, \*200 (Sept. 8, 1999) (Judge Luckem)*, *unreviewed*, Comm'n Notice (Oct. 25, 1999). Judge Luckem 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, 1999 ITC LEXIS 342 at \*200* (citing *Eastman Kodak Co. v. Goodyear Tire & Rubber Co., 114 F.3d 1547, 1557 (Fed. Cir. 1997))*.[[10]](#footnote-9)10

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**[\*19]** under the prior [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) and under [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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**[\*20]** 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, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P2S-4S20-004C-002X-00000-00&context=); [*Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 342-43, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5GN0-003B-S4S3-00000-00&context=). 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=) (quoting [*Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H870-003B-S01T-00000-00&context=) (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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P2S-4S20-004C-002X-00000-00&context=); [*Arizona, 457 U.S. at 342-43*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5GN0-003B-S4S3-00000-00&context=). Thus, the Court has held that *section 1* only addresses "unreasonable" restraints, *i.e.*, whether its anticompetitive effects outweigh its pro-competitive 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P2S-4S20-004C-002X-00000-00&context=) (citation omitted).**[\*21]** "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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P2S-4S20-004C-002X-00000-00&context=). "The *per se* rule is a presumption of unreasonableness based on 'business certainty and litigation efficiency.'" [*ARCO, 495 U.S. at 342*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=). 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P2S-4S20-004C-002X-00000-00&context=) (citations omitted); *see also* [*United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7110-003B-72F4-00000-00&context=).

[*Sections 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKX1-NRF4-44J4-00000-00&context=) (damages) and [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) (injunctive relief) of the [*Clayton Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GW01-NRF4-41BN-00000-00&context=) provide the vehicle for private enforcement of the *Sherman Act* and other ***antitrust*** laws in district court. [*Section 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKX1-NRF4-44J4-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=). It thus requires a plaintiff to allege that the unlawful ***antitrust*** conduct caused the plaintiff 's injury.**[\*22]**[[11]](#footnote-10)11*See* [*15 U.S.C. § 15*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=).

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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9KX0-003B-S48B-00000-00&context=). More specifically, the Supreme Court has explained that actions that are *per se* unlawful under the *Sherman Act* may nonetheless have *some* pro-competitive effects, even though the actions may disadvantage particular private parties. [*ARCO, 495 U.S. at 342-43*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=). 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5GN0-003B-S4S3-00000-00&context=) (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**[\*23]** from supporting suits by private plaintiffs for either damages or equitable relief" [*Id. at 342*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5GN0-003B-S4S3-00000-00&context=). "Pro-competitive or efficiency-enhancing aspects of practices that nominally violate the ***antitrust*** laws . . . should play no role" with respect to providing relief based on that violation. [*Id. at 344*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5GN0-003B-S4S3-00000-00&context=) (citation omitted). ***Antitrust*** injury, therefore, is an essential substantive element to ensuring the proper enforcement of the ***antitrust*** laws.[[12]](#footnote-11)12*See, e.g.,* [*ARCO, 495 U.S. at 339-40*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=); [*Cargill, 479 U.S. at 109-12, 110 n.5*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4C70-0039-N04M-00000-00&context=); [*In re Aluminum Warehousing* ***Antitrust*** *Litig., 833 F.3d 151, 157 (2d Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KDW-SRM1-F04K-J42R-00000-00&context=); [*Somers v. Apple, Inc., 729 F.3d 953, 963 (9th Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:598H-7Y31-F04K-V072-00000-00&context=); *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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=) (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, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XDD0-003B-R3PV-00000-00&context=) (citations omitted). Given that ***antitrust*** injury**[\*24]** 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) violation, receive an exclusion order or cease and desist order—for losses stemming from continued competition." *See* [*ARCO, 495 U.S. at 334, 344*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=) (citations omitted). Without a need to show ***antitrust*** injury, complainants could use [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) to pursue results that are at cross purposes with the preservation of competition.

U.S. Steel argues that [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) is "not merely a statute to protect competitors but also a statute to preserve competition." *See* [*Steel Pipe, 1978 ITC LEXIS 63 , 1978 WL 50692, \*17*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:5SFB-V600-02P2-R3J4-00000-00&context=)**[\*25]**. The "threat or effect" prong of [*section 337(a)(1)(A)(i)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), [*(ii)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), [*(iii)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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, 1971 ITC LEXIS 2 (Dec. 1971)*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:5SDJ-4H50-014D-B4MW-00000-00&context=) (emphasis added). Additionally, the protectionist focus of [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) includes domestic industry injury language under [*subsections (i)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) and [*(ii)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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 [*Spansion Inc. v. Int'l Trade Comm'n, 629 F.3d 1331 (Fed. Cir. 2010))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51S1-VNF1-652G-2000-00000-00&context=). 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). Nor do we find that the omission of the domestic industry injury language in [*subsection (iii)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) of the "threat or effect" prong reflects a choice by Congress that ***antitrust*** injury is not applicable to ***antitrust*** claims under [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=).[[13]](#footnote-12)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**[\*26]** in competition. *See* [*ARCO, 495 U.S. at 334*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=). 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.

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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=); *see, e.g.,* [*Certain Apparatus for Flow Injection Analysis and Components Thereof, Inv. No. 337-TA-151, 1984 ITC LEXIS 158, 1984 WL 63180, \*1 (Nov. 1, 1984)*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:3T1S-BFN0-001M-03JV-00000-00&context=).[[14]](#footnote-13)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**[\*27]** has noted the way in which private rights are at issue under [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=):

It is correct that a [*§ 1337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), "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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-K8J0-0039-V30M-00000-00&context=). 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.

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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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.**[\*28]** 23, 2016) (EDIS Doc. No. 595868). We do not agree. [*Section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-K970-0039-V356-00000-00&context=).[[15]](#footnote-14)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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), [*(e)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). 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 *Spansion* precludes the Commission from considering the effect on consumers**[\*29]** 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, *Spansion* provides that the Commission is not required to apply the *eBay* factors during the remedy phase of an investigation before issuing an exclusion order "[Oven the different statutory underpinnings for relief before the Commission in [*Section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) actions and before the district courts in suits for patent infringement." [*Spansion, 629 F.3d at 1359*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51S1-VNF1-652G-2000-00000-00&context=) (citing [*eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4JYJ-1TX0-004B-Y03H-00000-00&context=). *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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNX1-NRF4-43GX-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). We further note that**[\*30]** [*section 7*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GMM1-NRF4-40SW-00000-00&context=) of the Sherman Act[[16]](#footnote-15)16 originally included similar "injury" language to [*section 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) of the Clayton Act. Specifically, [*section 7*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GMM1-NRF4-40SW-00000-00&context=) of the Sherman Act formerly provided a private cause of action for persons injured by violations of the *Sherman Act*; whereas [*section 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-WCH0-0039-X3DP-00000-00&context=). [*Section 7*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GMM1-NRF4-40SW-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) of the Clayton Act. *See* [*Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 311 n.8, 98 S. Ct. 584, 54 L. Ed. 2d 563 (1978)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9250-003B-S43F-00000-00&context=). [*Section 7*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GMM1-NRF4-40SW-00000-00&context=) 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 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), the fact that the [*Clayton Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GW01-NRF4-41BN-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GW01-NRF4-41BN-00000-00&context=) and [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) that leads**[\*31]** us to understand that Congress did not want the Commission to apply ***antitrust*** injury standing to a [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). 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)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5SB7-BYT0-008G-Y25K-00000-00&context=); [*SiRF Technology, Inc. v. Int'l Trade Comm'n, 601 F.3d 1319, 1326 n.4 (Fed. Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7Y74-4WP0-YB0K-G03T-00000-00&context=) (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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=)." Order No. 38 at 15.

Finally,**[\*32]** 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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 ALP's finding that "***antitrust*** injury" is required for [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) investigations in which the alleged unfair method of competition or unfair act is based on a violation of the *Sherman Act*.[[17]](#footnote-16)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]](#footnote-17)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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KGT-NMF1-F04K-P11T-00000-00&context=) (affirming dismissal under [*Rule 12(b)(6) of the Federal Rules of Civil Procedure*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) for failure to allege ***antitrust*** injury)**[\*33]** (citations omitted). *See also* [*In re Aluminum Warehousing* ***Antitrust*** *Litig., 833 F.3d at 157*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KDW-SRM1-F04K-J42R-00000-00&context=) ("[A]ntitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KGT-NMF1-F04K-P11T-00000-00&context=). 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, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=), which requires that the complaint "show[ ] that the pleader is entitled to relief," [*Fed. R. Civ. P. 8(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=). 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KGT-NMF1-F04K-P11T-00000-00&context=). The district court did not allow the plaintiff to amend its complaint to allege recoupment.**[\*34]** [*Id. at 690-91*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KGT-NMF1-F04K-P11T-00000-00&context=). 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KGT-NMF1-F04K-P11T-00000-00&context=).

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)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5SB7-BYT0-008G-Y2B2-00000-00&context=) ("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)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5SB7-BYT0-008G-Y2B2-00000-00&context=) to allow Complainant to amend its complaint. *See also* [*Fed. R. Civ. Proc. 15*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F103-00000-00&context=) ("The court should freely give leave when justice so requires."). However, on review before the Commission, U.S. Steel has indicated**[\*35]** 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**[\*36]** Commission.

/s/ Lisa R. Barton

Lisa R. Barton

Secretary to the Commission

Issued: March 19, 2018

**Dissent by:** MEREDITH M. BROADBENT

**Dissent**

**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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), [*19 U.S.C. § 1337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), 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*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5JXC-4M60-006W-83TW-00000-00&context=)-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 ("ALP) issued Order No. 38, an initial determination ("ID") granting Respondents' motion to terminate U.S. Steel's ***antitrust*** claim. The ID held that**[\*37]** U.S. Steel's failure to plead ***antitrust*** injury as an element of its ***antitrust*** claim in its [*Section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) complaint required the Commission, as a matter of law, to terminate the ***antitrust*** claim under [*Section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) investigation. Consequently, the ID should be reversed and vacated, and the ***antitrust*** claim remanded to the AU for further proceedings.

The ID noted two separate and independent requirements of [*Section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), *i.e.*, "the threat or effect of [the unfair trade practice] is ... to restrain**[\*38]** 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=)...." *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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=)." *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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=).

The ID reasoned that "the limitations on private ***antitrust*** litigants must apply under [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:83CR-YKH1-652G-21GT-00000-00&context=) ("*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.**[\*39]** 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, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9KX0-003B-S48B-00000-00&context=).[[19]](#footnote-18)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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) 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**[\*40]** 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 (citing [*Newman v. Universal Pictures, 813 F.2d 1519, 1522-23 (9th Cir. 1987)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BPY0-001B-K2HK-00000-00&context=), *cert. denied*, *486 U.S. 1059, 108 S. Ct. 2831, 100 L. Ed. 2d 931 (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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=)). 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) of the Tariff Act of 1930, *Section 1* of the Sherman Act, and [*Sections 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) of the Clayton Act.

The Commission's authority to investigate**[\*41]** 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). [*Vastfame Camera, Ltd. v. Int'l Trade Comm'n, 386 F.3d 1108, 1112 (Fed. Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DGV-2GY0-003B-91CB-00000-00&context=); [*Sealed Air Corp. v. U.S. Int'l Trade Comm'n, 645 F.2d 976, 987, 68 C.C.P.A. 93 (C.C.P.A. 1981)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2WJ0-003S-M089-00000-00&context=). [*Section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). As is clear from the language of this provision, a violation of [*Section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) comprises two separate and independent elements: (1) "unfair methods of competition**[\*42]** 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=); [*Akzo NV v. Int'l Trade Comm'n, 808 F.2d 1471, 1486 (Fed. Cir. 1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-JST0-0039-V47F-00000-00&context=) ("[T]o prove a violation of [*§ 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), 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)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RW5-MVP0-0039-V038-00000-00&context=) ("[*[S]ection 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) has consistently been interpreted to contain a distinct injury requirement of independent proof'). I agree with the AU, 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=).

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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GRV1-NRF4-41P8-00000-00&context=), 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**[\*43]** act in importation." The Court rejected this construction stating:

We are of the opinion that when Congress used the phrase, in [*section 337(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) of the Tariff Act of 1930, [*19 USCA 1337(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), "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, 22 C.C.P.A. 166, Treas. Dec. 47124, T.D. 47124 (C.C.P.A. 1934)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WY9-TV70-003S-J486-00000-00&context=). *See also* [*In re Von Clemm, 229 F.2d 441, 443-44, 43 C.C.P.A. 56 (C.C.P.A. 1955)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-64K0-003S-M0HS-00000-00&context=) ("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**[\*44]** Act of 1922, the predecessor to [*Section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WY9-TV70-003S-J486-00000-00&context=) (quoting [*Frischer & Co. v. Bakelite Corp., 39 F.2d 247, 17 C.C.P.A. 494, T.D. 43964 (C.C.P.A. 1930))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WY9-TSP0-003S-J2T6-00000-00&context=). 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.[[20]](#footnote-19)2[*Id. at 455*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WY9-TV70-003S-J486-00000-00&context=). *See also* [*Tianrui, 661 F.3d at 1331-32*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:83CR-YKH1-652G-21GT-00000-00&context=) (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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) to reach trade secret misappropriation occurring abroad); [*Von Clemm, 229 F.2d at 443-44*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-64K0-003S-M0HS-00000-00&context=) (citing [*N. Pigment, 71 F.2d. at 447*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WY9-TV70-003S-J486-00000-00&context=))). 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**[\*45]** and help a great many American industries." [*N. Pigment, 71 F.2d at 456*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WY9-TV70-003S-J486-00000-00&context=).

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 antidumping statute the country has ever had." [*N. Pigment, 71 F.2d at 454*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WY9-TV70-003S-J486-00000-00&context=) (quoting [*Frischer, 39 F.2d at 259*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WY9-TSP0-003S-J2T6-00000-00&context=)) (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 itone 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**[\*46]** 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-64K0-003S-M0HS-00000-00&context=). *See also* [*Frischer, 39 F.2d at 259-60*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WY9-TSP0-003S-J2T6-00000-00&context=) (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, 22 C.C.P.A. 149, Treas. Dec. 47123, T.D. 47123 (C.C.P.A. 1934)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WY9-TV70-003S-J485-00000-00&context=).

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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GN2-B251-F04B-M063-00000-00&context=) (Fed. Cir. 2015**[\*47]** (*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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44NC-00000-00&context=)), 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GN2-B251-F04B-M063-00000-00&context=).

The Federal Circuit in *Tianrui* further explained that although the scope of the Commission's authority to remedy unfair acts in the importation**[\*48]** 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), such as substantive U.S. patent law applied under [*Section 337(a)(1)(B)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). [*661 F.3d at 1333*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:83CR-YKH1-652G-21GT-00000-00&context=). 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:83CR-YKH1-652G-21GT-00000-00&context=). *See also* [*Suprema, 796 F.3d at 1352*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GN2-B251-F04B-M063-00000-00&context=) ("Congress enacted a legal regime for enforcement against unfair trade acts by directing the Commission to**[\*49]** base [*Section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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 ofDep't of Health & Human Servs., 924 F.2d 1029, 1034 (Fed. Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-NJK0-003N-42P7-00000-00&context=) ("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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), 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**[\*50]** 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."[[21]](#footnote-20)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**[\*51]** 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), 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 ***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.[[22]](#footnote-21)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**[\*52]** that the statutory term "unfair methods of competition and unfair acts" in [*Section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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.[[23]](#footnote-22)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. *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****[\*53]*** *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, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P2S-4S20-004C-002X-00000-00&context=) ("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, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7110-003B-72F4-00000-00&context=) ("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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GW01-NRF4-41BN-00000-00&context=). Specifically, [*Sections 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) of the Clayton Act are remedial statutes that authorize private parties to sue in federal court for**[\*54]** 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GW01-NRF4-41BN-00000-00&context=). *See, e.g.*, [*15 U.S.C. §§ 15*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=), [*26*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=); [*ARCO, 495 U.S. at 331-32*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=) (action brought under [*§ 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) of the Clayton Act, [*15 U.S.C. § 15*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=), 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, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4C70-0039-N04M-00000-00&context=) (action brought under [*§ 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) of the Clayton Act, [*15 U.S.C. § 26*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=), and complaint alleged an unlawful merger in violation of [*Section 7*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNT1-NRF4-426N-00000-00&context=) of the Clayton Act, [*15 U.S.C. § 18*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNT1-NRF4-426N-00000-00&context=)). Under [*section 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) (emphasis added). Under [*section 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) (emphasis added).[[24]](#footnote-23)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**[\*55]** that must be proven under [*sections 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) of the Clayton Act. *See* [*ARCO, 495 U.S. at 334*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=) ("A private plaintiff may not recover damages under [*§ 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) 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, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9KX0-003B-S48B-00000-00&context=); [*Cargill, 479 U.S. at 117-18*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4C70-0039-N04M-00000-00&context=) (requiring ***antitrust*** injury in a private action seeking injunctive relief under [*section 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) of the Clayton Act); [*id. at 110 n.5*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4C70-0039-N04M-00000-00&context=) ("A showing of ***antitrust*** injury is necessary, but not always sufficient, to establish standing under [*§ 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) [of the [*Clayton Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GW01-NRF4-41BN-00000-00&context=)] . . . ."); [*Brunswick, 429 U.S. at 489, 489 n.14*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9KX0-003B-S48B-00000-00&context=) (requiring ***antitrust*** injury in a private action seeking treble damages under [*section 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) 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 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=) (citations omitted) (emphasis in original).

Importantly, the Supreme Court has explained the critical distinction between**[\*56]** ***antitrust*** injury, which derives from the injury language in the private remedy provisions of [*sections 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=) ("[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)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M73-M0F1-F04K-H003-00000-00&context=) ("[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)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KGT-NMF1-F04K-P11T-00000-00&context=) ("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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) 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**[\*57]** 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) or [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=), as well as the requisite elements of the underlying substantive ***antitrust*** statute. *See, e.g.,* [*ARCO, 495 U.S. at 339-40*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=) (***antitrust*** injury under [*Section 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) of the Clayton Act is a separate requirement from the ***antitrust*** claim involved); [*Cargill, 479 U.S. 107-113*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4C70-0039-N04M-00000-00&context=) (extending ***antitrust*** injury requirement of [*Section 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) of the Clayton Act, which is the source of this requirement, to [*Section 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) of the Clayton Act); [*Blue Shield of Virginia v. McCready, 457 U.S. 465, 482, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5FV0-003B-S4KH-00000-00&context=) (requiring ***antitrust*** injury to establish standing to maintain an action under [*section 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8WR0-001B-K1WS-00000-00&context=) ("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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*12*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) [*sic*, [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=)] of the [*Clayton Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GW01-NRF4-41BN-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SB0-VT50-003B-91DC-00000-00&context=) (affirming district court's grant of summary judgment on ***antitrust*** claims where Goodyear failed to allege sufficient ***antitrust*** injury under**[\*58]** [*sections 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) of the Clayton Act).

For example, in *ARCO*, the complaint was brought under [*section 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKX1-NRF4-44J4-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=). The Supreme Court noted that "[*[s]ection 4 of the Clayton Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GW01-NRF4-41BN-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=) (emphasis added); *see also* [*Brunswick, 429 U.S. at 485*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9KX0-003B-S48B-00000-00&context=) ("[*Section 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKX1-NRF4-44J4-00000-00&context=), 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKX1-NRF4-44J4-00000-00&context=) of the Clayton Act [], as amended, [*15 U.S.C. § 15*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=)." *See* [*ARCO, 495 U.S. at 332*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=).

Thus, while [*sections 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) 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**[\*59]** forbidden in the ***antitrust*** laws" or any "violation of the ***antitrust*** laws." *See* [*15 U.S.C. §§ 15*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=), [*26*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) (*i.e.*, [*sections 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) of the Clayton Act). Similarly, [*Section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) requires underlying "unfair methods of competition" or "unfair acts," for example, an ***antitrust*** violation. Under the [*Section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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."[[25]](#footnote-24)7

Further, [*Section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) does not include the language of [*section 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) or [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=)) or "threatened loss or damage by a violation of the ***antitrust*** laws" (under [*section 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=)). *See* [*Cargill, 479 U.S. at 112*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4C70-0039-N04M-00000-00&context=). As explained in *Cargill*:

Like [*§ 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=), [*§ 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) provides a vehicle for private enforcement of the ***antitrust*** laws. Under [*§ 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKX1-NRF4-44J4-00000-00&context=), "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**[\*60]** the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." [*15 U.S.C. § 15*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=). In [*Brunswick*], *supra*, we held that plaintiffs seeking treble damages under [*§ 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9KX0-003B-S48B-00000-00&context=).

. . .

The wording concerning the relationship of the injury to the violation of the ***antitrust*** laws in each section is comparable. [*Section 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) requires proof of injury "by reason of anything forbidden in the ***antitrust*** laws"; [*§ 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GW01-NRF4-41BN-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4C70-0039-N04M-00000-00&context=) (emphasis in original). Thus, while the "***antitrust*** injury" standing requirement is directly tethered to the express language of [*Sections 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) of the Clayton Act regarding injury to business or property ([*Section 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=)) or threatened loss or damage ([*Section 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=)**[\*61]**), there is no parallel or similar language set forth in [*Section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). Respondents failed to cite any statutory authority or controlling precedent linking or tracking the injury language of [*Sections 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) of the Clayton Act to the substantive violation language of [*Section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), *i.e.*, "unfair methods of competition and unfair acts."[[26]](#footnote-25)8 Thus, respondents' argument for an ***antitrust*** injury requirement in [*Section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), severed from its statutory moorings in [*Sections 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GW01-NRF4-41BN-00000-00&context=) "***antitrust*** injury" standing requirement must be engrafted onto the "unfair methods of competition and unfair acts" language of [*Section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=).

The "***antitrust*** injury" standing requirement is also distinct from prudential standing which was essentially undermined by the Supreme Court's *Lexmark* decision. *See* [*Lexmark Intl, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 188 L. Ed. 2d 392 (Mar. 25, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BTS-W1F1-F04K-F003-00000-00&context=). As stated in *Lexmark*, standing under [*section 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) of the Clayton Act, *i.e.*, ***antitrust*** injury, "rest[s] on statutory, not 'prudential,' considerations." [*Id. at 1386*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BTS-W1F1-F04K-F003-00000-00&context=). 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) 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 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, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5500-003B-S0SB-00000-00&context=).

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**[\*62]** of the congressionally enacted provision creating a cause of action" and "Nil doing so, [the Court] appl [ies] traditional principles of statutory interpretation." [*Lexmark, 134 S. Ct. at 1387-88*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BTS-W1F1-F04K-F003-00000-00&context=).[[27]](#footnote-26)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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) that is applicable to "unfair methods of competition and unfair acts" under [*section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). For private actions in federal district courts under [*Sections 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) of the Clayton Act alleging ***antitrust*** violations, the Supreme Court's interpretation of the nature and extent of injury required in [*sections 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), the "threat or effect" standard delineated in [*subsections (i) through (iii)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) claim alleging "unfair methods of competition and unfair acts," such as a *Sherman Act* claim. *See* [*Textron, 753 F.2d at 1028-29*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RW5-MVP0-0039-V038-00000-00&context=) ([*Section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) contains "a distinct injury requirement of independent proof' albeit there is "no precise and all-inclusive definition of 'injury' under [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=)," which "stems**[\*63]** in large part from the diversity of practices covered by the statute.").[[28]](#footnote-27)10

Furthermore, the "***antitrust*** injury" requirement is an additional standing requirement for private plaintiffs asserting ***antitrust*** claims in federal courts under [*sections 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) or [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) of the Clayton Act; it is separate and distinct from "injury-in-fact" or Article III constitutional standing.[[29]](#footnote-28)11*See* [*Associated Gen. Contractors, 459 U.S. at 535 n. 31*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5500-003B-S0SB-00000-00&context=) ("[T]he focus of the doctrine of '***antitrust*** standing'[[30]](#footnote-29)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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=) (distinguishing injury in fact from ***antitrust*** injury); [*Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121 (2d Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4PYS-73D0-TXFX-41T7-00000-00&context=) ("***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*** [*Litig., 332 F.3d 896, 909 (6th Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48V2-4HF0-0038-X1CW-00000-00&context=) ("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**[\*64]** is not constrained by the standing requirements of Article III district courts.[[31]](#footnote-30)13*See* [*Envirocare of Utah, Inc. v. Nuclear* ***Regulatory*** *Comm'n, 194 F.3d 72, 74, 338 U.S. App. D.C. 282 (DC Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XPM-50Y0-0038-X2R0-00000-00&context=) ("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)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-22G0-0039-W2TN-00000-00&context=) ("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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) or [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) and Complainant's alleged ***antitrust*** claim or unfair act is based on *section 1* of the Sherman Act.[[32]](#footnote-31)14*See* [*Ritchie v. Simpson, 170 F.3d 1092, 1095 (Fed. Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W1H-B9G0-003B-90JB-00000-00&context=) ("[T]he starting point for a standing determination for a litigant before an administrative agency is not Article III, but is the statute that**[\*65]** confers standing before that agency.").

Moreover, that the "***antitrust*** injury" standing requirement for private ***antitrust*** actions in district court under [*sections 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) of the Clayton Act is not required as a matter of law in [*Section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) investigations is also consistent with the distinction, as recognized by the Federal Circuit, between the remedies available at the Commission and district courts.[[33]](#footnote-32)15*See, e.g.,* [*Spansion Inc. v. Int'l Trade Comm'n, 629 F.3d 1331, 1359 (Fed. Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51S1-VNF1-652G-2000-00000-00&context=) (holding that the Commission is not required to apply the eBay factors before issuing an exclusion order "[g]ven the different statutory underpinnings for relief before the Commission in [*Section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) actions and before the district courts in suits for patent infringement") (citing [*eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4JYJ-1TX0-004B-Y03H-00000-00&context=). As noted *supra*, [*section 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) of the [*Clayton Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GW01-NRF4-41BN-00000-00&context=) is a remedial provision that makes treble damages available to private litigants in district courts. *See* [*ARCO, 495 U.S. at 331 n.1*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=); *see also* [*Brunswick, 429 U.S. at 485*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9KX0-003B-S48B-00000-00&context=) ("[*Section 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=), 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 [*Clayton Act's*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GW01-NRF4-41BN-00000-00&context=) remedial statutory provisions ([*section 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=)) into the Commission's substantive violation determination or to displace the existing standing**[\*66]** requirement of [*Section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=).[[34]](#footnote-33)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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*section 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) of the Clayton Act, into the [*Section 337 (a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) unfair trade practices provision, *i.e.*, "unfair methods of competition and unfair acts," of [*Section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). *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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) or [*16 of the Clayton Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) 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**[\*67]** [*Section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) investigation, the ID's findings that hold otherwise should be reversed and vacated and the matter remanded to the ALI for further proceedings.

**End of Document**

1. 1U.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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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. [↑](#footnote-ref-0)
2. 2In 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. [↑](#footnote-ref-1)
3. 3The 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. [↑](#footnote-ref-2)
4. 4Although the IA agreed that ***antitrust*** injury should be required, the IA argued before the ALI 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."). [↑](#footnote-ref-3)
5. 5Although 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. [↑](#footnote-ref-4)
6. 6President Carter disapproved the Commission's issuance of remedial orders on policy grounds. *See* [*Steel Pipe, 43 Fed. Reg. 17789 (Apr. 26, 1978)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:51CS-MF90-00H6-R30Y-00000-00&context=). [↑](#footnote-ref-5)
7. 7Counsel for both Complainant and Respondents described the legislative history for [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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). [↑](#footnote-ref-6)
8. 8The Commission has considered [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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 ITC LEXIS 63, 1978 WL 50692 (Feb. 22, 1978)*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:5SFB-V600-02P2-R3J4-00000-00&context=); [*Certain Airtight Cast-Iron Stoves, Inv. No. 337-TA-69, USITC Pub. 1126, 1981 ITC LEXIS 228 (Jan. 1981)*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:3T1S-BP70-001M-0428-00000-00&context=); [*Certain Electrically Resistive Monocomponent Toner, Inv. No. 337-TA-253, USITC Pub. 2069, 1988 ITC LEXIS 14 (Mar. 1988)*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:3T1S-B3W0-001M-0329-00000-00&context=). 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, 2000 ITC LEXIS 490 (May 2000)*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:4N25-G650-001M-0031-00000-00&context=). 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)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:50SB-27G0-0121-01J1-00000-00&context=). A finding of violation on an ***antitrust*** claim was made in one investigation and the recommended remedy was rejected by the President. *Steel Pipe*, Inv. No. 337-TA-29, [*43 Fed. Reg. 17789 (Apr. 26, 1978)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:51CS-MF90-00H6-R30Y-00000-00&context=). A violation finding was made in a second case but was rescinded upon reconsideration. ***Tractor Paris, Inv. No. 337-22, 36 Fed. Reg. 15077 (Aug. 12, 1971)***. [↑](#footnote-ref-7)
9. 9[*19 U.S.C. § 1337(a)(1)(B)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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. [↑](#footnote-ref-8)
10. 10The 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, 1988 ITC LEXIS 14 (Mar. 1988)*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:3T1S-B3W0-001M-0329-00000-00&context=). In that case, the Commission found no [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) violation based on an ***antitrust*** claim. Writing separately, two Commissioners suggested the doctrine's applicability under [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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, 1988 ITC LEXIS 14 at \*48*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:3T1S-B3W0-001M-0329-00000-00&context=) ("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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) when it found a violation of [*section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:5SFB-V600-02P2-R3J4-00000-00&context=), 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, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9KX0-003B-S48B-00000-00&context=). 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, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6DX0-003B-S0YX-00000-00&context=) ([*Robinson-Patman Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44BK-00000-00&context=)); [*Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5FV0-003B-S4KH-00000-00&context=) (***Sherman Act***); [*Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5500-003B-S0SB-00000-00&context=) (***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, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4C70-0039-N04M-00000-00&context=). *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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=). We are unpersuaded that the Commission's 1978 *Steel Pipe* decision, by not addressing ***antitrust*** injury, ruled on the issue before us. [↑](#footnote-ref-9)
11. 11A private plaintiff can seek an injunction under [*section 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) of the Clayton Act "against threatened loss or damage by a violation of the ***antitrust*** laws." [*15 U.S.C. § 26*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=). ***Antitrust*** injury is required in a private action seeking injunctive relief under [*section 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GR31-NRF4-44X5-00000-00&context=) of the Clayton Act. *See* [*Cargill, 479 U.S. at 116-18*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4C70-0039-N04M-00000-00&context=). [↑](#footnote-ref-10)
12. 12The 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=). 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.* [↑](#footnote-ref-11)
13. 13On review, Complainant argues that under [*subsection (iii)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), "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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), which echoes that of the ***Sherman Act***, further conveys an intention to protect competition and not simply competitors. *See* [*Steel Pipe, 1978 ITC LEXIS 63, 1978 WL 50692, \*17*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:5SFB-V600-02P2-R3J4-00000-00&context=).

    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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), rather than [*subsections (i)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) or [*(ii), of section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). Because we ground our decision in the meaning of "unfair methods of competition and unfair acts" in [*section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), rather than the subsections thereof, we find it unnecessary to reach this question and therefore express no opinion on it. [↑](#footnote-ref-12)
14. 14We do not here address the standards that would apply in a self-initiated investigation. [↑](#footnote-ref-13)
15. 15We 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)***. [↑](#footnote-ref-14)
16. 16*See* [*Act of July 2, 1890, ch. 647, § 7, 26 Stat. 210*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C7R-8160-01XN-S2VW-00000-00&context=) (repealed 1955). [↑](#footnote-ref-15)
17. 17U.S. Steel's claim that is 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XDD0-003B-R3PV-00000-00&context=); [*ARCO, 495 U.S. 337-41*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=); [*Energy Conversion Devices Liquidation Trust v. Trina Solar Ltd., 833 F.3d 680, 688-91 (6th Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KGT-NMF1-F04K-P11T-00000-00&context=). 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. [↑](#footnote-ref-16)
18. 18Consistent 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*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:56C5-S2P0-008G-Y4V7-00000-00&context=)." *See Certain Carbon and Alloy Steel Products*, Inv. No. 337-TA-1002, Comm'n Op. at 7 (Mar. 6, 2017) (citations omitted). [↑](#footnote-ref-17)
19. 1Specifically, 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 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, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=) ("*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, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XDD0-003B-R3PV-00000-00&context=). [↑](#footnote-ref-18)
20. 2As 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) did not enlarge the substantive scope of U.S. patent law. [*Tianrui, 661 F.3d at 1333-34*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:83CR-YKH1-652G-21GT-00000-00&context=) (citing *In re Amtorg Trading Corp., 75 F.2d 826, 22 C.C.P.A. 558, T.D. 47583 (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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:83CR-YKH1-652G-21GT-00000-00&context=). [↑](#footnote-ref-19)
21. 3USTR, 2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program, at 4 (March 2018). [↑](#footnote-ref-20)
22. 4U.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. [↑](#footnote-ref-21)
23. 5To 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), [*(f)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=), [*(g)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). [↑](#footnote-ref-22)
24. 6The definition of "***antitrust*** laws" appears in [*15 U.S.C. § 12(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNX1-NRF4-43GX-00000-00&context=), and does not include [*Section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) of the Tariff Act of 1930, as amended. [↑](#footnote-ref-23)
25. 7The 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) if U.S. Steel could demonstrate standing."); *see also* [*Socony-Vacuum, 310 U.S. at 223*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7110-003B-72F4-00000-00&context=) ("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*."). [↑](#footnote-ref-24)
26. 8Respondents 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) to mandate engrafting the injury language of [*Sections 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) 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 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 ITC LEXIS 342, 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 AU'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 ALT 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 ITC LEXIS 342, 1999 WL 961281, at \*69)***, contrary to the mandatory removal provision applicable to counterclaims under [*19 U.S.C. § 1337(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=). 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). [↑](#footnote-ref-25)
27. 9The *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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BTS-W1F1-F04K-F003-00000-00&context=) (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). [↑](#footnote-ref-26)
28. 10Because ***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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) as the ID finds. [↑](#footnote-ref-27)
29. 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)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MKH-CS11-F04B-M04F-00000-00&context=) (quoting [*Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JSS-2DD1-F04K-F00N-00000-00&context=); [*Hollingsworth v. Perry, 570 U.S. 693, 133 S. Ct. 2652, 2661, 186 L. Ed. 2d 768 (2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58RS-VVD1-F04K-F07Y-00000-00&context=); [*Lujan v. Deft. of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XF70-003B-R3RX-00000-00&context=) (alteration in original). [↑](#footnote-ref-28)
30. 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)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W04-VYG0-TXFX-8312-00000-00&context=) (quoting [*Cargill, 479 U.S. at 110 n.5*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4C70-0039-N04M-00000-00&context=)); *see also* [*Barton & Pittinos, Inc. v. SmithKline Beecham Corp., 118 F.3d 178, 182 (3d Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F7G0-00B1-D069-00000-00&context=) ("***Antitrust*** injury is a necessary but insufficient condition of ***antitrust*** standing.") (citation omitted). [↑](#footnote-ref-29)
31. 13On 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*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MKH-CS11-F04B-M04F-00000-00&context=). [↑](#footnote-ref-30)
32. 14No party has argued, nor does the ID hold, that U.S. Steel's ***antitrust*** claim under [*Section 337(a)(1)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) must be brought under [*Section 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) or [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) of the Clayton Act. *See, e.g.*, Oral Arg. Tr. at 47-48 (noting that [*Clayton Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GW01-NRF4-41BN-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) or [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) 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 party has made any argument that there is a textual basis in ***Section 1*** of the Sherman Act for ***antitrust*** injury). [↑](#footnote-ref-31)
33. 15Respondents acknowledge important distinctions regarding the treatment of imports in [*Section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) investigations compared to district court actions that pertain to a ***Sherman Act*** ***antitrust*** claim. Namely, [*Section 337*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJM1-NRF4-422M-00000-00&context=) "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 AU and the Commission to fully develop the record, including serving discovery, filing motions, appearing at trial, questioning witnesses, and filing briefs before the AU and the Commission. *Id.* at 194. [↑](#footnote-ref-32)
34. 16I find unpersuasive respondents' policy argument that ***antitrust*** injury required by [*Sections 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) of the Clayton Act should be adopted for the same reasons that in patent-based investigations, the Commission, as a policy matter, looks to fedeial law regarding patent standing to determine patent ownership required by Commission [*Rule 210.12(a)(7)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5SB7-BYT0-008G-Y25K-00000-00&context=). 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)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7Y74-4WP0-YB0K-G03T-00000-00&context=). 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=) and [*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=). *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. [↑](#footnote-ref-33)