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Material Injury and the Business Cycle in Antidumping and Countervailing Duty Cases

James R. Cannon, Jr.*

INTRODUCTION

The antidumping and countervailing duty laws of the United States provide relief from dumped and subsidized imports only to the extent that a domestic industry is materially injured or threatened with injury by such imports.¹ To gauge whether imports are a cause of injury, the U.S. International Trade Commission (Commission) must consider a variety of factors, including the trends in shipments, sales, production, and profits of the domestic industry.² These trends, however, exist neither in isolation nor in the economist's fiction of ceteris paribus. Rather, there are a variety of forces in addition to imports that affect an industry and complicate the causation analysis. The aggregate effect of such trends often manifests itself in the business cycle of an industry.³

An industry that is susceptible to business cycles depends on economic peaks to generate the returns necessary to carry it through the economic troughs. Such an industry reaps full benefits of an upturn in the business cycle only if it can achieve

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³ A business cycle is defined as the regular sequence of expansions and contractions in business. Vol. 2 Economic Principles and Problems ch. 32 (W.E. Spahr 4th ed. 1940). These expansions and contractions are recurrent, periodic, and well defined. There is a high degree of probability that, apart from disturbances such as wars or other grave countering developments, 1) a business cycle will be completed every three to four years, and 2) at the peak, business activity will be from ten to twenty-five percent above the trendline, and at the trough, from five to twenty-five percent below the trendline.
potential performance during peak periods. Potential performance refers to an industry's optimal performance when it does not compete with unfairly traded imports.

A seemingly healthy industry may not operate at its potential performance level because of dumped or subsidized imports. Improvement in shipments and profitability is an inaccurate measure of an industry's health if the industry is unable to achieve the highest output and revenues possible absent competition from unfairly traded imports. Increasing shipments and improving profitability, therefore, may mask material injury. Conversely, business cycles may create the impression of aggravated economic injury in cyclical downturns. A proper determination of material injury in antidumping and countervailing duty cases, therefore, must consider the business cycle of the domestic industry.

Prior to 1988, various commissioners of the International Trade Commission incorporated the effects of the business cycle in their injury analyses on a subjective basis. The results were unpredictable, and the analyses lacked economic foundation. The commissioners failed to develop standards to determine the existence of a business cycle, its relevance to the material injury analysis, the cyclical status of an industry, and the appropriate temporal scope of the Commission investigation.

Congress addressed this unsatisfactory situation in 1988 by amending Title VII of the Tariff Act of 1930. The amendment, section 1328 of the 1988 Omnibus Trade and Competitiveness Act (1988 Act), requires that the Commission consider the effects of the business cycle in determining material injury or threat of injury to U.S. industries. Additionally, section 1328 amended the statute by providing that the Commission evaluate the relevant statutory economic factors “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.” Nevertheless, section 1328 does not define a “business cycle” or identify factors that should be considered in analyzing the effect of a cycle on domestic industry output, sales,

5 As noted, the statute explicitly requires consideration of the business cycle “distinctive to the affected industry.” 19 U.S.C. § 1677(7)(C)(iii) (1988). See also S. Rep. No. 71, 100th Cong., 1st Sess. 117 (1980) [hereinafter S. Rep. No. 71]. Not all commissioners have treated the issue in this manner. In some cases, commissioners have looked to the business cycle experienced by the entire U.S. economy, rather than the one distinctive to the particular industry affected by unfairly traded imports.
6 19 U.S.C. § 1677(7)(C) (1988). Sections 1677(7)(B) and (C) set out the relevant statutory factors that the Commission must consider.
market share, profits, cash flow, productivity, return on investment, capacity utilization, prices, inventories, employment, wages, growth, or the ability to raise capital and develop new or more advanced products.  

The Commission has begun applying section 1328, but has yet to formulate a cogent economic approach to business cycle analysis. Generally, the Commission has been more likely to find material injury when an industry was on the downward slope of a business cycle—when shipments, production, capital utilization, and profitability were declining—and less likely to find material injury during an upturn in the business cycle. This oversimplification reflects the fact that the Commission has found it more difficult to establish material injury where domestic industry performance is improving during the period reviewed.  

The business cycle thus represents an important backdrop to the statutory factors that the Commission must consider. The purpose of the statute is not to protect domestic industry from the vagaries of business cycles, placing restraints on imports during downturns and lifting restraints whenever U.S. industry is enjoying a recovery. The Commission is charged with determining whether imports are a cause of injury, not whether there are other causes. This Article addresses the Commission's inconsistent consideration of business cycles in the context of its material injury analyses. Part I discusses the unpredictable treatment of business cycles in Commission decisions prior to 1988. Part II then reviews the legislative background and policies underlying section 1328 of the 1988 Act. Part III critically examines the Commission's treatment of business cycles subsequent to the 1988 Act and identifies factors that are critical to such analysis. Finally, Part IV offers recommendations for a more coherent approach to business cycle analysis.

I. Commission Consideration of Business Cycles Prior to the 1988 Act

No consistent mode of analysis or set of criteria emerged from Commission decisions prior to 1988. In some cases, the commissioners determined that a deteriorating domestic industry was
not injured by unfairly traded imports, attributing a negative trend in domestic industry performance solely to a downturn in the business cycle. For example, in *Stainless Steel Wire Cloth from Japan*, the Commission found no material injury where an industry in recession heavily depended on another industry in recession. This method of analysis ignores the congressional warning that the Commission not weigh causes of injury, but assess the impact of imports apart from other sources of injury. If an industry is in a weakened state because of a decline in demand arising from a decline in demand of a downstream product, unfairly traded imports can exacerbate the situation.

In other cases, the Commission focused on the loss of market share by the domestic industry despite improving production, shipments, and an upturn in demand. Thus, in cases such as *Hot-Rolled Carbon Steel Sheet from Brazil*, *Iron Construction Castings from Brazil, India, and the People's Republic of China*, and *Certain Welded Carbon Steel Pipes and Tubes from Turkey and Thailand*, the fact of rising import penetration during a recovery pointed to material injury caused by imports. In several other cases, a significant factor in the Commission's analysis may have been its familiarity with the industries under investigation and previous findings of material injury. A previous finding of material injury

10 USITC Pub. 1552, at 19, Inv. No. 731-TA-190 (Prelim.) (July 1984) (where the oil drilling industry was one of the most important markets for the stainless steel wire cloths industry, the business cycle of the latter industry was closely linked with the former, and diminished sales and income in the stainless steel wire cloths industry resulted from the decline of the oil drilling industry, not from unfairly traded imports).


typically persuaded the Commission to identify unfairly traded imports as a cause of material injury, even when the domestic industry was in the midst of an economic recovery.

The Commission often failed to mention the impact of the business cycle altogether, despite wide-spread recognition that the relevant industries were characterized by cyclical performance. The absence of any discussion of business cycles, even where a cyclical pattern was obvious, was grounds for reversal of at least one Commission decision. Reviewing the Commission's decision in Cold-Rolled Carbon Steel Plates and Sheet from Argentina, the Court of International Trade was unable to find substantial evidence in the record to support a negative determination of material injury where improvement in the domestic industry's performance was attributable to an upturn in the business cycle. The court held that the record lacked sufficient evidence to sup-

TA–313, 314, and 316–317 (Feb. 1987). In 1987, however, the industry profited from a strong increase in demand. Brass Sheet and Strip from Japan and the Neth., USITC Pub. 2099, at 11. The Commission majority analyzed the data for a whole business cycle over the course of four years, as opposed to the usual three years, and noted that the additional data provided a "more complete picture" of the trend in the business cycle. Id. at 13. As in Certain Welded Carbon Steel Pipes and Tubes from Turkey and Thailand and Iron Construction Castings from Brazil, India, and the People's Republic of China, the Commission found injury because the recovering industry was unable to reap the full benefits of the upturn in consumption. The market share captured by unfairly traded imports and the price effects of the imports again were significant factors.

17 See, e.g., Cold-Rolled Carbon Steel Plates and Sheets from Argen., USITC Pub. 1637, at 4–5, Inv. No. 731–TA–175 (Jan. 1985). The Commission did not refer to the business cycle in its investigation of the domestic steel industry. During 1981 through 1984, domestic consumption, shipments, capacity utilization, and employment pointed to a nadir in 1982 and a recovery in 1983 and 1984. The Commission found that while the U.S. industry was materially injured, Argentine imports were not the cause of the injury, even though Argentine steel imports had increased concurrently. In a simultaneous case, however, the Commission found that Korean steel imports were a cause of material injury or threat of injury even though the Korean market share of 1.2 percent was only 0.4 percent higher than the Argentine market share. Certain Cold-Rolled Carbon Steel Products from the Rep. of Korea, USITC Pub. 1634, at 6.

In Certain Unfinished Mirrors from the Federal Republic of Germany, Italy, Japan, Portugal, and the United Kingdom, the Commission did not emphasize the size and expansion of the market share of imports. USITC Pub. 1938, at 3–10, Inv. Nos. 731–TA–521 to 525 (Jan. 1987). Between 1983 and 1985, the consumption of mirrors increased by 21 percent while shipments of domestic producers increased by only 11 percent and operating income declined. The Commission majority attributed the relatively poor domestic performance to new domestic entrants in the mirrors market. On review, the Court of International Trade found that the industry was healthy and upheld the Commission. National Ass'n of Mirror Mfrs. v. United States, 696 F. Supp. 642, 649 (Ct. Int'l Tr. 1988).

18 USX Corp. v. United States, 655 F. Supp. 487, 490 (Ct. Int'l Tr. 1987). "The mere fact that an industry has been lifted out of a recession can not automatically trigger the conclusion that foreign imports are not affecting the domestic market." Id.
port a finding that unfairly traded imports had not caused material injury, and held that the failure to consider whether the "recovery" of the domestic industry was "stymied" by the increasing imports of steel was reversible error. 19

In conclusion, the Commission's pre-1988 material injury analyses do not reveal a clear pattern or practice for the consideration of business cycles. Moreover, with few exceptions, the Commission failed to collect information that would have addressed the business cycle of the investigated domestic industry. 20 In one case, the Commission approved of expanding the period for which data were collected in order to analyze a complete cycle. 21 In other cases, however, the Commission refused to consider the level of domestic production, shipments, capacity utilization, or employment, either peak to peak or trough to trough. 22 Thus, the Commission's precedents fail to establish any consistent approach for the analysis of business cycles in determining material injury attributable to unfairly traded imports.

II. Evolution of Section 1328 of the 1988 Act

Congress considered the relevance of the business cycle to a material injury analysis as early as 1968 when it rejected the 1967 International Antidumping Code. At the time, Congress noted that dumped imports could injure a prospering industry as well as a foundering industry. 23 In later cases, various commissioners relied upon this intent as the basis for considering the effects of the business cycle, finding injury despite the improved performance of domestic industries. 24

In 1979 Congress indicated that the Commission should focus its attention on the "condition of trade, competition, and devel-

19 USX Corp., 655 F. Supp. at 490. It should be noted, however, that in a similar case where the Commission also failed to consider the business cycle, the court did not find that this omission was a legal error. National Ass'n of Mirror Mfrs., 696 F. Supp. at 649.
21 See, e.g., New Steel Rails from Can., USITC Pub. 2217, at 93–94, Inv. Nos. 701–TA–297, 731–TA–422 (Sept. 1989) (such an approach was expressly rejected by Commissioner Brunsdale who found that the industry was not cyclical).
opment regarding the industry concerned.” Though broad, Congress’s concern appears to encompass recognition of the business cycle as one factor of competition in the domestic market. As amended in 1979, the statute instructs the Commission to assess the “actual and potential” negative effects of unfairly traded imports upon the domestic industry. This language suggests that injury that is not immediately obvious because of an upturn in the business cycle nonetheless would be actionable.

By 1988, Congress confronted a decimated steel industry and anticipated decline in many manufacturing sectors. In contemporaneous amendments to section 201 of the Trade Act of 1974, Congress required that the Commission expressly consider the extent to which a domestic industry is unable to generate adequate capital to finance modernization and research and development. Thus, the history of section 1328 of the 1988 Act reflects the longstanding concern of Congress for the ability of domestic industry to invest, modernize, and develop.

The Senate Finance Committee report in connection with the drafting and consideration of section 1328 explained that the proposed amendment was intended to clarify existing practice and to ensure that individual commissioners applied standards


27 Similarly, in 1979 the Senate Finance Committee expressed its concern for a cyclical analysis of agricultural production. The Senate Finance Committee was concerned that gross sales and employment in the beef producing industry could be increasing at a time when economic loss was occurring: “cattle herds are being liquidated because prices make the maintenance of herds unprofitable.” S. Rep. No. 249, supra note 25, at 88.


29 Pub. L. No. 100-418, Aug. 23, 1988, § 1401, 102 Stat. 1107, 1228, amending 19 U.S.C. § 2252(C)(1)(b)(ii), Section 201 of the Trade Act of 1974, known as the “Escape Clause,” permits the imposition of a quota or other restriction upon a finding of “serious injury” by reason of imports, regardless of whether those imports are subsidized or dumped. This standard of injury is higher than the standard for “material injury” used in the unfair trade statutes set forth in the Tariff Act of 1930.
consistent with the original congressional intent.\textsuperscript{30} The Senate Finance Committee was particularly concerned that the Commission avoid an abstract approach to analyzing the health of U.S. industries, warning that failure to consider the business cycle could result in erroneous determinations.

Sometimes, the existence of temporary cyclical trends can mask real harm being caused by unfairly traded imports. For example, capital intensive industries that are suffering severe dislocation from imports may stop investing in new plant and equipment because they cannot raise capital or the existence of low priced imports in the market makes investment unprofitable. Such industries may continue to have respectable operating profits from fully depreciated plant and equipment, thereby appearing on a cursory examination not to be injured, although examination of such factors as capital expenditures would show they are becoming uncompetitive.\textsuperscript{31}

The statutory language of the 1988 Act, however, falls short of specifically directing the Commission to consider the impact of imports on both the actual investments of a domestic industry and its ability to invest, in the context of a business cycle. Section 1328 of the 1988 Act merely added the explicit requirement that the Commission consider the evidence of material injury "in the context of the business cycle and conditions of competition that are distinctive to the affected industry."\textsuperscript{32} Section 1328 apparently presumes that a business cycle exists, but offers no specific guidelines for business cycle analysis. In light of the Commission's pre-1988 record of occasional consideration of the business cycle, section 1328 is a significant improvement. Nevertheless, the statute lacks standards for determining the existence of a business cycle, the period of the cycle, and the proper approach to isolating the impact of imports from the impact of the business cycle itself. Congress evidently intended that the Commission apply accepted norms of economic analysis in identifying the existence and periodicity of the business cycles in the industries under investigation.

The legislative history of section 1328 thus suggests that Congress intended to protect a domestic industry's ability to make investments during periods of solid economic performance. Con-

\textsuperscript{31} \textit{Id.} at 116.
sequently, section 1328 directs the Commission to consider—in addition to the absolute performance of a domestic industry over a given period—the potential impairment of its actual or potential investments by unfair imports.

III. Commission Practice Since the 1988 Act

The Commission has begun applying section 1328, but thus far, no majority of commissioners has established what evidence indicates injury in the context of a cyclical industry, or how unfair imports affect the ability of a domestic industry to invest, modernize, and develop during an upturn in the business cycle. In the case of a cyclical industry, the Commission's analysis should develop data that cover an entire business cycle, should compare data at identical points over two different cycles, or should otherwise attempt to integrate the impact of cyclical behavior into its material injury analyses.

A. Determining the Existence of a Business Cycle

A threshold determination in material injury analyses should be whether the domestic industry under investigation is susceptible to a business cycle. The 1988 Act apparently assumes that business cycles exist and can be considered in every case. Certain industries, however, do not exhibit strong cyclical patterns—for example, the health care industry, or industries that produce custom-made products with "low and irregular sales over time." Such industries may not exhibit any discernible trends or performance cycles. Similarly, newly emerging or rapidly changing industries do not have a sufficiently long history to exhibit cyclical trends. Therefore, as a preliminary matter, the Commission should determine the existence of a business cycle.

In determinations under the 1988 Act, the Commission has made little effort to clarify this threshold aspect of its business cycle analysis. In recent decisions, the Commission has recognized that the statute compels analysis of the business cycle but has

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34 3.5" Microdisks and Media Therefor from Japan, USITC Pub. 2170, at 25–26, Inv. No. 731-TA-389 (Mar. 1989). For example, the market for 3.5-inch microdisks did not exist until 1986, and consumption steadily increased through the period investigated in the Commission's 1988–1989 proceeding.
failed to discuss its application of economic principles to the facts of the case. For example, in *Certain Residential Door Locks from Taiwan*, the Commission considered a product that is heavily influenced by trends in new residential construction. All of the commissioners commented that under the amended statute it was appropriate to consider the industry in the context of its business cycle. None of the commissioners, however, indicated whether there was a business cycle for this industry and whether it affected the material injury analysis. The Commission analyzed the period from 1986 through March 1989, during which the market for new residential housing was declining. Thus, the lack of analysis of the business cycle does not reveal the manner in which commissioners evaluated the impact of imports on the domestic industry's ability to make capital investments. The statutory change, however, implies that the Commission should have made an explicit determination.

Similarly, in *Certain Telephone Systems and Subassemblies Thereof from Japan, the Republic of Korea, and Taiwan*, the Commission referred to a business cycle, driven by the approximately five-year product replacement cycle, but did not enumerate the factors considered in determining whether that industry was cycllical. The Commission also failed to address the period of the cycle or its effect on the analysis of domestic industry performance. The Commission majority's approach to causation focused almost exclusively on price competition and the impact of the unfairly traded imports on the domestic producer's prices. The Commission did not explain how those imports reduced or otherwise impaired the ability of the domestic industry to generate or attract capital. Nor did the commissioners attempt to distinguish the impact of imports from the effects of the business cycle in order to gauge the optimum or potential level of domestic industry performance in the absence of the unfairly traded imports.

More recently, in the preliminary determination in *Silicon Metal from Argentina, Brazil, and the People's Republic of China*, one commissioner attributed a three-year trend in domestic industry ship-

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ments to the fact that the middle year was a "peak year in the silicon metal industry," without otherwise examining the existence or period of a business cycle. The majority of the commissioners did not even address the issue. This approach harkens back to the pre-1988 opinions, in which the business cycle was considered on a selective and subjective basis.

In general, recent Commission determinations have only referenced the business cycle, without guiding the parties or the Commission staff as to the substantive determinations necessary for a finding of material injury in the context of a business cycle. In a few cases, however, the Commission has indicated some criteria for characterizing a particular industry as cyclical. For example, the Commission has recognized the existence of product cycles based on typical product life, derived demand in the market for products in which the investigated merchandise is incorporated, or changes in consumer preferences. These


42 Martial Arts Uniforms from Taiwan, USITC Pub. 2216, at 38, Inv. No. 731–TA–424 (Aug. 1989) (two commissioners found that domestic consumption fluctuated as a result of the "Ninja craze"); Limousines from Can., USITC Pub. 2220, at 37 (Commissioner Cass noted the decline in demand due to the stock market crash in 1987 and the
“conditions of competition,” though not business cycles per se, were variously factored into the Commission’s analyses.

In other cases, such as *Calcined Bauxite Proppants from Australia*, the Commission considered the impact of derivative demand on the merchandise under investigation. Bauxite proppants are used in the oil and gas industries, and demand for these products is derived from the demand for oil and gas. The Commission staff collected data for the oil and natural gas industries and reported oil and gas prices, the number of new wells drilled from 1980 through 1988, and the total number of wells. This data indicated a cyclical peak in oil prices and number of wells in 1981, followed by stable prices and number of wells until a dramatic decline between 1985 and 1988. Yet, despite the addition of sufficient data to trace the trend in demand, the Commission majority did not link that trend to the performance of the bauxite proppants industry in any detailed manner.

In other recent cases, the Commission generally did not collect information over a period long enough to evaluate cyclical behavior. The Commission may lack sufficient data for a fact-based determination of the existence of a business cycle because it has traditionally limited the investigative period to three years. The Commission usually collects information for the three calendar years prior to the year in which the antidumping or countervailing duty petition is filed, and for each quarter during the year of filing for which complete data are available. The three-year

temporary lull in limousine sales preceding the new model year); Certain All-Terrain Vehicles from Japan, USITC Pub. 2163, at 27, Inv. No. 731–TA–388 (Mar. 1989) (Commission majority found that any injury to the domestic industry was caused by a decline in consumption due to public concerns about safety); Sewn Cloth Headwear from the People’s Rep. of China, USITC Pub. 2185, at 6–10, Inv. No. 731–TA–405 (May 1989). In this case, the Commission majority rendered a negative determination without citing to the statutory provisions regarding the business cycle and without any discussion of whether the industry was cyclical. As noted by the majority, the case was characterized by “a domestic industry’s failure to participate in an expanding market.” Sewn Cloth Headwear, USITC Pub. 2183, at 10 n.28. The staff investigation indicated that the upward trend in consumption may have been the result of “increased popularity” of baseball caps. *Id.* at A-15. The Commission’s failure to address the flat performance of the domestic industry in the context of the expanding market offers no guidance or useful insight into the rationale for the final determination.

44 *Id.* at A-17 to 18.
limitation is a practical attempt to reduce, for the parties and the Commission’s staff, the burden which arises from the complexity of the Commission’s questionnaires, the numerous statutory factors to be considered, and the deadlines for reaching preliminary and final determinations. Nonetheless, the identification of a business cycle is largely a matter of observation, and the period of the cycle will vary from case to case. Hence, to best determine the existence of a business cycle, the Commission may need more data than are generally available.

B. How Long is a Business Cycle and Where in the Cycle is the Industry?

The Commission has failed to develop a consistent or meaningful approach to relating the period under investigation to the period of the business cycle. As noted, the Commission examines the effect of unfair imports over the three calendar years preceding the year of filing plus the interim three-month periods available for the year in which the petition was filed. Nevertheless, the Commission cannot meaningfully analyze this three-year snapshot of the industry without identifying the length of any relevant business cycle and the position of its snapshot within that cycle. In light of the statutory requirement that it examine business cycles, it would seem that the Commission should collect data at least over one complete business cycle, and preferably more than one cycle.

Prior to 1988, the Commission occasionally expanded its three-year period of investigations. In Brass Sheet and Strip from Japan and the Netherlands, the Commission extended the period of investigation to include a full business cycle. In other cases, how-

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46 The obvious reason for limiting the period under investigation is the statutory time limit for a determination and the length and complexity of the Commission’s questionnaire. Analysis, however, of the impact of imports over a business cycle or of comparisons of data from the same point in several cycles does not require the Commission to collect data on all of the statutory factors. By seeking evidence with regard to a few relevant factors, and limiting the reporting to summary data for early years, the burden on the Commission staff and the parties would be manageable.

47 For example, in the fresh cut flower industry, the Commission observed sharp increases in domestic consumption during the holidays, followed by sharp declines in the summer and fall. As a result, the Commission collected pricing and other data on a seasonal basis to permit the comparison of appropriate points in the cycle. Certain Fresh Cut Flowers from Can., Chile, Colom., Costa Rica, Ecuador, Isr., and the Neth., USITC Pub. 1956, at A-18 to 19, A-130 to 147, Inv. Nos. 731–TA–327 to 331 (Mar. 1987).

ever, the Commission refused to expand the investigative period. In the case of a few industries, however, the Commission has had occasion to conduct more than one investigation over a period of time. As a result, industry data are available for more than the three-year period usually analyzed. For example, in the case of Color Television Receivers from the Republic of Korea and Taiwan, the Commission had data available for a total of twelve years. USITC Pub. 1514, at 15 n.55 and A-3 to 5, Inv. Nos. 731-TA-134 to 135 (Apr. 1984). Similarly, in Bicycle Tires and Tubes from Taiwan, the Commission had data available for an eight-year period. USITC Pub. 1532, at 4, Inv. No. 731-TA-166 (May 1984). In these cases, the Commission did not specifically collect the data to determine that an industry was cyclical or to analyze cyclical trends.

Commission precedent provides only case-by-case principles to identify business cycles. In some cases, the Commission has evaluated an industry in a recovery phase simply by analyzing its market share and the trend in prices. These determinations have not sought to compare cash flow, level of profitability, or return on investment as affecting the industry’s ability to invest, with respective levels during earlier recovery periods. In other cases, where appropriate data happened to be available, the Commission has emphasized peak-to-peak trends and the comparative performance of the industry in different periods.

Although a determination of material injury is properly grounded in the facts of a particular case, in many industries the business cycle is derivative and can be discerned from the trend in another industry. Consumption of mirrors, for example, follows the trend in the construction industry; bauxite proppants follow the trend in the oil and gas industries. By examining these related trends, the Commission can ensure that it understands the business conditions affecting the three-year period for which it has data. Data as to the duration and amplitude of the business cycle is critical. The Commission adds nothing to the analysis merely by indicating that the industry is in the midst of a downturn or an upturn.

C. Burden of Persuasion and Duty to Investigate

The Commission and the courts have differed on the question of the burden of persuasion and the Commission’s responsibility to investigate business cycles. In a May 1989 decision, Commissioner Cass noted that the burden was on the parties, not the Commission, to submit data and assert whether a business cycle
exists. Commissioner Cass’s rejection of data presented by the petitioner did not mention any conflicting evidence offered by opposing parties or by the Commission staff. The Commission thus disregarded apparently unrebutted evidence and did not make an independent investigation.

In contrast, the courts have held that the Commission has the burden to investigate the statutory criteria. Thus, the Commission is not simply an adjudicator, but rather, has an affirmative duty to investigate and develop an administrative record. Because the statute requires consideration of the business cycle, it follows that the Commission and its staff and economists must gather evidence of a business cycle in every case, even if none of the parties raise the issue or present relevant data. The Commission staff could identify and analyze the length of a business cycle and the cyclical status of a given industry based on published data such as the Annual Survey of Manufacturers, the Quarterly Financial Reports, the Current Industrial Reports, as well as the annual U.S. Industrial Outlook. The Department of Commerce compiles and publishes these and similar statistics for intermediate and final products.

D. The Business Cycle and Investment

Congressional concern that an industry’s ability to fund investment and research and development not be impaired by unfair foreign competition was the major reason for mandating consideration of the business cycle in section 1328. In highly cyclical industries, producers depend upon large profits during peak

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50 Industrial Belts from Isr., Italy, Japan, Singapore, S. Korea, Taiwan, the U.K., and W. Ger., USITC Pub. 2194, at 104–05, Inv. Nos. 701–TA–293 and 731–TA–412 to 419 (May 1989). Commissioner Cass took the same approach in Certain Telephone Systems and Subassemblies Thereof from Japan, the Republic of Korea, and Taiwan, seeking evidence from the parties to illuminate “the connection between dumping and trends in industry performance.” USITC Pub. 2156, at 95–96, Inv. Nos. 731–TA–426 to 428 (Prelim.) (Feb. 1989). There was no indication that this ought to be the independent task of the Commission staff and economists.


52 The statute imposes an affirmative duty on the Commission to collect the “best information available.” 19 U.S.C. §§ 1671b(a), 1673b(a) (1988); 19 C.F.R. § 207.17. That duty is not discharged simply because one of the parties fails to carry the burden of proof. Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1560 (Fed. Cir. 1984). It is the duty of the agency to investigate, not merely to serve as a passive receptacle for information. See, e.g., Budd Co., Ry. Div. v. United States, 507 F. Supp. 997, 1001 (Ct. Int’l Tr. 1980).

53 19 U.S.C. §§ 1671b(a), 1671d(b), 1673d(b), 1675(b), 1675(d) (1988).
years to finance modernization and investment. During the bottom of the cycle, industries typically cannot invest in modernization. Generally, however, the Commission has not sought evidence that would provide benchmarks for measurement of an industry’s ability to make adequate investments over the span of the business cycle, from peak to trough. 54

In many cases in which the Commission found no material injury, it placed great significance on the fact that a domestic industry was profitable or had been investing and funding research and development. 55 In only a few cases, however, has the Commission compared the amount or degree of investment, maintenance, or research and development expenditures with the optimum requirements for such expenditures as they would have existed without the suppression of cash flow, profitability, and return on investment attributable to the unfairly traded imports. 56

In the case of the steel industry in 1985, the Commission recognized improvements in the economy and consequent improvement in steel demand. Nevertheless, the Commission considered the steel industry’s continued inability to sustain operating profits in 1985 to be an indication of material injury. 57 Without adequate

54 The Commission has recognized that the “loss of profits, which could be plowed back into operations to make the U.S. firms more efficient and competitive, is certainly an injury cognizable under the unfair trade laws, though it is not the most easily demonstrable form of material injury.” Stainless Steel Sheet and Strip from Spain, USITC Pub. 1593, at 7–8, Inv. No. 731–TA–164 (Oct. 1984), citing Radial Ply Tires for Passenger Cars from the Rep. of Korea, USITC Pub. 1572, at 11–12, Inv. No. 751–TA–200 (Prelim.) (Sept. 1984).


56 Color Television Receivers from the Republic of Korea and Japan is an exception. There the Commission considered the trend in industry profits and financial performance over a twelve-year period. USITC Pub. 1514, at 15 n.55 and A–3 to 5, Inv. Nos. 731–TA–134 to 135 (Apr. 1984). The Commission noted that despite the increase in demand in the most recent period, domestic producers’ profit margins did not increase because dumped imports depressed prices. More typical was Brass Sheet and Strip in which the Commission noted that capital and research and development expenditures declined over the period under review, but did not consider industry performance over more than one business cycle or during a comparable period in another cycle. USITC Pub. 2099, at 14, Inv. Nos. 731–TA–579 to 380 (July 1988).

57 See, e.g., Certain Cold-Rolled Carbon Steel Products from the Rep. of Korea, USITC Pub. 1634, at 4–6, Inv. No. 701–TA–218 (Jan. 1985). In its 1980 investigations, the
profitability during the economic upturn, the industry would be unable to undertake necessary investment after several years of sustained losses and poor business. In *Cellular Mobile Telephones and Subassemblies Thereof from Japan*, despite an expansion of the U.S. market, domestic producers did not earn a return on investment commensurate with the level necessary for further investment and research and development.\(^{58}\) Again, the Commission recognized the need for an adequate return during the peaks of the business cycle in order to finance innovation and improvement and sustain the industry through economic troughs.

The preliminary determination in the 1986 case *Portland Hydraulic Cement and Cement Clinker from Colombia, France, Greece, Japan, Mexico, Korea, Spain, and Venezuela* is noteworthy because the petitioner argued that the Commission should compare the profit margin earned during the most recent period with the margin earned during a prior cyclical peak.\(^{59}\) Although the Commission acknowledged the cyclical nature of the industry and the fact that impaired profitability during an upturn could be a cause of injury, it found that the relatively poor performance of the U.S. industry during the most recent upturn was due to lower inflation and lower interest rates rather than unfair imports.\(^{60}\) The Commission thus impermissibly weighed causes without any analysis of the effect of the unfairly traded imports as a contributing cause of injury.

E. Does Non-Traditional Analysis Avoid the Issue?

In assessing the current practice of the Commission, economists have generally identified two modes of analysis. Commissioners

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\(^{60}\) In the 1989 preliminary determination in *Gray Portland Cement and Cement Clinker from Mexico*, the Commission found that the industry did not demonstrate any pronounced cyclical trend on a regional basis. USITC Pub. 2235, at 21, Inv. No. 731–TA–451 (Prelim.) (Nov. 1989). Although demand was derived from general construction activity, the Commission found that there were different trends even within the same region.
who adhere to statutory factors such as decline in output, sales, market share, profits, productivity, and utilization of capacity are said to adopt “traditional” analysis. Those commissioners who rely upon the aforementioned factors, but also upon economic models to compute indicators such as price, supply and demand elasticities, and product substitutability, adopt “non-traditional” analysis. This Article has focused on the traditional analysis of the Commission majority and the implications of the business cycle for that approach. To the extent that any commissioners apply non-traditional analysis, the question arises whether non-traditional analysis already incorporates, or makes it otherwise unnecessary to consider the business cycle. It is useful to consider a case in which the Commission majority, applying traditional analysis, did not find material injury in a situation that suggests that it looked only to an industry’s improving performance during an upturn in the business cycle. An affirmative injury determination in the same case based on a non-traditional analysis could indicate that the non-traditional approach implicitly incorporates consideration of the business cycle.

For example, in Digital Readout Systems and Subassemblies Thereof from Japan, the Commission majority found that the domestic industry was not materially injured in the context of steadily rising domestic capacity and employment, and increasing sales and profits. The Commission majority did not discuss or evaluate the business cycle for the digital readout systems industry. The Commission staff, however, noted that demand for such

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products depended upon the demand for machine tools.\textsuperscript{64} In examining consumption of digital readout systems and consumption of machine tools, the staff found demand declining steadily between 1985 and 1987, and recuperating during 1988. Although the presented data covered less than four years, its trend indicated a business cycle trough in 1987, and an upturn during the most recent period under investigation.

A Commission minority found material injury based on consideration of additional economic indicators. The minority found that imported and domestic systems were moderately substitutable, that demand tended to be inelastic, that other sources of supply did not exist, and that the margins of dumping were moderate to large. Hence, in the absence of dumped imports, the domestic industry could have captured additional sales volume.\textsuperscript{65}

Nevertheless, although non-traditional analysis may produce an opposite finding in material injury determinations, that approach does not incorporate substantial analysis of the business cycle. The non-traditional approach relies upon economic factors such as the elasticity of price, the price elasticity of demand, and the degree to which unfairly traded imports are substitutes for domestically produced "like products."\textsuperscript{66} None of these factors, however, directly incorporates or measures the impact of the business cycle.\textsuperscript{67} Thus, the use of such elasticities as factors for consideration does not satisfy the requirements of the 1988 Act.

\textsuperscript{64} Id. at A-11.
\textsuperscript{65} Id. at 35–53 (views of Acting Chairman Brunsdale), 126–36 (views of Commissioner Cass). Analysis of the elasticity of demand, product substitutability, and supply elasticity is characteristic of the non-traditional approach to material injury analysis. A very similar analysis and result is set forth in \textit{Certain Light-Walled Rectangular Pipes and Tubes from Argentina}, where the commissioners, applying non-traditional analyses, found material injury in the context of a recovery in the business cycle because the product responded to derived demand and demand was relatively inelastic. USITC Pub. 2187, at 10–13, Inv. No. 731–TA–409 (May 1989).
\textsuperscript{66} The Commission is directed by statute to consider injury to the domestic industry producing a "like product." 19 U.S.C. §§ 1677(4), 1677(10) (1988). By definition, a "like product" is identical to the imported merchandise or is "most similar in characteristics and uses" with that merchandise. 19 U.S.C. § 1677(10) (1988).
\textsuperscript{67} The price elasticity of demand, for example, measures the slope of the demand curve. If demand is perfectly inelastic, the curve will be vertical and price will not affect the volume of goods demanded. The business cycle, however, does not affect the slope of the demand curve so much as it shifts the entire curve to the right or left over time. That is, during an upturn in the business cycle, the demand curve moves to the right,
Commissioners who have adopted a non-traditional approach assert that the use of economic concepts, as opposed to the statutory factors, is more transparent. These commissioners, however, have not yet rigorously discussed the impact of the business cycle on the level of demand, or the fact that demand may change over time. Nor have these commissioners related the measures of elasticity to cyclical phenomena, measures which themselves have been criticized by the Court of International Trade for their lack of precision. Hence, the non-traditional approach does not produce more transparency with respect to cyclical analyses.

In the context of either the traditional or non-traditional approach, consideration of the business cycle should be explicit. The majority of cases analyzed under the non-traditional approach commonly base a determination of no injury on findings that demand is relatively elastic, that imports and domestic like products are not close substitutes, that the dumping or subsidy margins are small, or that other sources of supply would replace the unfairly traded imports and thus deny any benefit to the domestic industry. Even in such circumstances, the analysis must ultimately determine the magnitude of the injury, whether it is "inconsequential, immaterial, or unimportant." In every case where the domestic product is at all like the unfairly traded imports, there is likely to be some degree of competition, lost sales volume, or price effects. The business cycle and consideration of the potential impairment of an industry's ability to raise capital, modernize, and conduct research and development are all relevant in measuring the degree of injury. Apart from the fact that the statute as amended requires consideration of cyclical

reflecting the increase in demand; during a downturn, the curve moves back to the left. The business cycle, therefore, may have little effect upon demand elasticity.

68 Acting Chairman Brunsdale believes that "examination of the mechanism through which imports affect domestic producers of the like product using simple elasticity analysis provides the degree of insight into the Commission's reasoning that Congress sought when it amended the dumping statute." Digital Readout Systems, USITC Pub. 2150, at 36. See also Brass Sheet and Strip from Japan and the Neth., USITC Pub. 2099, at 45 n.32, Inv. Nos. 731-TA-379 to 380 (July 1988). It may be noted, however, that traditional analysis has survived numerous challenges in court on the ground that the reasons given by various commissioners were sufficiently clear to satisfy the statutory requirements.


conditions, logic compels the same result. Neither traditional analysis nor non-traditional analysis offer much guidance as to the impact of business cycles on the question of material injury.

IV. Future Prospects for Commission Consideration of the Business Cycle

The history of the material injury provision reveals that Congress has increasingly identified the specific factors and considerations that the Commission should consider in its decisions. Over time, tools for analysis that were once used only sporadically ultimately have been incorporated into the statute. Since 1988, the Commission has frequently recognized its statutory obligation to analyze material injury in the context of business conditions, but has not elaborated on the significance of various conditions or the impact of cyclical swings on its decisions. The Commission must now develop coherent standards for its consideration of business cycles.

It is important that the Commission first identify whether there is a discernable and significant business cycle. This threshold determination is essentially empirical, applying classical economic analysis of business cycles to the facts of a given case. The Commission should expect the parties to a proceeding to identify the relevant business cycle, and should critically evaluate the evidence submitted, requesting further data as appropriate. The burden on the staff and parties in this regard need not be great. Resort can be had to readily available publications, to evidence of cyclical trends in related industries, to evidence of derived demand, and to Commission experience with other industries. The Commission should then identify the duration of the business cycle, that is, the peaks and troughs in consumption, and the frequency,

71 Compare, for example, the practice of cumulation—that is, the consideration of unfairly traded imports in the aggregate—which also began as an approach adopted on an ad hoc basis by individual commissioners. Before 1984, the doctrine was applied haphazardly, depending upon the personal views of each commissioner. Congress addressed this uncertain state of affairs by amending the statute to require cumulation in all cases upon a finding of competition. Trade and Tariff Act of 1984, Title VI, § 612(a), 98 Stat. 3033, codified 19 U.S.C. § 1677(7)(C)(iv) (1984). Ultimately, the Commission identified the factors upon which it would base a finding of competition. Uncertainty in the standards for analysis of the business cycle is very similar to the uncertainty with respect to cumulation prior to 1984. In the case of cumulation, the statutory change has brought about greater certainty, permitting parties to address the relevant criteria, and the Commission Staff to develop pertinent information.
amplitude and regularity of the peaks and troughs. Of course, where there is no evidence of cyclical trends, disregard for the business cycle does not offend congressional intent. In the case of an apparent cycle, however, the Commission should not fail to make the requisite identification for want of relevant data.

Next, the Commission should locate the three-year period of investigation within the business cycle. Traditional economic factors should be analyzed over the period of the cycle, not simply year-to-year within the period of investigation. The Commission need not statistically document each statutory factor—that is, profits and losses, employment, return on assets, cashflow, research and development expenditures, capital investments—because a business cycle can manifest itself in the trend in consumption or shipments alone. In many cases, this would be discernible from published data collected by the Department of Commerce or by industry associations.72

Finally, resort to non-traditional analysis does not obviate the need for separate consideration of the business cycle. The factors measured by use of elasticities of price, supply, and demand are irrelevant to the influence of industry-wide recoveries or downturns on the condition of the domestic manufacturers investigated.

CONCLUSION

With section 1328, Congress has explicitly added the business cycle to the list of factors that the Commission must consider in its injury determinations. Thus far, the Commission has failed to formulate any consistent or objective approach to determining the existence and period of business cycles in the industries that it investigates. For the past twenty years, Congress has emphasized that a domestic industry must be able to attract sufficient investment to modernize and develop, and that even an apparently prospering industry may be materially injured. Yet, without recognition of the nature and duration of business cycles, the

72 Pursuant to section 332 of the Tariff Act of 1930, the Commission itself has conducted studies of the condition of various domestic industries for years. In addition, trends in industrial sales and income, broken down into separate industries by Standard Industrial Classification (SIC) codes, are readily available for major industries from Quarterly Financial Reports for Manufacturing, Mining, and Trade Corporations, a publication of the U.S. Department of Commerce, Bureau of the Census.
most damaging effects of unfair trade to the long-term health of U.S. industries can be obscured by cyclical upturns in industry performance. The Commission's material injury analyses must be more discriminating. The Commission should not ignore the potential or optimum level of industry performance attainable in the absence of dumped or subsidized imports.