Investigation No. 337-TA-1002

International Trade Commission

In the Matter of

CERTAIN CARBON AND STEEL ALLOY PRODUCTS

Comments of the International Center of Law & Economics Regarding the Commission's Determination to Review an Initial Determination Granting Respondents' Motion to Terminate Complainant's Price-Fixing Claim

Summary of Argument

A cornerstone of the Initial Determination is that "[u]nder *TianRui*, the Commission's discretion cannot be exercised in a way that conflicts with applicable federal law,"[1] and, therefore, that "the dispute between U.S. Steel and Respondents in this case must be resolved using the same substantive law that governs federal antitrust cases."[2] But this conclusion misreads *TianRui's* holding, and is misapplied here.

Moreover, because adjudicative process at the ITC, available remedies, and the statutory objectives of Section 337 are substantially different than Article III processes, remedies, and the aims of the antitrust laws when adjudicated in Article III courts, the unmodified importation of standing rules from Article III courts to the ITC is improper.

Finally, the end to which trade laws are directed is not necessarily, or not solely, consumer welfare in an antitrust sense, and a protection of domestic injury — effectively the opposite of what's required for antitrust standing under the antitrust laws in Article III courts — may be perfectly actionable under Section 337. As Section 337 is a standalone statute, the importation of antitrust rules can be effected only to the extent that such importation furthers the objectives of Section 337 — and certainly not in a way that would *contravene* them.[3]

Antitrust injury requirements developed as a judicial limitation, not as an "express congressional limitation"

TianRui, a Federal Circuit case, considered an appeal from an ITC decision regarding the proper interpretation of trade secret law in unfair competition cases before the Commission.[4] The central issue in the case was whether the ITC would have unbounded authority to apply any substantive law it found appropriate when Congress had not spoken on the question. The full context of the *TianRui* holding underpinning the Initial Determination in the present matter is illustrative:

> The import of those decisions [focusing on the territorial limitations in the patent-granting clause] is 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. Because there is no parallel federal civil statute regulating trade secret protection, there is no statutory basis for limiting the

[1] Certain Carbon and Alloy Steel Products, Inv. No. 337-TA-1002, 14 n.11, (Nov. 14, 2016).

[2] *Id.* at 14.

[3] Importantly, we offer no opinion as to whether the merits of the position U.S. Steel advances are ultimately sound given the facts of this particular case. We merely believe that, given the case law and statutory framework against which the ITC operates, it is fully appropriate for the Commission to *investigate* the price fixing claim submitted in this matter.

[4] TianRui Grp. Co. v. Int'l Trade Comm'n, 661 F.3d 1322, 1325 (Fed. Cir. 2011).

> Commission's flexible authority under section 337(a)(1)(A) with respect to trade secret misappropriation.[5]

Thus, according to the ALJ's reading of *TianRui*, although Congress intended to allow the Commission wide discretion in determining what practices are unfair, "the Commission's discretion cannot be exercised in a way that conflicts with applicable federal law."[6]

But *TianRui* does *not* say that the ITC's authority and powers would be completely replaced whenever another body of statutory law is adopted by Congress; rather, it says only that the ITC is not permitted to evade "express congressional limitations" *within* a particular body of statutory law. And because the antitrust injury requirement is *not* an "express congressional limitation" (having first arisen as a judicial doctrine in *Brunswick Corp. v. Pueblo Bowl-O-Mat*),[7] it is not binding on the Commission under the holding in *TianRui*.

In *Brunswick,* the Court first developed the judicial standards that should be applied to guide (and limit) recovery of treble damages under Section 4 of the Clayton Act. Crucial to the *Brunswick* Court's reasoning is the notion that "[t]he antitrust laws… were enacted for 'the protection of competition not competitors'…. It is inimical to the purposes of these laws to award damages for the type of injury claimed here."[8] Thus the antitrust injury doctrine introduced in *Brunswick* was intended to address the scope of antitrust laws in the context of domestic competition — not of international trade. While the Clayton Act does require *some injury*, the specific contours of that injury were imposed by the courts, and they were imposed to limit recovery under the broadly worded statute in Article III courts enforcing the antitrust laws directly. In fact, the *Brunswick* Court clearly notes that the limitation it imposes was not expressly imposed by Congress:

> Of course, Congress is free, if it desires, to mandate damages awards for all dislocations caused by unlawful mergers despite the peculiar consequences of so doing. But because of these consequences, "we should insist upon a clear expression of a congressional purpose" before attributing such an intent to Congress. We can find no such expression in either the language or the legislative history of § 4 [of the Clayton Act].[9]

Moreover, the doctrine seems at least partly intended to address the threat of excessive litigation by private plaintiffs attracted by the lure of large damage awards — a threat that arises only in

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[5] *Id.* at 1333 (emphasis added).

[6] Certain Carbon and Alloy Steel Products, Inv. No. 337-TA-1002, at 14 n.11.

[7] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

[8] *Id.* at 488 (citing Brown Shoe Co. v. U.S., 370 U.S. 294, 320 (1962)). The Court has subsequently held the antitrust injury limitation in *Brunswick* to apply in Sherman Act and other antitrust cases, as well. *See* Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) (applying the antitrust injury rule to a claim brought under the Sherman Act); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) (imposing the antitrust injury requirement on every private antitrust case, irrespective of the statutory source of liability) [hereinafter *ARCO*].

[9] Brunswick, 429 U.S. at 488 (citation omitted).

Article III court proceedings.[10] Crucially, the Court based its new doctrine on the requirement in the Clayton Act that "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…."[11]

Therefore, far from the Clayton Act containing an "express congressional limitation" requiring a showing of antitrust injury, that doctrine developed as a prudential limitation imposed upon litigants in Article III courts in order to prevent frivolous and ruinous law suits.

But, even under the terms of the judicial doctrine, antitrust injury requirements would not apply in the present matter. When a party alleges antitrust harm, courts require the demonstration of antitrust standing.[12] This requirement ensures that firms are not merely complaining about normal competition (e.g. requiring demonstration of "predatory" prices instead of just low prices), and that the harm is proximately connected to the offender's conduct.

The First Circuit recently wrestled with antitrust injury in a context that sheds light on the present matter:

> Private plaintiffs and the FTC as government enforcer stand in different shoes. Under the governing antitrust statutes, the FTC is empowered to directly enforce the substantive antitrust laws. See 15 U.S.C. § 45(a)(2). Meanwhile, private plaintiffs derive their authority to sue from Section 4 or 16 of the Clayton Act and must therefore satisfy the additional evidentiary burdens that those provisions impose. See id. §§ 15, 26. As the FTC's amicus brief aptly explains, "[t]his distinction is rooted in public policy. The interest of private plaintiffs is to remediate an injury they have suffered or may suffer. The interest of the

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[10] William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467, 467-69 (1980).

[11] Brunswick, 429 U.S. 477 at 485 (quoting Clayton Act, § 4, 15 U.S.C. § 15). Importantly, the antitrust injury requirement is not solely imposed on private litigants. Rather, it operates as a limitation on government enforcement actions, as well, in order to better tie those actions to the underlying aims of the antitrust laws as the courts have refined them since the late 1970s. Antitrust injury is an important check on the expansion of antitrust laws beyond actions having identifiable anticompetitive effect — regardless of the plaintiff. But in the context of the ITC, as we discuss below, that limitation is misdirected. It is appropriate when the antitrust laws are being directly enforced (say, by the DOJ), and even when they are being enforced by the FTC via Section 5 of the FTC Act. It is even appropriate for an agency to explicitly adopt them as a considered part of its jurisprudence under a consumer protection statute (as the FTC has done with its UMC Statement, *see* Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, Federal Trade Commission (Aug. 13, 2015) *available at* https://goo.gl/fypMqv). But in that context (consumer protection) and in others (e.g., trade), it is not required. It may be sensible as a matter of constraining enforcement discretion, but it is not required given the divergent objectives and processes of enforcement under other laws.

[12] *See* ARCO, 495 U.S. at 339 ("Antitrust injury does not arise for purposes of § 4 of the Clayton Act… until a **private party** is adversely affected by an anticompetitive aspect of the defendant's conduct.") (emphasis added); Brunswick, 429 U.S. at 486 n.10 ("The initial House debates concerning provisions related to private damages actions reveal that these actions were conceived primarily as 'open(ing) the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv(ing) the injured party ample damages for the wrong suffered.'") (citations omitted); Energy Conversion Devices Liquidation Trust v. Trina Solar Ltd., 833 F.3d 680, 689 (6th Cir. 2016) ("**Every private antitrust plaintiff,** including those challenging an agreement as unlawful under § 1, must include in its complaint allegations of 'antitrust injury.'") (emphasis added).

> government is to 'prevent and restrain' violations of the antitrust laws along with the attendant social costs such violations can cause.[13]

While this does not mean that the government is free from tying its enforcement actions to actual antitrust injury (i.e., anticompetitive effects), it does mean that a private plaintiff must show more than simply harm to itself, which might arise from *procompetitive* behavior — just as the government must show the likelihood of anticompetitive effects beyond mere harm to a particular competitor.

Together, these concerns outline a focus on the limitations appropriate for antitrust litigation in Article III courts — not as a pure gloss on the antitrust statutes.

> Section 4… is in essence a remedial provision. It provides treble damages to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing.… It nevertheless is true that the treble damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy.
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> Plainly, to recover damages, respondents must prove more than that petitioner violated § 7, since such proof establishes only that injury may result. Respondents contend that the only additional element they need demonstrate is that they are in a worse position than they would have been had petitioner not committed those acts. The Court of Appeals agreed, holding compensable any loss "causally linked" to "the mere presence of the violator in the market." Because this holding divorces antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so, we cannot agree with it.[14]

This analysis makes clear that the injury requirement was developed by the Court and that its logic does not apply in the context of ITC actions where competitor injury is not a proxy for harm to "competition not competitors." Instead, avoidance of competitor injury is itself the intended object of ITC cases, and, where there is no possibility of monetary recovery, application of the antitrust injury requirement is inappropriate.

This is not to say that the ITC should *ignore* the sensible court-developed limitations on antitrust liability — and, in fact, the ITC has long relied upon U.S. antitrust case law for guidance.[15] What it does mean, however, is that, short of *TianRui's* requirement that *express* congressional limitations be respected, the Commission is free to adopt only the case law and judicial doctrines that comport with its *own* express Congressional mission to prevent "[u]nfair methods

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[13] In re Nexium (Esomeprazole) Antitrust Litig., 842 F.3d 34, 60 (1st Cir. 2016).

[14] Brunswick, 429 U.S. at 486-87.

[15] Certain Airtight Cast-Iron Stoves, Inv. No. 337-TA-69, USITC Pub. 1126, 6 (Jan. 1981) (Final).

of competition and unfair acts in the importation of articles… into the United States, or in the sale of such articles."[16]

And, critical here, this latitude should be exercised with respect to both procedural and substantive law — perhaps even more so to the former given the dramatically different procedural context and litigation incentives in ITC cases — including doctrines of standing and injury. Although *TianRui* itself was facially about substance, it was in practical effect about the scope of limitations Congress has imposed on the ITC. And, without an express statutory requirement otherwise, the ITC can and should interpret statutes in accordance with its own particular circumstances (and statute) — not those of Article III courts.

ITC Processes and the Purpose of 337 Should Guide the Application of U.S. Antitrust Law in ITC Investigations

Moreover, *TianRui* also makes clear that the ultimate governing authority in a case such as this one is Section 337 itself, and that, absent an express congressional limitation to the contrary, standards inconsistent with Section 337 should not be read into it.[17] Thus, even assuming that the judicial doctrine of antitrust injury should be applied to litigants appearing before the Commission, the ALJ misapplied that doctrine with respect to the particular sort of antitrust harms alleged here.

The vast array of procedural, substantive, remedial and other differences between standard Article III antitrust cases and Section 337 actions before the ITC in which anticompetitive conduct is asserted as unfair conduct makes the unadulterated importation of Article III antitrust injury rules improper. Among other things, in this matter there is no request for damages, as indeed there cannot be, because the ITC's powers are statutorily limited to issuing exclusion and cease-and-desist orders.[18] As detailed above the antitrust injury doctrine developed as a way to constrain private actions for damages, and not for constraining the enforcement of antitrust laws to remedy trade defects under the Tariff Act. At the same time, Section 337 cases are government investigations — not private disputes — subject to pre-institution processes and authorization by the Commission, involvement by an Investigative Attorney, and, ultimately, review by the President.[19] Because of these differences (among others)

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[16] 19 U.S.C. § 1337(a)(1)(A) (2012).

[17] *See* Tianrui, 661 F.3d at 1334-35 (noting, with respect to the treatment of trade secrets law in Section 337 cases, that "it would be a strained reading of [Section 337] to bar the Commission from considering acts of trade secret misappropriation that occur abroad…. To bar the Commission from considering such acts because they occur outside the United States would thus be inconsistent with the congressional purpose of protecting domestic commerce from unfair methods of competition in importation").

[18] 19 U.S.C. § 1337(d)-(h) (2012). Section 1337(h) does allow the Commission to issue sanctions for abuse of process. These sanctions, however, are not damages assessed as a result of substantive claims in an investigation.

[19] In fact, complainants and respondents before the ITC are not really litigants at all. A complainant is much more like a person notifying the FTC, for example, of a violation of consumer protection laws, insofar as the ITC issues an investigation in response to a party complaint. While it is the parties to the investigation who then present evidence, notably they do so alongside the ITC's own counsel and, as noted, have no ability to recover damages. Thus, in form and function, a complaint before the ITC is much less like a complaint before an Article III court, and much more like an FTC investigation.

it may be inappropriate to assume that the same sort of standing requirements should apply — and they are surely sufficient to raise the question, necessitating an evaluation of appropriateness in light of these differences.

Moreover, what amounts to injury in the international trade context, even with respect to anticompetitive conduct, is different from what is contemplated under the antitrust laws. When the Tariff Act of 1922 was passed (which later became Section 337) the scope of its unfair methods of competition authority was described as "broad enough to prevent every type and form of unfair practice" involving international trade.[20] At minimum, Section 337 does not, as the antitrust laws do, focus on *consumer* harm, but rather harm to *industry* arising from international trade. Section 337 is not a mere proxy for other federal laws, and its aim diverges in important ways from those of other federal laws — even where general principles may be the same or similar. It is, in other words, a trade protection provision, first and foremost, not an antitrust law, patent law, or even precisely a consumer protection statute.

The distinction between antitrust laws and trade laws is firmly established in the case law. And, in particular, trade laws not only focus on effects on industry rather than consumers or competition, per se, but they also contemplate a different kind of economic injury:

> The "injury to industry" causation standard… focuses explicitly upon conditions in the U.S. industry…. In effect, Congress has made a judgment that causally related injury to the domestic industry may be severe enough to justify relief from less than fair value imports *even if from another viewpoint the economy could be said to be better served by providing no relief*.[21]

Thus, the end to which trade laws are directed is not necessarily, or not solely, consumer welfare in an antitrust sense, and "harm to *competitors* not competition"[22] — effectively the opposite of what's required for antitrust standing under the antitrust laws in Article III courts — is actually perfectly actionable under Section 337. As Section 337 is a standalone statute, the importation of antitrust law can be effected only to the extent that such importation furthers the objectives of Section 337 — and certainly not in a way that would *contravene* them.

Thus, lacking the private damages remedies as they do, and focused as they are on harm to *industry* and not harm to a particular *competitor*, the actions of a litigant before the ITC hew much more closely to that of a private attorney general directly enforcing the antitrust laws, and much less closely to that of a private litigant under the Sherman and Clayton Acts. Standing requirements should correspond to these differences.

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[20] S. Rep. No. 67-595, pt. 1, at 3 (1922).

[21] USX Corp. v. United States, 682 F. Supp. 60, 67 (Ct. Int'l Trade 1988) (emphasis added).

[22] *Cf.* Brunswick, 429 U.S. at 489.

U.S. Steel's Complaint Accurately Reflects the Trade Protection Aims of Section 337

Perhaps for a claim of predatory pricing, and if the ITC had the power to award damages, it would make sense for the ITC to import the Article III antitrust standing requirement. Indeed, if one alleges damage, and also alleges an anticompetitive practice, it seems reasonable to require that these two terms be connected.

But that is not the reality in ITC investigations. More importantly, that is also not what U.S. Steel did with its complaint. Instead, it very clearly focused its complaint on the harm to competition and consumers by outlining a *price fixing* claim.

The Initial Determination seems to miss this distinction in holding that "the requirement to allege predatory pricing arises in any price-fixing case as an element of antitrust injury, as set forth in *ARCO*, where the Supreme Court directly addressed and rejected purported distinctions between § 1 and § 2 of the Sherman Act with regard to standing."[23] The Initial Determination goes on to note a passage from *ARCO* that highlights the understandable confusion when applying this doctrine in front of the ITC:

> U.S. Steel says *ARCO* involved vertical price fixing, which is subject to the rule of reason and is not a per se violation…. The *ARCO* decision directly rejects U.S. Steel's argument, saying, "Although a vertical, maximum-price-fixing agreement is unlawful under § 1 of the Sherman Act, it does not cause a competitor antitrust injury unless it results in predatory pricing."[24]

But in *ARCO* a competitor sued another competitor as private litigants in U.S. court, seeking damages.[25] And as the *ARCO* Court observed:

> In Cargill, Inc. v. Monfort of Colorado, Inc.... we reaffirmed that injury, although causally related to an antitrust violation, nevertheless will not qualify as "antitrust injury" unless it is attributable to an anticompetitive aspect of the practice under scrutiny, "**since '[i]t is inimical to [the antitrust] laws to award damages' for losses stemming from continued competition**."[26]

The point of introducing an antitrust injury requirement into antitrust suits is to minimize error costs by ensuring that there is a proper fit between anticompetitive conduct and effect. After all, there is a potential for greater injustice if firms can be accused of harming a particular competitor and having to pay damages when their conduct could just as likely have been procompetitive.

Moreover, the Initial Determination misconstrues *ARCO's* requirement that predatory pricing must be plead in order to assert antitrust injury in a vertical price fixing case under § 1 of the

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[23] Certain Carbon, Inv. No. 337-TA-1002, at 23.

[24] *Id.* at 24.

[25] ARCO, 495 U.S. at 331–34.

[26] *Id.* at 334 (emphasis added) (citations omitted).

Sherman Act by attributing the requirement to any *per se* case rather than only to *vertical* agreements (which, subsequent to *ARCO*, are no longer treated as *per se* illegal).[27] The Court's point in *ARCO* was to identify that both procompetitive and anticompetitive effects can arise from vertical agreements — a precursor to today's rule of reason approach in such cases — thus necessitating application of an injury requirement to minimize the likelihood of error costs. *Horizontal* price fixing as alleged here, however, remains a *per se* violation, with only minimal exceptions.[28]

Regardless, in the final analysis the motivation for imposing an injury requirement is to ensure that firms are not suing each other for competitive advantage, a concern that, theoretically, should never be involved in an enforcement action instituted by a government agency.

ARCO provides further insight into this distinction when litigating antitrust harms before the Commission:

> Respondent alleges that it has suffered losses as a result of competition with firms following a vertical, maximum-price-fixing agreement. But in Albrecht we held such an agreement per se unlawful because of its potential effects on dealers and consumers, not because of its effect on competitors.[29]

This harm — harm to *competitors* — is exactly the sort of harm that U.S. Steel has complained of,[30] and which the ITC is empowered to prevent: unfair competition from foreign firms resulting in harm to US industry.

Conclusion

Because antitrust injury is not an express requirement imposed by Congress, because ITC processes differ substantially from those of Article III courts, and because Section 337 is designed to serve different aims than private antitrust litigation, the Commission should reinstate the price fixing claims and allow the case to proceed.

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[27] *See* Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 889-90 (2007); State Oil Co. v Khan, 522 U.S. 3, 10 (1997); U.S. v. Apple, 791 F.3d 290, 321-22 (2nd Cir. 2015).

[28] *See, e.g.,* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9 (1979).

[29] ARCO, 495 U.S. at 336-37.

[30] Second Amended Complaint at 16-21, Certain Carbon and Allow Steel Products, Inv. No. 337-TA-1002 (Nov. 14, 2016).