

UNITED STATES INTERNATIONAL TRADE COMMISSION

In the Matter of:) Investigation Nos.
SUGAR FROM MEXICO) 704-TA-1 and 734-TA-1 (REVIEW)

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THE UNITED STATES
INTERNATIONAL TRADE COMMISSION

IN THE MATTER OF:) Investigation Nos.:
SUGAR FROM MEXICO) 704-TA-1 AND 734-TA-1 (REVIEW)

Thursday, February 19, 2015
Main Hearing Room (Room 101)
U.S. International Trade
Commission
500 E Street, SW
Washington, DC

The meeting commenced pursuant to notice at 9:30
a.m., before the Commissioners of the United States
International Trade Commission, the Honorable Meredith M.
Broadbent, Chairman, presiding.

1 APPEARANCES:

2 On behalf of the International Trade Commission:

3 Commissioners Present:

4 Chairman Meredith M. Broadbent (presiding)

5 Vice Chairman Dean A. Pinkert

6 Commissioner Irving A. Williamson

7 Commissioner David S. Johanson

8 Commissioner F. Scott Kieff

9 Commissioner Rhonda K. Schmidtlein

10

11 Staff Present:

12 Bill Bishop, Supervisory Hearings and Information

13 Officer

14 Sharon D. Bellamy, Program Support Specialist

15 Mikayla Kelley, Student Intern

16

17 Amy Sherman, Investigator

18 Douglas Newman, International Trade Analyst

19 Tana Farrington, Economist

20 Charles Yost, Accountant/Auditor

21 Courtney McNamara, Attorney

22 Elizabeth Haines, Supervisory Investigator

23

24

25

1 Embassy Witnesses:

2 Embassy of Mexico, Washington, DC

3 Kenneth Smith Ramos, Head of the Trade and NAFTA Office
4 of the Ministry of Economy

5 Salvador Behar, Legal Counsel for International Trade
6 of the Trade and NAFTA Office of the Ministry of Economy

7

8 In Favor of the 704/734 Petitions TRADEWINS LLC, Washington,
9 DC on behalf of AmCane Sugar LLC:

10 David Rosenzweig, Chief Executive Officer, AmCane Sugar
11 LLC

12 John Magnus and Sheridan S. McKinney, TRADEWINS LLC

13

14 White & Case LLP, Washington, DC on behalf of Imperial Sugar
15 Company ("Imperial Sugar"):

16 Michael A. Gorrell, President and Chief Executive
17 Officer, Imperial Sugar

18 Patrick Henneberry, Senior Vice President, Imperial
19 Sugar

20 Gregory J. Spak, Kristina Zissis and Ron Kendler, White
21 & Case LLP

22

23

24

25

1 In Opposition to the 704/734 Petitions Cassidy Levy Kent
2 (USA) LLP, Washington, DC on behalf of The American Sugar
3 Coalition and its members:

4 Dr. Colin A. Carter, Distinguished Professor of
5 Agricultural and Resource Economic, University of
6 California-Davis

7 Robert C. Cassidy, John D. Greenwald, Jennifer A.
8 Hillman and James R. Cannon, Jr., Cassidy Levy Kent (USA)
9 LLP

10

11 Greenberg Traurig LLP, Washington, DC on behalf of Camara
12 Nacional De Las Industrias Azucarera Y Alcoholera ("Mexican
13 Sugar Chamber")

14 Juan Cortina Gallardo, President, Ingenio Tala de C.V.
15 ("Tala") and it cross-own affiliates, (collectively, "GAM")

16 Humberto Jasso Torres, Director, General, Mexican Sugar
17 Chamber

18 Christophe Armero, Director, International Business and
19 Strategy Beta San Miguel SA de CV

20 Dr. Seth T. Kaplan, Senior Economic Advisor, Capital
21 Trade, Inc.

22 Oscar Cruz, Counsel, Cruz Advogados

23 Irwin P. Altschulter, Philippe M. Bruno and Rosa S.
24 Jeong, Greenberg Traurig LLP

25

1 Covington & Burlington LLP, Washington, DC on behalf CSC

2 Sugar LLC

3 Paul J. Farmer, President and Chief Executive Officer,

4 CSC Sugar LLC

5 David R. Grace and James McCall Smith, Covington &

6 Burlington LLP

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P R O C E E D I N G S

(9:30 a.m.)

MR. BISHOP: Will the room please come to order?

CHAIR BROADBENT: Good morning. On behalf of the U.S. International Trade Commission, I welcome you to this hearing on Investigation No. 704-TA-1 and 734-TA-1 involving Sugar Imports from Mexico.

On October 27th, 2014 Commerce and the Government of Mexico initialed a draft agreement to suspend the countervailing duty investigation on sugar from Mexico. On the same date Commerce and exporters accounting for substantially all of the subject imports from Mexico initialed a draft agreement agreement to suspend the antidumping duty investigation on sugar from Mexico. These agreements were revised after a comment period and signed in a final form on December 19th, 2014.

The agreement to suspend the countervailing duty investigation restricts the volume of subject imports from Mexico permitted each year. The agreement to suspend the antidumping investigation establishes a minimum price for exporters of the subject merchandise. Both agreements are required by statute to eliminate completely, is what the statute says, the injurious effect of exports to the United States of the subject imports.

On January 8, 2015, Imperial Sugar Company and

1 AmCane Sugar LLC, two sugar cane refiners, filed petitions
2 with the Commission requesting review of the suspension
3 agreements.

4 The Commission instituted these reviews on the
5 same date. The purpose of the reviews which we are here
6 today to discuss is to determine whether the injurious
7 effect of imports of the subject merchandise is eliminated
8 completely by the suspension agreements under review.

9 Documents concerning this oral proceeding are
10 available at the public distribution table. Please give all
11 prepared testimony to the Secretary and do not place it on
12 the public distribution table.

13 All witnesses must be sworn in by the Secretary
14 before presenting testimony. Each panel will be allowed up
15 to 30 minutes for its oral presentations of which it may
16 reserve up to five minutes for rebuttal.

17 Commissioners will ask questions of each panel
18 after its presentation. If you have any questions about
19 time, please ask the Secretary.

20 Speakers are reminded not to refer to business
21 proprietary information in their remarks or in answers to
22 questions. Please speak clearly into the microphone and
23 state your name for the record so that the court reporter
24 knows who is speaking.

25 If you will be submitting documents that contain

1 information you wish classified as business confidential,
2 your request should comply with Commission Rule 201.6.

3 Mr. Secretary, are there any preliminary matters?

4 MR. BISHOP: No, Madam Chairman.

5 CHAIR BROADBENT: Very well. Will you please
6 announce our embassy witnesses.

7 MR. BISHOP: From the Embassy of Mexico, we have
8 Kenneth Smith Ramos, Head of the Trade and NAFTA Office of
9 the Ministry of Economy and Salvador Behar, Legal Counsel
10 for International Trade and NAFTA Office of the Ministry of
11 Economy.

12 CHAIR BROADBENT: Welcome, gentlemen, you may
13 begin when you're ready.

14 REMARKS ON BEHALF OF THE EMBASSY OF MEXICO

15 MR. RAMOS: Thank you very much. Good morning
16 members of the Commission. For the record, my name is
17 Kenneth Smith Ramos and I am the head of the Trade and NAFTA
18 Office in Washington, D.C.

19 On behalf of the government of Mexico I want to
20 thank you for the opportunity to make this brief statement
21 regarding the petitions filed by the two U.S. refiners,
22 Imperial Sugar and AmCane Sugar requesting the ITC to review
23 the antidumping and countervailing duty suspension agreement
24 signed on December 19, 2014.

25 As you know, the government of Mexico is an

1 interested party in the underlying investigations and I will
2 be happy to answer any questions you may have.

3 On February 10, the government of Mexico filed
4 comments in response to the public notice instituting the
5 review of the suspension agreements. Our submission
6 described the mechanism implemented in Mexico to ensure full
7 compliance with the commitments undertaken by the government
8 of Mexico under the agreement suspending the countervailing
9 duty investigation. We understand that this review
10 procedure has never been previously used and that therefore
11 this situation is unusual.

12 Mexico regrets the decision by Imperial Sugar and
13 AmCane Sugar to request a review of suspension agreements
14 that have been duly vetted, not only by the Commerce
15 Department, but also by the petitioners and USDA.

16 Mexico is convinced that the agreements will
17 ensure and maintain the delicate balance in trade of
18 sweeteners between Mexico and the United States. The
19 countervailing duty suspension agreement ensures that U.S.
20 imports of sugar from Mexico will be limited to the needs of
21 the U.S. market as defined in the formula set out in the
22 agreement.

23 As USDA stated, the needs based quantity limits
24 on Mexican sugar exports to the United States and the
25 countervailing duty suspension agreement will decrease the

1 likelihood of sudden and unexpected sugar inflows from
2 Mexico that could otherwise complicate USDA's management of
3 the sugar program and depress U.S. sugar prices.

4 I would now like to address the mechanism
5 implemented in Mexico to ensure full compliance with the
6 countervailing duty suspension agreement. On February 6,
7 2015, the Ministry of Economy published in the Diario
8 Oficial of Mexico which is Mexico's version of the Federal
9 Register the rules for exports of sugar from Mexico in
10 accordance with the agreement. The rules are set forth in a
11 document known as the implementing regulations. These
12 regulations prescribe that no sugar from Mexico will be
13 exported either to the U.S. or third countries without a
14 valid export permit issued by the Ministry.

15 The main difference between the export permit
16 regimes implemented through this regulation for exports to
17 the U.S. and exports to third markets is that the quota only
18 applies to exports to the U.S.

19 By requiring export permits for such third
20 country exports Mexico can monitor those exports and impose
21 legal obligations prohibiting retransfers to the U.S. The
22 implementing regulations established the mechanism to
23 allocate the volume that results from the application of the
24 formula amongst the Mexican sugar mills. This allocation
25 will be updated in accordance with the provisions set out in

1 Section 5 of the agreement as of September, December, and
2 March as determined by the U.S. Department of Commerce.

3 Once the allocation of the volume is distributed
4 to the mills, export permits could be requested in any given
5 time and will have an expiration date of 90 days from
6 issuance, or September 30th, of the commercial year,
7 whatever occurs first.

8 For further clarity, the sugar commercial cycle
9 is defined as running from October the 1st to September the
10 30th.

11 It is important to highlight that the
12 implementing regulations clearly state that no export
13 permits for sugar refined or raw will exceed the export
14 limit allocated for the specific export limit period.

15 Sugar worldwide is a very sensitive commodity
16 that is heavily monitored by all countries and all markets.
17 The situation in Mexico is no different. In Mexico several
18 agencies monitor sugar, including the Comité Nacional para
19 el Desarrollo de la Cana de Azúcar (CONDADESUCA), which
20 tracks the Mexican industry from harvest to production to
21 exports.

22 On the U.S. side, USDA has a very similar
23 mechanism. Accordingly, the new implementing regulations
24 build on the mechanisms already in place to monitor
25 production and export activity both to the U.S. and third

1 markets. I am able to confirm to you that the regulatory
2 mechanisms in Mexico are fully operational.

3 I would like to thank the Commission and I will
4 be available to respond to any question now or during the
5 Commission's discussion with the panel in opposition to the
6 review.

7 Thank you very much.

8 REMARKS ON BEHALF OF THE EMBASSY OF MEXICO

9 MR. BEHAR: Thank you very much.

10 CHAIR BROADBENT: Mr. Secretary, will you call
11 the first panel witnesses, please?

12 MR. BISHOP: Would the panel in favor of the 704
13 and 734 petitions please come forward and be seated.

14 Madam Chairman, all witnesses on this panel have
15 been sworn.

16 (Pause.)

17 CHAIR BROADBENT: I want to welcome the panel to
18 the ITC and you may begin when you're ready.

19 OPENING STATEMENT ON BEHALF OF THE 703/734 PETITIONS

20 MR. SPAK: Thank you, Madam Chairwoman. Good
21 morning to all the Commissioners and staff. My name is
22 Gregory Spak of the law firm of White & Case. My colleagues
23 and I appear on behalf of Imperial Sugar Company which is
24 represented today by President and CEO Mike Gorrell and
25 Senior Vice President, Patrick Henneberry.

1 We share the panel this morning with John Magnus
2 and Sheridan McKinney of Tradewins, appearing on behalf of
3 AmCane which is represented by CEO David Rosenzweig.

4 We are all aware of the novelty of the
5 circumstances that bring us together today, extraordinary
6 circumstances, really. The U.S. industry is split. Part of
7 the U.S. industry sits with the Mexican producers against
8 whom they've petitioned for relief. Government agencies
9 have weighed in to explain their views why these agreements
10 eliminate completely the injurious effect of the unfairly
11 traded imports. Economists have joined the hunt and have
12 their own theories on why these agreements satisfy a
13 statutory test.

14 Our witnesses will talk to you this morning about
15 their business which is the business of refining cane sugar.
16 They have both submitted declarations and they will describe
17 their views here and answer questions based on their
18 real-world experience and facts, not theories.

19 As you listen to the witnesses, I ask you to keep
20 the following points in mind. First, while we all know that
21 suspension agreements are rare, we need to keep in mind that
22 this particular type of suspension agreement is the rarest
23 of them all. A C agreement in Commerce Department parlance
24 rather than eliminate the dumping and subsidies, these
25 agreements permit dumping and subsidization to continue.

1 So the refiners that you hear on our panel are
2 being asked to compete with dumped and subsidized sugar
3 entering the United States for direct consumption.

4 Second, Congress permitted this to happen on one
5 condition, that the agreements eliminate completely the
6 injurious effect of the unfairly traded imports. Not most
7 of the injurious effect, not partial elimination, the
8 injurious effect must be eliminated completely. Some may
9 view this as a difficult standard, but we submit that it is
10 completely justified when the parties choose a C agreement
11 that allows unfairly traded goods to remain in the market.
12 The statutory language and Congress' intent are clear.

13 Third, it has been suggested by some of the
14 parties urging approval of these agreements that the proper
15 time period for the Commission's analysis extends from the
16 past to the date that these agreements were signed. This is
17 kind of commingled with a rephrasing of the statutory
18 language as parties rush to prove that no injury would have
19 occurred in the past had these agreements been in place at
20 that time.

21 It seems to us that these theories tend to
22 confuse the cause and the effect. And they forget the
23 statute requires the effect to be eliminated completely.

24 We urge the Commission to cut through all of this
25 and to focus on the statutory test. To assist, we have

1 prepared a simple chart that appears on the screen. We ask
2 that you keep this in mind as you listen to the witnesses in
3 argument today. The injurious effect that the Commission
4 filed in its preliminary determination is what has to be
5 eliminated completely.

6 The appropriate focus is not what might have
7 prevented injury in the past, but whether these agreements
8 eliminate completely the injurious effect that in fact
9 already occurred. This may require some reasonable
10 inferences to be drawn about present and future, but the
11 commission is used to this.

12 And, finally, I ask that you not allow potential
13 doomsday scenarios to distract your attention from the
14 statutory test. You may hear today that all sorts of chaos
15 will ensue if you vote in the negative. Don't believe it.
16 There are several ways to solve this problem for the good of
17 everyone. The first step, though, is to hear the affected
18 refiners explain why the injurious effect of the unfairly
19 traded imports is not eliminated completely by these
20 agreements. So let's get to their story beginning with Mr.
21 Gorrell of the Imperial Sugar Company.

22 Thank you.

23 OPENING STATEMENT ON BEHALF OF IMPERIAL SUGAR

24 MR. GORRELL: Good morning. My name is Mike
25 Gorrell and I'm the President and Chief Executive Officer of

1 Imperial Sugar Company. I've been involved in the sugar
2 business in various capacities since 1996.

3 Imperial Sugar Company accounts for about 7
4 percent of all sugar produced in the United States, not just
5 cane sugar, but all sugar. It's also one of the largest
6 cane sugar refiners in the country, employing about 500
7 workers primarily at our Savannah, Georgia refinery.

8 Refining, packaging, and related logistic
9 operations also support many ancillary jobs throughout the
10 community in maintenance, warehousing, trucking, rail and
11 container operations, and vessel and import operations.

12 The Savannah refinery has played an important
13 role in the development of the U.S. sugar market, beginning
14 operations during World War I. It has seen its highs and
15 lows, none lower than the tragic fire that nearly destroyed
16 the facility in 2008, taking one million tons of refining
17 capacity off the market. It has been a long road back from
18 that disaster. But I am proud to say that we have built and
19 we continue to build a world-class refinery to serve this
20 country.

21 If I could show you our state-of-the-art
22 packaging lines at the Savannah refinery, you would be
23 amazed at the technology and efficiency at the very origin
24 of the fire that almost destroyed our company. This
25 achievement shows the strength and the determination of our

1 people.

2 So if Imperial is so resilient, why have we
3 reacted so negatively toward these suspension agreements?
4 The simple answer is that we know our business, and we know
5 a bad deal when we see one. And the bad deal comes at a
6 very tough time for the U.S. cane refining sector.

7 The Commission properly found in its preliminary
8 determination that the cane refiners suffered significantly
9 from the increased volume of unfairly traded Mexican sugar.
10 This is no surprise. Any time that you have a refining
11 industry with significant spare capacity any imports of
12 refined sugar will injure the domestic refiners. Refining
13 capacity in our segment of the industry, the destination
14 refiners, is about 4.4 million tons. And that represents
15 about one-third of the total refined sugar production
16 capacity in this country inclusive of both the cane and the
17 beet sectors.

18 These agreements leave this important segment of
19 the industry with an outlook of running it between 61 and 66
20 percent of capacity utilization. In this environment every
21 ton of imported refined sugar hurts especially when it's
22 dumped and subsidized.

23 The Commission properly found that the
24 significant volume of Mexican sugar, approximately one
25 million tons of which, was sold as refined or otherwise for

1 direct consumption had an injurious effect on the U.S.
2 industry including their refineries. The damage was done
3 and it's significant.

4 Now, do these agreements eliminate completely the
5 injurious effect caused by the unfairly traded Mexican
6 imports? Absolutely not. Instead they permit the
7 continuation of the injurious effect that the Commission
8 found in their preliminary determinations.

9 I'll focus on just some of the reasons why this
10 is true, all of which are particularly important in the case
11 of a significant cane refiner like Imperial.

12 First, let's talk about the production costs of a
13 refinery. We are in the business to earn a fair profit and
14 costs are one half of the equation. They take on even more
15 importance when you have to compete against dumped and
16 subsidized imports of the finished product that you produce.

17 There are two important points to keep in mind
18 when you analyze the cost of the cane refiner. First, fixed
19 costs play a significant role in a refiner's cost of
20 production. A true refiner like Imperial will have invested
21 significantly in plant equipment, most importantly people.
22 And the ability to cover the related fixed costs will always
23 determine whether a refinery has a chance of making a
24 profit.

25 The only way to break even or make a profit in

1 this business is to operate at a reasonable level of
2 capacity utilization which depends on having sufficient raw
3 material at a competitive price, and being able to sell that
4 sugar to our final customers at a price that covers our
5 cost.

6 The supply of raw sugar, as we all know, is
7 highly regulated. U.S. refiners have to rely on raw sugar
8 that they can purchase from domestic cane millers, imports
9 under TRQs, credits earned under the reexport program, and
10 Mexico.

11 In the last two crop years refiners like Imperial
12 relied on approximately 1.15 million tons of Mexican sugar
13 to run through their refineries which allowed the refiners
14 to achieve approximately 65 to 75 percent capacity
15 utilization. Even at this level the refiners were
16 challenged to cover their fixed costs and the financial
17 performance suffered.

18 Do the suspension agreements alleviate these
19 supply constraints so that the U.S. cane refiners can
20 operate at levels to cover these fixed costs? No. In fact,
21 they complicate the supply even further.

22 As explained in our prehearing brief, the volume
23 limitations in the CBD agreement mean that the U.S. refiners
24 will have at least 400,000 tons less Mexican sugar for
25 refining. This hurts. And it hurts even more to know that

1 we will have this capacity constraint while the agreements
2 allow nearly the same million tons of Mexican sugar to enter
3 the direct consumption market that helped cause the injury
4 in the first place.

5 I would like to share a couple figures with you
6 briefly just to put this in perspective. At current
7 refining margins, the average contribution to the bottom
8 line of U.S. refiners, after covering variable costs, is
9 about \$110 per ton when we ship sugar in bulk and it's about
10 \$150 per ton when we ship the sugar in bags.

11 The fact that nearly one million tons of Mexican
12 sugar is bypassing the cane refiners is costing America's
13 refiners between \$110 to 150 million per year, even before
14 considering the impact of any -- of price suppression. A
15 significant portion of that damage is to Imperial.

16 A second relevant cost consideration for a U.S.
17 refiner like Imperial is the cost of its raw material, sugar
18 for refining, or raw sugar. The cost for raw sugar is far
19 and away the most important of our variable costs. What did
20 these agreements do for these costs? They raised it. In
21 fact the agreements establish a price floor that is higher
22 than the actual raw sugar prices in 30 of the last 33 years
23 in this country. This is mind blowing.

24 To summarize, our supply of raw material has been
25 cut, the cost of that supply has been increased, and the

1 dumped and subsidize imports of refined sugar that caused
2 the problem in the first place are allowed to stay in the
3 market at about the same quantity.

4 It is super clear to me that the U.S. refining
5 industry will continue to suffer the injurious effect of the
6 unfairly traded Mexican imports.

7 All of this may be excused if the agreements did
8 something to raise the price that a refiner like Imperial
9 would get for its product. But the reality is, as the chart
10 on the screen shows very clearly, the cane refining margin
11 has been squeezed by the unfairly traded Mexican sugar in
12 the recent past and it will continue to be squeezed under
13 these agreements.

14 We can see that the one-year average of the
15 refining margin is the purple line there, peaked at 14.73
16 cents per pound in April of 2012. And then the low of 3.95
17 cents per pound in May of 2014. That's a 73 percent
18 collapse of the most important number in our business.

19 These agreements set the refining margin even
20 lower as demonstrated by the green line on the chart.

21 I addressed this issue in my declaration
22 submitted prior to this hearing and I hope that we get a
23 chance to discuss this chart in more detail through your
24 questions.

25 To bring this altogether, we're in a serious bind

1 here. These agreements leave the situation where the
2 unfairly traded Mexican refined and direct consumption
3 imports force capacity utilization and refining margins to
4 levels that consistently resulted in refinery closures in
5 the past. This is just unacceptable.

6 Before I conclude my testimony, I would like to
7 address one last issue head on. I've read the opposition
8 briefs in this proceeding as well as in the continuation
9 proceeding and I see consistently the opinion that Imperial
10 and AmCane are minor players with outlier abuse. This is
11 not true. Any rational business manager focused on a
12 refining business like ours would have precisely the same
13 views as we do. The reality is that when you look at the
14 destination cane refining sector, American sugar refining,
15 ASR, owns more than half of the capacity. I'm certain that
16 these agreements are bad for ASR's cane sugar refining
17 business as they are for ours. We're not here to disrupt
18 the U.S. circuit program. We would like to see agreements
19 that work for the entire U.S. industry, not just one segment
20 or another. But it is very clear to us that these
21 agreements allow the continuation of the injury that the
22 Mexican sugar imports are causing the U.S. cane sugar
23 refining industry and its workers.

24 That concludes my direct testimony. I look
25 forward to your questions during the Q&A session. And I

1 would like to thank you very much for your time in reviewing
2 this matter for us.

3 STATEMENT OF DAIVD ROSENZWEIG

4 MR. ROSENZWEIG: Good morning. My name is
5 David Rosenzweig. I am AmCane CEO, and have been in the
6 sugar business for 35 years. I've served on the boards of
7 companies encompassing a wide range of sugar activities,
8 including production, transport, distribution and trading on
9 four continents.

10 AmCane's headquarters and refinery are located
11 in Taylor, Michigan. Like Imperial, AmCane is not
12 vertically integrated but operates as a destination
13 refinery. Also like Imperial, and unlike various other
14 parties you have encountered including CSE, we perform
15 full-scale refining. The raw material that we process for
16 customers into proof grade granular and liquid sugar comes
17 mainly from outside the United States. A lot of it
18 historically has come from Mexico.

19 Industrial customers have choices in terms of
20 suppliers and contract duration, from one month to multiple
21 years. Ordinarily, when agreeing to supply refined sugar
22 over a given time period, we price the raw material via the
23 sugar futures market.

24 The refining margin is a key element of our
25 business. When circumstances prevent us getting full price

1 cover for raw material costs, we have to honor our contracts
2 anyway, which means that raw material hikes can be painful.
3 With forward contracting, it can take some time for adverse
4 developments to show up in our P&L.

5 Our competition is partly domestic and partly
6 Mexican. We were not involved in the original request for
7 import relief; in fact, it took us quite by surprise. But
8 we and the domestic industry's refining segment are
9 certainly experiencing harmful effects from Mexico's
10 onslaught. Mr. O'Malley from ASR explained this to you
11 during the preliminary injury conference, as shown in the
12 slide.

13 He spoke of prices too low even cover a
14 refiner's variable costs, and noted that because of forward
15 contracting, the adverse impact will last through the 2015
16 crop cycle and into the 2016 cycle. Mr. O'Malley was of
17 course speaking on the American Sugar Coalition's panel.
18 The Coalition generally did a good job of documenting the
19 harmful effects suffered by the domestic industry's refining
20 segment, and the Commission responded with specific
21 findings.

22 Notably included were underselling for the
23 refined pricing products, and a worsening COGS to revenue
24 squeeze. We are here today because the investigations have
25 been suspended on the basis of agreements that do nothing to

1 curb and quite a bit to worsen those harmful effects.

2 During what remains of my time, I'd like to
3 give you a refiner's perspective on the agreements you are
4 reviewing, and then to clarify some areas of agreement and
5 disagreement with other parties, starting with Commerce.

6 So what's wrong with the agreements? The
7 simple answer is that they only cure part of the import
8 injury problem. They do not address the other part and
9 actually make it worse. Shoddy construction is one culprit.
10 On the threshold task of separating the imports into two
11 categories, the drafters unwisely relied on polarity, which
12 is an ill-considered metric and furnishes a poor foundation
13 for the agreement's more substantive elements.

14 On volume disciplines, the agreements lock in
15 rather than rolling back the 500,000 ton increase in refined
16 sugar sales achieved by Mexico during the injury reference
17 period, and they invite slippage, which will likely see a
18 meaningful portion of the 47 percent raw allotment sold for
19 direct consumption as well.

20 On price disciplines, the agreements assigned
21 a lower raw reference price to significant amounts of food
22 grade Mexican sugar. In short, the agreements are not
23 well-designed. They do not achieve what supporters claim
24 they achieve or guarantee what they are supposed to
25 guarantee.

1 Another problem is bias. The agreements
2 emphasize grower and miller interests over refiner
3 interests. Negotiators acknowledge the need to take account
4 of refiner interest, but their actions showed indifference
5 at best. We were stunned when they initialed agreements
6 that had a mere three cent refining margin, and by defining
7 refined sugar as above 99.9 polarity. Contained no price
8 discipline for refined sugar imports.

9 Then, instead of heeding refiners' comments on
10 the drafts, they finalized agreements with three distinct
11 types of punishment for us. One, a refined reference price
12 set too low to prevent underselling. Two, provisions on raw
13 sugar that promote shortage and high pricing; and three, a
14 still inadequate refining margin.

15 The point I just made about locking in the
16 500,000 ton refined sugar increase highlights the bias
17 brilliantly. All of the volume reduction occurring under
18 these agreements hits raw material, not direct consumption
19 sugar. One segment of the domestic industry gets shorted,
20 and the other gets shafted.

21 You may wonder, and we do too, whether this
22 was accidental on Commerce's part. What I can say is that
23 Commerce's defense of the arguments is neither thorough nor
24 objective. We find it particularly odd that Commerce would
25 highlight the change in the implicit refining margin from

1 just under three cents per pound in the draft suspension, to
2 just under four cents in the final.

3 As Mr. Farmer of CSE has clarified, both
4 margins are ruinously small. At four cents or even five
5 cents, as he explained in his earlier testimony, nobody
6 makes any money. Likewise with Commerce's latest
7 explanatory memo authored by Mr. McInerney, which seems to
8 conclude that firms operating a supplied managed sector have
9 lesser rights under the anti-dumping and countervailing duty
10 laws. I don't see how that can possibly be correct.

11 It seems to us that all of Commerce's
12 published findings are based on an idealized version of the
13 agreements, and on pretending that the loopholes and biases
14 so obvious to us simply don't exist. So we are glad to be
15 here. We are counting on the injury experts in this
16 building, on you, to evaluate the agreements as they are,
17 without borrowing Commerce's rose-colored glasses.

18 What about the other parties? Before closing,
19 I want to note some areas of agreement with the Coalition,
20 with the Mexican Chamber and with CSE. We agree with the
21 Coalition about how agreements, including government to
22 government agreements, may be powerless to remove injury
23 that has been baked into forward contracts.

24 Mr. Greenwald, at the preliminary hearing, put
25 this well, as you can see on the slide. Talking about how

1 an agreement then under consideration will do nothing about
2 the injury that has already been locked into contracts for
3 future delivery. The same thing is true of the agreements
4 under review here. One reason why those agreements do not
5 completely remove the injurious effect is because that
6 effect is locked into contracts for future delivery.

7 AmCane has such contracts. Given Mr.
8 O'Malley's comment on injury automatically persisting into
9 the 2015 and 2016 crop cycles, it would seem ASR has such
10 contracts too. We agree with the Mexican Chamber, that the
11 Commission's analysis in this review must take account of
12 conditions of competition. Those conditions have changed
13 for the worse as recently as this week, with an announcement
14 by the Mexican government about closing off one of the
15 largest estimations for sugar coming through the U.S.
16 reexport program.

17 You have heard from Mr. Gorrell about the
18 importance of each ton of throughput, and enabling cane
19 refiner to cover their substantial fixed costs. This new
20 change will take away another roughly 200,000 tons. As for
21 CSE, we agree with their cost buildup reproduced in this
22 slide. We specifically agree that refining costs averaged
23 six cents per pound, with the implication that refining
24 margins below six cents can be viewed as injurious.

25 And yet there Mr. Farmer sits, ready to be

1 part of a panel defining a settlement with reference prices
2 separated by less than four cents. He must be planning to
3 tell you the settlement has somehow purged all the injury.
4 On that point, we and Mr. Farmer do not agree, but in
5 fairness he does not agree with himself. While it's in
6 front of you, let's review Mr. Farmer's comparison.

7 It shows two things. First is the U.S.
8 refiners' optimal cost scenario for bulk refined sugar at
9 32.4 cents per pound, X factory. Second is the cost for
10 supplying to a U.S. buyer sugar that has been refined in
11 Mexico, 32-1/2 cents per pound for a buyer located in
12 Chicago. You can also see in red some numbers completing
13 the picture, showing the U.S. refiners' cost to package and
14 transport the product to the buyer in Chicago.

15 We are sure that Mr. Farmer will agree this is
16 necessary for an apples to apples comparison. What he has
17 documented is a situation in which underselling has been
18 institutionalized rather than eliminated. Selling to
19 Chicago, for example, the suspension agreements keep us
20 pinned six cents above competing material from Mexico. In
21 fact, we can never be below a Mexican refiner who wants to
22 be below us.

23 Even with the utmost cost control, we are
24 defenseless against underselling. Far from precluding
25 underselling, the suspension agreements virtually guarantee

1 it. That's pretty much all I have to offer in direct
2 testimony. I made some broader points in the declaration
3 submitted last week on the peso/dollar exchange rate, and on
4 how to look at lost sales. I'm glad to answer questions on
5 these points.

6 Lastly, we had no wish to get embroiled in
7 these import relief proceedings. But when the Commerce
8 Department took the proceedings off the normal trajectory
9 and got maneuvered into these settlements, we were left no
10 choice. Thank you for your attention today.

11 MR. BISHOP: Madam Chairman, that concludes
12 testimony from this Panel.

13 CHAIRMAN BROADBENT: Okay, and you've got five
14 minutes reserved, okay, for rebuttal later. Thank you.
15 Let's see. I'd like to start with my colleague, Vice
16 Chairman Pinkert, for questions.

17 COMMISSIONER PINKERT: Thank you Madam
18 Chairman, and I thank all of you for being here today, to
19 help us to understand these issues. I want to begin with a
20 question for Mr. Rosenzweig. You talked about the polarity
21 threshold that was built into the draft agreement, the
22 original draft agreement, and it's my understanding that
23 that was changed in the final agreement. Did that change
24 meet with your satisfaction?

25 MR. ROSENZWEIG: No sir. The reason is fairly

1 simple. Polarity is not a useful metric in determining
2 whether or not a product is or is not suitable for direct
3 human consumption or use in food manufacturing. All that is
4 required is that the sugar be produced in a certain manner
5 with certain safeguards, and handled in an appropriate
6 manner from that point hence.

7 So to give you an example, when you go and buy
8 or anyone buys sugar in a supermarket, if you buy a brown
9 sugar, the polarity on that is probably 94 polarity, yet it
10 is still food grade. An icing sugar is probably well, well,
11 well below any threshold envisioned here. More to the
12 point, on a far larger scale, sugar can be produced in
13 handled in a manner that comes in below 99.5 and is still
14 suitable for industrial use.

15 What I referred to in the original initial
16 agreement was the complete mistake, wherein they set refined
17 by sugar by definition at anything over 99.9. To our
18 knowledge, probably less than one percent of the sugar, if
19 that, actually came from Mexico above 99.9. So it was -- at
20 that stage, it was completely and utterly meaningless.

21 COMMISSIONER PINKERT: I understand your
22 points about the difficulty of using polarity as a measure.
23 But if you were consulted, I don't know if you were
24 consulted about this. But if you were, and you were asked
25 to pick a polarity threshold, what would that threshold be?

1 I understand that you don't think polarity's the right
2 measure, but what would that threshold be?

3 MR. ROSENZWEIG: You would have -- I would
4 have to consider that sir, to address a few points of your
5 question. Firstly, I'm not certain we were consulted, but
6 we volunteered our opinion on numerous occasions. Secondly,
7 as you've restricted me to answering this on a basis of
8 polarity, it's difficult, because I truly believe it is an
9 inappropriate metric.

10 I think you would have to be materially lower
11 than the level you're at now, in order to prevent direct
12 usage. But as I said in my first answer to you sir, sugar
13 can be consumed as low as 95 polarity, which is really not
14 useful for many industrial functions, if it's handled in the
15 correct manner. So to actually rule out direct usage, you
16 would have to go so far from where this agreement has been
17 constructed.

18 I mean really, the Commerce Department and the
19 people at the table had an opportunity to do it very simply
20 by dividing for direct use and for further refining and they
21 chose not to, and they chose not to for their own specific
22 reasons. It didn't hurt them. In fact, it helped them.

23 COMMISSIONER PINKERT: Thank you. Any other
24 comments on the Panel about polarity?

25 MR. GORRELL: Yeah. I would say -- sorry.

1 Mike Gorrell from Imperial Sugar. I would say the other
2 flaw in the agreement is that the polarity is not clarified
3 as to whether it's dry basis or wet basis. If you take the
4 view that polarity is one of the ways you're going to
5 differentiate, and I agree with David's comments on the
6 brown sugar. Brown sugar is about 94 degrees polarity on
7 the white basis. That's probably about 98 degrees polarity
8 on a dry basis, which I'll get to in a little bit. But it's
9 a very, very important consideration.

10 Powdered sugar, you know, what you'll use in
11 your home to make icing and some people call it icing sugar;
12 some people call it powdered sugar. It is 95 percent
13 refined sugar and three percent corn starch. So that by
14 definition has a polarity of below 99.5 degrees. But it is
15 very firmly direct consumption sugar, and to a refinery like
16 ours and ASRs and, you know, the large integrated
17 refineries, the brown sugar segment and the powdered sugar
18 segments are two of the highest value-added segments in our
19 business.

20 It's one of the things that helps sustain the
21 cane refining industry in the United States. So these are
22 clear targets for anybody looking to bring sugar that meets
23 the other sugar definition in some -- in these agreements to
24 the United States for direct consumption and undercut prices
25 in the United States.

1 Wet basis versus dry basis. It is crucial on
2 this point, because in purest form, liquid sugar is 67-1/2
3 percent sugar, 32-1/2 percent water. Now if I measure
4 polarity of that sugar on a wet basis or what we call
5 commercial basis, that will fall at 67-1/2 percent, because
6 it's 67-1/2 percent sucrose.

7 That's important for commercial
8 considerations, because we don't want to buy and sell water,
9 right. So you know, if somebody ships me raw sugar that is
10 99.35 degrees polarization on a dry basis, but they decide
11 to spray water onto the sugar as it goes onto the vessel and
12 it's actually 98-1/2 percent sugar as part of the total
13 solution.

14 Then when we settle commercially with our
15 suppliers, we will be paying basis 98-1/2 percent
16 polarization, not 99.35 percent. These agreements leave
17 open a loophole, where you can basically spray a little bit
18 of water on sugar, on refined sugar, bring it over the
19 border, and it will clear as other sugar, if left unchanged.

20 There's another issue with regard to
21 enforcement, you know. So far, what we've seen from Customs
22 on this is there will be no enforcement on the polarity,
23 right. That is a big issue on here, and it hasn't been
24 addressed yet, and we're very concerned about that. Thank
25 you.

1 COMMISSIONER PINKERT: Thank you.

2 MR. MAGNUS: Commissioner Pinkert if I may,
3 what you heard both witnesses tell you is that the sugar
4 from Mexico they're competing against is direct consumption
5 sugar, regardless of whether it comes in above or below that
6 arbitrary polarity threshold at 99.5. So above it, it faces
7 one reference price. Below it, it faces another reference
8 price.

9 They're competing against it either way, and
10 the assurance that Commerce has offered that says well, 47
11 percent of the sugar from Mexico is going to be available to
12 you for refining are not persuasive in the least, because
13 all of that material or a good bit of it is food grade
14 material that could be sold for direct consumption.

15 COMMISSIONER PINKERT: Thank you. Now I
16 believe that Mr. Rosenzweig testified about this next issue
17 to some degree, but I want to get it nailed down for the
18 Panel. Did the agreements restore the supply conditions
19 that prevailed in the U.S. market prior to the 2012-2013
20 increase in Mexican production?

21 MR. ROSENZWEIG: They've effectively locked in
22 a higher level of refined shipments than were in place
23 before the reference period. Was that your question sir?

24 COMMISSIONER PINKERT: Well, I'm referring
25 specifically now to that 2012-2013 increase in Mexican

1 production, and I'm trying to get at whether the supply
2 conditions in the U.S. market, under the agreements, would
3 be comparable to what prevailed just prior to that 2012-2013
4 increase?

5 MR. ROSENZWEIG: So what you're asking is if
6 we were to take the suspension agreement today, and apply
7 the formulas in that to the period in question, what would
8 the shipment quantity be? Is that correct? I'm sorry. I'm
9 not certain I understand.

10 COMMISSIONER PINKERT: I'm just trying to
11 understand what you project the impact of the agreements to
12 be. Would -- there's been -- I understand that's your
13 characterization. But there is discussion in the Commerce
14 memo, for example, of the 2012-2103 increase in Mexican
15 production, and the intent to try restore the status quo
16 ante with regard to supply conditions in the U.S. market.
17 I'm asking you whether you agree with that characterization.

18 MR. ROSENZWEIG: You can let Mr. Gorrell that
19 one for me.

20 MR. GORRELL: Mike Gorrell, Imperial Sugar.
21 There will be one major difference between the supply
22 conditions in the previous agreement or in the prior times,
23 versus the spot conditions under the current times, and that
24 is that the protocol set up by these agreements is to give
25 Mexico 100 percent of the access of sugar to the United

1 States.

2 In prior times, we had significant quantities
3 of raw sugar that were coming from other countries, over and
4 above the minimum TRQs, right. What is being established in
5 these agreements is that 100 percent of U.S. needs is to
6 come from Mexico. That's one significant difference.

7 The other issue at hand with the prior time is
8 that the prior time was laying the seeds for the collapse in
9 prices, you know. If we look to the 2000 -- you asked about
10 the 2012-2013 fiscal year, right? During 2011-2012, we
11 actually had a buildup in stocks in the United States, up to
12 17.2 percent stocks to use ratio above that of what the
13 USDA, you know, normally sees as a normal stocks to use
14 ratio. I'm sorry. I'm just trying to look at my notes
15 here, to find the precise numbers.

16 But basically what happened during 2011-2012
17 is that Mexico imported a significant quantity of sugar from
18 the world market at much cheaper prices, and reexported a
19 significant quantity of sugar to the U.S. market during
20 2011-2012. Ending stocks in the U.S. grew significantly,
21 both at the B processor level in refined sugar stocks, and
22 at the cane refiner level as both raw and refined sugar
23 stocks, right?

24 So you had a backup of sugar already occurring
25 during 2011-2012 due to about a million tons of direct

1 consumption sugar coming in from Mexico to the United
2 States.

3 COMMISSIONER PINKERT: I'm going to have to
4 stop you right there, because I'm past the end of my round.
5 Thank you.

6 MR. GORRELL: Thank you.

7 CHAIRMAN BROADBENT: Commissioner Williamson.

8 COMMISSIONER WILLIAMSON: I want to thank the
9 Panel for their testimony. Mr. Rosenzweig, you can finish
10 your point and Mr. Gorrell, you want to add on?

11 MR. ROSENZWEIG: Thank you. Counsel has just
12 helped me understand your question, and I think this will
13 answer it more succinctly. For the three-year period prior
14 to the reference period, so in other words '08, '09 and '10,
15 as compared with '11, '12 and '13, we had different levels
16 of direct consumption refined sugar imports. During the
17 reference period, those imports increased by approximately a
18 half million tons.

19 COMMISSIONER WILLIAMSON: Okay, thank you for
20 finishing it up. In a Title VII investigation, we are
21 normally required to consider the industry as a whole.
22 Should we do the same here, and if so, how does that affect
23 our analysis, or how would that affect our analysis?

24 MR. SPAK: Thank you and good morning,
25 Commissioner Williamson. Greg Spak speaking. Absolutely we

1 have to consider the industry as a whole, and I think partly
2 what you're hearing is we wish these two gentlemen and their
3 companies and workers wish the Commerce Department had
4 approached it that way. So it's important that you do
5 consider the industry as a whole.

6 Now to us, when you combine that with the
7 requirement that the injury, that the injurious effect be
8 eliminated completely, to us that's significant. So it
9 means not that you take what most of the industry is
10 experiencing, what the effect that these agreements have on
11 most of the industry.

12 You have to look at all the industries. So we
13 do urge you please to look at the industry as a whole, and
14 as we've said in our direct testimony, these two gentlemen
15 and their companies and workers represent part of that
16 industry.

17 COMMISSIONER WILLIAMSON: You're saying look
18 at every element, as opposed to I think we're talking about
19 an aggregate, looking at the industry as an aggregate. Is
20 there a distinction there?

21 MR. SPAK: Well I --

22 COMMISSIONER WILLIAMSON: And let me go on to
23 say. Is there any legal support for us looking at anything
24 more narrower than say the refiners as a whole?

25 MR. SPAK: Well, I'd respectfully say that I

1 don't think you need to look at it more narrowly. We're
2 asking you to look at it broadly, take the industry as a
3 whole. But because of the eliminate completely standard,
4 that is new and is different than your normal analysis, you
5 have to look at the condition of these particular companies.

6 COMMISSIONER WILLIAMSON: And what share of the
7 refining capacity do your companies represent?

8 MR. GORRELL: If you look at the total country,
9 Imperial Sugar produces about 7 percent of the total refined
10 sugar in this country. That includes both cane sugar and
11 beet sugar. If you look at what we call the destination
12 refining capacity, the refining capacity is in the city
13 rather than in the cane field. So, there are four sugar
14 refineries in the United States located in Florida and
15 Louisiana that have a different profile and different
16 economic than the cane refineries that are serving the
17 cities.

18 Within that destination, cane refining segment,
19 we're about 22 percent of that.

20 COMMISSIONER WILLIAMSON: So, you distinguish
21 between the total refineries that are -- yes.

22 MR. GORRELL: That's Imperial Sugar. I don't
23 know precisely the capacity, but I would say another 1
24 percent of the total industry and about 2 or 3 percent of
25 the destination refining capacity.

1 COMMISSIONER WILLIAMSON: Is one of those
2 destinations the Yonkers Plant?

3 MR. GORRELL: Yes, sir.

4 COMMISSIONER WILLIAMSON: I grew up watching that
5 plant. Okay, I wrote that according to Table 3-5 of our
6 preliminary staff report, refined sugar produced from
7 Mexican imports accounts for a very small share of total
8 U.S. refined production. So, how do we take this into
9 account in our analysis?

10 MR. GORRELL: Look at the refined and direct
11 consumption of sugar arriving from Mexico is roughly a
12 million tons a year in broad terms, right? And you're
13 right, out of a 12 million ton sugar market, or almost 12
14 million ton sugar market that would only be a percent. But
15 if you look at it in a different way in terms of the way the
16 U.S. market and the farm support is set up, the domestic
17 producers are guaranteed an outlet for their shipment,
18 right?

19 We do not, as a company, have an argument with
20 those guarantees. You know, it's the domestic producers are
21 unable to sell their sugar at the market at a price that is
22 above loan rate. They do have the option to put it into the
23 CCC. And what you saw in 2013, unfortunately, as the CCC
24 sold some of that sugar to be burnt as ethanol in our cars.
25 The crazy, uneconomic use of our resources, but it was done.

1 If you then look at the part of the marketplace
2 that has to be served by imports because out of that 12
3 million tons about 75 percent of that is from that domestic
4 production that is well protected and the other 3 million
5 tons is imports. So, the Mexican million tons of direct
6 consumption sugar is one-third of the import program.

7 Now, that is significant if you look at the fact
8 that the destination refineries, particularly, a refinery
9 like Imperial, is largely dependent on imported sugar.

10 If you look at the history over the years of the
11 direct consumption imports as a percentage of total imports
12 coming into this country, we can go back into the 2001/2002
13 crop year. Let me read you a few of the numbers starting in
14 2001/2002 into these later periods, 8 percent, 9.7
15 percent, 8.6 percent, 25 percent was in 2005/2006 due to
16 Hurricane Katrina.

17 We needed direct consumption imports when the
18 refinery went down in Louisiana. That accounted to 12
19 percent and up to 19 percent. And it spiked again to 32.5
20 percent when, unfortunately, the Savannah Sugar Refinery
21 went down. Then it went back down again to 28 percent, but
22 look what it did in the last two or three years? 2012/'13,
23 the highest ratio of consumption imports relative to total
24 imports, 36.6 percent of the sugar that came into this
25 country was for direct consumption.

1 So, when you look at the million tons of Mexican
2 direct consumption imports with that lens, instead of the
3 lens of a total 12 million tons of sugar sold in this
4 country, it has a very strong impact on marginal price,
5 especially when the impact of that million tons is idling
6 the destination cane refineries, the capacity utilization is
7 between 61 and 66 percent. These are just unsustainable
8 capacity utilization rates for the refining sector.

9 In broad terms, it means that Yonkers and
10 Savannah can go away.

11 MR. MAGUS: Commissioner, one small add-on to
12 that. Mexico's more modest share of the market for refined
13 sugar means -- and I think all of the economic testimony
14 you've seen and will hear today will bear this out. It's
15 very unlikely that the reference price in the agreements for
16 refined sugar is somehow going to set the price in the U.S.
17 market. It's just not a big enough piece of the puzzle to
18 do that.

19 So, in fact, you could have market clearing
20 prices that are below that reference price. And whereas,
21 for rare sugar Mexico is a big enough factor that everybody
22 seems to agree that it will set the market in the United
23 States for raw sugar. And this is crucial to understanding
24 what the agreements mean with regard to underselling. All
25 right, there's no way that these gentlemen are going to

1 face a market clearing price in the United States any lower
2 than the reference price in these agreements for Mexican raw
3 sugar.

4 They very well face a market clearing price for
5 their refine sugar output that is below that reference
6 price. So, maybe the implied refining margin in this
7 agreement of less than four cents isn't even what they'll
8 see. Maybe it'll be less still.

9 COMMISSIONER WILLIAMSON: Thank you. Mr.
10 Gallardo, you kept using direct consumption sugar. And
11 thinking about our earlier discussion about polarity, is
12 that defined on a different basis than polarity?

13 MR. GORRELL: Well, unfortunately, it's not
14 defined. All right. If we find a customer that is willing
15 to put 98 degrees polarity sugar into their final product,
16 then that is direct consumption sugar. You know the sugar
17 and the raw, the packets that you pick up from the
18 restaurant tables that actually comes from the country that
19 has raw sugar because it is raw sugar with polarity of less
20 than 99.5 degrees. It also comes at very high prices, so I
21 think that answer it. Is that clear?

22 COMMISSIONER WILLIAMSON: Yes. Mr. Rosenzweig,
23 my time has expired.

24 MR. ROSSENZWEIG: May I just amplify on that. If
25 the sugar is properly handled and it meets the

1 specifications for the use by its buyer, polarity is
2 irrelevant. All direct consumption means is sugar that goes
3 directly to either the ultimate consumer or a manufacturer
4 and is used as it is delivered to them.

5 COMMISSIONER WILLIAMSON: Okay, thank you for
6 those answers.

7 CHAIRMAN BROADBENT: Commissioner Johanson.

8 COMMISSIONER JOHANSON: Thank you, Madam
9 Chairman. And I'd like to begin by thanking all of you for
10 appearing here today.

11 The questions proceeding today's novel we have
12 never reviewed the relevant statutory provision that we are
13 looking at today, and so we face a difficult issue. What I
14 heard last month of the petition for review of the
15 suspension agreements I commented to myself that I'd never
16 heard of the relevant statutory provisions before, 19 U.S.C.
17 704(H) and 734(H).

18 Looking at my statute binder, I noted, however,
19 that I had indeed read these provisions before, way back in
20 2011 when I was preparing for my Senate confirmation. Way
21 back in 2011, at 19 U.S.C. 734(H) I circled the word
22 "completely" after the word "eliminated." And in the
23 margin, I wrote, "very high standard." That was my initial
24 impression of the statute, but how accurate was my initial
25 impression?

1 Given the legislative history, context, and
2 purpose of the provision, how high a standard is eliminated
3 completely in your view?

4 MR. SPAK: Thank you, Commission Johanson. We
5 think it's a very high standard. Now, it's confusing,
6 right, because you look at the legislative history and
7 Congress tells you not to confuse it with the high material
8 injury standard. So, in other words, the injury that is
9 remaining doesn't need to get to that high material injury
10 standard. You see that actually reinforces and shows just
11 how important the eliminated completely standard is.

12 It also about in terms of no discernible impact
13 -- no discernible affect, right. So, this, to us, is a very
14 high standard, especially when you have to look at an
15 industry as a whole, as Commissioner Williamson mentioned.
16 We know that there was injury. We have to look at the
17 industry as a whole, and we have to make sure that the
18 injury is eliminated completely.

19 Now, it might be that in some industries this
20 standard is just not -- you know, could never work. It
21 might be, but that's not necessarily our view. As we've
22 said before, and we'll say again, we support the idea of an
23 agreement. And we think we could -- there is a way to meet
24 the high statutory standard in this case, but this isn't it.

25 MR. MAGNUS: And Commissioner, I would just add,

1 as Mr. Spak told you a few moments ago, it's an
2 appropriately high standard because these type of agreements
3 allow unfairly traded merchandise to continue to come into
4 the U.S. market. In these agreements there is some
5 diminution of the intensity of the dumping. There's
6 absolutely nothing done with regard to the intensive
7 subsidization of this product, which continues to flow, and
8 as you've heard, at the refined level in undiminished
9 quantities.

10 MR. GORRELL: Mike Gorrell, Imperial Sugar. I
11 would like to add, you know, one broad point, but it's
12 layered into sub-points. I understand the debate about
13 "completely" "high standard," and all that, and I leave the
14 attorneys to handle that. That's not my area of expertise.

15 But I would like to say that already in my
16 testimony I highlighted how a million tons of direct
17 consumption refined sugar coming in from anywhere, all
18 right, causes to the cane refining industry just on lost
19 processing margin, let alone price impact, suppression, that
20 sort of thing.

21 Just on lost processing margin at a fair average
22 processing margin, you know, when that purple line is in the
23 middle of the historical range that is causing the
24 destination cane refining industry 110 to \$150 million of
25 damage per year. That doesn't even get to the price

1 suppression. All right.

2 By introducing another million tons of direct
3 consumption sugar into this marketplace and putting the
4 class utilization down to these refineries down into the
5 sixties in terms of capacity utilization that's why the
6 purple line goes from 14 cents down to 4 cents a pound. Ten
7 cents a pound is \$200 per short ton. Two hundred dollars
8 per short ton per sector of 3 million tons of imports is \$60
9 million per year.

10 I continue to read the original petitioner group.
11 I'm sorry. I'm confusing petitioners. The Coalition's
12 comments where the infinitesimal part of this industry. We
13 have the outlier views. The reality is the math doesn't lie
14 to us. These agreements allow Mexican dumped subsidized
15 sugar to come into this country and cause hundreds of
16 millions of dollars of damage to this domestic industry.
17 Thank you.

18 COMMISSIONER JOHANSON: Thank you, Mr. Gorrell.
19 Going back to Mr. Spak's comments, and also to Mr. Magnus's,
20 does the legislative history of the provision put gloss on
21 the terminology that suggest that the standard is not as
22 high as the statutory language might support? Does the
23 legislative history soften the statutory language? And
24 looking specifically at the words "no discernible injurious
25 affect," is that, in your view, akin to the no discernible

1 adverse impact standard that we apply in considering
2 cumulation in five-year reviews?

3 MR. SPAK: Thank you, Commission Johanson.
4 First, though, we would all say as lawyers, of course, that
5 if the statute's clear we've got to go with the statute.
6 That's how Congress speaks. And we don't read anything
7 inconsistent or anything in the legislative history that
8 really softens the clear mandate in the statute in this
9 case.

10 Now, of course, there is overlap in the sense of
11 -- or commonality, let's say, in the use of the discernible
12 affect phrase here and the discernible impact test in the
13 sunset review and negligibility analysis. And obviously,
14 it's a word "discernible." And we think that -- you know,
15 again it's used in this portion of the legislative history
16 to show just how difficult a standard this is, how strict
17 the standard that it is.

18 So, we don't see an inconsistency. We don't
19 think it's soft, the statute. We don't think it could
20 soften it, but even if it could, it doesn't. We see it as
21 very consistent with that standard. Thank you.

22 COMMISSIONER JOHANSON: Thank you. In looking
23 back at the legislative history, I assume that you have dug
24 as deep as you can, but do you all know why this statutory
25 provision is on the books?

1 MR. MAGNUS: I think the short answer is that --
2 you mean the provision allowing for this kind of an
3 agreement or the provision allowing for this kind of
4 provision to be challenged in this way?

5 COMMISSIONER JOHANSON: The provision allowing
6 for the ITC to review the agreement.

7 MR. MAGNUS: Because Congress could get it wrong,
8 because this is where injury expertise resides, because
9 Congress may ardently wish to fashion something that
10 completely eliminates the injury and do its best and swing
11 and miss.

12 COMMISSIONER JOHANSON: Do you know,
13 historically, why this happened? I mean was there a bad
14 suspension agreement at some point?

15 MR. MAGNUS: I think it's simpler than that. The
16 statute provides for a category of agreement that allows
17 dumping and subsidization to continue and is okay only if
18 injury has been fully purged and the final judgment in cases
19 of dispute on whether injury has been fully purged is placed
20 where it belongs. I'm not aware of any train wreck scenario
21 that occurred that lead to the enactment.

22 COMMISSIONER JOHANSON: Mr. Spak?

23 MR. SPAK: Well, you know, it would be hard to
24 talk about suspension agreements and the history of trade
25 law without talking about the steel industry, right? And we

1 know that there were a lot of train wrecks along the way
2 with the steel industry. So, we can't do very much in terms
3 of producing documents that say precisely why this is here
4 in the statute, but we can know from the context that, you
5 know, that industry is also an industry that has different
6 players playing different roles within the industry. And I
7 think it makes sense, right? It makes sense that if the
8 Commerce Department is going to reach a "B" agreement, the
9 normal kind of agreement that puts them squarely in their
10 expertise, that is, a "B" agreement says you can continue to
11 ship, but you've got to get rid of the dumping and you've
12 got to get rid of the subsidization.

13 So, that's Commerce's bailiwick, smack dab in the
14 middle. So, it makes sense that, okay, if you want to go
15 down that road, have at it. You're the expert. It simply
16 just makes sense to us that if they want to do the
17 extraordinary thing, and let's not forget that part of the
18 legislative history either. Extraordinary, this is an
19 extraordinary event and they go for the "C" agreement that
20 allows unfairly traded imports to stay in the industry -- to
21 stay in the market, then they might get it wrong, as Mr.
22 Magnus said, and we think that's the meaning of the
23 provision.

24 COMMISSIONER JOHANSON: Well, it appears to me --
25 and this is just my comment -- that the statute is maybe

1 drafted hastily. It puts the adverb after the verb, and
2 that is really jarring to me. That's just my observation.
3 The statute is a statute, so we take it as it's written.
4 Thank you. My time's expired.

5 CHAIRMAN BROADBENT: Commissioner Kieff.

6 COMMISSIONER KIEFF: Thank you very much, Madam
7 Chairman. And I just add my note of thanks and appreciation
8 to the counsel and the parties for coming and presenting the
9 information. Having greatly enjoyed studying technology and
10 economics, I'm fascinated by the details you laid out.

11 And having previously learned a little bit about
12 group decision-making without a formal teacher on the
13 Southside of Chicago as I watched some streets get plowed in
14 some neighborhoods faster than others, I just wonder,
15 though, that what you're really telling -- I think I'm
16 hearing you tell me that the sugar industry is a
17 heterogeneous industry. It is a large group.

18 I think you're telling me that, lo and behold,
19 decision got made -- passive voice. You were not an active
20 participant in those decisions to the extent you might have
21 wished, and those decisions got made in ways that turned out
22 not to help you. And then along the way, as those who were
23 participating in the decisions engaged and enjoyed their
24 participation, they and their friends and business partners
25 noticed that, in effect, your lunch could be eaten by them.

1 So, it sounds like along the way it turns out the
2 price of one of your inputs went up. It turned out the
3 diversity of your potential suppliers went down. It turned
4 out your ability to sell went down. You, simply put, as you
5 laid out on your first slide, got squeezed. And you know
6 it's a very compelling story. Welcome to Washington. It's
7 very familiar here, but while it's very compelling and it's
8 also not -- we're limited in how we can address it.

9 So, the statute, yes, as my colleague was
10 discussing with you, uses a word that on the street to a
11 plain, vanilla, lay audience sounds compelling, clearly
12 eliminated harm. You know, gosh, if there's harm left I can
13 surely -- we take you at face value, you're being harmed or
14 you're certainly threatened of harm, but can the statute
15 really mean that? Is the statute sending to Commerce, in
16 effect, delegating to Commerce and other parts of the
17 Executive Branch the power to negotiate on behalf of the
18 large, heterogeneous group and any time big groups make
19 decisions members of the groups, subgroups don't like it.

20 In effect, is a statute that has a -- your
21 interpretation of "fully eliminate" is that statute, in
22 effect, conferring on each member of the industry a veto to
23 the ability of the Executive Branch to negotiate suspension?
24 Is that your read?

25 MR. SPAK: Well, thank you, Commissioner Kieff.

1 We don't think that this has been delegated to Commerce.
2 You know, this "eliminate completely" appears twice, of
3 course, in the statute, right? Once in telling Commerce
4 that they can go out and negotiate an agreement with that
5 aim, but importantly, it also appears in the part that says
6 the Commission gets a chance to review it, and that's
7 extraordinary. So, it's the proof that it's not delegated
8 to Commerce's discretion.

9 I don't think that -- and I understand your
10 difficulty with it, and I'll get to the veto point, but I
11 think that that's quite extraordinary and I don't think it's
12 by accident because let's remember that there are other
13 parts --

14 COMMISSIONER KIEFF: But couldn't you have a
15 reading of that that is capacious enough to envision our
16 review, but nonetheless, limiting of our power to review.
17 So, for example, a bad faith veto, not enough power to veto,
18 a good faith veto, enough power to veto. I mean this is
19 group decision-making, right? You got a heterogeneous
20 group, people who are vertically integrated, not vertically
21 integrated; you've got a lot of different business models.

22 And I assume the other side is going to stand up
23 later and authentically tell us that this works jim-dandy
24 for them just fine, and in their perspective it's fully
25 eliminated. And if we did a Vulcan mind melt with them,

1 we'd find out they're telling what their heart believes to
2 be the truth. And if we count noses, there are more of them
3 than there are of you. And so, in some mathematical sense,
4 most of the industry is totally, authentically of the view.
5 So, aren't we then back to the veto problem, a big group
6 with some minority in the group having an authentic view
7 that they're getting the very, very short end of the stick.

8 Unfair as that may be, is the schema here a
9 schema, a system that says, in effect, unless every member
10 of the group is happy the group can't move forward? Is that
11 your view?

12 MR. SPAK: We think the statute clearly says that
13 any party that meets the test can ask you to review it. So,
14 that's really the -- I wouldn't call it a veto. It has a
15 statutory right to ask this body to review the agreement.

16 COMMISSIONER KIEFF: Okay, there's standing, if
17 you will.

18 MR. SPAK: That's the absolute part of their
19 right.

20 COMMISSIONER KIEFF: Please, I'm not suggesting
21 there's anything frivolous here. I'm not suggesting you
22 shouldn't be here. I'm not suggesting this is not a
23 properly lodged proceeding. I'm asking whether the
24 underlying, substantive standard here, in effect, works out
25 like when you do the math and you work out the Ord chart and

1 you work out the game tree it just turns out -- here's
2 another example. Isn't this the numerator/denominator
3 problem?

4 Here we are in Southwest D.C. where we were told
5 -- we, the public, were told on many, many occasions that it
6 was authentically in the best interest of this corner of the
7 city and the folks who were here to make it look the way it
8 does now. And you know, the folks who built the buildings
9 got paid a lot and the folks who were the developers and
10 bought the nice new condos all of those groups benefitted.
11 Turns out the African American community that used to live
12 here didn't get to participate so much in that vote. This
13 is a standard group dynamic problem where an under
14 represented minority gets a very, very short end of the
15 stick and an over represented majority authentically tells
16 you they're much better off with the outcome.

17 And whether you're Susan Kelo in New London,
18 Connecticut or the African American community in Southwest,
19 D.C., or you know, one of the sugar manufacturers, you know,
20 you authentically are a minority and your views are not
21 being represented by the rest of the group, but the rest of
22 the group is still 100 percent sure that 100 percent of
23 their agenda is being met.

24 MR. SPAK: Commissioner, let's not forget why it
25 turns out that this group is a heterogeneous group. It's a

1 decision that goes back to the filing of the petition.

2 Okay, the Coalition that filed this case could have filed a
3 case on raw sugar, in which case these gentlemen would be
4 disgruntled industrial users of the same type that appear
5 before you periodically and generally leave unsatisfied.
6 That's not what they did.

7 They filed a petition that included all sugar,
8 that included refined sugar. By virtue of which, these are
9 domestic producers. Domestic producers of like products
10 like the accused imports.

11 COMMISSIONER KIEFF: So, let me just in the
12 interest of discussion because I think that you've gotten to
13 the second biggest problem that I'm wrestling with, which is
14 let's assume you lose here. What could stop you from
15 bringing a brand new proceeding where the industry is your
16 industry, where the numerator and denominator work out to
17 mathematical one.

18 In other words, you are, in effect, 100 percent
19 and your record that you've built here would be, at least on
20 the face of it without prejudging it, it looks to me like a
21 really, pretty powerful, compelling record for your own
22 independent case. Could you do that?

23 MR. MAGNUS: The same subject merchandise that is
24 in your hypothetical already covered by a suspension
25 agreement, surely not. The subject of import relief already

1 theoretically through a suspension agreement, no.

2 COMMISSIONER KIEFF: So you're saying, in effect,
3 the path dependency of the other side sweeping you into
4 their scope has blocked you from all other outlets and
5 that's why we have to read the fully eliminated text the way
6 you're describing.

7 I notice my time is up, but --

8 (Simultaneous conversation.)

9 MR. MAGNUS: You have to read it the way we're
10 describing because --

11 COMMISSIONER KIEFF: -- I'm now seeing the
12 connection.

13 MR. MAGNUS: -- it's meaning is just blindingly
14 clear. It doesn't say "completely eliminated" unless you
15 think that that creates some sort of a public choice problem
16 or a negative policy consideration. It's blessedly simple.
17 Any discernible adverse impact in the decision you have to
18 make is clear. And I think you were asking before, you
19 know, in this regard, is the law an ass? I would say the
20 law is not an ass because this is a kind of an agreement
21 that allows unfairly traded merchandise to continue to come
22 into the United States.

23 CHAIR BROADBENT: Commission Schmidtlein.

24 COMMISSIONER KIEFF: Sorry, my time is up.
25 Sorry.

1 COMMISSIONER SCHMIDTLEIN: Good morning. Okay.
2 So I have several questions. We'll try to see if we can get
3 through them in ten minutes. If not, we'll take it up again
4 in my second round. I guess let me start with a legal
5 question just to sort of follow up on this.

6 My question has to do more with the decision we
7 have to make about which period we look at in determining
8 whether the injurious effect has been completely eliminated.
9 And your brief focuses on the first year following the
10 effective date of the suspension agreement, essentially, if
11 I understand it correctly. Those in opposition to your
12 position focus on the last year of the period of
13 investigation. So can you tell me, you know, do you think
14 we are legally compelled to adopt one of those approaches or
15 legally precluded from adopting one of them? Or do we have
16 the discretion to choose which of those periods we look at?

17 MR. MAGNUS: Whether or not you answer this sort
18 of -- this backward-looking question that the other parties
19 have invited you to look at, we think you clearly under the
20 statute have to examine the question of whether the
21 agreements do and will during their actual contemplated life
22 span completely eliminate the injury that has in fact
23 occurred.

24 Okay. It may be an interesting theoretical
25 exercise to look backward and say, well, what effect would

1 these agreements have had if they were in effect during some
2 prior period of time. Truthfully, we think what we've shown
3 you with regard to the cost comparisons and the underselling
4 means it's very clear what the correct answer is either way.

5

6 What we've shown you in our comparison is an
7 idealized scenario under really laboratory perfect
8 conditions with regard to cost control and raw material
9 prices and everything else. It is literally impossible for
10 these gentlemen to be underneath the price of competing
11 Mexican product. If you picked that up and plunk it down in
12 some other point in time, the only way in which it could be
13 different would be to be even worse.

14 Okay. At some other point in time the U.S.
15 market price for the raw material might stabilize above the
16 reference price. Okay. And so then rather than paying six
17 cents above, they might pay 12 cents above. Okay. But it
18 can never ever in any time period can never be any better.

19 Okay. So this is something that is equally true
20 or more true, no matter what time period you focus on.

21 COMMISSIONER SCHMIDTLEIN: But do you think we
22 are required to focus on the future?

23 MR. MAGNUS: Whatever other --

24 (Simultaneous conversation.)

25 COMMISSIONER SCHMIDTLEIN: Regardless of

1 whether --

2 MR. MAGNUS: -- looking at questions, you know,
3 the Commission can follow this sort of weird metaphysics,
4 you know, that's been proposed to you about old harms and
5 new harms if you want. But what you can't do is fail to
6 answer a question the statute puts in front of you which is
7 during its actual intended contemplated lifetime, does and
8 will this agreement or these agreements completely eliminate
9 the injury that has in fact occurred. It can't not do that.

10

11 COMMISSIONER SCHMIDTLEIN: And I invite you to do
12 this in the post-hearing, if you would like, but I would be
13 interested to see you walk through the statutory language in
14 terms of the support for that position.

15 Did you have anything further to add?

16 MR. SPAK: No, I agree with co-counsel here. I
17 mean, it's -- the concept is injurious effect. And we're
18 talking certainly about a past event. Right. And, again,
19 if we go back to this notion of cause and effect, the cause
20 certainly occurred in the past. But the statute requires
21 you to look at the injurious effect that results from those
22 causes, those events.

23 Now, when it's eliminated completely, that could
24 happen, I guess, in one fell swoop and resolve all
25 questions, or it could be something different. I believe

1 that the Commission is used to these kind of issues, that it
2 can exercise its discretion just as it does in other
3 analyses and investigations to determine exactly how to
4 make--how to give meaning to that statutory directive. But
5 I would agree with co-counsel, Mr. Magnus, that what you
6 can't do is just sort of arbitrarily build a wall and say
7 I'm not going to look over there because I know it might be
8 a different problem. So you've got to wrestle with it and
9 it's a past event, the effect is now, and it continues and
10 if it continues, then it hasn't been eliminated completely.

11 COMMISSIONER SCHMIDTLEIN: And I assume you've
12 reviewed their submission where they apply the formula in
13 the agreements to the volumes and prices and so forth. Do
14 you dispute that application in terms of the numbers that
15 they present in their submission as to how this formula
16 would have applied during the period of investigation and
17 specifically the last year?

18 MR. SPAK: Well, look, I mean, I don't mean to
19 oversimplify, and I'm not saying you can't look at that. Go
20 ahead and look at it. It's an interesting question, it's an
21 interesting economic exercise or econometric exercise. But
22 it's a little bit like in my view, you know, it's kind of
23 chronological. If you say would I have been hit in the face
24 by somebody who had their hands tied behind their back, then
25 I guess the answer is no, at least not with their hands.

1 Right?

2 So, of course, if the agreement were in place at
3 the time in a limited quantity to levels that are
4 non-injurious, if that were the case, yeah, that's an
5 interesting fact. But it really doesn't answer the question
6 as put in the statute. In our view Congress meant what it
7 said. Thank you.

8 COMMISSIONER SCHMIDTLEIN: Okay. This is, I
9 guess, a bit more factual, but I want to understand a couple
10 of things. One is the supply constraints that I think both
11 of the witnesses have talked about. And can you explain to
12 me, and maybe I misunderstand how the sugar program works,
13 and what Mexico was permitted to do after 2008 when the
14 obligations phased out. My understanding was, there wasn't
15 any quota restrictions on Mexico at that time. So were your
16 companies facing supply constraints for raw sugar before
17 this agreement and after 2008 when there were no limits on
18 how much Mexico could ship here?

19 MR. ROSENZWEIG: From the point at which Mexico
20 could ship an unlimited quantity they have generally been
21 able to fill the breach or the need, whatever the USDA felt
22 the balance was that Mexico could not potentially fill
23 either before they had unlimited shipments, or afterwards.
24 The USDA closely monitors the program and they would allow
25 in additional TRQ quantities --

1 COMMISSIONER SCHMIDTLEIN: Right.

2 MR. ROSENZWEIG: -- to fill what they felt was
3 required to meet an appropriate stocks to use ratio, again,
4 as they determined.

5 COMMISSIONER SCHMIDTLEIN: So were you -- did you
6 have supply constraints prior to this agreement then?

7 MR. ROSENZWEIG: No.

8 COMMISSIONER SCHMIDTLEIN: No. Okay. But your
9 position now is that the agreement will cause a supply
10 constraint for your companies and this is because of the
11 53/47 split; is that right?

12 MR. ROSENZWEIG: Yes. I mean, there were
13 instances, you know, if we're going to go back long enough,
14 sure, there have been periods during, you know, our
15 business' history where the program has been run too tightly
16 and the cost of raw materials goes up quite precipitously
17 and generally the USDA has been sensitive to that and has
18 reacted and open to tap, so to speak.

19 In this instance you're correct. Our concern is
20 that our raw material -- we're going to hit on two sides.
21 Not only are we getting squeezed on the raw material
22 physical quantities, we are getting squeezed on the raw
23 material pricing and at the same time there's an influx of
24 refined sugar with which we simply cannot compete on price.

25 COMMISSIONER SCHMIDTLEIN: So --

1 MR. MAGNUS: Commissioner?

2 COMMISSIONER SCHMIDTLEIN: Yes.

3 MR. MAGNUS: The newly introduced supply
4 constraint sits alongside a series of other injurious
5 effects that are not newly created by these agreements, but
6 are not eliminated by the agreements. Okay. Some injurious
7 effects persist despite the agreements and then some new
8 ones are introduced by the agreements.

9 COMMISSIONER SCHMIDTLEIN: And what are the new
10 ones that are introduced by the agreements?

11 MR. MAGNUS: The supply constraint which you just
12 asked about.

13 COMMISSIONER SCHMIDTLEIN: Okay. So legally, are
14 we able to consider an injury that's created by the
15 agreement that wasn't imposed by the dumped or subsidized
16 products?

17 MR. SPAK: Well, again, let's not forget that
18 supply of a product is related to your capacity utilization,
19 your capacity utilization is connected to your ability to
20 earn a profit. All the things that Mr. Gorrell sort of
21 walked through in the introduction. So I think a very fair
22 reading of what this Commission said in the preliminary
23 determination, especially with respect to the refining
24 industry is that they noticed that the cost of good sold to
25 net revenue gap was getting compressed, or that the cost of

1 goods sold was rising relative to the net sales revenue. So
2 that's an effect. That's an effect that's caused by several
3 factors. What we're seeing, you know, so I think the
4 question here for the Commission is, if that is the effect,
5 have these agreements taken away that effect? Whether have
6 they done to that effect? Whether it's through decreasing
7 the volume or increasing the price, that's the effect that's
8 got to be eliminated and we just don't think it does it.

9 So we're not a big fan of this distinction
10 between, you know, old injury, new injury. It's the effect
11 that the Commission found before and is the agreement -- or
12 are the agreements eliminating it completely?

13 COMMISSIONER SCHMIDTLEIN: Okay. Unfortunately
14 my time is up. Thank you.

15 CHAIR BROADBENT: Thank you. Let's see. I want
16 to congratulate the petitioners here for breathing life
17 into a long, dusty provision of the statute that I frankly
18 never knew existed. And it gives us a chance to sort of
19 look at things a little bit differently and think of some
20 new concepts. We tend to deal with these things in a fairly
21 rote way, generally, under Title 7 and you've raised some
22 really interesting issues for us to consider and we
23 appreciate it.

24 Overall, but I'm trying to get a picture of what
25 -- given the objectives and the constraints and the problems

1 that Commerce was facing, what do you think a fair agreement
2 or fair agreements would look like?

3 MR. ROSENZWEIG: Thank you for the opportunity.
4 One that effectively safeguarded the coalition so that they
5 were not suffering the effects of subsidized and dumped
6 goods. One that also allowed other members of the domestic
7 industry to survive and in so doing, allowed for a fair
8 playing field.

9 We needn't be here today. The parties and
10 Commerce and the government of Mexico agreed a deal that
11 albeit might have been easier for them to reach an agreement
12 on because they didn't address all of the concerns, but it
13 wouldn't have taken so much serious tweaking. What we
14 focused on are the points of major concern for us; the
15 availability of raw material and the pricing level. And how
16 you actually get around to dealing with that depends on
17 careful attention to the crafting of the agreement. So we
18 don't have these back channels where our raw material is
19 ostensibly defined by some metric which is really
20 meaningless. If you can do that, we can get there.

21 And during the actual second stage, we call it
22 Version 2.0 of these discussions, there are many suggestions
23 sent about. And we didn't accidentally end up -- or the
24 negotiators didn't -- at 57/43 -- excuse me, 53/47. Those
25 percentage points were fought about quite arduously, right,

1 by us, or at least represented by us as things that, gee,
2 please don't leave us out here to starve, you know. Don't
3 put us in a position of having to challenge this agreement.
4 And yet for expedience and because for the people in the
5 room, that deal worked, they took it.

6 So to answer your question basically it's price
7 and it's volume. And if we get the volume at a price that
8 works, we have an opportunity to compete, we have an
9 opportunity to have our variable costs in line. We can
10 actually survive and keep our plants and our jobs in tact.

11 MR. GORRELL: May I add something here? Mike
12 Gorrell, Imperial Sugar. We were communicating both with
13 the USDA and Department of Commerce throughout the process,
14 and quite actively.

15 If you look at the grand -- just look at this at
16 a very high level here and you look at the price impacts
17 that occurred and I think I showed the chart earlier on
18 where you had the peak in the trough of the refining
19 margins; right? When you hit the peak of the one-year
20 average, your refining margins, that was in April of 2012
21 and you hit the troughs in May of 2014. Over that period,
22 the refined sugar price in the United States went down by 37
23 percent.

24 The raw sugar price in the United States went
25 down by 23 percent and the refining margin went down by 73

1 percent. All right. It is super clear to us that the issue
2 causing the most damage to the U.S. industry, not just to
3 the cane sugar refiners, but also to the beet processors who
4 produce refined sugar to the vertically integrated cane
5 sugar milling and refining operations in Florida that the
6 largest amount of injury occurring to this industry was
7 coming from the million tons of refined and direct
8 consumption imports from Mexico that were being unfairly
9 traded.

10 This agreement basically leaves that quantity of
11 sugar coming as the status quo and in the broad scheme of
12 things we were importing 2.15 million tons of sugar in
13 2012-13, and 2013-14. And that needed to get down to 1.6
14 million tons in order to balance the system on a 13.5
15 percent stocks to use ratio. At least that's the outlook
16 for the coming year according to the USDA numbers. One
17 hundred percent of the reduction that's coming out of this
18 agreement. It's coming out of the raw sugar for further
19 processing. Right.

20 The thing that was causing the most damage on the
21 record with the price increases you can see the charts, gets
22 left at the status quo whereas 100 percent of the reduction
23 here is coming out of the raw sugar. Right?

24 Part of our communication to the Department of
25 Commerce and the USDA is very simple to fix. Right?

1 If you're going to remove a half million tons of
2 supply to this country, remove it from the direct
3 consumption and refined sugar imports. At least give the
4 refineries here a fighting chance to run their business.
5 And that's not going to take us up to a 90 percent capacity
6 utilization. That's going to tweak our capacity utilization
7 by 10 or 11 ticks. Right. Instead of being in the range of
8 61 to 66, we'll be in the range of 72 to 77, something like
9 that.

10 We've had exhaustive discussions with the USDA
11 and Department of Commerce about this, but it did not suit
12 the Mexican side of the negotiations and this is where we
13 are left today.

14 CHAIR BROADBENT: Okay. Could you just outline
15 the big five ticks of an agreement that you think would be
16 fair to you?

17 MR. GORRELL: I think any way you slice it,
18 there's one very large tick which is, if we need to
19 constrain the amount of Mexican sugar that's coming to the
20 United States from the average of 2.1 million -- let me give
21 you a precise number. The 2.126 million short-ton raw value
22 per USDA Foreign AG Service import statistics was coming to
23 the United States in the last two years, fiscal years
24 2012-13, 2013-14.

25 So we basically need to reduce supply this year

1 by 527,000 tons. Right.

2 That needs to be reduced out of the direct
3 consumption and refined sugar imports rather than reducing
4 it from the raw sugar feed stock. That is the number one
5 thing within our segment any way you slice it. And to be
6 honest, there are very large members of the petitioner
7 groups that were -- that had precisely the same view.
8 Right?

9 We can do it by end-use certificates. We can do
10 it by polarization even though, as David will point out,
11 there's slippage in polarization. We can do it by
12 percentages. There are many ways to get these agreements to
13 agreements that will be more reasonable.

14 MR. SPAK: So that leaves four more and I would
15 ask that we -- if you allow us to just respond later. But I
16 don't want to speak on behalf of everyone here. But, you
17 know, obviously there are issues involving enforcement that
18 are of concern. There are other parts of this that are, you
19 know, really all the parties could agree upon. But I think
20 everybody at this table would agree that this was probably
21 the most difficult issue for these American companies and
22 their workers to understand. Right?

23 If we all agree that a reduction needs to be
24 made, why not do it on -- have the reduction come out of the
25 product that the refiners produce and where most of the

1 injury is coming from.

2 So, you know, you can sense from Mr. Gorrell's
3 answer and other things we've written, that that's kind of
4 the incomprehensible thing. It's very difficult for Mr.
5 Gorrell to explain to his board and to everybody involved,
6 including the workers, you know, why would our government do
7 this to us.

8 CHAIR BROADBENT: Okay. I have one question for
9 petitioners on page 18 to 20 of your submission. You
10 challenge the definition of refined sugar as sugar with
11 sucrose content below 99.5 percent. However, that is the
12 precise standard proposed by you in your comments to
13 Commerce on the draft suspension agreements. Is it fair for
14 the Commission to entertain a challenge by you to a
15 provision of the suspension agreement that you proposed? Or
16 do I have this wrong?

17 MR. GORRELL: Look in one of the areas of, I
18 guess, potential disagreement between David and -- you know,
19 AmCane and Imperial throughout this process was, how to best
20 fix the agreements after version one. All right.

21 Owing to some of the issues on enforcement and
22 end-use certificates, right. There is a global standard for
23 setting the brake between raw sugar and refined sugar. That
24 is 99.5 degrees polarization.

25 We do expect slippage. Right. So if the

1 percentage is set at 70 percent raw sugar, meaning sugar
2 below 99.5 degrees and 30 percent refined sugar meaning
3 sugar above 99.5 degrees as per the global standard, there
4 is highly likely to be real slippage in an authentic way,
5 you know, brown sugar coming over. And there is very
6 possibly, if there's poor enforcement, to be, let's say,
7 less authentic slippage, if Customs isn't doing the proper
8 work. Every vessel of sugar that we bring in under the TRQs
9 gets tested by Customs. All right. And if that sugar comes
10 in above 99.5 degrees, we have to pay customs' penalties of
11 about \$330 per ton on that sugar. Right.

12 Today if Mexican quote/unquote 99.4 degree
13 polarization sugar comes over the boarder and it's account
14 99.6 degrees, there's absolutely no penalty. So there's a
15 very rigid enforcement regime in place on all of the other
16 sugar that we're importing into this country. The
17 enforcement regime, if there is to be one, looks like it's
18 going to be a very light enforcement regime.

19 (Simultaneous conversation.)

20 MR. GORRELL: -- set up these agreements and have
21 them aligning with the rest of the global standards of trade
22 on raw and refined sugar. But there are multiple ways to
23 set these agreements to achieve the objectives of the
24 Mexican industry and the U.S. industry inclusive of all the
25 parties. If they want to go with a mechanism to ensure that

1 we have enough raw sugar supply, and remove the injurious
2 refined sugar exports, there are other mechanisms other than
3 99.5 degrees as a cutoff line that can be used. We're very
4 open to discussing those with the Commerce, the Mexican side
5 and the USDA.

6 CHAIRMAN BROADBENT: Okay. I guess it's fair
7 I should let you just comment too.

8 MR. ROSENZWEIG: Thank you, and unfortunately
9 I messed up back one question, because you were asking for
10 five points, and I think perhaps we've already addressed the
11 balance between raws and whites and supplier raw material of
12 course. But the second thing and the most important is the
13 implied refined margin. We need to widen that to a
14 survivable level.

15 CHAIRMAN BROADBENT: Okay, sorry. I apologize
16 to my colleagues for taking too much. Commissioner Pinkert.

17 COMMISSIONER PINKERT: Thank you Madam
18 Chairman. I just have a couple of relatively technical
19 questions as followup. One of the things that I'm
20 struggling with is the provision in the statute concerning
21 the prevention of undercutting in the future, and in order
22 to have an idea of what would prevent undercutting in the
23 future, we would have to have some idea of what the
24 prevailing U.S. prices would be in the near future.

25 That's how you can decide whether the price is

1 coming in or above or below the prevailing price. So what
2 should we use as a measure of what the prevailing U.S.
3 prices are going to be in the near future? Presumably, we'd
4 want to go back at least before that record Mexican
5 production in 2012-2013, because that would have affected
6 U.S. prices. So what is the measure going into the future
7 of prevailing U.S. prices?

8 MR. MAGNUS: Well, you can use the cost
9 buildup Mr. Farmer so helpfully put on the record. It will
10 never be any better than this, with these agreements in
11 place. It will never be possible for the domestic refiners
12 to deliver refined sugar to customers in these cities at a
13 price better than the one you see on here.

14 So if you're wondering what is the lowest
15 imaginable price that they can get to, that you would have
16 to be aware of if you wanted to see whether undercutting was
17 going to occur in the future, you can look at this.

18 MR. SPAK: I agree with that and, you know,
19 and as this say, it was put on the record by Mr. Farmer. If
20 you compare it to what we put in in Exhibit 21 of our brief,
21 you'll find that, you know, it says if we were all putting
22 the same numbers on a piece of paper, there's a high level
23 of coherence between the two tables, the one prepared by us
24 and the one prepared those who were opposing the agreement.

25 The difference, of course, they weren't at the

1 same level of trade, right? One was delivered and the other
2 was not. So this is part of it, you know. The reference
3 prices in the agreement give you one basis to think about
4 underselling going forward, and whether the underselling
5 that you already found is going to be eliminated or not,
6 okay. So that's one point.

7 And I think, you know, the other point here is
8 that you've got a record from the preliminary determination.
9 You've made some findings about underselling in the past,
10 and you can work with that data. Now yes, was it affected?
11 Was it affected by the large volume of imports of what we
12 know now are unfairly traded imports?

13 I guess it would be. I mean that's what
14 everybody has said, even in the prelim, that of course this
15 is reflecting some of that. But let's remember, these
16 agreements don't eliminate dumping and subsidization. So I
17 don't think it's an unfair comparison. You can take the
18 data that you have on the record, from the preliminary, and
19 there's no reason to adjust it for any reason because for
20 example the subsidy rates are going to stay the same.

21 These agreements don't address it. It was a
22 conscious decision not to go down the road of an agreement
23 that eliminates the dumping and subsidization. So we don't
24 see a problem with using the record that you have from the
25 preliminary determination, plus some helpful things like

1 this.

2 MR. GORRELL: If I could just add one last
3 comment, is that you asked a classic economist a merchant
4 question, what's the reference, you know? What do we
5 compare it against, and whenever we look at markets, we look
6 at two things. One is cost and the other is value. You
7 know, I'm not at liberty to discuss precisely Imperial
8 Sugar's cost, but I did lay some of that in the APO
9 affidavits that we submitted last week.

10 I think you'll see that is one potential
11 benchmark for you to compare against an underselling, and
12 these charts give you broad perspective on that as well.
13 The other chart, which you know, we keep flashing up there,
14 the purple line that goes up and down, that gives you a good
15 sense of value over time in the historical perspective.

16 What you'll see on that chart is that the
17 margins, you know, as David was responding to Ms. Broadbent
18 in terms of the -- what else can be fixed, the margins
19 established between refined and raw sugar on those reference
20 prices from Mexico are basically setting the value at the
21 bottom of the historical range here.

22 So I think you've got to consider both of
23 those, as well as some of the inputs that Greg and John had
24 told you. But from an economist or a merchant point of
25 view, I look at cost and value in that. I think by any

1 measure, if you look at those two components, you're going
2 to see that this is going to allow that Mexican direct and
3 refined consumption to undersell the U.S. refineries.

4 COMMISSIONER PINKERT: Your answers to that
5 question have been very helpful to me. But I want to
6 reframe my question a little bit, to see if we have an
7 understanding here of what the parameters are.

8 Would I be wrong to look at prevailing U.S.
9 prices just prior to that record Mexican production as a
10 measure of what the prevailing U.S. prices are going to be
11 in the near future, so that I can then determine whether the
12 agreement prevents undercutting?

13 MR. SPAK: Again, I think one difference I
14 think we'd have to acknowledge. You'd have to acknowledge
15 in that analysis, if you're saying that could you take
16 pricing that existed in the market before dumped and
17 subsidized imports were present, and compare it to what will
18 happen under the agreement, you're going to have a difficult
19 problem, which is that under the agreement, dumped and
20 subsidized imports continue.

21 So you see there's -- I'm not sure why you
22 would go outside the period. I think the data that you've
23 got reflects the conditions that are going to exist under
24 the agreement.

25 MR. MAGNUS: And to the extent that there's an

1 implied premise for what you're asking, you know, you can't
2 -- the time before the dumping and subsidy analysis focused
3 on, there may very well, probably was dumping and subsidies,
4 right? It just wasn't focused on. There may very well have
5 been and probably was injury experienced by virtue of that,
6 including at the refining level of industry, okay.

7 They weren't complaining about it. It hasn't
8 been analyzed, but I don't think it's possible to look at
9 that as a period in which -- that's free of either dumping
10 subsidy or resulting injury, and if that's what you're
11 asking, it's not like some sort of a pristine period just
12 because it's before the period that got looked at in these
13 cases.

14 MR. GORRELL: If I could add one last thing.
15 I mean the period prior to this is both -- was both in the
16 United States as well as in the global sugar market, one of
17 the most extraordinary periods seen in decades. You know,
18 you had the refinery explosion in Savannah, and that was
19 February 7th, 2008. Took out, you know, impaired a million
20 tons of refining capacity in this country.

21 At the same time, from late 2009 through 2011,
22 you had world sugar prices spike to levels that we hadn't
23 seen since the early 80's, right. The world ran out of
24 sugar in the summer of 2010. I think that was my previous
25 life. The world ran out of sugar and you had

1 extraordinarily tight supply conditions within the United
2 States.

3 So by any measure, and it's hard for me to
4 explain this to the 25 or 28 year-old sugar merchants that I
5 have working for me at this time, I said guys, don't think
6 the world is going to be the way it's been in the last three
7 years. That was the hardest thing as a manager that I had
8 to deal with in 2011-2012, is erasing the memory bank of all
9 the younger parts of our team as to what was going on
10 between 2009 and 2011 on the global scene.

11 The U.S. was not immune to that from a global
12 market perspective, and in addition to that, in a major part
13 of the industry you had a refinery impaired at the time.

14 COMMISSIONER PINKERT: Thank you. My last
15 question is for the post-hearing. The parties differ in
16 their estimates of the likely quota on Mexican sugar that
17 the suspension agreements would impose. How should we
18 reconcile the different estimates? Mr. Spak is shaking his
19 head. I think that means he's going to answer the question
20 in the post-hearing.

21 MR. SPAK: Commissioner Pinkert, I'm
22 definitely going to answer. But I'd like to say now, I
23 don't think they're really all that off in a sense, because
24 in fact it's something interesting. We saw it during the
25 negotiation period. I mean, you know, when we started

1 talking to the Commerce Department and the Department of
2 Agriculture, you know, they didn't believe our numbers
3 either and we confirmed them with them.

4 We showed, through some considerable effort by
5 the company and using publicly available data that, you
6 know, what the data were. So I think that's, you know,
7 we'll be happy to do that.

8 COMMISSIONER PINKERT: Thank you very much.
9 Thank you, Madam Chairman.

10 CHAIRMAN BROADBENT: Commissioner Williamson.

11 COMMISSIONER WILLIAMSON: Thank you. I was
12 wondering, can you use Estander imported as refined sugar as
13 an input to your refining process? I'm going to ask some
14 more questions about Estander later, but I'm going to start
15 with this one.

16 MR. ROSENZWEIG: Yes, Estandar delivered in
17 bulk. We treat it as a non-food grade product because it
18 hasn't been handled appropriately. So it goes through the
19 refining and it's a perfectly fine feedstock.

20 COMMISSIONER WILLIAMSON: Okay, okay. Even if
21 the agreements limited your supply of raw sugar from Mexico,
22 why can't you make up that supply from other sources?

23 MR. ROSENZWEIG: Commissioner Schmidlein
24 asked something along this line. The pool is only so large,
25 and it's dictated by the levels of the TRQ. It's a

1 controlled market. So we can't go fish elsewhere. We have
2 to fish in the pond that we're presented by the government
3 in the legislation.

4 MR. MAGNUS: Mexico gets 100 percent of U.S.
5 needs.

6 COMMISSIONER WILLIAMSON: Wait a minute. You
7 still have the TRQ, the WTO TRQ, right? So 100 percent
8 of --

9 MR. MAGNUS: U.S. needs is a defined term in
10 this world.

11 COMMISSIONER WILLIAMSON: Okay. Can you
12 elaborate on that, because I noted that when you said it.

13 MR. MAGNUS: U.S. needs is defined in a way
14 that takes into account what we have to do on TRQ. But
15 additional TRQ access is not expected to be a normal feature
16 of the landscape.

17 COMMISSIONER WILLIAMSON: As it was in the
18 past?

19 MR. MAGNUS: Unless Mexico announces that it
20 can't ship quantities that have been allocated to it.

21 MR. GORRELL: And if I may add one thing here.
22 There is another pond for us to fish into for sugar, and
23 that is sugar that comes into the United States and pays the
24 high tier tariff. The high tier tariff for raw sugar in the
25 United States is about 15.2 or 15.4 cents per pound, 15-1/2

1 cents a pound. To that you add at least two cents of
2 transportation.

3 So we take the world market on No. 11 sugar
4 futures, the world market raw sugar prices, which today are
5 around 15 cents a pound, and we add 17-1/2 cents a pound to
6 that. We can have unlimited feedstock at 32-1/2 cents a
7 pound, all right, six and a half cents a pound above the
8 reference price for white sugar Mexico.

9 It is horribly uneconomic. It happens once
10 every 25 or 30 years in this country, when the USTA doesn't
11 react quickly enough to bring sugar into the country when
12 there's a shortage, right. It is a complete outlier. If
13 you then look at the TRQ, right, we have accounted for 1.2
14 million tons of TRQ sugar, which is a higher end of recent
15 performance on TRQ shipments.

16 A couple of hundred thousand tons of sugar
17 coming in under the Raw Sugar Reexport Program; used to be
18 400,000 tons, but that's likely to be impaired by Mexico's
19 actions over the weekend. And not a half million tons of
20 domestic sugar that is not processed at those origin
21 refineries we talked about. But when we add that to the
22 sugar that may come to us, if we just add the 750,000 tons,
23 which is the 47-1/2 percent that's supposed to make it to
24 the cane refining sector but not obligated to, that's when
25 we get to these capacity utilization rates of like 61

1 percent, right.

2 COMMISSIONER WILLIAMSON: Because you're
3 saying the domestic sugar, the domestic cane sugar produced
4 is going to be all refined, mostly refined at the refineries
5 of origin?

6 MR. GORRELL: Most of the domestically
7 produced cane raw sugar gets refined in two refineries in
8 Louisiana and two refineries in Florida, right, about five
9 to six hundred thousand tons of that domestically produced
10 raw sugar. Sugar from Hawaii goes to California, a little
11 bit of Texas sugar does to Louisiana, so that doesn't make
12 it around to the destination refineries.

13 A little bit of Louisiana sugar comes around
14 to the East Coast, and then quite a bit of Florida raw sugar
15 is moved up to the East Coast, primarily to the Yonkers
16 refinery, because the Yonkers refinery is owned by the
17 Florida producers. So when we look at the total basket of
18 sugar in there, we get, you know, the leftovers from the
19 domestic cane raw sugar producer, and then we really need to
20 rely on imports.

21 COMMISSIONER WILLIAMSON: So the other
22 refiners, these refiners that are near the location, how are
23 they affected by this agreement?

24 MR. GORRELL: Well, the largest is American
25 Sugar Refining, is Domino. One of the brands they have is

1 Domino; the other is C&H. This is not good for them, right.
2 I am 100 percent positive that if you looked at American
3 Sugar Refining as a stand-alone company, right, this
4 agreement is not good for them.

5 If you look at it from their shareholder
6 level, for cane raw sugar producers, and also of interest in
7 other producing countries that have some those TRQ rights,
8 then if I'm sitting in their shoes, I am really stuck in a
9 dilemma here as to which side of the table I'm sitting on
10 here, right. They have competing interests within their own
11 organization.

12 It's almost, you know, if you went and sat on
13 a board of directors, often before you have a related party
14 transaction, you ask the related party to exit the room
15 before you take a decision on that transaction. One
16 response to these suspension agreements is super-simple, and
17 I think everyone in the industry expected it.

18 If you look at ASR, they are in the toughest
19 spot of anybody in this country, as to whether to support
20 these suspension agreements or to go against them, because
21 of this dynamic of having such a large cane refining
22 business within their own contacts, but being owned by sugar
23 millers and sugar cane growers.

24 COMMISSIONER WILLIAMSON: So why aren't the
25 other refiners complaining too?

1 MR. GORRELL: There's only four of us, right.
2 There's AmCane, there's Imperial, there's ASR and then on
3 the other side of the table you'll maybe later today talk to
4 Paul Farmer, who's the majority owner of CSE Sugar.

5 It's a business that's set up in a much
6 different way than your traditional cane sugar refiners. We
7 perform seven steps in our process that will take sugar,
8 even the color of these window panes, the window shades,
9 right, and turn that into consumable dry sugar products,
10 right.

11 CSE's business is primarily, when you look at
12 his processing business, is primarily to take very, very
13 high quality raw sugar or sugar not for direct consumption,
14 whether it's Estandar or from another origin, and produce
15 the liquid sugar from that, right. He has a significant
16 advantage in terms of his cost base, as well as the
17 economics of his business, to be running off of this Mexican
18 Estandar or even Mexican 99.7 polarization sugar, rather
19 than bringing in the traditional TRQs.

20 He also happens to be, according to my
21 knowledge, one of the largest if not the largest originator
22 of Mexican sugar. He buys more Mexican sugar than anybody
23 in this room, because he does a very good job with them, and
24 to us, he's a very strange relationship. He's a supplier,
25 he's a competitor and he's a customer, right.

1 So when we look at the players in the cane
2 refining industry, the destination cane refining industry,
3 you're looking at two of them here and then you have ASR and
4 CSE. There's nobody else left.

5 COMMISSIONER WILLIAMSON: Okay. You just
6 answered -- my next question was going to be are there U.S.
7 firms that process raw sugar from Mexico and why they aren't
8 complaining, and you just addressed that question.

9 Out of curiosity, I think, Mr. Gorrell, you
10 said that the Mexicans refuse -- basically didn't want a
11 limit on the refined sugar, or they weren't agreeing,
12 willing to do something. I was just -- I know it's
13 speculation, but why do you think they didn't want to do
14 that?

15 MR. GORRELL: Well look. I mean this has been
16 -- it's been a very long and tiring story the last 12
17 months, as you can imagine, right, and during the period
18 when we were less active at the Department of Commerce, and
19 I would say that even before Suspension Agreement 1 was
20 concluded, we had tried to reach out to the Department of
21 Commerce in order to bring the perspective that we bring to
22 this industry.

23 Unfortunately, you know, we didn't get to
24 speak to them before, until after the first version of the
25 suspension agreement was outlined. But the -- at a stage in

1 that process, and that's really where I started to worry
2 about this process, you know, I went from a state where the
3 petitioner group was telling me that yeah Mike, the ask is
4 100 percent raw sugar and no refined sugar.

5 And then I started reading Financial Times
6 articles where the Mexican economy minister, he's writing
7 things like "all hell with break loose if we don't have an
8 agreement by next week." I mean that's when I really
9 started to worry, and one of the most contentious issues in
10 this entire discussion was the refined versus the raw sugar
11 split.

12 COMMISSIONER WILLIAMSON: Okay, thank you.

13 MR. ROSENZWEIG: If I may sir?

14 COMMISSIONER WILLIAMSON: Sure.

15 MR. ROSENZWEIG: I believe the simplest answer
16 is that the sugar that they produce can almost universally
17 go into direct consumption, and if they direct it in such a
18 path, they capture a higher margin.

19 COMMISSIONER WILLIAMSON: Okay, and that is --
20 and that's called Estandar?

21 MR. ROSENZWEIG: Estandar, blanco, refinata,
22 refined, whatever you want to call it. Again, it's various
23 grades of the same product. Approved grade, direct --
24 approved grade sugar, suitable for direct consumption, and
25 depending upon levels of purity, you might be able to

1 attract slightly different prices.

2 But for their side, they attract a higher
3 price if they handle it appropriately and ship it to a final
4 buyer, than they do if they throw it on a vessel where it
5 comes to a destination refinery.

6 COMMISSIONER WILLIAMSON: And it's coming in
7 as raw sugar unrefined?

8 MR. ROSENZWEIG: Well, we treat it as a raw
9 material.

10 COMMISSIONER WILLIAMSON: Uh-huh.

11 MR. ROSENZWEIG: As should any other refinery
12 who takes sugar off a vessel.

13 MR. GORRELL: Once you put sugar onto a bulk
14 shipped in a vessel hull that maybe has loaded coal or
15 fertilizers or something else along the way, it's not good
16 grade.

17 COMMISSIONER WILLIAMSON: Okay. Thank you for
18 those answers.

19 CHAIRMAN BROADBENT: Commissioner Johanson.

20 COMMISSIONER JOHANSON: Thank you, Madam
21 Chairman. At one point in a prior life, my work involved a
22 suspension agreement also involving an agricultural product.
23 So I'm somewhat familiar with suspension agreements.

24 When reading the briefs over the weekend, I
25 had a Eureka moment. I thought if anyone ever wants to

1 impose a suspension agreement on any product, sugar would be
2 the perfect product and 2014 would be the perfect year,
3 because in 2014, after much debate, Congress passed a farm
4 bill, which in effect set prices which in our effect
5 perceived by some as non-injurious prices.

6 The Department of Commerce brief discusses at
7 some length the sugar program as set up in the 2014 farm
8 bill. How do you all react to Commerce's characterization?

9 MR. MAGNUS: Really I'm so glad you asked this
10 question, because all of the briefs and the Commerce
11 Department analyses gives so much attention to this idea
12 that somehow these reference prices are above forfeiture
13 levels, and that somehow that's meaningful in the context of
14 figuring out about injury. I've got to say, we don't get
15 it.

16 Forfeiture equals catastrophe, way, way beyond
17 injury. Forfeiture is when product gets taken out of the
18 food economy and put into the transportation economy, right,
19 and that idea that somehow any price above forfeiture is by
20 definition non-injurious seems crazy to us.

21 Of course, it is possible for the industry to
22 experience injury at price levels that are above forfeiture.
23 Forfeiture is a calamity. To interpret it otherwise, it
24 seems to me stands the statutory provision on its head,
25 right. You all have a statutory provision that says if you

1 see that the government is having to lay money out because
2 of forfeiture, that's an indication that injury exists.

3 It certainly doesn't say or imply that when
4 that's not happening, there's no injury. So this idea that
5 somehow setting reference prices above forfeiture purges all
6 possibility of injury in the industry, you know, and that
7 somehow without saying so explicitly, that the farm bill
8 amended Title VII of the Tariff Act, seems crazy to us.

9 Your question doesn't, but the arguments that
10 have been put to you citing that, do seem crazy to us.

11 COMMISSIONER JOHANSON: Thank you for your
12 response.

13 MR. SPAK: Commissioner Johanson, just very
14 quickly. Greg Spak from White & Case. I don't, you know,
15 look. We don't have a problem with the Commerce Department
16 writing the memo talking about the sugar program, saying
17 what they were trying to achieve. We don't even have a
18 problem with them trying to reach an agreement that is in
19 some view consistent with the sugar program.

20 I mean the two departments are the same
21 government, and we would hope that they would work together.
22 But at the end of the day, I think we all think that, you
23 know, it just doesn't trump the statutory test. It just
24 doesn't trump it, you know, and it doesn't need to be
25 inconsistent. You can do both.

1 So we have a lot of respect for people at the
2 Commerce Department, at the U.S. Department of Agriculture.
3 I'm sure they have a very difficult job. I wouldn't want to
4 manage the sugar supply in this country, and they've got a
5 lot of difficult things. I'm sure they're trying their
6 best.

7 But you know respectfully, we just think they
8 got it wrong, and that it's now in your court to apply the
9 right standard.

10 COMMISSIONER JOHANSON: Thank you for your
11 responses. I'd like to follow up on a question of
12 Commissioner Kieff and I think some other commissioners have
13 raised this too as well, or had questions along these lines.
14 Under the statute, could a suspension agreement with parties
15 that include both -- that are both producers and processors
16 ever be possible?

17 COMMISSIONER JOHANSON: I mean you all had
18 different interest, right?

19 MR. ROSENZWEIG: The short answer is yes.
20 Generally, an agreement that works not everyone walks away
21 completely and utterly happy, but there certainly was more
22 than enough scope, which would have left Mexico a tremendous
23 amount of access which would have protected the sugar
24 program, which would have allowed the USDA to monitor it,
25 which would've probably substantially cured any concerns of

1 injury from the domestic side here, the Coalition that
2 originally brought the action. There was plenty of room,
3 but it was just not actually looked at. The people that
4 weren't in the room had their voices and their opinions
5 largely discarded.

6 MR. MAGNUS: And since you asked about suspension
7 agreements, generally, of course, there is always the other
8 category of agreement, one that actually zeros out dumping
9 and disgorges the subsidies and then none of these problems
10 that you just referred to are any where as near as
11 significant in a structural sense.

12 This is a particular kind of an agreement. It's
13 difficult with a heterogeneous industry and the decision to
14 try to go for a "C" agreement, a no-injury agreement. It's
15 difficult, not impossible but difficult.

16 COMMISSIONER JOHANSON: No, I could see where it
17 would be very difficult. As you mentioned, the word
18 "heterogeneous industry" is certainly what we have in the
19 room today. Okay.

20 Following certainly along that point, the
21 economic reports submitted by Dr. Kaplan further concludes
22 that for independent cane processors the suspension
23 agreement would first limit price competition from refined
24 Mexican sugar to a price floor that exceeds long-term U.S.
25 price refined sugar.

1 Second, limit imports of Mexican fine sugar to 53
2 percent of total import volume. Third, eliminate all
3 imports of Mexican refine sugar, and thus, any injurious
4 affects of Mexican refine sugar. Should the U.S. refine
5 sugar fall below the floor and four, increase refine
6 profitability by eliminating Mexican imports at the floor
7 price.

8 It seems like there's quite a bit in there built
9 for the refiners. Correct?

10 MR. GORRELL: Look, with all respect to Dr.
11 Kaplan, I cannot imagine how he could look at a situation
12 were a million tons of direct consumption of refined sugar
13 imports, one third of this country's imports are coming in
14 and not coming through a cane refining center that has the
15 capacity to process the imports and would drive capacity
16 utilization down to the rates that we've been discussing
17 earlier on. How he could say, yeah, no problem, the
18 refiners will be okay. It just doesn't make any sense.

19 MR. ROSENZWEIG: And on top of that, to do it at
20 a level where, if they care to, they can sell at six cents
21 below our costs when we're operating at an optimal level of
22 efficiency. It doesn't square.

23 COMMISSIONER JOHANSON: Yes, Mr. Magnus.

24 MR. MAGNUS: So, whatever he has concluded is the
25 long-term price at which -- I mean this is the very

1 long-term price, optimal long-term price for U.S. refiners
2 to produce refined sugar. And the price floor isn't above
3 it. It's six cents below it. So, that was the first of
4 several points that he rattled off. It's just wrong.

5 MR. GORRELL: Look, with all due respect, I don't
6 think he understand the cost structure of running a sugar
7 refinery in America. That's one of the fundamental flaws in
8 his reasoning.

9 COMMISSIONER JOHANSON: Perhaps you all could
10 educate me a bit. You've made the argument that the Mexican
11 sugar industry and government want to maximize the amount of
12 refined sugar shipped to the United States. They, of
13 course, would prefer to have the value added done in Mexico.
14 Does the Mexican government still own sugar mills in Mexico?
15 I think that was the case at one point. Could elaborate a
16 bit more on how it is that the suspension agreement fails
17 adequately to limit refined sugar imports into the United
18 States?

19 If you could start first, though, with the
20 question on whether or not the Mexican government owns
21 mills.

22 MR. ROSENZWEIG: Yes, I'm not sure of the exact
23 percentage. I believe it's 22 or 23 percent. I'm sure
24 someone else here can probably give you the exact number.

25 COMMISSIONER JOHANSON: Thanks.

1 MR. GORRELL: And I guess to the second question
2 it does limit the amount of refined sugar that can come into
3 this country, but it sets the levels, and I think you guys
4 have looked at the data. You know looked at our data that
5 we've submitted under APO. These were levels that were
6 causing significant injury to the cane refining industry.

7 So, yeah, there's a limit, but it's a very high
8 limit that just allows the injurious affect to continue.

9 MR. ROSENZWEIG: And as for Dr. Kaplan's
10 analysis, again, perhaps I'm having a hard time reconciling
11 it with the reality as we see it. And just to take, again,
12 the most optimal costs structure using the build up CSC has
13 represented to us gives us a delivered cost in values to
14 Chicago at 38.72. And by their own analysis, Mexican sugar
15 can come in at 32 . I don't see how we're in a position to
16 avoid undercutting if the Mexicans wish to, or can possibly
17 compete against a subsidized and dumped sugar in this
18 regard.

19 COMMISSIONER JOHANSON: Thanks for your comments.
20 My time has expired.

21 CHAIRMAN BROADBENT: Commissioner Kieff.

22 COMMISSIONER KIEFF: Just to pick up where we
23 left off, if the other side were to concede all of your
24 facts as you described them, or we were to announce that we
25 agree with your facts and disagree with theirs, do they

1 lose?

2 MR. ROSENZWEIG: I would say they walk away with
3 an agreement which is still very good considering the
4 position that they're in today.

5 COMMISSIONER KIEFF: Yes. I'm sorry. I
6 apologize. I was ambiguous. Let me be more clear. I'm not
7 asking for business assessment. I'm asking your lawyers for
8 the specific legal question put before us in this phase of
9 this proceeding before this Commission.

10 You're asking us for one outcome. They're asking
11 us for a different outcome. The outcome you're asking for,
12 as I understand it, is that we proceed to a full, ordinary
13 Title VII type investigation.

14 MR. SPAK: Not necessarily so, Commissioner.

15 COMMISSIONER KIEFF: Okay.

16 MR. SPAK: We're asking for a decision that you
17 see a remaining, discernible adverse impact and uneliminated
18 injurious affect, whether that pushes this case down one
19 path or another that is unknowable at this point.

20 COMMISSIONER KIEFF: What are the options?

21 MR. SPAK: One is Suspension Agreement 3.0.
22 Another path forward is final determinations, which could be
23 orders or it could be nothing. Any of those scenarios, any
24 of them is better for these companies than these suspension
25 agreements. These suspension agreements are ruinous for

1 them.

2 COMMISSIONER KIEFF: Sure. Can you please
3 explain what you mean? If we decide at this phase to move
4 forward are you suggesting that the time alone could help
5 you before Commerce?

6 MR. SPAK: That the time alone?

7 COMMISSIONER KIEFF: I apologize. I'm simply not
8 understanding you.

9 MR. SPAK: If these agreements are found by the
10 Commission to flunk the statutory standard --

11 COMMISSIONER KIEFF: Then what?

12 MR. SPAK: Then everything reverts to where it
13 was on the day the preliminary determinations came out of
14 Commerce. There is no more suspension agreement.

15 COMMISSIONER KIEFF: Then what?

16 MR. SPAK: And then several different things
17 could happen. The parties could go for a suspension
18 agreement that is lawful instead of the current one, which
19 we believe is unlawful.

20 COMMISSIONER KIEFF: And what do we do in that
21 process?

22 MR. SPAK: You might or might not in that context
23 wind up being in a position of making a final determination
24 -- a final phase determination on material injury. You
25 might and you might not. That would depend on whether

1 continuation occurs.

2 COMMISSIONER KIEFF: Okay, so let's go back then
3 to the beginning. The question before us today is you want
4 us to decide yes on a question. They want us to decide no
5 on a question. If we buy all of your facts must we decide
6 yes on your question?

7 MR. SPAK: You must.

8 COMMISSIONER KIEFF: I look forward to hearing
9 from the other panel this afternoon their views about
10 whether if we happen to agree with your facts, or if they
11 concede your facts whether they, in fact, lose the legal
12 question put before us. So, that certainly would help.

13 Just in the interest of transparency, the reason
14 I'm asking that question in case it wasn't clear is at least
15 I'm struggling with the statutory question put before us.
16 And I get your definition, but I'm not sure I or the
17 majority of the Commission agree with it. And let me ask
18 you then the converse question. If we disagree with you on
19 your legal view, even if we believe all of your facts, don't
20 you lose?

21 MR. SPAK: You could apply a legal standard under
22 which "completely" doesn't mean completely, and we hope you
23 won't. And I don't know what legal standard you're thinking
24 you might apply. We think we have shown injurious facts
25 that are not eliminated, have not been eliminated by these

1 suspension agreements. And as far as we're concerned,
2 that's the beginning and end of it.

3 COMMISSIONER KIEFF: Yes, so you seem to be
4 repeating your view of the definition.

5 MR. SPAK: Definition of which term, "completely"
6 or "effect"?

7 COMMISSIONER KIEFF: So, to "completely" let me
8 -- all the lawyers in the room have been to law school.
9 They're all familiar with hypothetical questions that ensue
10 when one has debates about numerator/denominator problems.
11 Surely, "completely" doesn't mean mathematically 100 percent
12 because if that were the case a single member of the
13 industry with a slightly different business interest could
14 always come forward with an accurate balance sheet that
15 truthfully would reveal they are not made whole by the group
16 decision, and the group would not be able to move forward.
17 They would have, in effect, a veto.

18 And if your view of the statute is that unanimity
19 among industry participants is required, then that's your
20 view. And I just have to confess I think that's a hard one
21 for me to get my mind around. I don't think Congress
22 usually is delegating to society that kind of suicide pact,
23 that kind of a need for unanimity. Usually, when they
24 delegate they're envisioning some good faith belief that
25 the agency in charge of negotiation, in this case Commerce,

1 is going to get 100 percent for the bulk of its
2 constituents, but recognizing that one or two might not buy
3 in.

4 MR. SPAK: Can I just add? I think, and I don't
5 want to repeat myself. I think you know our view that
6 completely means completely. A hypothetical, you know the
7 parade of horrors that we could bring out of the one
8 little refiner in this part -- you know, what if he says
9 he's not happy does that ruin everything. Did Congress
10 really intend to have the entire government come to a halt
11 or the agreements come to a halt just because that one
12 interest, first, it's not the situation we have here. It's
13 not the situation.

14 These are relevant, significant producers of
15 sugar in the United States with relevant, significant
16 workforces and communities. So, first, I don't think it
17 applies. Secondly, I don't agree that this is a binary
18 choice that you say if one person's not happy therefore
19 everything comes to a halt. It's not the case. Your
20 comments about the group dynamic I appreciate them, but
21 group dynamic also sometimes lead to choices where people
22 say, well, it wasn't perfect but it's good enough, and it
23 achieves what Congress wanted to achieve. So, in that
24 context, yes, it is the standard that Congress wrote. It's
25 extraordinary. I don't see many parts of the law that use

1 the word like "completely," but it's there. And the fact
2 that it's there, and the legislative history emphasizes how
3 extraordinary it is, I think a court would say they meant
4 it.

5 COMMISSIONER KIEFF: So, referring back to your
6 first slide, if one of the check marks were present and not
7 all of them, would that be enough?

8 MR. SPAK: I mean I guess it would depend on the
9 magnitude. It would depend on your judgment.

10 COMMISSIONER KIEFF: What if your authentically
11 pled before us that it really meant a lot to you?

12 MR. SPAK: And if you were to look at that, and
13 agree that that was an injurious affect that was not
14 eliminated, I think you would be bound to make a negative
15 determination.

16 COMMISSIONER KIEFF: Well, if it's money coming
17 out of your pocket, won't it always be injurious?

18 MR. SPAK: If you thought that that was an
19 injurious affect --

20 COMMISSIONER KIEFF: Is this a question of degree
21 or of kind?

22 MR. MAGNUS: Commissioner, I think that the
23 question may be twisting together two things that are better
24 split apart. They're entitled to a particular ruling from
25 this Commission not because they are voting no or expressing

1 a veto, not because they're expressing an opinion, but
2 because of the facts that they have brought to bear and
3 established in this proceeding. Okay, it's not just because
4 they don't like it or they're feeling --.

5 COMMISSIONER KIEFF: No, I'm not thinking they're
6 dreaming it, not at all. I'm just confessing that by your
7 reading of the statute they or anyone like them the next
8 time this comes around, if it turns out they're
9 mathematically doing less well off they could very much in
10 good faith say, hey look, this didn't do it for us.

11 MR. MAGNUS: Not just less well off, but less
12 well off in a way that is specifically the result of the
13 import injury that you found to exist and not eliminated by
14 the suspension agreements. Okay, they have shown facts here
15 that correspond precisely to the forms of injury and
16 injurious affects that this Commission identified at the
17 preliminary stage.

18 COMMISSIONER KIEFF: So, is that a final
19 determination at the preliminary stage? What have we found?

20 MR. MAGUS: It's the only determination that's
21 out there. All the parties that are appearing in the
22 proceeding --

23 COMMISSIONER KIEFF: But at the preliminary
24 stage, all we determined was that there is a reasonable
25 indication. We didn't determine that anything had occurred.

1 So, it sounds to me like you're saying that is enough.

2 MR. MAGNUS: What we're saying, and what the
3 other parties as well are saying, is what's out there. It's
4 what you have. The findings that you have made, and if you
5 look at the statutory scheme, the injury that the statute
6 refers to can only mean the injury that you found,
7 preliminarily, exists, the injurious affects that you
8 identified at the preliminary stage. That the only thing
9 that the statutory language could possibly be pointing to.
10 And we're not in any disagreement with the other parties on
11 that point. All of them have said you need to look at the
12 elements of the preliminary determination and the categories
13 of injurious affects that you identified and see if they've
14 been purged or not purged.

15 COMMISSIONER KIEFF: I see that my time has
16 expired. We'll follow up next round. Thanks. Commissioner
17 Schmidtlein.

18 COMMISSIOENR SCHMIDTLEIN: Thank you. I wanted
19 to follow up on a line of questioning that Commissioner
20 Johanson was pursuing having to do with t he forfeiture
21 price under the USDA program. And I know, Mr. Magnus, you
22 said that forfeiture equals catastrophe.

23 And so I wondered if one of the industry
24 witnesses could help me understand how USDA comes to the
25 forfeiture prices that they choose each year? What do they

1 look at and what are those prices designed to do?

2 MR. GORRELL: Yes, the forfeiture prices are
3 actually prescribed in the Farm Bill by Congress.

4 COMMISSIONER SCHMIDTLEIN: Okay, not USDA.

5 MR. GORRELL: Yes. And we put that into the
6 brief. Those forfeiture prices are national average, right?
7 The national average for cane raw sugar is 18.75 cents per
8 pound. And the national average for beet refined sugar is
9 determined based as a multiple over 18.75 cents per pound,
10 and it's described in the statute by taking 18.75 cents per
11 pound times 1.285 equals 24.09 cents per pound is the
12 national average beet sugar loan rate as prescribed in the
13 statute.

14 It's a bit ironic, and highly unfortunate for us
15 that if you take the percentage between the refined sugar
16 reference price out of the 26 cents per pound and you divide
17 that by 22 and a quarter. You actually only get to a 16.8
18 percent spread between the refined sugar price and the raw
19 sugar price.

20 COMMISSIONER SCHMIDTLEIN: What does Congress
21 look at, though, when they're choosing these numbers? They
22 don't just pick them out of thin air, so are they looking at
23 reasonable levels of profitability? What do they look at?
24 You all have been in the industry for decades, how do they
25 come to those numbers?

1 MR. GORRELL: You're coming to one of the most
2 contentious parts of sugar policy in this country, and I
3 believe, but I'm not sure, that they're looking at cost of
4 production for the cane and the beet sugar producers. The
5 USDA then has the mandate to prescribe the loan rates by
6 state. And there was a very good paper written by the USDA.
7 I think it was in late 2009 which formed the translation of
8 the loan rate for raw sugar at that time, which was 18.25
9 cents per pound into a different loan rate by state,
10 Louisiana and then Florida and Hawaii and Texas. It really
11 got down to freight.

12 And in that memo, they explained that 18.25 cents
13 per pound roughly translated into 20.5 cents per pound
14 delivered East Coast USA quarts. We have a futures contract
15 that trades in the United States on the ice futures exchange
16 where they get some price transparency.

17 There was a phase-in of higher loan rates for the
18 domestic producers. But a loan rate today of 18.75 cents
19 per pound probably defined a delivered U.S. East Coast port
20 at around 21 cents per pound. So, that's the indicator for
21 the USDA to sort of calibrate between their numbers and
22 reality. They have a rough target stocks to use range,
23 which is another very contentious issue between the sugar
24 users and the sugar producers. But the USDA has been on
25 record to say that they're targeting a stalks-to-use ratio

1 between 13 1/2 and 15 1/2 percent in this country.

2 So, when they see that raw sugar prices are
3 trading well below 21 cents a pound, they need to worry,
4 right? On the contrary, over the last 33 years, with the
5 exception of those three years that were extraordinary where
6 the world ran out of sugar, right, whenever they saw sugar
7 prices climbing above 24 cents a pound that was also a
8 warning signal to the USDA. We need to get more raw sugar
9 into this country.

10 And by statute, it's very clear in the Farm Bill
11 that they are to bring raw sugar into this country unless
12 domestic refining capacity has been fully utilized or fully
13 maximized. Only after the domestic refining capacity has
14 been maximized is the USDA to bring in white sugar imports.

15 COMMISSIONER SCHMIDTLEIN: Did you want to add
16 anything, Mr. Rosenzweig? I guess my follow-up question
17 would be you mentioned that they basically look at cost of
18 production. I mean I'm not so much interested in the
19 individual calculations. I'm trying to get sort of the
20 broader purpose or policy behind it. So, the question is
21 really getting to is the forfeiture number supposed to be
22 set at the point at which they feel the industry, as a
23 whole, would break even, would lose money, and you could say
24 as above that number they're assuming that the industry, as
25 a whole, is making some level of profit, a reasonable level

1 of profit? I mean I'm sure there's lots of information out
2 there and we will go look at it, but given that you've had
3 so much experience in the industry I thought you might know
4 off the top of your head.

5 MR. ROSENZWEIG: I believe that some of the
6 people who will be speaking later might be better placed to
7 address their exact costs and how the individual companies
8 compare against the loan rates.

9 I think as a matter of practice they historically
10 tried to get whatever Congress would agree and then
11 consistently it's a point of discussion each time the Farm
12 Bill comes up. They're seeking to elevate the loan rate
13 levels. I would suspect that initially it was defined as a
14 safety net. Whether there's a built-in profit percentage in
15 there, I'm not qualified to answer.

16 COMMISSIONER SCHMIDTLEIN: Okay.

17 MR. HENNEBERRY: This is Pat Henneberry with
18 Imperial Sugar. It's difficult to know whether individual
19 firms are profitable or not from my perspective, so I can't
20 really comment on that. But broadly, it seems to me in
21 watching agricultural policy for the last 30 or 40 years
22 that the safety nets on these -- in these kinds of bills
23 were set to prevent catastrophic losses, not necessarily to
24 prevent all losses. And we have seen, in my experience in
25 watching in the Louisiana industry with which we've had a

1 close partnership over the years, that as the prices got
2 down towards the loan rates mills were closing.

3 So, I think that they're probably at levels that
4 are not necessarily sustainable for all, but maybe
5 sustainable for some, maybe profitable for some, but
6 certainly some are in a very troubled state when they get
7 down to that level.

8 And the other thing that I would say is that the
9 Farm Bill takes extraordinary measures to get rid of excess
10 sugar in the marketplace when you're at or below balloon
11 rates. They cause it to burnt into ethanol possibly in
12 order to get rid of it and alleviate that injury, so that's
13 a potential answer.

14 COMMISSIONER SCHMIDTLEIN: Let me just get
15 another question in here before my time runs out. So, you
16 mentioned the futures market, and I know this is mentioned
17 in your brief, the ice and sugar number 11 and sugar number
18 16, and so I wondered if you might help me understand what
19 we might be able to tell from what the future price -- the
20 futures market price of, I guess it's aw sugar is 11 and 16.
21 I don't know if there's a futures market for refined sugar?
22 No. It's just raw sugar. So, you know, when you look at
23 that, what the futures market price is, if it's above where
24 the reference price is in the agreements, what does that
25 tell us about how these agreements are operating?

1 You know, I know that the futures market says
2 it's a settlement price, I'm trying to -- what's the
3 difference between that and a delivered price?

4 MR. ROSENZWEIG: You've asked about three
5 separate contracts.

6 COMMISSIONER SCHMIDTLEIN: Uh-huh.

7 MR. ROSENZWEIG: There's a white sugar contract
8 which is largely -- or is not that pertinent to this
9 discussion. As you've heard before, occasionally if the
10 Department of Agriculture determines that there is a
11 requirement for additional sugar, and the refining capacity
12 has already been maximized, they can open up what's called a
13 "refined quota" and they have done so. At that point the
14 refined futures contract is a FOB valued contract at country
15 of origin. People could look at that price, whatever is the
16 prevailing price at that time, built up and delivered price
17 which would then include cost of freighting, stevedoring,
18 supervision, insurance, finance, and the rest, and then they
19 would have a landed number here. Okay.

20 So that leaves two other contracts, the number 16
21 contract and the number 11 contract. The number 16 contract
22 is a delivered to an east coast -- well gulf or east coast
23 refinery of sugar that is duty and fees paid. It's a sift
24 duty paid contract. Okay.

25 So those sugars almost exclusively and for

1 purposes of your understanding, are TRQ sugars or Mexican
2 origin sugars.

3 COMMISSIONER SCHMIDTLEIN: Union

4 MR. ROSENZWEIG: There is a possibility someone
5 utilizing a credit position under the re-export program
6 could in fact bring some sugar under that too, but that's
7 somewhat rare, less frequent.

8 For purposes of the market and understanding
9 where the number 16 is likely to trade, we believe that the
10 number 16 will most firmly be tethered to a derived landed
11 price as shown earlier of approximately 25 and a half cents,
12 this being the cost of the referenced price of Mexican sugar
13 plus handling to the port, loading the vessel, sailing the
14 vessel to the discharge port, and discharging it. Okay.

15 So why do we feel that the number 16 will be so
16 closely tied and associated with a build up from the Mexican
17 reference price? It's simply that there are 40 TRQ shipping
18 countries. If you look at the Mexican share which we today
19 feel is inadequately low, but the percentage that will come
20 in as raw sugar even after slippage, those numbers represent
21 a higher quantity than 37 -- the lower or the smaller 37 of
22 the 40 TRQ quota holders. So everyone is going to operate
23 right at or right under that umbrella. Okay. To phrase it
24 another way, the Mexican share exceeds the top eight TRQ
25 quota holder share.

1 So we build up and say, the government is now
2 effectively set a platform a minimum value for delivered
3 sugar. People could sell under it if they wanted to, but
4 they're not likely to, you know. You can ask any industry
5 expert and you're going to get the same answer on that one.

6 Then you asked about the number 11 contract. The
7 number 11 is the largest of the three futures contracts that
8 we've just touched upon. That is an FOB world sugar
9 contract. Okay.

10 That has relevance to our pricing to the extent
11 that when the world market prices elevate, if they should do
12 so above the constructed, landed, number 16 price, which
13 we've just referred to, that then tends as a rising tide
14 lifts all bottoms, it will then elevate the 16. Okay.
15 Because the TRQ holders and the Mexicans are not bound to
16 ship here. It's only an option. They do so because it
17 enjoys a substantial premium to the world market levels.
18 But if the sugar can actually be sold elsewhere at a higher
19 level, the U.S. market has to gravitate upward to attract
20 that sugar to the United States.

21 COMMISSIONER SCHMIDTLEIN: Uh-huh. Okay. I
22 appreciate it. Thank you.

23 MR. ROSENZWEIG: You're welcome.

24 COMMISSIONER SCHMIDTLEIN: My time is up.

25 VICE CHAIRMAN PINKERT: Commissioner Williamson.

1 COMMISSIONER WILLIAMSON: Okay. Both sides have
2 presented economic analysis and Commissioner Johanson had
3 asked you a question about the other sides of economic
4 analysis. In your second briefing you want to add addition
5 points on this, the economic analysis if you think of it or
6 get a chance to do that.

7 Also, for your second submission, could you
8 please discuss your company's financial results over the
9 preliminary POI as compared to the processors and refiners
10 as a whole. And I'm thinking particularly the data that's
11 in D-15 of the preliminary staff report. So this is most
12 appropriately done in a second submission.

13 And with that, I want to thank the witnesses for
14 all their testimony today.

15 Thank you.

16 VICE CHAIRMAN PINKERT: Commission Johanson.

17 COMMISSIONER JOHANSON: Thank you, Vice Chairman,
18 Pinkert. This follows up to one of my earlier questions and
19 also a question of Commissioner Broadbent. Mr. Magnus, you
20 earlier stated that the forfeiture price is a disastrous
21 price. I think those are the words that you used. I was
22 working on Capitol Hill during the 2008 Farm Bill, and it
23 was my impression that sugar was treated pretty well in that
24 farm bill. And I don't know a whole lot about the 2014 farm
25 bill, I was here working at the ITC during that time, but

1 you know, is "disastrous" the right word to use or is the
2 price really that low? Because it's my impression back in
3 2018 (sic) that Congress would not want that price to be at
4 a disastrous level. Thank you.

5 MR. MAGNUS: I certainly didn't mean to imply
6 anything about the subjective views of individuals who
7 worked on the farm bill.

8 COMMISSIONER JOHANSON: Well, I'm not saying I
9 worked on that farm bill.

10 (Simultaneous conversation.)

11 COMMISSIONER JOHANSON: But my general impression
12 during the time.

13 MR. MAGNUS: They may have felt that they were
14 being terribly generous, they may have intended to be
15 terribly generous. I think it is safe to assume, and I
16 think the legislative history shows that Congress would not
17 take the extraordinary step of pulling this material out of
18 the food economy and putting it into gas tanks unless
19 something pretty horrible had occurred. And something that
20 was really completely unsurvivable from the point of view of
21 the injury of the industry involved.

22 COMMISSIONER JOHANSON: But you might also say
23 that the fact that that program was created -- the ethanol
24 program -- and demonstrates that Congress really wanted to
25 provide strong support to the sugar industry?

1 MR. MAGNUS: No argument there.

2 COMMISSIONER JOHANSON: Or to sugar producers?

3 MR. MAGNUS: Absolutely. Absolutely. I don't see
4 that there's any tension at all between those two ideas.
5 Yes, it wanted to provide support and including through the
6 fuel program. And, yes, it's also true that putting an
7 edible -- putting this material out of the food economy
8 altogether and buying it at forfeiture is something that
9 responds to a calamitously bad situation in the marketplace.

10 It's also perhaps relevant that the mandate to
11 run the program to the extent possible at no cost to the
12 taxpayer.

13 COMMISSIONER JOHANSON: Right. And I would just
14 like to clarify again that I do not work for a sugar state
15 Senator, it was just my observation from someone in the back
16 of the room that that was the case.

17 And I'd like to refer again to Doctor Kaplan's
18 report. His report which was submitted by the Mexican Sugar
19 Chamber indicates that the floor price established in
20 agreements for raw sugar is higher than the actual raw
21 prices in 30 of the last 33 years and that the price floor
22 established in the agreements for refined sugar is higher
23 than the actual refined prices in 28 of the last 33 years.
24 That sounds kind of compelling to me. I know that you all
25 have gone over this before, but I'm still struck by these

1 numbers. Could you maybe discuss it a bit more?

2 MR. GORRELL: Yeah, I think the raw sugar price
3 is very clear. Right, you know, 30 of the last 33 years,
4 you know, as I testified earlier, any time you got to above
5 24 to 24.5 cents a pound delivered to the east coast USA,
6 that that was a signal to the USDA to bring more sugar into
7 the country. I think the price behavior will show that.

8 We will -- you know, we would like the
9 opportunity as we've been invited to, to comment further on
10 Dr. Kaplan's figures in his brief. I didn't notice that,
11 you know, he commented that 28 out of the 33 years. But the
12 reality -- go ahead.

13 MR. MAGNUS: So the fact that the raw price is
14 above where it's been 30 of 33 years is additional pain for
15 these gentlemen. Right. Not a benefit.

16 On the refined price, to the extent -- it sounds
17 like the contention there is that they've been malingering
18 for decades in a situation where the pricing environment for
19 the product they make is not very good. And that's normal
20 and therefore it can't be injurious. Right?

21 That's not correct. And if I may, I will read to
22 you Mr. Greenwald's explanation of why that's not correct
23 from the preliminary injury conference.

24 "The testimony, as I understood, is they always
25 lose money, therefore they can't possibly be injured by the

1 terms of the statute you cannot accept these sorts of
2 fantastical arguments. It's possible to argue that any
3 situation is the norm, but if you're in business, you cannot
4 possibly contend that the norm is a money losing
5 proposition.

6 Below cost sales prices for the U.S. industry
7 have been locked in for the balance of this year. It is
8 impossible given the structure and purpose of the
9 antidumping and countervailing duty laws to say, well,
10 that's not injurious because it is your norm. It just
11 isn't.

12 While I understand the point, it seems it misses
13 the fundamental reason why the United States actually has an
14 antidumping and countervailing duty law."

15 So if the idea in Mr. Kaplan's analysis is, well,
16 this poor pricing environment and this compressed situation
17 and suboptimal results is the norm, it can't be injurious,
18 it can be injurious. They may have had any number of
19 reasons why they didn't complain about it. It now has been
20 complained about, and it was a significant part of the case
21 that the petitioners -- the coalition made at the
22 preliminary stage in this proceeding.

23 COMMISSIONER JOHANSON: All right. Thank you for
24 your responses today. I find them very useful. I have no
25 further questions.

1 VICE CHAIRMAN PINKERT: Commissioner Kieff.

2 COMMISSIONER KIEFF: So to pick up again where we
3 left off, the preliminary determination, as I understand it,
4 was made with respect to the industry as a whole; is that
5 right?

6 MR. MAGNUS: And it included findings that
7 telescoped in here and there. But, yes, it was also made
8 with respect to the industry as a whole.

9 COMMISSIONER KIEFF: So then isn't it possible
10 that one could view the statutory charge given to us today
11 through the lens of the industry as a whole and come to the
12 view that as a whole there has been elimination?

13 MR. MAGNUS: If this were a regular injury
14 determination, you would absolutely have to look at it that
15 way. There's court precedent on that. It isn't one.

16 Okay. This statutory provision talks about the
17 injurious effect being eliminated completely. Completely
18 meaning no injury continuing to be no injury, it's effect
19 remaining for any segment of the domestic industry.

20 So it is possible, it is always possible for any
21 decisionmaker to say for policy reasons, I have to pretend
22 that completely doesn't mean completely. We don't think you
23 should.

24 COMMISSIONER KIEFF: Yeah, I mean, I certainly
25 don't think of myself as doing anything approaching policy

1 or pretense. I mean, I could have false consciousness but I
2 am pretty sure that I am neither pretending nor doing
3 policy. I'm struggling with what I think boils down to a
4 kind of industry as a whole type approach or an every single
5 member of the industry type approach. And whether you look
6 at it through the lens of group dynamics or look at it
7 through the lens of public choice, or look at it through the
8 lens of as a whole modifiers, I'm just -- if I'm following
9 your argument, it basically boils down to two things, that
10 Mr. Spak nicely highlighted it at the opening which is, you
11 know, it's 100 percent for 100 percent of the members. And,
12 you know, at that point your facts -- I mean, your facts are
13 pretty clear. You guys are really getting hurt, and, you
14 know, that's bad, no one wants that. But then the legal
15 standard, I think you're basically telling me that if I
16 agree with your legal standard, you win times ten. You win
17 emphatically and if I convince my colleagues to do the same,
18 then we get a majority. But, if, you know, if it turns out
19 the view of the Commission is not on the legal question
20 identical to the one you're giving us, you're out of luck
21 even if everybody believes your facts. In fact, you're in a
22 sense a double victim. We totally agree that you're very
23 badly hurt and there's nothing we can do about it.

24 MR. SPAK: Commissioner Kieff, I don't agree with
25 that. I mean, I just think that if you agree to our facts,

1 you could even disagree with us on the standard and you
2 might say that there could be a little bit of remaining
3 injury. If you wanted to go in that direction, say, the
4 statute says completely, but it really can't mean
5 completely, it can't mean every ounce if we were to put it
6 on a scale, right.

7 COMMISSIONER KIEFF: I mean, I take it the other
8 side is -- I mean, we'll see, we'll hear from them, but I
9 think if they're going to say something like, it does mean
10 something pretty close to every ounce. But, you know,
11 through the lens of the industry as a whole, and the
12 industry as a whole has spoken, and they disagree with you.
13 You're a minority, they're a majority, the end.

14 MR. SPAK: I think, you know, a court looking at
15 this would say, if that's what Congress meant, they sure
16 didn't say it that way.

17 COMMISSIONER KIEFF: All right. Well, let me ask
18 then some other broad systemic questions. It sounds like
19 you were saying, in our first round, that you're in a sense
20 -- find yourselves today a victim of the scope set
21 yesterday, that if you could -- if we weren't -- if we
22 weren't in this particular procedural posture and you were
23 not part of a settlement, then you would be able to bring a
24 new case saying, hey, look, we're really getting hurt by
25 these imports. And it's the happenstance that you're part

1 of a scope that led to a settlement that you're now
2 precluded from bringing a new case. Do I have the path
3 dependency right?

4 MR. MAGNUS: That's not at all what -- it is true
5 that these companies are domestic producers because of the
6 way that the request for import relief was originally
7 formulated. That's true.

8 The problem that they're experiencing isn't their
9 inability to seek import relief. The problem that they're
10 experiencing is that these suspension agreements pronounce a
11 death sentence on their businesses. They were experiencing
12 the harm associated with the unfairly traded Mexican
13 products before, but did not join in the request for import
14 relief. They were experiencing the harm. You looked at the
15 segment of the industry and observed that they were
16 experiencing the harm. But they didn't choose to file.

17 COMMISSIONER KIEFF: So it sounds like this isn't
18 really -- in your view this is just a really, really easy
19 case for us. That after all you're clear -- I mean, the
20 degree of your harm seems very clear. And I don't think any
21 of us is seriously questioning it. But in effect your
22 negotiators didn't negotiate on your behalf. They
23 negotiated on the behalf of others to your detriment. And
24 you're saying that when it plays out that way, the statute
25 is written specifically to target that effect. It's

1 designed to say, negotiations on behalf of the heterogeneous
2 group really have to some extent reflect the diverse
3 interests of the group.

4 MR. MAGNUS: And the facts. Okay. Again, it
5 isn't just the way they voted, it's the facts that they
6 brought forward. It's what these agreements don't do in an
7 objective sense, not who holds which opinion or which view.
8 Okay. The statute does not entitle them to a negative
9 determination here because they're opposed, but because of
10 what they've been able to prove. And based on what they've
11 been able to prove, a statute that requires complete
12 elimination of the injurious effect is one under which they
13 have to succeed.

14 COMMISSIONER KIEFF: So why would Commerce, when
15 negotiating on your behalf, simply ignore the harm that is
16 happening whether your client noticed the harm or not?

17 MR. MAGNUS: It wasn't negotiating on our behalf.

18 COMMISSIONER KIEFF: So it sounds like you had a
19 bad agent.

20 MR. MAGNUS: No. Didn't have an agent at all.
21 Commerce was negotiating on behalf of Uncle Sam and the
22 petitioners group, and not these companies.

23 COMMISSIONER KIEFF: But then why would -- you're
24 saying that the logic behind the statutory framework is send
25 someone who doesn't represent your interests and in fact can

1 be directly adverse to your interests to go strike a deal
2 and then after the deal is struck, shock of shocks, doesn't
3 represent your interests, we then tell them to go do it
4 again until it represents your interests?

5 MR. MAGNUS: With some criteria in the statute
6 that prevents abuse. Okay. The whole point is that in
7 order for this to stand it has to completely remove the
8 injury. Okay. That doesn't preclude suspensions from being
9 negotiated in the future. It establishes rules of the road
10 and guidelines that are perfectly plausible for Commerce to
11 follow in the future.

12 COMMISSIONER KIEFF: So it sounds like you're
13 saying, the bonding mechanism to make Commerce integrate
14 into its thinking your interests is a proceeding like this
15 one where if it turns out they haven't we then, pretty
16 quickly, pretty easily, send it right back to them to say,
17 gosh, guys, you forgot to integrate the interests of these
18 domestic businesses.

19 MR. MAGNUS: Well, specifically you're not really
20 going to be making a finding on their process. You're going
21 to be making a finding that is an objective finding about a
22 pair of agreements that are in front of you that you have to
23 evaluate as they are, free of any kind of rose-colored
24 glasses, based on what they say and what they will and won't
25 do and which injurious effects have been eliminated.

1 Okay. You're not sitting in judgment of
2 Commerce's process for how badly they treated us, you're
3 finding whether the agreements do or do not completely
4 eliminate the injurious effect. Injurious effect is one
5 that you identified in the first place, and they can get it
6 wrong if they conclude that the injurious effect has been
7 purged, they can get it wrong and you're a check on that.

8 MR. SPAK: And if I could just add, Commissioner
9 Kieff, I mean, conceptually I would like to agree with you.
10 I think you've got it. I mean, I think that if Commerce
11 made a mistake, this is what Congress put into the statute
12 to make sure the mistake didn't give memorialized into
13 agreements that were going to affect all the members of the
14 industry going forward. I think you've got it. And I would
15 agree conceptually with that.

16 And I want to just make one final point which is
17 that Commerce -- there are other factors in the statute that
18 direct Commerce in its negotiations. For example, it has to
19 make a determination which the Department has done about the
20 public interest. So that's within their realm under the
21 statute. What's not under the realm is the final decision
22 as to the injurious effect and the complete elimination of
23 the injurious effect. I hope that's clear.

24 COMMISSIONER KIEFF: And I notice I'm out of
25 time. Thank you.

1 COMMISSIONER JOHANSON: Commission Schmidtlein.

2 COMMISSIONER SCHMIDTLEIN: Thank you. I
3 apologize, we are well into the lunch hour at this point.
4 And I always find myself asking, as we get to the close of
5 one of the panels, do I understand the main points. And so,
6 I apologize in advance. Sometimes during these rounds of
7 questions things get asked more than once, and, you know,
8 you can't -- if you didn't ask the question, you may not be
9 -- you know, one of us may not be clear on the answer.

10 So I had two things I wanted to make sure I
11 understand before we walk out.

12 One is, this idea of this implied constraint.
13 And I invite you to also follow up and answer this in
14 writing. But if I understand your position correctly in
15 that the agreement is going to allow in an exceptional
16 amount of refined sugar not enough raw sugar for you to
17 maximize your capacity utilization; correct?

18 And I guess my question is, just to be succinct,
19 is, but why can't you purchase that raw sugar from other TRQ
20 countries? And if you can't, and it's because the TRQs
21 aren't high enough, isn't that a problem that U.S. or
22 Congress/USDA has created under the sugar program of which
23 they're monitoring and could theoretically fix?

24 MR. GORRELL: To answer your last question
25 first --

1 COMMISSIONER SCHMIDTLEIN: Yeah, yeah, sure.

2 MR. GORRELL: They can't fix that, because the
3 USDA is mandated to keep an orderly supply in this market,
4 and above all, make sure that -- do their best to ensure
5 that the program is run at zero cost, right. So if you look
6 at the broad context of the U.S. sugar market, the domestic
7 producers get to sell first, right. They're protected.

8 COMMISSIONER SCHMIDTLEIN: Correct.

9 MR. GORRELL: And as they have outlined in
10 their brief, they don't necessarily have the luxury of
11 stocking and restocking, reacting to market. They have to
12 sell yes or yes, right. So then look at -- and they cover
13 about 75 percent of the market, right? So the balance is
14 the import, which is broadly speaking three million tons.

15 To the extent that Mexico sends refined sugar
16 to the United States, it's crowding out the ability for the
17 USDA to act in their other mandate under the statute, which
18 is when the country needs more sugar, it brings raw sugar
19 from those other TRQ countries. So when we give you figures
20 about what we expect our capacity utilization rates to be,
21 those capacity utilization rates are based off of the TRQ
22 sugars that we expect to get.

23 But we can't get anymore, because the USDA
24 won't let any more in, and the whole program is designed to
25 allow the domestic producers to sell first. If not for

1 Mexican refined sugar exports, allow the domestic refining
2 capacity to be maximized, right. What we're really sitting
3 here not necessarily asking you to judge, because as Greg
4 and John point out, you guys, as I understand, are meant to
5 judge whether the injury remains or not.

6 But what we're really debating about here is
7 whether on the margin, within that three million tons of
8 imports, of which the TRQ rights are embedded in WTO
9 agreements and you can't take them away, right. But within
10 the last of the margin, are we importing unfairly traded
11 Mexican refined sugar, or are we importing raw sugar that
12 goes through the refineries and are processed by domestic
13 businesses and domestic workers?

14 That's what we're really debating here, when
15 we're debating whether the raw is white at 70-30 or 47-53 or
16 100-0. I mean and just, I guess the last point which, in
17 terms of completely eliminate, if not for policy
18 considerations, right, if not for fear that a dispute with
19 Mexico would potentially put at risk the sugar program,
20 right, the domestic producers predominantly are sellers of
21 refined sugar.

22 So when that purple line is up near the highs,
23 they're doing a lot better off than when the purple line is
24 down at the lowest, because as we've testified, 30 of the
25 last 33 years the raw sugar price is between, you know,

1 around 21 to 24 cents per pound, because the government has
2 a mandate to keep it up above 21, below which you get loan
3 defaults.

4 And they have shown in their actions that
5 above 24 to 25 cents, so long as the world market's not at
6 30 cents, you know. When the world market is where it is
7 today at 15 cents, the USDA has the mandate to act, has
8 acted and will continue to act to bring raw sugar into this
9 country in this price range.

10 So if, you know, we reform the mix of refined
11 versus raw sugar imports back from 36 percent, which is
12 where they peaked in 2012-'13, back to something in the
13 historical normal range, then that has the impact of raising
14 the bulk refining margins, and done in the context of a raw
15 sugar market that's based off of 21 to 24 cents a pound.

16 Every domestic producer out there, barring a
17 couple of guys that sell raw sugar instead of refined sugar,
18 the large majority of this industry is better off.

19 COMMISSIONER SCHMIDTLEIN: So prior to 2008,
20 what was Mexico importing into the United States in terms of
21 raw versus refined sugar?

22 MR. GORRELL: I'd like to respond --

23 COMMISSIONER SCHMIDTLEIN: You can do that in
24 writing, yeah.

25 MR. GORRELL: Yeah. If I could, I'd like to

1 respond later. But if you even go to 2007-2008, the year
2 that the -- it's October of 2007 through September of 2008,
3 the figure that I have in front of me, I'd like to reconfirm
4 it in our brief.

5 COMMISSIONER SCHMIDTLEIN: What I was really
6 getting at is before the NAFTA commitments completely kicked
7 in, right. So before that, Mexico apparently was under some
8 type of tariff quota, right?

9 MR. GORRELL: Much, much, much. Yeah, much
10 lower numbers. Pat may know, but even during October 2007
11 through September 2008, the figure from Mexico I have in
12 front of me is 414,000 tons.

13 COMMISSIONER SCHMIDTLEIN: Of?

14 MR. GORRELL: Of --

15 COMMISSIONER SCHMIDTLEIN: Total?

16 MR. GORRELL: Yeah, total, total.

17 COMMISSIONER SCHMIDTLEIN: Total.

18 MR. GORRELL: That I'd like to reconfirm, but
19 I'm looking at a figure --

20 COMMISSIONER SCHMIDTLEIN: Total refined and
21 raw?

22 MR. GORRELL: I'd like to reconfirm, but I
23 believe, I'm fairly sure 414,000 tons of direct consumption
24 imports, yeah. I'm not sure within that year there were any
25 raw sugar imports that year.

1 COMMISSIONER SCHMIDTLEIN: So where were you
2 getting your raw sugar then?

3 MR. GORRELL: From TRQ countries. The USDA
4 was systematically bringing more raw sugar to the country
5 because the sugar -- the country was in need of more raw
6 sugar, right?

7 COMMISSIONER SCHMIDTLEIN: Okay.

8 MR. GORRELL: Greg keeps reminding me that our
9 capacity became impaired on February 7th, 2008.

10 COMMISSIONER SCHMIDTLEIN: Oh, okay.

11 MR. GORRELL: Right. So that's, you know,
12 Imperial wasn't operating between February 7th, 2008 and the
13 spring to early summer of 2009.

14 COMMISSIONER SCHMIDTLEIN: Okay, all right.
15 The last question I had has to do with the price of refined
16 sugar, and I understand and I think we were talking about,
17 I'm not sure if it was my last question or one of the other
18 commissioners, the idea that because Mexico's allotment of
19 raw sugar, even under the suspension agreement, is so large
20 compared to the other TRQ countries added together, that
21 that floor is going to essentially set the price, and all
22 these countries are going to hover around that or just below
23 it.

24 But you don't believe that's true with regard
25 to the price of refined sugar?

1 MR. ROSENZWEIG: That particular tail is not
2 big enough to wag the dog, you know.

3 COMMISSIONER SCHMIDTLEIN: Okay.

4 MR. ROSENZWEIG: As a percentage, refined
5 sugar is about eight percent of the total market.

6 COMMISSIONER SCHMIDTLEIN: The Mexican?

7 MR. ROSENZWEIG: So we don't believe that the
8 Mexican reference price, which still can very badly undercut
9 our pricing, we don't believe that that necessarily equates
10 to the bottom level that refined sugar can sell at. In
11 other words, there might be domestic constraints for
12 producers here. They need to move sugar. They have
13 logistical concerns. They shall.

14 COMMISSIONER SCHMIDTLEIN: And of course it's
15 not a ceiling?

16 MR. ROSENZWEIG: It's not a ceiling, but it's
17 certainly not a bottom either.

18 COMMISSIONER SCHMIDTLEIN: So could it go
19 higher? What would cause it to go above the --

20 MR. ROSENZWEIG: What would cause the
21 domestic price to go above the minimum derived Mexican
22 blended number?

23 COMMISSIONER SCHMIDTLEIN: So right, because
24 it seems like you're saying the Mexican reference price for
25 refined sugar is kind of irrelevant to the U.S. market

1 price?

2 MR. ROSENZWEIG: Well, I wouldn't quite go
3 that far. It's certainly relevant in that it is, you know,
4 as per the reference number, it generates the lowest
5 possible level that the Mexicans can sell at. It's not
6 necessarily the lowest level anyone else can sell at.
7 Domestic producers can still sell below that.

8 COMMISSIONER SCHMIDTLEIN: But it's such a
9 small amount that it's not going to really impact with other
10 sellers, because it's not enough to drive the market?

11 MR. ROSENZWEIG: I don't believe it's enough
12 to necessarily drive the market up. You know, market
13 behavior really depends upon the participants, their
14 economic requirements, their logistical requirements, their
15 perceptions as to what the market's doing. People react to
16 things that they perceive to be there. It's a benchmark
17 which the domestic sellers will know the Mexicans can't go
18 below.

19 But if they want to sell in the October-March
20 position, when their crop comes in, and they're fearful of
21 the Mexicans being, again our example 32-1/2 in Chicago,
22 they'll sell below that, if that's their determination. Now
23 they may well say that they try not to. Like any business,
24 they would try to maximize their value.

25 But all we're saying is that it doesn't

1 represent a minimum price we could go to, and our refining
2 margin is basically inadequate as this. We simply cannot
3 compete, because these suspension agreements, if allowed to
4 stand, institutionalize a position where we're going to be
5 tight for supply. We're going to have a shortage which is
6 going to result in high pricing.

7 It's got two lower reference numbers. So we
8 could be undercut by them or the domestic industry, or
9 domestic growers, and it's just the margin is unacceptable
10 now. You know, you just bumped our cost of goods at a
11 minimum 20 percent, and I can certainly give plenty of
12 examples where it will be higher than that.

13 If we get a peso shipped, an appreciation in
14 the peso, all other things staying the same in Mexico, the
15 Mexicans will be obliged to raise their dollar price above
16 the math that's shown on this slide, okay, because they have
17 to honor their price undertakings under the suspension
18 agreement. So they would have to continue to raise their
19 prices to us.

20 COMMISSIONER SCHMIDTLEIN: Okay. But I guess
21 what I'm struggling with is how can -- if the amount of
22 refined sugar is not enough to affect the overall price on
23 the markets, and it's a floor, not a ceiling, then how is
24 the set price, the reference price in the suspension
25 agreement causing a problem, okay? And that's putting aside

1 the question of if it is causing a problem, legally whether
2 that's an issue that we can, you know, deal with because
3 it's not a problem caused by dumped imports.

4 MR. GORRELL: Sure sorry. I think the
5 simplest way to explain it, right, and if you look at this
6 grid here, I'm going to consolidate New York and New Jersey
7 area, right. If you look at New York, New Jersey, Atlanta,
8 Los Angeles, Chicago and Dallas, right, Imperial Sugar has
9 sold 50 pound bags and continues to sell either 50 pound
10 bags or one ton bags of sugar into all of those markets in
11 the last 12 months, right.

12 If you are a Mexican supplier and you're able
13 to land sugar, as you can see in the bottom section there,
14 anywhere between 31 cents a pound and 33 cents a pound, all
15 right, and you're a domestic refiner, and that's the minimum
16 reference price, right. If you're a domestic refiner, your
17 landed cost is somewhere in that neighborhood, broadly
18 speaking. You know, that's not our privileged APO data, and
19 you can probably see it. We can do some followup analysis
20 if you'd like.

21 But broadly speaking, it's anywhere between
22 37.72 and 42 cents, right? The way this works in the real
23 world is if I offer a 50 pound bag at 38.72, because it
24 happens to be my cost, whether it is -- the Mexican will say
25 well, I'll offer 37. If I go say well, how about 36?

1 Mexicans are well, how about 35? Then I say well how about
2 34?

3 By the time I get to 34, the math doesn't work
4 for us anymore, and you just keep going down until the
5 Mexican finally stops and says well, I'm sorry. I can't
6 sell below 32.50 delivered Chicago.

7 COMMISSIONER SCHMIDTLEIN: Yeah. I guess I
8 understand, I guess. But I still come back to that's just
9 Mexico, and they're not affecting the price in the bottom
10 market, so -- according to you all's testimony.

11 MR. GORRELL: But this is on the margin,
12 right, and what we're really talking about is those marginal
13 tons, that marginal one million tons, and as it relates to
14 Imperial, you know, you've heard me testify we're 22 percent
15 of the destination refining capacity. So our marginal is
16 220,000 tons. It does affect us, big time.

17 COMMISSIONER SCHMIDTLEIN: Okay.

18 MR. MAGNUS: Even if it does not set the
19 market clearing price for refined sugar in the United
20 States, that doesn't mean that being 10-6, six cents above
21 them isn't a problem for the domestic cane refiners.

22 COMMISSIONER SCHMIDTLEIN: Okay, I get it.
23 Fair point. All right, thank you. My time's up.

24 VICE CHAIRMAN PINKERT: Are there any
25 additional questions on this side? Commissioner Johanson.

1 COMMISSIONER JOHANSON: Thank you, Vice
2 Chairman Pinkert, and sorry to keep you all here a little
3 longer. I know we're all hungry and cold, but I just want
4 to ask you one more question, which is a legal one.
5 Commerce contends that the type of guaranty that AmCane and
6 Imperial seek, that they be insured a generous supply of
7 inexpensive raw sugar, is not part of what Congress intended
8 when it requires certain suspension agreements to eliminate
9 the injurious effect from dumped or subsidized imports.

10 How do you respond to Commerce's position that
11 your requirements for structuring the suspension agreement
12 go beyond a level of and are different -- and are of a
13 different nature than those addressed by the normal
14 operation of the AD-CBD laws. The AD law, for example,
15 requires agreements to prevent "suppression or undercutting
16 of price levels of domestic products." Yet your position
17 seeks the maintenance of low prices for all of the sugar
18 refining.

19 MR. MAGNUS: So in the McInerney memo that
20 you're reading from, among other things, pretty badly
21 misunderstands the nature of the injurious effects that the
22 companies are raising in this proceeding, and says, you
23 know, those are forms of harm that are not part of the
24 concept of injury embodied in Title VII.

25 But they are. It's a COGS to revenue squeeze

1 of underselling. Those are core Title VII injury concepts,
2 and absolutely part of the findings that the Commission made
3 at preliminary. So to say that somehow they're bringing
4 forward categories of injurious effect that have nothing to
5 do with Title VII injury, or that somehow they're asking for
6 something in the suspension agreement context that --

7 You know, I mean look. Mr. McInerney's punch
8 line was that not only was it not required that Commerce
9 design the suspension agreements in the way that these
10 companies want, but actually it would have been unreasonable
11 to do so, okay. Love to help you, but it would be unlawful
12 if we took care of your problem in the suspension agreement.

13 It's a neat trick, but it's wrong. It's just
14 not correct. There's nothing at all in the anti-dumping law
15 that requires Commerce to design an agreement that sorts out
16 one segment of an industry and shafts another. Nothing
17 whatsoever, and no way to -- you've heard this morning the
18 evidence that's been presented on the surviving injurious
19 effects not eliminated by these agreements, and they are
20 right dead smack in the middle of the normal batch of things
21 that you normally look at in an injury analysis:

22 COGS to revenue squeeze, underselling,
23 overhang of contracts into which injury is baked in that
24 require deliveries far into the future, prices that are low
25 because of Mexico's dumping, binge of dumping and that will

1 continue to hit the P&L all the way through the current and
2 the next crop cycle.

3 None of that is outside the concept of Title
4 VII injury, and addressing it in a suspension agreement
5 would not in fact have been unlawful.

6 MR. SPAK: Excuse me, Commissioner.

7 COMMISSIONER JOHANSON: Yes.

8 MR. SPAK: If I could just add, we're not --
9 nobody asked them to guarantee anything, right. Nobody
10 asked them to guarantee. So I don't think it was meant to
11 be characterization of our position, at least I hope not,
12 because nobody ever really asked that. What the companies
13 asked was to ensure that they would be in a position where
14 they could run their facilities, employ their workers, have
15 the supply to do so, and not be caught in this margin
16 squeeze, right?

17 So that's what the ask was, and we don't see
18 anything in the statute that prevents that, and those
19 concepts are completely consistent, as Mr. Magnus said. I
20 would just add, I mean I really don't think, and I think
21 Commerce would tell you, that they never got to this level
22 of detail in looking at the analysis. I really -- I think
23 that's clear.

24 In fact, when I looked at the Department's
25 memo, I stopped at the end of the first paragraph, and I

1 said normally, the Department regards the satisfaction of
2 this condition as implicit in reaching such agreements. So
3 to me, it seems to me that they approached this like just
4 any other negotiation, without really looking that hard.

5 These gentlemen here are telling you what the
6 real world consequences are, and whether the injurious
7 effects were removed.

8 MR. ROSENZWEIG: And if I may add a non-legal
9 point, but Dr. Kaplan, whose testimony or submission was
10 spoken to earlier, stated that the raws price from this
11 agreement would generate a price higher than 30 out of the
12 33 years. He's gone back, and I don't know how to reconcile
13 that with Mr. McInerney's concern or statement that all we
14 want is cheap sugar.

15 COMMISSIONER JOHANSON: Yes, go ahead, Mr.
16 Magnus.

17 MR. MAGNUS: The input, actual input, was not
18 focused on the raw reference price in any absolute sense.
19 It was focused on the spread, the implied refining margin,
20 not on the absolute level of the raw reference price, okay,
21 and that submission is a matter of public record, and it's
22 been badly misdescribed in Commerce's memo, which I regret.
23 But you can read it, anybody can read it. It was a comment
24 about the spread between the two reference prices and the
25 implied refining margin that that sets. So he's not

1 correctly described what was asked for.

2 COMMISSIONER JOHANSON: It does seem at the
3 end of the day, and I brought this up earlier, you have the
4 problem of the suspension agreement, which covers both
5 processors and producers, and I don't -- it would be very
6 hard to come up with a suspension agreement, I would think,
7 that would address the concerns of both sides.

8 I know y'all have said that's possible, but at
9 the end of the day, AmCane and Imperial of course want
10 lower-priced, raw Mexican sugar, and the U.S. producers
11 would not favor that.

12 MR. GORRELL: May I respond to that?

13 COMMISSIONER JOHANSON: Yes.

14 MR. GORRELL: I think it would be very easy to
15 get the domestic producers, the processors aligned and
16 according to my knowledge, that was the starting point for
17 the American Sugar Coalition when they sat down to do a deal
18 with Mexico, and that was to allow Mexico to have their 100
19 percent of U.S. import needs, that is extremely valuable to
20 the Mexican industry.

21 I mean just that statement in itself is worth
22 hundreds of millions of dollars per year to the Mexican
23 domestic industry, and it allows them to support their
24 domestic market at levels that are well above the world
25 market. This is something that India or Thailand or Brazil

1 or Australia, they would kill for this, right.

2 Don't take it literally but, you know, this is
3 golden. There has been pushback from the other Tier 2
4 countries to our government to say hey, what about us,
5 right? But that starting point would have 100 percent
6 alignment with this industry, and it's something that they
7 were asking for, because it sort of fits with the mandate of
8 the farm bill, to say well yeah, we give the domestic
9 producers the first shot, and then after that, we allow the
10 domestic refining industry to become maximized, and then
11 after that we allowed refined sugar imports.

12 So that we have universal alignment between
13 people sitting at this table, the domestic industry and
14 probably even CSE Sugar. You could ask him that later on.
15 He's also a domestic refiner. I don't know. I don't speak
16 for him. So that's very doable. The problem in this whole
17 thing is the political calculus that goes on if the Mexicans
18 say no, right.

19 So the Mexican side, you know, bluntly asked
20 for the right to continue injuring this cane refining
21 industry, in exchange for a trade-off where they quite
22 frankly, and they've put it into the press, did not put
23 tariffs on high fructose corn syrup imports from the United
24 States to Mexico. This is where, as Greg was saying,
25 broader public policy and, you know, the non-injury related

1 things.

2 That was very clearly in Commerce's mind and
3 USDA's mind during these negotiations. I know that, because
4 I spoke to them about it, all right. So there can be
5 alignment. I'm certain of that.

6 MR. ROSENZWEIG: Just to clarify one point.
7 You said we need prices low. We don't need prices low. Our
8 concern is --

9 COMMISSIONER JOHANSON: You would prefer
10 prices low, of course?

11 MR. ROSENZWEIG: No, not necessarily. We
12 prefer a margin. It doesn't matter if the prices are high.
13 If the world market, the No. 11 contract that we referred to
14 earlier, went up and it lifted the domestic price here to 30
15 cents, we don't mind, provided that we have an operating
16 margin to sell our white sugar at.

17 COMMISSIONER JOHANSON: All right. Thank you
18 for your responses. I know it's been a long morning, but I
19 found them very informative. Thanks.

20 VICE CHAIRMAN PINKERT: Commissioner Kieff.

21 COMMISSIONER KIEFF: So just in the interest
22 of time, I'll ask for this in the post-hearing. But if you
23 could just explain in the post-hearing anything we should
24 keep in mind about the different branch of government
25 problem. So you know, I think that you -- this last

1 exchange with Commissioner Johanson highlights the problem.
2 If someone went and negotiated, they represented the
3 country. They didn't represent you. They got a deal that
4 met a lot of needs, not yours, and kind of what do we do
5 with that?

6 Do we -- are there any legal -- is there any
7 special deference we owe them as a branch of the government,
8 or does it all just boil down to Slide 1, the preliminary
9 determination, and the fact that Slide 1 is still there?

10 So if you could just in the post-hearing talk
11 about that, and otherwise I just can't emphasize enough how
12 helpful the lawyers and the clients have been in carefully
13 explaining the business, the politics and the law, which
14 unfortunately are a mess and I happen to be struggling with,
15 and you've been each extremely helpful.

16 So just I can't thank you enough for taking
17 the time to carefully explain it. Thank you. I look
18 forward to reading your post-hearing submissions.

19 VICE CHAIRMAN PINKERT: If Commissioners have
20 no further questions, does staff have any questions for this
21 Panel?

22 MS. HAINES: Elizabeth Haines. Staff has no
23 questions.

24 VICE CHAIRMAN PINKERT: Thank you. Do those
25 in opposition to the petitions have any questions for this

1 Panel?

2 MR. GREENWALD: We have none.

3 VICE CHAIRMAN PINKERT: In that case, I do
4 think it's time for lunch hour. We will resume at two
5 o'clock. The hearing room is not secure, so please do not
6 leave confidential information out in the room, and I want
7 to thank all of the witnesses for coming today and for
8 answering our questions.

9 (Whereupon, at 12:59 p.m., a luncheon recess
10 was taken.)

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1 A F T E R N O O N S E S S I O N

2 MR. BISHOP: Would the room please come to order?

3 CHAIRMAN BROADBENT: Are there any preliminary
4 matters for the afternoon session, Mr. Secretary?

5 MR. BISHOP: Madam Chairman, I would note that
6 the panel in opposition to the 704734 petitions have been
7 seated. All witnesses have been sworn.

8 CHAIRMAN BROADBENT: Thank you, Mr. Secretary. I
9 want to welcome the second panel to the ITC. I would like
10 to again remind all witnesses to speak clearly into the
11 microphone and state your name for the record for the
12 benefit of the court reporter.

13 You may begin when you're ready.

14 STATEMENT OF JOHN D. GREENWALD

15 MR. GREENWALD: Thank you, Madam Chairman. My
16 name is John Greenwald. I'm appearing today on behalf of
17 the American Sugar Coalition. With me are my partners, Bob
18 Cassidy, Jennifer Hillman, and Jim Cannon.

19 We're a little worried about giving you an
20 overload on the legal side of things as opposed the business
21 side, but the issues that are before you here are more legal
22 than let's say in most of the cases that come before you.

23 When Petitioners opened their case this morning
24 they did it a way that struck me as something of an
25 overstatement. They said that the domestic industry, the

1 domestic sugar industry is split on the agreements that are
2 now before you. The domestic is split only in the narrowest
3 technical sense. The Coalition that we represent accounts
4 for over 90 percent of domestic sugar production. And it
5 includes cane growers, beet farmers, sugarcane mills,
6 sugarcane refiners, and beet processors.

7 This Coalition supports the suspension agreements
8 that were negotiated between the U.S. Government and the
9 Government of Mexico. We believe they completely eliminate
10 the injurious affect found by the Commission -- let me stop
11 here for a minute and talk about what that affect is and at
12 least how we view the task that is before you.

13 The anti-dumping statute, countervailing duty
14 statute makes a very clear distinction between
15 investigations of dumping and countervailing and injury.
16 You were vested with deciding whether or not injury exists.

17 Now, it is true that the Commerce Department can,
18 and in this case did, enter into agreements to suspend an
19 investigation if they find that the suspension eliminates
20 completely the injurious affect found to exist.

21 At the time, the only injurious affect at issue
22 was that found by this Commission in the preliminary
23 determination. You found a reasonable indication of
24 material injury to the domestic industry as a whole. You
25 did not find any particular company or any particular subset

1 of that industry was injured, rather you found injury to the
2 industry as a whole.

3 As I understood the testimony this morning there
4 isn't really any disagreement on that. So, the issue before
5 you, it seems to me, by both the language and the structure
6 of the statute, is do the agreements signed by the
7 governments of the United States and Mexico eliminate the
8 injury that you found to exist to the domestic industry as a
9 whole.

10 That injury was injury by reason of imports from
11 Mexico, and it was a combination of the volume effects.
12 There was a very large increase, which you know well in the
13 volume of imports and the pricing affects of those imports.
14 So, the first question that seems clearly to rise is do the
15 agreements address and eliminate the affect of this very
16 large surge in imports from Mexico and the affect of pricing
17 of the imports?

18 I don't think the answer to that is in question.
19 The agreements limit the volume of imports that may enter
20 from Mexico to U.S. needs, as determined by the Department
21 of Agriculture under a formula. They changed dramatically
22 the situation of Mexico's participation in the U.S. market
23 from before until after.

24 Before, Mexico was free to ship as much sugar as
25 it wanted to duty-free and tariff-free. It can no longer do

1 that. Before Mexico was free to ship all the refined sugar
2 it chose to ship. It can no longer do that. The agreements
3 do not limit in any way the amount of raw sugar that Mexico,
4 except by the overall limit. What they do do is within that
5 overall limit establish a ceiling on the amount of refined
6 sugar, as defined by the agreement, that may come in.

7 When you limit supply and you bring imports from
8 Mexico under a sugar program, you are necessarily limiting
9 the price if you believe in sort of basic market economics.
10 That reduction in supply has an impact on price. But the
11 agreements went a step further. What they also do is
12 establish floor prices below which the Mexicans are not
13 permitted to sell in the U.S. market because the agreements
14 eliminate -- not eliminate -- they address, I think, 85
15 percent of the dumping issue as found by the Department of
16 Commerce. And those prices were established by Commerce,
17 negotiated, and Commerce has found that they meet the
18 requirements of the statute in terms of eliminating most of
19 the margin of dumping.

20 That particular issue isn't before you, but the
21 point I want to make for you is that the price provisions of
22 the agreement are in addition to the volume provisions and
23 that they are floor prices.

24 I was struck today that the entire presentation
25 made on behalf of Imperial and AmCane was predicated on the

1 proposition that floor prices are market prices, and I have
2 no idea why. The margin calculations, so much of what their
3 testimony was, essentially assumed that on a going forward
4 basis the floor prices in the agreements will set market
5 prices in the United States. I have no idea why.

6 But as that relates to the issue before you, it
7 seems to me to raise a critical issue. When they are
8 talking about the margin, they're not talking about what
9 happened in your period of investigation. They're not
10 talking about how the agreements addressed the indication of
11 material injury that you found during your period of
12 investigation. They are talking about what the agreements
13 mean in terms of the future. And with respect, that is not
14 an issue that is before you.

15 Commerce does not have the authority to determine
16 what injury there might be in the future. And frankly, is
17 not part of the statutory construct. The statute tells
18 Commerce it's free to negotiate agreements that eliminate
19 the injurious affect.

20 Another point that I would like to raise, and it
21 was glossed over, not discussed. If we are right that the
22 injurious affect is this aggregate finding of material
23 injury by reason of subject imports, then the use of the
24 singular, the affect, makes sense.

25 If, on the other hand, what's at issue is whether

1 or not the agreements eliminate all the affects of the
2 imports at issue you would have to use the plural, and the
3 statute doesn't. Simply put, the language of the statute
4 follows the structure of the statute. There's a material
5 injury finding based the evidence that you had before you.
6 And the question is do the agreements address the volume
7 affects or the volumes, the price and price affects that you
8 found to exist?

9 One final point I would like to make and that has
10 to do with this peculiar provision of the statute. I
11 shouldn't use the word "peculiar," but it's unique. It
12 addresses the particular problem of the issue of injury
13 where you have an agricultural support program.

14 USDA had to intervene in the market. We submit,
15 and we think the record shows, that USDA's need to take a
16 million tons of sugar off the market was a direct
17 consequence of the volume and pricing of imports from
18 Mexico. That injurious affect, which I think you did
19 reference in your preliminary injury determination, has been
20 addressed by this agreement. I can't speak for USDA,
21 although on occasion I wish I could, but I can't.

22 But it is my understand that under the analyses
23 that they have done, had this suspension agreement been in
24 effect during your period of investigation there never
25 would've been any need for USDA intervention. And going

1 forward, there will be no need for USDA intervention.

2 One other point that I would like to make as you
3 consider this, the testimony before you today in the morning
4 focused very heavily on what's going to happen in the
5 future. And as I said, I don't believe that issue is
6 properly before you. However, you should know that the
7 agreements themselves have review provisions in them under
8 which the Commerce Department will review the operation of
9 the agreement on request, including whether or not there are
10 sufficient supplies of raw sugar for the U.S. cane sugar
11 refiners.

12 And that is a provision that was obviously of
13 interest to our members, our Coalition, and I suspect should
14 be of interest to AmCane and Imperial as they appear before
15 you today. The point I want to make is that while
16 projections about the future are not properly before you
17 there is, in fact, a mechanism in these agreements which
18 were carefully negotiated to address the issue.

19 Let me close, and turn the microphone over to Ms.
20 Hillman about the legislative history.

21 STATEMENT OF JENNIFER A. HILLMAN

22 MS. HILLMAN: I wanted to make just a couple of
23 quick points with respect to the legislative history of this
24 particular provision, in part, in response to a number of
25 questions that were raised this morning.

1 Just I think if you look back at the legislative
2 history of this it's very clear that the concern at the time
3 that this provision about this 75-day review that you're
4 engaged in came into the statute, the concern was that the
5 Treasury Department, which was then the administer of the
6 dumping statute, would enter into an agreement over the
7 objection of -- and it's very clearly stated -- of the
8 domestic petitioning industry who had won an affirmative
9 preliminary determination of dumping, who had won a
10 preliminary affirmative injury determination, and would
11 therefore be entitled to import relief.

12 And the concern was that Treasury would enter
13 into an agreement over their objection, and that was the
14 reason that this provision for this review that you're
15 engaged in was put into the statute. Obviously, since that
16 happened, the authority was transferred to the Commerce
17 Department to engage in the dumping and subsidy analysis and
18 to negotiate suspensions agreements.

19 And obviously, we've seen 36 years in which a
20 number of suspension agreements have been entered into, and
21 yet, no request of this kind has ever been made.

22 The second thing I would want to note about the
23 legislative history of this is that you heard a lot this
24 morning about how extraordinary this is and the reason that
25 this particular kind of suspension agreement is so

1 extraordinary is because it permits dumped and subsidized
2 imports to continue. That's not actually really accurate
3 because the statute itself defines what does it mean by
4 "extraordinary."

5 What is extraordinary about this, and the statute
6 explicitly defines extraordinary as meaning circumstances in
7 which the suspension of the investigation will be more
8 beneficial to the domestic industry than continuation of the
9 investigation. So, it is a defined term in the statute
10 itself. It then goes on to say that extraordinary
11 circumstances also includes the notion that the case be
12 complex.

13 And again here the legislative history is very
14 clear. Complexity simply means there would be a lot of
15 cases to investigate, there's a lot of firms to look at,
16 there's a lot of transactions to engage in, there's a lot of
17 people involved in or institutions involved in the
18 investigation. Clearly, we meet the terms of that. I mean
19 whether or not we here have the vast majority of the
20 domestic industry indicating that these suspension
21 agreements will be more beneficial to them than continuation
22 of the investigation. And secondly, we clearly have a
23 complex case.

24 So, in terms of meeting these kinds of notions, I
25 think that's clearly within what these agreements provide.

1 The third point would only be I think you heard a
2 lot of testimony that would suggest that these kind of "C"
3 agreements are going to continue to allow widespread access
4 of both dumped and subsidized imports to the market. And
5 again, statutorily, and these agreements, in specific, would
6 not allow that. Unequivocally, the statute has very clear
7 criteria for what kind of an agreement can fit within this.

8 First of all, it does have to eliminate a
9 significant portion of the dumping and the net countervail
10 subsidy amount clearly laid out in the statute. The statute
11 also indicates that it must prevent price suppression or
12 undercutting of domestic prices.

13 The question was raised this morning about how
14 exactly does that work. Here, again, the legislative
15 history is very clear, and I'll read it.

16 "Such an agreement must provide that the price
17 level of domestic products will not be undercut or
18 suppressed by such imports. The Committee -- and in this
19 instance it was the Ways and Means Committee -- does not
20 intend that this provision place obligation on the authority
21 to continuously monitor domestic price levels, but the
22 authority must be assured that this provision is being
23 satisfied and must respond to complaints that it is not."

24 And here again, these agreements come with a
25 Commerce Department finding that they have met these

1 criteria under the statute. And come with an administrative
2 review process so that if others are indicating that they
3 have not met this notion of undercutting or lack of price
4 discretion there is built within the suspension agreements a
5 mechanism for the Commerce Department to address those
6 concerns.

7 So, each of these very clear criteria that are
8 built into the statute and the legislative history of it are
9 within the suspension agreements themselves and are within
10 the Commerce Department's memorandum that has walked
11 through each of the criteria that permits them to enter into
12 these agreements within the context of the statute as it
13 exists.

14 STATEMENT OF IRWIN P. ALTSCHULTER

15 MR. ALTSCHULTER: Good afternoon. Thank you. My
16 name is Irwin Altschulter with Greenberg Traurig. We
17 represent the Mexican Sugar Chambers, and we appreciate the
18 opportunity to be here and we fully align ourselves with the
19 very clear testimony of the ASA just now.

20 I was going to brief. I will now be even
21 briefer, and make only a few points. I'll also mention to
22 the Commission that all of the witnesses listed as opposing
23 the current petitions are here and sworn and will be
24 available for your questions. We will have two witnesses
25 briefly, in addition to myself, Dr. Kaplan, and Juan

1 Cortina.

2 So, as I say, t o be brief, first two quick
3 opening thoughts. I thought this morning had an unusual
4 feel, maybe necessarily so, of a settlement conference. But
5 settlement has been reached and the ASA, the Petitioners in
6 the AV and CVD cases, which were filed on behalf of the
7 industry as a whole, is satisfied with the terms of the
8 settlement as struck by the suspension agreements.

9 And this morning's group seemed to suggest that
10 somehow their complaint is one of due process, that they
11 were somehow shutout of the process that has brought us here
12 today. Of course, that's not true. AmCane and Imperial
13 could've been active back to the early stages of the
14 Commission's and Commerce Department's preliminary
15 investigations. They could've expressed their concerns to
16 the Commission during the prelim phase. That is why we have
17 seriously questioned their standing to bring these
18 petitions. In any case, we remind the Commission that they
19 chose not to participate and their rights have not been
20 ignored or abused.

21 On the legal issues that Mr. Greenwald
22 summarized, we share the Commission's views. And most
23 critically, we think it is clear from the statutory language
24 and the scheme that it is the domestic industry, as a whole,
25 that must be the focus of the Commission's analysis. That

1 is the basis for applying the test of complete elimination
2 of injury.

3 Now, until the very end of this morning's
4 sessions it seemed to us that AmCane and Imperial realized
5 that that's the standard. And at the beginning, they kind
6 of gave lip service to it, but by the end it seemed that
7 they were clearly saying that the Commission must look at
8 the industry as a whole by looking company-by-company. That
9 doesn't quite work, and we disagree with that formulation
10 and think it's incorrect under the statute.

11 The agreements were designed to bring the
12 intended relief sought by the U.S. petitioning industry
13 under the U.S. law, less sugar from Mexico and higher
14 prices. As such, they address the crux of the injury
15 allegations made by the U.S. industry, too much Mexican
16 sugar at too low prices. Whether this goal is achieved by
17 the imposition of countervailing and anti-dumping duties or
18 through suspensions agreements doesn't matter as long as
19 relief is granted, and that kind of follows on Ms. Hillman's
20 comment a minute ago.

21 And the Petitioners, as I say, in the CVD and
22 anti-dumping cases, in their capacity as representing the
23 U.S. industry, are satisfied with their relief.

24 There's one other point I would make quickly
25 before turning to our other witnesses. And that is, it

1 seems to me there needs to be clarification about how the
2 quota actually works. There is no cap on raw sugar. A
3 hundred percent of the quota can be raw sugar. On the other
4 hand, there is a cap on what percentage of the quota that
5 can come as refined sugar. What will dictate the split
6 between the raw and refined sugar ultimately will be market
7 conditions.

8 So, I'm going to conclude my abbreviated remarks
9 and turn first to Mr. Cortina and then to Dr. Kaplan.

10 STATEMENT OF JUAN CORTINA GALLARDO

11 MR. CALLARDO: Thank you very much. Good
12 morning. My name is Juan Cortina. I'm Chief Executive
13 Officer of GAM, a publicly-owned group of Mexican sugar
14 mills, which is a subsidiary of Cultiba, a Mexican public
15 company that is quoted on the Mexican stock exchange. I'm
16 also Chairman of the Camara Nacional de las Industrias
17 Azucarera y Alcoholera, the Mexican sugar industry
18 industrial chamber.

19 In that capacity, I signed the anti-dumping
20 suspension agreement on behalf of the Mexican sugar
21 industry. In addition, I'm a permanent member of
22 CONADSECUA, Mexico's National Committee for the Sustainable
23 Development of the Sugar Industry.

24 I have over 20 years of sugar industry
25 experience, so I have seen the evolution of a truly

1 integrated North American sweeteners market under NAFTA,
2 especially the removal in 2008 of all barriers to Mexican
3 sugar entering the U.S. market and high fructose corn syrup
4 entering the Mexican market.

5 As a Mexican sugar businessman, I understand the
6 complexities of the U.S. market and the laws and policies
7 that establish a high degree of regulation and order to the
8 market. When anomalous circumstances developed in 2013,
9 especially the record harvest around the world and the
10 dropping of sugar prices all around the world too, political
11 and business strains were felt in both of our industries.

12 As I testified at the Commission's preliminary
13 injury hearing, I firmly believe that imports from Mexico
14 were not a cause of injury, but it became apparent to the
15 two governments and industries that it would be beneficial
16 to all parties if Mexico were brought inside of the U.S.
17 sugar program through the agreements on quantities and
18 prices, as permitted under U.S. law. These agreements were
19 negotiated carefully with input, not only from Petitioners,
20 but from others in the U.S. industry as well.

21 And now, Petitioners and the U.S. Administration
22 have concluded that with agreements in place there will be
23 no recurrence of the situation that developed in 2013.

24 MR. GALLARDO: Despite this it seems like the two
25 U.S. refiners speculate that there will be too little

1 Mexican sugar, prices are too high. Of course this is exact
2 opposite of the American Sugar Alliance complaint. And as
3 to their speculation, I can tell you that the agreements
4 will not change the historical trade flows between Mexico
5 and the United States and that raw sugar will continue to be
6 available.

7 After all the proportion of refined and raw sugar
8 did not change when all limits are displayed between raw and
9 refined were removed in 2008 when NAFTA came into effect.
10 So there's absolutely no reason to think the refiners would
11 lose anything now that the caps are in place.

12 To the best of my knowledge neither Imperial, nor
13 AmCane have come down to Mexico to buy sugar since the
14 agreements were signed. Obviously the concerns of the two
15 refiners are quite accurately described as unfounded
16 speculation. Mexico remains open for business with them and
17 there's plenty of Mexican sugar available for refiners to
18 buy and further process.

19 They can easily confirm this by meeting with
20 potential Mexican sellers and by buying or taking delivery
21 from the exchange.

22 Finally it's clear to us that Imperial and AmCane
23 are asking for things that go way beyond the scope of the
24 antidumping and CVD Petitions and the relief that the
25 Petitioner asked for and got. They are hoping to take

1 advantage of this situation to gain preferential treatment
2 under the agreements. Two very small entities and a large
3 U.S. industry are asking for unique protection and not from
4 unfairly traded imports.

5 This does not seem right under U.S. law or the
6 U.S. sugar program. We completely agree with the U.S.
7 Department of Commerce which said in its February 10th memo,
8 the problems and I quote "the problems which AmCane Sugar
9 and Imperial Sugar complained go well beyond the level loss
10 and are of a different nature than those addressed by the
11 normal operations of the AD and CVD loss or that Congress
12 intended to address in establishing the sugar program."

13 The agreements do what they and the U.S. law
14 intended them to do and they should remain in force, thank
15 you very much.

16 STATEMENT OF SETH T. KAPLAN

17 DR. KAPLAN: Good afternoon Commissioners and
18 Chairman, Vice Chairman, Seth Kaplan from Capital Trade.
19 I'm going to address three things quickly. First is the
20 size of the industry believing the agreements eliminate the
21 effects and the size of the value added of the group here
22 this morning.

23 From my understanding to find injury to the
24 industry as a whole after these agreements would be
25 extraordinary since well into the high 90% of the industry

1 thinks it solves the problem. The impression I got this
2 morning from the petitioning group was that if any single
3 firm felt that they weren't remediated by the agreement then
4 you should vote in the affirmative. I would point out that
5 AmCane by their view, AmCane alone the yellow sliver would
6 be enough to stop this, that's the numbers that fit with the
7 theory of what complete and industry as a whole mean.

8 Could you please go to the next slide and I just
9 want to run quickly through what the new floors do. This
10 was the old price floor to the sugar agreement and these are
11 the prices of refined sugar since 1981. The next slide
12 shows this was the revenues above the floor by the refined
13 sugar industry.

14 The next slide shows the new floor and the next
15 slide shows the increase in revenues throughout the period
16 from 1981 if the new floor holds. In particular this is the
17 period at the end of the period of investigation. As you
18 see the next slide is where prices fell as was described by
19 the morning group from a period in which no one in the world
20 could find sugar to their more historical levels.

21 This would be the increase to eliminate the
22 injury that the Commission found. Could you please go to
23 the next slide?

24 This shows the volume of imports from Mexico in
25 2013 the year the Commission showed particular interest and

1 what the level of imports would be under the suspension
2 agreement. Note that they would be less than half. So the
3 price issues that you had were resolved by the increase in
4 the floor, the volume issues are resolved by the CVD
5 agreement which would have limited imports significantly in
6 the 2012-13 period. This concludes my presentation here for
7 time issues. I thank you very much and I would be happy to
8 answer questions.

9 MR. BISHOP: Madam Chairman that concludes this
10 panel's testimony. I would also note that our embassy
11 witnesses from Mexico are available for questions Mr. Ramos
12 and Mr. Behar.

13 CHAIRMAN BROADBENT: Okay thank you Mr. Secretary
14 we will begin the questioning with Commissioner Williamson
15 please.

16 COMMISSIONER WILLIAMSON: Thank you. I would
17 express my appreciation to the witnesses, the lawyers for
18 being here today. My first question is this morning the
19 Petitioners gave us a calculation of their total cost to
20 produce refined sugar and argued that the price set by the
21 agreement for refined sugar will undercut them. If so,
22 partially answered that but I wanted a fuller response to
23 that.

24 DR. KAPLAN: Yes I want to make one point before
25 handing it off to Mr. Farmer who supplied the calculations

1 on delivery costs and he had them vetted by the Department
2 of Congress in the way he calculated the numbers that I used
3 but one of the key points I want to make is that this
4 morning the petitioning group testified that they believe
5 the market price for refined sugar could fall below the
6 floor and that would pressure them and I want to point out
7 in particular that once the market price for refined sugar
8 falls below the floor, imports from Mexico are zero.

9 So that the extent that they are concerned about
10 that -- any cause of effect on them cannot be due to Mexican
11 imports because Mexican imports are not allowed in below
12 that price floor which they say could be breached by
13 intra-industry competition in the United States solely by
14 U.S. refiners.

15 With respect to your question --

16 COMMISSIONER WILLIAMSON: Does that mean that
17 there -- they get cut off and the U.S.D.A. says there's
18 still a need, do they still have to fill it from Mexico or
19 does it make sense -- are they related?

20 DR. KAPLAN: It's my understanding that -- that
21 if the way U.S.D.A. calculates things that there would not
22 be a need of Mexican sugar should it fall below the floor
23 but should there be need they could raise the quotas on
24 other countries.

25 COMMISSIONER WILLIAMSON: Okay.

1 DR. KAPLAN: So, the key --

2 COMMISSIONER WILLIAMSON: That was my question
3 thank you, thank you.

4 DR. KAPLAN: By the agreement it can't be due to
5 Mexico because below the floor there are zero Mexican
6 imports and the reason that it can fall below the floor is
7 nothing to do with Mexican imports, it is due to the nature
8 of the refining industry and the excess capacity in the
9 United States which drives the margin down is the domestic
10 producers themselves compete.

11 I'm going to now hand it to Paul Farmer to
12 discuss the chart and what the prices were, but I would also
13 suggest that he has an intimate understanding of the
14 refining industry being a refiner and could discuss how the
15 domestic industry competition itself drives prices below the
16 floor without anything to do with Mexico, Paul?

17 STATEMENT OF PAUL J. FARMER

18 MR. FARMER: Good afternoon my name is Paul
19 Farmer. I am President and the majority owner of CSC Sugar,
20 headquartered in New Canaan, Connecticut. CSC is involved
21 in many aspect of the sugar business in the United States.
22 For the longest time for over 20 years we have been the
23 largest supplier of raw sugar to most of the refining
24 companies in the United States including ASR and Imperial
25 and still are today a large supplier to both of those

1 companies.

2 A few years ago we entered the refining business
3 building 5 small liquid refineries across the United States
4 and today we supply liquid sugar to customers from Vermont
5 to California every day. I did provide the information to
6 both the U.S.D.A. and to the Mexican government as far as my
7 cost price calculations on how -- what the competitive
8 environment would be under the suspension agreement.

9 I don't know if it's possible to bring up one of
10 the slides that Imperial presented this morning, the one
11 where my name was mentioned about 20 times, but their page
12 number 5 --

13 COMMISSIONER WILLIAMSON: I'm looking at it go
14 ahead.

15 MR. FARMER: So my goal in this price rejection
16 was to provide an approximate cost of refined sugar from a
17 cane refinery in the United States. So for instance it
18 would be we take some sugar from Mexico, a Mexican mill
19 delivered to the port, put it on a ship and bring it to New
20 York, Baltimore, Savannah, New Orleans or California.

21 And I came up with a price of about \$32.47 based
22 on an estimated average refining cost. And I believe
23 refining cost, depending on what the size of the company is
24 could be anywhere from say 4 1/2 cents a pound to 7 1/2
25 cents a pound, it kind of depends on the dynamics of that

1 company.

2 As far as the cost of refined sugar from Mexico
3 to the United States, I tried to give something like apples
4 to apples which would be if you bought refined sugar in a 50
5 kg bag which is the standard packaging in Mexico you would
6 have to bring it to a transfer point, transfer it to a
7 packaging which would be useable in the United States or at
8 least moveable in the United States which would generally be
9 a one ton sack or we will call it tote, and then you would
10 put it on a rail and you would ship it to a destination in
11 the United States, but it would rarely -- very rarely ever
12 go directly to an end consumer, it can't because it's
13 traveling thousands of miles, you don't know if it is going
14 to be there in 2 weeks or 6 weeks so you go to a
15 distributor.

16 The distributor receives in the sugar and chances
17 are he is going to repackage it, right? So to the
18 distributor is the price that I gave as far as the delivery
19 costs of Mexican sugar. To actually get to a customer, an
20 end use customer you have to add the handling costs for a
21 distributor which are at least a couple of cents a pound and
22 if he wants it in a 2 pound bag which I am assuming is what
23 Imperial is using for their refining -- or for their
24 packaging cost because it's 3 1/2 cents a pound, well you
25 have got to add that as well and they are going to be

1 similar.

2 At the same time what --

3 COMMISSIONER WILLIAMSON: Can you speed up?

4 MR. FARMER: What Imperial tried to do in their
5 chart here is to basically say that they can't compete to
6 sell sugar in Los Angeles. Sugar from Savannah should never
7 end up in Los Angeles. There are many refineries that are
8 much closer.

9 So they are basically trying to take my numbers
10 and turn them around and say well we can't compete to
11 Chicago or Dallas or New York, well there's a refinery in
12 New York so the reality is any time something -- refined
13 sugar from one refinery has to travel hundreds or thousands
14 of miles and cross over another refinery, they are going to
15 be uncompetitive.

16 COMMISSIONER WILLIAMSON: But you are still not
17 getting to -- I think the question is -- aren't they saying
18 that they can't deliver sugar anywhere at the price that
19 would be coming from Mexico, so they would always lose out.

20 MR. FARMER: Well I think we can take a perfect
21 example which is Atlanta, which is generally would be the
22 prime market for the refinery in Savannah, Georgia which
23 Imperial has. So I believe that their costs to deliver
24 sugar to Atlanta are about 175 points to what they show,
25 right.

1 But I would say let's talk about bulk sugar, all
2 right -- bulk sugar which is generally what would come from
3 Mexico. To deliver bulk sugar to Atlanta as we have in the
4 past, we have to rail it up -- it actually goes on a barge.
5 It goes to Mobile, Alabama and it gets railed to Atlanta but
6 once again it has to go through a distributing company,
7 right?

8 So you would take the cost that I have here which
9 is 33 cents a pound, deliver it to Atlanta, okay and you
10 would have to add to that a couple of cents a pound to go in
11 and out of a distributing company right and then you would
12 have to add to that freight to the end buyer whereas
13 Imperial, being in Savannah, Georgia would deliver it
14 directly to the end buyer. They wouldn't go through a
15 distributor in Atlanta.

16 And when you actually look at the numbers that
17 way I believe Imperial would have an advantage in Atlanta.

18 COMMISSIONER WILLIAMSON: Are you telling me that
19 you should have an additional line below the delivered cost
20 on the chart?

21 MR. FARMER: So the numbers that I gave to the
22 U.S.D.A. to the Commerce Department would basically show
23 bulk sugar at its distribution point or at a refinery and
24 what Imperial has done in this chart is they have added in
25 packaging costs which we don't know what packaging they are

1 talking about. It could be a 2 pound bag or it could be a
2 2,000 pound bag and then they have added transportation
3 costs.

4 COMMISSIONER WILLIAMSON: Maybe with the second
5 submission could you maybe give us a chart that has apples
6 to apples because I think you are telling me it is apples to
7 oranges?

8 MR. FARMER: That's right. I believe my original
9 chart that I gave to the U.S.D.A. was apples to apples to a
10 distribution point. So in other words, a one ton tote bag
11 delivered from Mexico --

12 COMMISSIONER WILLIAMSON: I'm sorry I have
13 limited time and the bottom line are you saying what they
14 represented here is not accurate in terms of -- this is the
15 competitor's situation. I'm suggesting that you give us a
16 chart that might show what the true picture would be.

17 MR. FARMER: Absolutely.

18 COMMISSIONER WILLIAMSON: Good.

19 MR. GREENWALD: Mr. Williamson.

20 COMMISSIONER WILLIAMSON: Mr. Greenwald?

21 MR. GREENWALD: Commissioner Williamson I'm sorry
22 I know you are on limited time. The fundamental problem
23 with this chart is it makes the assumption for reasons I do
24 not understand that the prices prescribed as minimum prices
25 in the Department of Commerce suspension agreement become

1 market prices, why?

2 COMMISSIONER WILLIAMSON: All right Mr. Kaplan do
3 you have an answer?

4 DR. KAPLAN: Yeah I just want to put a -- kind of
5 cross the "T", dot the "I" a bit that it's not an apples to
6 apples comparison because of the additional costs from
7 distribution are accounted for the domestic producer but not
8 counted from imports from Mexico.

9 COMMISSIONER WILLIAMSON: Okay. I'm trying --

10 DR. KAPLAN: That's the difference in the chart,
11 they added to their costs but not to our costs, thank you.

12 COMMISSIONER WILLIAMSON: Okay and maybe they
13 argued this morning that the way things would go that would
14 become a minimum. I guess maybe someone might want to
15 analyze why they were wrong.

16 MR. GREENWALD: Well it's speculative. It makes
17 the black letter assumption that if you have a minimum price
18 in an agreement between the United States and Mexico now
19 there are the market prices in the United States when there
20 is an awful lot of other supply coming in and I have yet to
21 hear anybody tell me why that assumption is valid and how
22 it's made?

23 COMMISSIONER WILLIAMSON: I may be wrong but what
24 I thought that they were saying is they are taking their
25 particular substance refiners -- I forgot the term they

1 used, that they have sort of a limited sources of supply,
2 now I may be wrong on that but this may be something that
3 needs to be discussed more in the second submission just to
4 clarify that -- yes sir?

5 MR. FARMER: This is Paul Farmer I would like to
6 add a few words about this.

7 COMMISSIONER WILLIAMSON: Sure, go ahead.

8 MR. FARMER: So when you talk about the overall
9 price of the market, the absolute price right. The effect
10 of the overall price is based on the total amount of sugar
11 that's available in the United States expected at the end of
12 the year which is controlled by the quota. So the U.S.D.A.
13 -- under this deal the U.S.D.A. will project forward an end
14 stock ratio of 13 % which generally speaking is kind of
15 tight, right which generally speaking based on past history
16 have a market that would be generally higher.

17 The absolute price you don't know because it just
18 kind of depends on who wants -- what people believe they
19 need to pay. In other words you never really know for sure.
20 What Imperial's complaint is about is not the absolute price
21 it's about the refining margin.

22 COMMISSIONER WILLIAMSON: Yeah.

23 MR. FARMER: The refining margin has nothing to
24 do with the absolute amount of sugar it has to do with the
25 competitive nature of the refining industry and whether or

1 not there is over capacity or under capacity. So if there
2 are 7 million tons of refining capacity but there is only 6
3 million tons of raw sugar available under the quotas, it
4 really just comes down to whether or not I want to beat out
5 Domino ASR or I want to beat out Imperial or they want to
6 race to get that sale done before I do, it's really not
7 related to the overall amount of sugar -- it's related to
8 the competitive nature of the domestic market.

9 And the competitive nature of the domestic market
10 literally for 30 years has been an oversupply of refining
11 capacity except for a few years when Hurricane Katrina --

12 COMMISSIONER WILLIAMSON: And I'm running out of
13 my time, the Chairman is going to cut me.

14 CHAIRMAN BROADBENT: He says, Commissioner
15 Johanson?

16 COMMISSIONER JOHANSON: Thank you Chairman
17 Broadbent and I would also like to thank all the witnesses
18 for appearing here today. Ms. Hillman I would like to turn
19 back to the legislative history where I started my questions
20 this morning with the -- with AmCane.

21 And looking at the legislative history we have
22 the House language, we have Senate language, does that
23 soften the statutory language of eliminated completely?

24 MS. HILLMAN: What it does say in terms of a
25 softening is this issue of what is the standard of injury

1 that would be included within that and there the legislative
2 history again in both the House and on the Senate side
3 indicates that the standard for the injurious effect
4 determination by the ITC under Section H so in both the
5 countervail and the dumping side is lower than the material
6 injury standard defined in the regular statute.

7 So it's clearly indicating to you that whatever
8 amount if you will of injurious effect you are looking at
9 when you are making this injurious effect determination it
10 is a lesser standard than what it would take. Whatever
11 would collectively constitute material injury when you are
12 now in this realm you are talking about something
13 considerably less than that.

14 So in that sense I do think it softens this
15 notion of completely eliminate.

16 COMMISSIONER JOHANSON: Are the words completely
17 eliminate, those are used also in the statute regarding the
18 actual suspension agreement itself, is that correct?

19 MS. HILLMAN: In this form of a suspension
20 agreement yes and then again just to go on with the
21 legislative history. It's clear as you read it on,
22 complete elimination of the injurious effect requires that
23 there be no discernable injurious effect by reason of any
24 net subsidy amount remaining under the agreement and again
25 if you read it on the countervail side, any net amount of

1 dumping because you have to remember, even under these
2 agreements, there are limits on the amount of the subsidy
3 and limits on the amount of the dumping that can occur.

4 So they are now saying that this injurious effect
5 that you are looking at is again this lower standard and
6 again it's the injurious effect by reason of the remaining
7 small amount of dumping or subsidy or countervail subsidies
8 that would remain post the agreement, that's what the
9 legislative history indicates.

10 COMMISSIONER JOHANSON: Is eliminated completely,
11 once again it's mentioned elsewhere in the statute. I don't
12 have the site but is there legislative history regarding the
13 use there?

14 MS. HILLMAN: No, that term itself is defined
15 only as I have just read it.

16 COMMISSIONER JOHANSON: Okay at 703 and 704H and
17 734H is that correct?

18 MS. HILLMAN: Correct it simply says the standard
19 is lower than the material injury standard but they don't go
20 into what this completely eliminate means.

21 COMMISSIONER JOHANSON: All right and concerning
22 the no discernable injurious effect language from the Senate
23 report can you explain that a bit, how that relates here?
24 And in particular we have the whole issue as you know in our
25 5 year reviews, our Sunset reviews of no discernable adverse

1 impact. I assume that's a difference standard between the
2 two?

3 MS. HILLMAN: Again you have to remember these
4 provisions were enacted in the 1979 Act so the Sunset --

5 COMMISSIONER JOHANSON: This is well much later.

6 MS. HILLMAN: Exactly well much later, so this is
7 in 1979 and again I think a lot of this, you have to
8 remember this is the first time we have had statutory
9 language with respect to suspension agreements at all. So
10 this is the statute now for the first time laying out these
11 kind of two forms for the suspension agreements, one that
12 completely eliminate the imports at all or the dumping or
13 the subsidies and then secondly this category that limits
14 the certain amounts of subsidies and dumping and eliminates
15 the injurious effect.

16 So you have two categories of suspension
17 agreements that are sent out in the statute in 1979. You
18 then have to fast-forward all the way to the Uruguay Round
19 Agreements Act before you get to the statutory language
20 governing Sunset reviews.

21 COMMISSIONER JOHANSON: All right yes Mr.
22 Greenwald?

23 MR. GREENWALD: This is just a reverence for the
24 English language. When you look up the word eliminate, the
25 definition is get rid of completely. So when drafters of

1 legislation say you have to completely eliminate the
2 completely is entirely superfluous. It's like saying
3 completely, completely get rid of and so I would not
4 understand that the Respondents put great emphasis on the
5 word but in terms of its actual meaning it adds nothing.

6 COMMISSIONER JOHANSON: Yeah I agree with you
7 there. I mean the use of completely -- as I said this
8 morning is kind of jarring. It comes after the adverb so
9 that always kind of bugs me, whatever. Can you provide the
10 language you have on the legislative history?

11 MS. HILLMAN: Absolution, I would be delighted
12 to.

13 COMMISSIONER JOHANSON: And the reason I'm
14 interested in this whole no discernable issues whenever
15 those words are issued up here, there are Sunset reviews it
16 certainly creates dramatic conversation sometimes and so
17 that caught my attention.

18 Getting back to the whole issue of the drafting
19 of the suspension agreement, what attempts were made to
20 accommodate AmCane and Imperial during the negotiations?

21 MR. CASSIDY: These agreements were negotiated by
22 the United States government with the government of Mexico.
23 The United States government was composed of the Department
24 of Commerce -- Department of Agriculture and the trade
25 representative's office and officials from those departments

1 directly participated in the negotiation.

2 Commerce consulted us because we were
3 Petitioners. I heard this morning that Commerce spoke with
4 Imperial Sugar and Commerce spoke with AmCane. We were not
5 in the room when the negotiations were going on, we wish we
6 had been but we weren't allowed there nor was Imperial nor
7 was AmCane so the question of how did these -- why did the
8 U.S. government enter into these agreements we don't know.

9 They have explained their rationale it's on the
10 record here. It does make sense to us so we support the
11 agreements but insofar as the procedure is concerned, the
12 procedure is the procedure that has always existed.
13 Interested parties can come and talk to the government and
14 the government can talk to interested parties.

15 We did that, I gather Imperial did that and
16 AmCane did that. The government didn't agree with
17 everything we said by any means whatsoever. And apparently
18 the government did not agree with what Imperial said or what
19 AmCane said but that's the way governments operate and the
20 government made a decision taking into account the law and
21 whatever other policy considerations it thought appropriate.

22 MR. BRUNO: I would like to add a few words if I
23 may here. This is Philippe Bruno with Greenburg Traurig.
24 As Bob said that Mr. Cassidy said that there was competition
25 perhaps that went on during the negotiations per se but

1 under the Department of Commerce's procedure you have to
2 request comments from interested parties and it did so after
3 the agreements were initialed, the first set of agreements
4 were initialed.

5 They sent letters to interested parties specially
6 requesting comments and both AmCane and Imperial did write
7 or did submit written submissions commenting profusely on
8 the agreements as they mentioned this morning.

9 COMMISSIONER JOHANSON: All right thank you for
10 your responses. And earlier today I asked Imperial and
11 AmCane about the issue of -- I stated that I believe that
12 sugar was a great product to have a suspension agreement on.
13 I think I used the word perfect and I shouldn't have said
14 that, but I would say in some ways it would be easy to come
15 up with a suspension agreement on sugar because you have the
16 Farm Bill of 2014 in which Congress said in effect was what
17 you could see as a non-injurious price.

18 And Mr. Magnus stated well his price is actually
19 a disastrous price. Could you all address that? I think
20 Mr. Kaplan you might have addressed this to some extent
21 already but if you could discuss it a bit more I would
22 appreciate it.

23 MR. GREENWALD: Before Mr. Kaplan jumps in on
24 behalf of the Mexican industry let me give you the answer on
25 behalf of the U.S. industry. The forfeit level is far below

1 cost. The U.S. industry cannot survive at forfeit level
2 prices so what Mr. Magnus was saying that if prices fall to
3 that level, the U.S. industry has no other option but simply
4 to withdraw over time and because it's a 3 year period in
5 cane, a 3 or 4 year perennial crop, withdrawing over time
6 does take time, but it would have to withdraw from the
7 market.

8 So it is true that there is a forfeit level. It
9 is equally true that that forfeit price is not and will not
10 sustain the U.S. sugar industry.

1 DR. KAPLAN: Just to discuss, that's the
2 forfeiture level. The level at which there's a minimum
3 price is above the forfeiture level, and it's determined
4 yearly by USDA. I am just willing to note that the new
5 level is considerably higher than both the forfeiture level
6 and the forfeiture level with transportation costs, and
7 higher for almost every period throughout 1981, and
8 significantly higher than the period in 2003.

9 So I'm not going to take a position. This is
10 not the injury case in a final investigation. But I just
11 want to note that these levels are significantly higher,
12 well above the levels, and that the increases for both the
13 raw and refined, a couple of slides forward -- no, a couple
14 of slides forward. There's a stack bar. There. That's
15 there's an increase of 23 percent in raw and 30 percent in

1 refined by the agreement, compared to the sugar program
2 minimum prices, which are themselves above the forfeiture
3 rate.

4 So without getting into an argument about
5 whether the forfeiture rate or the minimum prices are
6 profitable in discussing that, I just want to note how much
7 higher these are, and that I suspect that at these levels
8 might have something to do with why the vast majority of the
9 domestic industry signed onto this agreement. Mr. Greenwald
10 could comment on that, if he wishes to.

11

12 COMMISSIONER JOHANSON: If you could make it
13 rather brief, I'm out of time. But feel free to respond.

14 MR. GREENWALD: Not unless I have to. There's
15 no reason for me to add anything.

16 COMMISSIONER JOHANSON: Okay. Thank you for
17 your responses.

18 CHAIRMAN BROADBENT: Commissioner Schmidtlein.
19 Oh, excuse me. Commissioner Kieff.

20 COMMISSIONER KIEFF: Thank you. I join my
21 colleagues in thanking you for the presentations. Let me,
22 if I could, try to join the issue with our discussion from
23 the morning, and just in a -- I know you would like not to
24 do this.

25 No party wants to concede anything, but in the

1 interest of just trying to figure out the key components of
2 your argument, am I right in understanding that you could
3 concede almost all of the facts that the other side has
4 argued, under your legal interpretation, because the
5 industry as a whole legal test does a lot of work for you.
6 Am I right in understanding that?

7 MR. GREENWALD: You are correct.

8 COMMISSIONER KIEFF: So let me then try to
9 make -- try to focus then on that legal part, and see if I
10 -- see if I'm following it. In effect, it sounds like
11 you've got the grammatical problem that we've modified a
12 word "eliminate," in a way that on its face looks like it's
13 maybe trying to be emphatic, but in so doing, clumsily
14 becomes duplicative or redundant.

15 Sometimes arguments are made emphatically to
16 assuage an audience, when really the anxiety is appropriate.
17 We can never know what might have been hoped for, but we're
18 stuck with this clumsily drafted text. So it sounds like
19 what you're basically saying is to interpret that text, we
20 can look at our -- some of the legislative history. In
21 addition, we look at our practice in a prelim, and in fact
22 our practice in most cases, which is industry as a whole.

23 So we -- if there was a slogan to take from
24 that, it's we do it as a whole, and that you're then in
25 effect saying something akin to rational basis deference.

1 As long as what Commerce has done is rationally connected to
2 the harm as a whole, we ought to basically defer to it?

3 MR. GREENWALD: No, I don't think it's a
4 question of deference. I do think you have to start with
5 the proposition that the injury you find, and this is just
6 -- it's just black letter law. The injury you find has to
7 be the U.S. industry as a whole or to a major part of it.
8 That's statutory and that's what you do.

9 You came out with a preliminary injury
10 determination, which articulated the volumes, the price,
11 etcetera. There's a question, does this agreement address
12 those? You have to arrive at an independent determination.
13 Does it address that material injury in the aggregate? We
14 say yes.

15 COMMISSIONER KIEFF: You say yes and Commerce
16 said yes. In other words, Commerce basically, I think right
17 up front basically does the things that are -- that one
18 might do to address price suppression and underselling.

19 MR. GREENWALD: No, I think it's correct. But
20 again, I think it's wrong to -- I mean I would love the idea
21 of the Commission deferring to me. I don't think you're
22 going to do that. Nor do I think you defer to Commerce. I
23 think you ask the question given this agreement and how it
24 operates, does it address the key elements of the injury and
25 causation that you preliminarily found.

1 COMMISSIONER KIEFF: Okay but -- so I don't
2 mean formal administrative deference, but one could, for
3 example, envision following the stated logic of deference.
4 In other words, if the logic on its own terms addresses the
5 harms on their own terms, then it looks like it's
6 addressing. Is that what you're saying?

7 MR. GREENWALD: You are saying more than I
8 would. Let me make sure. If that's what you do, I don't
9 think we would have an issue with this. But I do think that
10 there is a legitimate question that's raised by this type of
11 proceeding, which is how does the agreement work? How is it
12 structured? In the context of the injury, it's the
13 injurious effect, the whole, that you found to exist, and
14 does it eliminate that?

15 So a lot of -- just a second. A lot of the
16 testimony today was about what's going to happen in the
17 future. It wasn't the past, and I would submit that that's
18 not the issue before you. Commerce couldn't possibly
19 address that. They have to look at the four corners of the
20 injury you found. There is -- I don't want to be in a
21 position of saying what petitioners hypothesize, speculate
22 about. It couldn't happen. It couldn't.

23 COMMISSIONER KIEFF: Yeah, but --

24 MR. GREENWALD: But that is -- there are
25 mechanisms in the agreement itself to address those issues.

1 That, as I see it, is not the case before you today.

2 COMMISSIONER KIEFF: So I think I'm following
3 the argument. What I'm then having trouble with, though, is
4 these are actually two agreements, not one. They don't
5 appear to be calibrated individually to address the
6 specifics of the harm, and the paragraph your opponent
7 quoted at the end of the Panel was pretty compelling, in
8 Commerce saying in its own words, you know, we did a high
9 meta-level gestalt, and then we kind of figured that covered
10 everything. We're good.

11 I'm grossly misparaphrasing what it said, but
12 I think it was purposefully saying something akin to we're
13 not trying to get into the details. I guess what I'm asking
14 you is should that trouble us under your reading of the
15 statute, or is that an inevitable imperfection that can't be
16 -- no sheet can be perfectly ironed smoothly?

17 MR. GREENWALD: I don't think in fact you're
18 being fair to what Commerce did. I understand that the way
19 they articulate what they did could lead to that impression.
20 But in fact, what has happened here is there was a very
21 large surge in Mexican supply, in a market which was
22 regulated. But for everybody but for Mexico, and the surge
23 in supply was accompanied by potential supply that was
24 greater still, because there were stocks in Mexico.

25 Commodity market prices react not only just to

1 shipments, but to available supply. So you have a very
2 serious issue that was supply-driven. The agreement
3 addresses that, concretely and directly. What happened
4 during the period in question cannot be repeated.

5 The second part of the agreement, and it's
6 very concrete, the dumping agreement addresses minimum
7 prices. Commerce has before it the actual prices in Mexico.
8 They can't ship at the prices they were shipping.

9 COMMISSIONER KIEFF: I hear you saying in
10 effect a prioritization occurred, and a targeting of remedy
11 to high priority harms was accomplished, but none of that is
12 inconsistent with what the other side is saying. What the
13 other side is saying is in fact we view that as a flaw of
14 the process, not a feature of it, because it completely
15 failed to address our problem, and in fact it steamrolled
16 us.

17 I think they would basically agree with
18 everything you just said, at least for purposes of debate.
19 If we would then decide that this remaining residual
20 non-prioritized harms that happened to acutely impact them,
21 should have been addressed. I think their complaint is
22 could you help us too, and could you at least not hurt us.

23 MR. GREENWALD: That is when you come back to
24 this question of harm to the industry as a whole. Let's
25 accept for a moment the proposition that what they said is

1 correct. Now there's a lot of speculation in there, because
2 when you look and when you read the transcript, what you're
3 going to find is not so much a complaint about what
4 happened, except related to the volume and pricing of
5 Mexican imports, both of which have been addressed, but
6 rather a squeeze because the margin isn't big enough
7 prospectively.

8 That may or may not happen. But it's not a
9 fact. The issue as I see it, if I were sitting in your
10 position, would be given the facts of what happened in our
11 finding, our preliminary finding, do the volume and the
12 price provisions of this agreement eliminate that problem
13 for the industry as a whole? Here, we are saying clearly
14 yes.

15 COMMISSIONER KIEFF: I see that my time's
16 expired. Thank you.

17 CHAIRMAN BROADBENT: Commissioner Schmidtlein.

18 COMMISSIONER SCHMIDTLEIN: Thank you. Good
19 afternoon. So I want to follow up a little bit on this idea
20 of, you know, what Commerce has done, and specifically I
21 wanted to know whether or not you all agree with the
22 February 10th memo from John McInerney to the
23 Undersecretary, with regard to why the agreements eliminate
24 completely the injurious effect.

25 MR. GREENWALD: I don't mean to be cute. We

1 don't disagree with it.

2 COMMISSIONER SCHMIDTLEIN: You don't disagree
3 with it. So let me be more specific then. Is it your
4 position that if the forfeiture prices haven't been
5 triggered, as Mr. McInerney puts it, and the sugar program
6 is operating as intended, that there can be no injury to the
7 domestic industry?

8 MR. GREENWALD: No. On that specific point,
9 we do disagree. The forfeiture price is a price that is so
10 far below cost, it is essentially a prescription for the
11 U.S. industry to get out of the sugar business. That's
12 non-sustainable. To say that because prices will not fall
13 to the forfeiture level, and therefore the agreement
14 eliminates the industry is just wrong. But that's not what
15 the agreement does, or what it says.

16 COMMISSIONER SCHMIDTLEIN: But that's what the
17 memo says, right?

18 MR. GREENWALD: But that's not what the
19 agreement does.

20 COMMISSIONER SCHMIDTLEIN: Uh-huh.

21 MR. GREENWALD: The agreement establishes
22 minimum prices and quantity limits. So if you're projecting
23 forward, I think it's correct to say, although I'm sure the
24 Commission staff will check with USDA, that USDA cannot
25 conceive of a situation in which there are forfeitures under

1 the agreement, as long as the agreements are in effect.

2 Now the fact that they can't conceive of
3 forfeitures or a burden on the program eliminates one of the
4 injuries that you found. But it does not mean that if the
5 prices come down to let's say just a penny above the
6 forfeiture level, that would be okay. But that's not what
7 the agreement does. The agreement limits the quantity.

8 So quite apart from essentially the pricing
9 provisions, the quantity limits are limited to U.S. needs
10 with a 13.5 percent stocks to use ratio, which is, as I
11 think the testimony said today, this morning, fairly tight,
12 and is designed to keep prices at least at a reinvestment
13 level, and we think they will do that.

14 COMMISSIONER SCHMIDTLEIN: So what should the
15 Commission do with that memo?

16 MR. GREENWALD: With the McInerney?

17 COMMISSIONER SCHMIDTLEIN: I mean do we --

18 MR. GREENWALD: Yeah. I mean there are things
19 -- the memo as a whole should be factored into the
20 Commission's decision-making. But when you are assessing
21 the effects of the agreements, what you have to do is look
22 at the terms of the agreements, and the fact that Mr.
23 McInerney, who I know and have great respect for, suggested
24 that somehow the -- anything about the support price was
25 okay and non-injurious, that's not true. But that is not

1 what the agreements do.

2 COMMISSIONER SCHMIDTLEIN: Okay.

3 MR. ALTSCHULTER: May I?

4 COMMISSIONER SCHMIDTLEIN: Sure.

5 MR. ALTSCHULTER: Irwin Altschulter. I guess
6 the way I look at the memo from the Commerce Department is
7 that it's very helpful and it's a good start in terms of
8 avoiding forfeitures. But I think as Dr. Kaplan pointed out
9 and can address a bit more, the fact is that these minimum
10 prices establish floor prices that are not at or near the
11 forfeiture prices. They're way above the forfeiture prices.

12 So I think that the point that the McInerney
13 memo made is a very good one. But we can go a lot further
14 than that, and I think the Commission can as well. If you
15 elaborate.

16 DR. KAPLAN: Given where the prices were put
17 and the fact that it's a belt and suspenders agreement, in
18 the sense that it closely monitors the shipping to assure
19 the price quota is met. That's the price you should be
20 looking at. So I take the argument there is a legal
21 argument, which is an interesting one but abstract, in the
22 sense that since the actual price is so much above, and
23 since the domestic industry supports it, whether or not at
24 the forfeiture plus transportation costs, the minimum price
25 level, the industry is profitable is kind of moot.

1 We're above that, both in terms of fixing the
2 price and the quantity to ensure that. But I didn't bother
3 analyzing that, and I don't know an issue of import, other
4 than kind of a legal notion about the interaction between
5 them, but as an economic matter, we're so far above it, it's
6 irrelevant to the injury issue that the Commission faces,
7 because they're looking at the prices, so far above, to see
8 if they were or were not injurious. I'm not going to join
9 the issue with Mr. Greenwald because there's no reason.

10 COMMISSIONER SCHMIDTLEIN: So I guess that's
11 one of my follow-up questions, and I apologize if this is --
12 you know, I did read all of the material. But you know, how
13 should we decide that, you know, you said these prices were
14 far enough above that we don't have to worry about price
15 suppression, undercutting and so forth.

16 Well, based on what? What is it that tells us
17 that those prices are high enough, that those four prices I
18 understand.

19 MR. ALTSCHULTER: I have one comment.

20 Earlier --

21 MR. BISHIP: Your microphone isn't on.

22 COMMISSIONER SCHMIDTLEIN: Yeah.

23 DR. KAPLAN: Is it on now?

24 MR. GREENWALD: Well while Mr. Altschulter is
25 working with his mic --

1 COMMISSIONER SCHMIDTLEIN: My time is ticking.

2 MR. GREENWALD: Why don't I give you what
3 seems to me to a very easy answer to your question?

4 COMMISSIONER SCHMIDTLEIN: Okay.

5 MR. GREENWALD: What confidence do you have,
6 the fact that 90 plus percent of the industry says this
7 agreement work? Should give you all the confidence you
8 need. We would not sign on to their forms. It was a
9 negotiation between the government of the United States, the
10 government of Mexico and the Mexican industry. We would be
11 on the other side of this table today, at least the
12 morning's presentation, if we didn't think it worked.

13 COMMISSIONER SCHMIDTLEIN: Well, but I mean do
14 you agree with the other memo, that we should be looking at
15 historical prices and so forth as a benchmark for where
16 these prices would be? I mean we have two economists here.
17 Are we supposed to look to, you know, expert testimony as to
18 this, why this is the right level?

19 I mean isn't there something -- I mean this
20 kind of goes -- if we're trying to avoid this question or
21 not pin the whole thing on do we look at the whole industry,
22 you know, the industry as a whole, or do we have to look at
23 every individual member of that industry? You know putting
24 that aside, how do I know these numbers are the right
25 numbers or good enough?

1 MR. GREENWALD: Well I mean in a sense, I go
2 back to my earlier answer. If the domestic industry that is
3 most directly affected by these numbers, says that these
4 numbers are good enough, that ought to give you confidence
5 that they work from a practical industry point of view.

6 It may be that you can get economic analyses
7 that says no, they don't work. But for most of the
8 industry, we would say those analyses are wrong.

9 COMMISSIONER SCHMIDTLEIN: Okay. Would anyone
10 else like to comment?

11 MR. ALTSCHULTER: Yeah, I think I'm working.
12 Mr. Greenwald said half of what I was going to say. You
13 know, they're here and, you know, this is in the context of
14 suspension agreements and they were consulted and they
15 agree, and that the injury has been completely eliminated.
16 They filed their case as petitioners and by law they had to
17 file on behalf of the industry.

18 So the U.S. petitioning industry that was
19 looking for relief from unfairly-traded Mexican imports of
20 sugar feel that they have gotten their relief. So what's
21 left? It's not only to me a fact of what's left is a very,
22 very small part of the U.S. industry. It's more basic than
23 that, because what they're looking for is the very opposite
24 of what dumping and CBD relief is all about.

25 The petitioners in the underlying cases wanted

1 less Mexican sugar at higher prices, and that's exactly what
2 these agreements give. What the petitioners in this
3 proceeding are looking for is more Mexican sugar at lower
4 prices. That is something that is not contemplated by the
5 dumping law, and would require an analysis and a legal
6 determination that it's proper to decide that suspension
7 agreements should be shot down if they cure the injury from
8 unfair imports, but don't leave things exactly as they were.

9 That just -- I don't know how to put it better
10 than to say that just doesn't make sense to me.

11 COMMISSIONER SCHMIDTLEIN: Okay, thank you.
12 My time is up.

13 CHAIRMAN BROADBENT: Okay. Mr. Greenwald and
14 maybe Mr. Cassidy, given your expertise and scholarship in
15 this area of trade law that we all live in, and your study
16 of Chairman Russell Long days, what was the -- do you have
17 any clue as to what the situation was surrounding the
18 company that inspired this amendment?

19 MR. CASSIDY: I do not claim remember
20 everything that happened in those days. But in general, and
21 I don't remember the specific company, although my
22 assumption is it was almost certainly a steel company,
23 because they were the people who were most aggressively in.
24 For those of you who don't know, I was the International
25 Trade counsel of the Finance Committee at the time the Trade

1 Agreements Act of '79 became law.

2 The concern was that Treasury had for years
3 handled inconvenient dumping countervailing duty cases by
4 not proceeding with the cases. So a major change in the law
5 was to put time limits on procedure, and it forced the
6 government to at least initiate an investigation, and to
7 complete it by a time certain.

8 The next level of concern is okay well,
9 they've done an investigation, but now they could get out of
10 it by doing an agreement with the other government, and we
11 would not get relief because of the suspension agreement.
12 The suspension agreement was required by the Tokyo Round,
13 countervailing duty and dumping agreements. So this
14 provision of law, which I must admit I probably had a hand
15 in writing, but I don't write things like "completely
16 eliminate," so I don't know --

17 CHAIRMAN BROADBENT: Yeah. I'm afraid no
18 one's going to claim that.

19 MR. CASSIDY: This provision of law was
20 included as a safeguard against the government getting out
21 of an inconvenient case by doing suspension agreements. I
22 cannot, I'm afraid, illuminate anything about why it says
23 "completely eliminate," other than they wanted to be sure
24 that, as we have heard in the legislative history, that the
25 petitioners did get the relief to which they were entitled

1 one way or another, either by duties or by an agreement, and
2 if the petitioners were unhappy, they had this provision to
3 challenge what the government was doing in the suspension
4 agreement.

5 I wish I could answer your question more
6 explicitly, but that's all I remember.

7 CHAIRMAN BROADBENT: Okay.

8 MR. GREENWALD: In that time, I think Jennifer
9 Hillman mentioned this, the Treasury Department ran
10 anti-dumping and countervailing duty. They were not a
11 department that had much appetite for the law they were
12 charged with administering, and there was this deep-seated
13 suspicion that if there were a way out, that was short of
14 imposing dumping and countervailing duties, they would use
15 to a fair-the-well.

16 So the entire process of implementing the
17 Tokyo Round was trying to put limits on what could be done
18 to avoid not enforcing the law, and I think this is one of
19 the outgrowths of that approach to what was happening, on
20 both the Finance Committee and Ways and Means Committee.

21 CHAIRMAN BROADBENT: Mr. Kaplan.

22 MR. KAPLAN: Let me give you an example. So,
23 let's say the industry, as a whole, on average went
24 uninjured as a hundred. Some firms are doing a little
25 better, some worse, but they're at a hundred. Then there's

1 injury and it brings the industry, on average, down to 90,
2 and you find that's material injury. Some are doing a
3 little better; some firms are doing a little worse.

4 The Treasury Department it was feared would sign
5 an agreement that would bring the industry, on average, back
6 to 95. That's not a eliminating the injury. So, bring the
7 industry, on average, back to 100. So the industry now has
8 completely eliminated -- the action of the suspension
9 agreement has completely eliminated the injury to the
10 industry as a whole through the suspension agreement. The
11 price floors were high enough. The restrictions were strong
12 enough.

13 It doesn't say like the other side that every
14 single firm. It's just that the agreement brings the
15 industry, as a whole, back to an unharmed state. And I
16 think that's just kind of a clear reading, especially if
17 you're worried about an agency that will cut a deal that the
18 industry, as a whole, doesn't think gets them there.

19 So, that interpretation, which I think is kind of
20 an economic matter is logical, doesn't require firm by firm
21 by firm elimination, but rather looks at the industry as a
22 whole, which is what the Commission does when it make their
23 determination. And I think we all agree that at both these
24 tables that this agreement does eliminate injury to the
25 industry as a whole.

1 MR. BRUNO: If I may add to what Dr. Kaplan said,
2 there is a sort of practical issue here to eliminate -- if
3 you decided to go entity-by-entity what evidence do you have
4 of injury for those two entities that you heard from this
5 morning? The Commission did not make specific determination
6 in their preliminary determination on an entity basis. So,
7 all you have to accept is whatever information they gave you
8 this morning, but there is nothing in the record, or your
9 finding, I should say, that specifically say where the
10 injury is and therefore how this agreement eliminate
11 completely the injury with respect to those entities. It
12 has to be the industry as a whole.

13 CHAIRMAN BROADBENT: I'm always a little
14 uncomfortable because we just have a preliminary rough guess
15 determination to work with, which seems to put the cart
16 before the horse in some ways.

17 For the Mexican industry, you mentioned that you
18 liked this agreement because it brought you in under the
19 U.S. sugar program. Could you describe what you meant by
20 that, please?

21 MR. GALLARDO: Well, obviously, as I said, we
22 believe that there was no injury to the U.S. industry. That
23 it was a very anomalous situation what happened in 2013
24 where stocks all over the world went up and prices came
25 down.

1 Now, it's true, and we understand that there is a
2 sugar program in the U.S., and it's going to make smoother
3 between both countries if it's in place. We accept it. We
4 don't like it, but we have to accept it. Bear in mind that
5 under NAFTA, we had complete access to the U.S. market in
6 terms of quality and quantity, total free access high
7 fructose corn syrup still has to the Mexican market, so
8 we're more or less with our hands tied going forward. But I
9 think, overall, and I think both governments agreed that
10 this would fix this anomalous situation from never happening
11 again, and by having this agreement, both industries will
12 work better.

13 CHAIRMAN BROADBENT: In terms of prices in this
14 market, is there a single market price for sugar? Does
15 underselling occur in this market, or is observed
16 underselling simply associated with a particular product?
17 And are price levels driven by supply?

18 MR. GREENWALD: Price levels are driven by
19 available supply. You have a product that is
20 interchangeable. Is there price underselling? Yes. How
21 does it occur? It occurs when available supply competes for
22 a demand and the choice is made to buy the lowest of a
23 commodity price that when used in my refinery it is
24 indifferent whether it is high polarity or low polarity
25 sugar. It is a price that the purchaser pays based on the

1 supply available to that purchaser.

2 And again, in commodity markets of this sort the
3 fact that the stocks were rising as quickly as they rose and
4 the available supply greatly exceeded demand lead to an
5 enormous drop in price, which we believe was precipitated by
6 the availability, in particular, of Mexican surplus which
7 came to the United States. The agreement, I have to say,
8 eliminates that. That cannot happen any more.

9 CHAIRMAN BROADBENT: This is a
10 question relative to the American Sugar Coalition testimony
11 or statement that they submitted. In a heading on page 22
12 of your submission you state that on the suspension
13 agreements underselling would not have occurred to the same
14 degree.

15 Similarly, on page 24, you assert that a large
16 portion of underselling would've been eliminated. The
17 statutory standard applicable to the AD suspension
18 agreement, however, is that undercutting of price levels of
19 domestic products by imports of that merchandise will be
20 prevented. Does an agreement that reduces the frequency of
21 underselling achieve the standard of preventing it?

22 MR. CANNON: So, this goes back to our ongoing
23 dialogue all day about injurious affect. In your
24 preliminary decision, you found underselling. In some of
25 your decisions lately when you find underselling, you don't

1 find any price affects. You, instead, find that the
2 underselling caused imports to capture a greater volume and
3 lead to volume affects.

4 That's not what you did here. In your
5 preliminary decision here, you found price depression.
6 Actually, U.S. domestic prices declined. And with the price
7 orders in place, you can think of it as this bar here. The
8 price decline would get down to the reference price and it
9 would not continue. And so, a portion of the underselling
10 would be eliminated.

11 Now, in a question this morning, Commissioner
12 Pinkert asked could we look at the data that we had at the
13 preliminary stage in some fashion and see this. We can't
14 look at the actual reference prices in terms of our
15 products, our pricing products because the reference prices
16 are set by polarity. They're differentiated by user or
17 industrial group and they are FOB plant in Mexico. They're
18 not FOB U.S. prices.

19 However, you can look at the trend and the data,
20 which is what I think your question was going to. If you
21 look back at the '11/'12 time period, for example, or '10
22 and '11, you see a different incidence of underselling. If
23 you just look at how much underselling was going on or what
24 time period did the underselling go on without trying to get
25 too much into confidential data, the underselling increased.

1 A large portion of it took place in the last full
2 year, 2012/2013. You did not see nearly the same level of
3 underselling at the beginning of the period. In other
4 words, it goes as you would expect, with a surge in volume.
5 And so, while we can't do a precise comparison of the
6 reference price can show a lot of the underselling would be
7 eliminate at a certain point, can't do it with specificity
8 because we don't have the pricing products. We don't have
9 the data to do it.

10 You can see from the data you have before you if
11 you, in essence, to the question -- turn back the clock
12 before the surge and we now are going to have a volume
13 constraint in place, which is going to prevent a surge, so
14 that's certainly a rational thing to do. If you do that, if
15 you turn back the clock, look to the time period before the
16 surge, you see a lot less underselling. And I think that
17 was what you were referring to in your brief.

18 MS. HILLMAN: I was going to only add one other
19 thing. The reason why I think there's not an effort to try
20 to totally map this out is obviously the volume restraints
21 have a price affect, so that is what nobody can tell you
22 exactly if there's "x" amount of volume restrained that in
23 and of itself, leave aside the reference price. Having
24 nothing to d o with reference prices, the volume restraint
25 along will have raised prices significantly.

1 What nobody can tell you is exactly how
2 significant that raise is, but there's no question that what
3 we put in our brief did not try to speculate about how much
4 the prices would've gone up as a result of the volume
5 affects completely apart from the reference pricing.

6 MR. KAPLAN: Yes, this is one area that I think
7 myself and Paul Farmer want to take great issues with, and
8 that's the notion of underselling in this market. Sugar is
9 a commodity. There's no underselling of gold. There's no
10 underselling of sugar.

11 In this investigation, what you're comparing in
12 your underselling data is a price from Mexico that was
13 negotiated in the last month with a price from the United
14 States that was negotiated months or potentially years ago.
15 So, what your underselling data shows is a comparison of two
16 products priced differently at different times and delivered
17 on the say dated. So, you're getting delivered prices that
18 were set two different times in the past.

19 If you went into the past two years ago and said
20 I want delivery to the United States and went from Mexican
21 sugar and U.S. sugar, the prices would be insignificantly
22 different. And the reason you find overselling in the
23 beginning of the period and underselling at the end of the
24 period, using your data, is because the contract lengths are
25 longer for the United States and shorter for Mexico. So,

1 when prices are rising, the Mexican prices are closer to the
2 current high prices and the U.S. prices are likely to
3 reflect the old prices.

4 What happens? You see at the beginning of the
5 POI and the beginning of that whole upsurge, Mexican's
6 overselling on delivery. On the downward side, Mexican
7 prices are falling faster spot, but you're seeing the old
8 high U.S. prices negotiated several years ago, both
9 delivered on the say date. And so the underselling numbers
10 are an artifact of the different times the prices were
11 negotiated.

12 If you did this for gold, you'd see the same
13 thing, although you know that thing's priced to the tenth of
14 a penny everywhere in the world by instant, by contract or
15 whatever year it is or what if it's spot. So, I think that
16 the issue of raising the price level is one thing, but the
17 issue of underselling is something completely different.
18 And I think the Commission will be going off track if it
19 looks at that. Thank you.

20 CHAIRMAN BROADBENT: Commissioner Pinkert.

21 COMMISSIONER PINKERT: Thank you, Madam Chairman.
22 And I thank all of you for being here today to help us
23 understand these issues.

24 Mr. Cannon has already started to answer my first
25 question. And I want to ask him for some clarification on

1 that. Under the statute, and I'm talking specifically about
2 the provision in Section 734 and 704.

3 There's a reference to the suppression or
4 undercutting of price levels of domestic products by imports
5 of that merchandise will be prevented. Are you saying that
6 we don't have to make a determination that undercutting will
7 be prevented by this agreement because of the nature of our
8 findings in the preliminary determination?

9 MR. CANNON: Yes. Yes, that's the framework in
10 which we started out when Mr. Greenwald opened up. It
11 completely eliminated. What is it that's completely
12 eliminated? It's the injurious affect. Well, what is the
13 injurious affect? It's what you found. And you found that
14 there was underselling and that it caused price depression.
15 All right, so in the holistic nature of your finding if you
16 find that the underselling is gone, and we think it is, it's
17 gone sufficiently to eliminate the injury, and that's the
18 injurious affect that's called for here.

19 And I think it goes to some of your questions you
20 asked us too. You asked this morning ^^^ I'd forgotten --
21 maybe it was Commissioner Schmidtlein. What about injury
22 caused by the agreement? Well, that's not on the table
23 either. It's not injury from other factors. It's the
24 injury that you found at the preliminary stage because
25 that's all that Commerce had in front of it when they

1 negotiated the agreement. I'm weakly trying to paraphrase
2 Mr. Greenwald.

3 COMMISSIONER PINKERT: Thank you.

4 Now, I'm also trying to get at exactly where the
5 disagreement is between the two sides. And I know that you
6 have a concern that the arguments by the other side in this
7 proceeding are attempting to solve a problem that is not a
8 problem of dumping or subsidization and the injury flowing
9 from that that was filed at the prelim. I understand that.

10 But answer me this, did the injurious pricing
11 found in the preliminary determination have an adverse
12 impact on the bulk refining margin that was discussed by the
13 other side this morning?

14 MR. GRACE: Commissioner Pinkert, this is Dave
15 Grace from Covington & Burling. I can't discuss it in a
16 public forum or at the public hearing, but it is very
17 instructive to look at the questionnaire responses that were
18 filed by the two parties that brought this petition, and the
19 responses to things like whether they were injured and
20 evidence and so forth of the injury or whether or not they
21 were injured.

22 COMMISSIONER PINKERT: Thank you.

23 MR. GRACE: We'll address it in our brief.

24 COMMISSIONER PINKERT: That would be very
25 helpful. Go ahead, Mr. Greenwald.

1 MR. GREENWALD: Just to say the same thing. I
2 think you raise an interesting question. I don't know the
3 answer to it. We could look it over, but there is still
4 this sort of underlying issues. And let me say I think it
5 ought to be addressed, and we will address it in
6 post-conference brief. We're going to have to look at the
7 data, but there is this question -- let's say the answer is
8 yes. Does that necessarily mean that the margin, refining
9 margin is going to be where they project it as being because
10 they've simply taken the difference between the minimum --
11 raw price and the minimum refined price from Mexico?

12 And again, I come back to this very basic
13 question. I understand why they're doing it, or at least,
14 you know, I hear it. But what it is that minimum prices
15 become market prices that dictate margins going forward is
16 beyond me. I mean if you take the analysis at face value
17 you're faced with the proposition that businessmen in Mexico
18 would rather sell higher cost sugar at a lower relative
19 price than lower cost sugar at a relative higher price.
20 That is, their margin, presumably, is also squeezed by this,
21 but somehow they like to do it because that's the way they
22 are, but our guys would be terrible injured by this.

23 I mean it seems to me the basic assumption that
24 Mexican sugar industry is going to ship higher cost sugar at
25 a relatively lower price, and it may end up that way, I

1 don't know, but it's certainly not something that I would
2 accept as fact going in.

3 COMMISSIONER PINKERT: I see that Dr. Kaplan
4 would like to say something, and I want to focus you're
5 attention on one aspect of this issue, Dr. Kaplan, and then
6 you can answer the other issues that may have been raised
7 here.

8 But it seems to me that if, arguendo, the bulk
9 refining margin was adversely impacted by the injurious
10 pricing that was found at the prelim, then on the face of
11 it, an attempt to resolve the problem of the bulk refining
12 margin is within the ambit of this proceeding. So, maybe
13 you can address that, or any other aspect of it.

14 MR. KAPLAN: I'll hand this off to Paul in a
15 minute to discuss the business side is determined. But I
16 show the margin here from 1981 to 2014. And you could see
17 the margin is somewhat variable. It has gone up during
18 certain events, and it has gone up during the 2009 to 2011
19 period, which was described as a period where no one in the
20 world could get sugar this morning by an industry
21 representative.

22 It also relates to the notion that the price for
23 refined could fall below the floor, as testified to this
24 morning. And what that tells me is that with no Mexican
25 sugar in the market the price of refined could fall below

1 that floor is that factors other than the Mexican sugar are
2 driving the refiners' margin.

3 What could those things be? And those things are
4 competition among the U.S. refiners that drive down their
5 own margin. The margin falls when there's no Mexican
6 imports. There were no Mexican imports during periods where
7 the margins were higher in the past. So, it's the
8 intercompany competition that could actually drive the
9 refiners' sugar price below the floor and squeeze their
10 margin.

11 Paul has been in this industry for 34, 37 years
12 -- 37 years. And I think he, as a refiner, can explain how
13 the refiners' margin is determined and how it's not related
14 to the Mexican sugar imports.

15 Paul, you want to discuss that.

16 MR. FARMER: First, I'd like to say that the
17 refining industry is the only free market part of the
18 industry where anybody can build a refinery or anybody can
19 get into a business and lose money and not be supported by
20 the U.S. Government. And it's been a horrendous business
21 for 30 something years since corn syrup came into the market
22 and the current Farm Program basically came into play in the
23 early eighties, 1982.

24 Something like 15 to 20 sugar refineries shut
25 down since then, and the refining business, basically, was a

1 loser right up until the current owners of ASR, which are
2 basically Florida growers. They basically cleaned up and
3 consolidated the industry. And then the only time they
4 actually made money -- can you see it from here -- was
5 during natural disasters or explosions of other people's
6 businesses.

7 The refining margin is determined by open
8 competition. What ASR thinks their competition is going to
9 do or whether their competition is sidelined or not. That's
10 what it's all about. And no matter what amount of Mexican
11 sugar is going to be on the market, the reality is that I'm
12 going to compete against them and they're going to compete
13 against me, and I can double my refining capacity if I have
14 enough money, or I could shut down if I want to.

15 So, the refining margin isn't controlled by the
16 amount of Mexican sugar or any other sugar. It's controlled
17 by people's freewill to build refineries or shut them down
18 or lose money year and year and year.

19 MR. ARMERO: Hi. My name's Chris Armero. I'm
20 from Beta San Miguel -- the largest private Mexican group.
21 And just for the record, I also worked at Domino Sugar and
22 Imperial Sugar in the last 20 years.

23 I just wanted to add to the comments that have
24 been made about whether the refining margin was affected by
25 Mexican exports to the U.S. Before the POI, and since 2008,

1 it has been noted we had no limits to the amount of sugar we
2 could sell to the U.S. or the quality of sugar that we could
3 sell to the U.S. So, we made our own decisions, but based
4 on what customers wanted to buy from us.

5 During the period under investigation, there was
6 an increase, and it's documented, in Mexican exports. And
7 the increase was in raw sugar, sugar for refining. And
8 there's been a bit of fast statistical interplay here
9 because all the sugar made in Mexico -- almost all the sugar
10 made in Mexico is above 99.5 polarization. And so when we,
11 in the period under investigation, exported sugar to be
12 refined by a refiner, it was above 99.5.

13 And so in the records, if you look at that, it
14 looks like, whoa, there's a huge increase in sugar above
15 99.5 coming into the U.S. In practice, if you look at where
16 the sugar went, which is available on the USDA website -- we
17 can submit that as part of our follow up -- you will see the
18 surge -- it's a bad word to use, but increase in Mexican
19 imports to the U.S. during the period under investigation
20 was almost exclusively sugar for refining.

21 And it follows, therefore, if there was a big
22 increase for sugar for refining, that would have a positive
23 affect on the refining margin because clearly a big increase
24 of raw sugar for refining would cap the raw price and have a
25 widening affect on the refining margin. The opposite would

1 happen, which is what they were contending this morning, if
2 there was a big increase in the refined exports that
3 would've reduced the refining margin. But if you look at
4 the data, the increase in the period was of sugar for
5 refining, which hadn't gone to the U.S. before.

6 COMMISSIONER PINKERT: Thank you.

7 Mr. Cannon, briefly.

8 MR. CANNON: I'll just save it.

9 COMMISSIONER PINKERT: You could've had the last
10 word this round.

11 MR. CANNON: Okay. Thank you, Madam Chairman.

12 CHAIRMAN BROADBENT: Commissioner Williamson.

13 COMMISSIONER WILLIAMSON: Thank you. I want to
14 follow, I guess, along that last discussion. And my
15 question was going to be the standard can fall either within
16 the polarity range for refined sugar or for all other
17 sugars, and how should we assess a standard -- I'm sorry or
18 an analysis here. What I think I've just heard is that all
19 of it might be over the 99.5 polarity, but it's still going
20 to come in as, I guess, sugar for further refining or
21 unrefined sugar; is that correct?

22 MR. ARMERO: I address the first point, and then
23 you can take over, Paul. This is Chris Armero again. As
24 a result of the suspension agreements, we've started making,
25 especially sugar under 99.5 for further refining, which we

1 didn't make before. So, if you want to look at it, we're
2 making products especially for the suspension agreement, and
3 that is one of the impacts of the suspension agreement.

4 Whether or sugar is sent for further refining or
5 for end use depends on the market. It depends on the prices
6 of what customers will pay, and I think there's no other way
7 of looking at it.

8 MR. FARMER: CSC is the largest shipper of
9 Mexican sugar to the United States, and has been for years.
10 And at the risk of offending the people at my own table
11 here, I would tell you that the vast majority of sugar we
12 ship from Mexico is not fit for human consumption. And that
13 what they call standard maybe fit for the table in Mexico,
14 but I would say there's only a few mills that could product
15 the quality product in Mexico that you would want to put on
16 your table, and you pay a premium for that. The rest of it
17 in our business goes in a bulk ship because we would never
18 deliver it directly to a customer, and it goes for further
19 refining.

20 COMMISSIONER WILLIAMSON: Okay, Mr. Kaplan.

21 DR. KAPLAN: I just kind of want to put a bow
22 on this a little bit. I think we all agree that the raise,
23 the increase in the floor prices and the quantity
24 restrictions from the agreements benefit the industry and
25 eliminate any injury, and in terms of support, the people in

1 the first table represent, along with Paul here, in the
2 upper 90 percent range.

3 So those people say they're better off. They
4 say this solves the problem. My analysis says that during
5 the year you looked at, it solved the problem. There are
6 people representing a very small part of the industry,
7 focusing on this margin. I think what you heard here is
8 that this margin is unrelated to those prices, in terms of
9 its rise and fall, but much more related and determined by
10 intra-refiner competition in the United States, of which Mr.
11 Farmer is part of.

12 COMMISSIONER WILLIAMSON: Let's get back to
13 the -- and as Mr. Amero's point, that now it seems like
14 you're shipping more sugar, forget about polarities.
15 There's going to be more raw sugar coming in under the raw
16 quota, and how does that -- what does that say about the
17 refining margin and particularly the complaint that the
18 petitioner this morning was making? It seems to me like
19 you're saying there's going to be more raw sugar in the
20 market.

21 MR. ARMERO: I think I would agree with Mr.
22 Greenwald. What the petitioners in this case are
23 complaining about is something that may happen in the
24 future, in a worst case that they envisage, as a result of
25 these suspension agreements. But you know, we are making

1 sure that we're loading it in bulk vessels, and we're going
2 to be delivering it to refiners.

3 We've made no specific plans to change our
4 strategy from before the POI, as a result of the suspension
5 agreements, except that now, we're having to change a bit
6 the kind of sugar that we produce. But our plans involve
7 bulk sugar for refiners, involve finished products for
8 industrial customers, and I would say we have not changed
9 our strategy since before the POI except, you know, now to
10 adapt to these suspension agreements.

11 What the refiners, the subset of refiners that
12 is complaining are saying is a hypothetical situation that
13 might happen, that they might run out of raw sugar. But I'd
14 like to add as well that before the POI, we could sell
15 anything we wanted to, and they got raw sugar. And now, we
16 have these constrictions and they're still going to get raw
17 sugar.

18 COMMISSIONER WILLIAMSON: It may be the
19 polarity above 99.5 or -- what does that -- how does that
20 play in?

21 MR. ARMERO: If we delivered -- if we
22 delivered polarity above 99.5, we'd have to meet the higher
23 reference price, so they probably wouldn't want it.

24 COMMISSIONER WILLIAMSON: Okay, okay. Does
25 anyone know why it was only -- polarity was used as the

1 dividing line, given what was said this morning about this
2 distinction, that the distinction really should be between
3 direct consumption and sugar for further processing?

4 MR. FARMER: Sir, this is Paul Farmer. I
5 could tell you the reason for that is that for 200 years,
6 polarity has been used as the measurement of what the
7 quality of sugar is coming into the United States. I
8 believe the oldest piece of equipment that Customs ever
9 bought, the first one was a polarimeter, right.

10 The reason why it was based on 99.5 is because
11 my competition, Imperial and AmCane, would prefer to have it
12 based on raw sugar only going to a refinery on the water,
13 with their name on it, with that crystallized sugar,
14 specifically to cut out my business, where I liquefy sugar
15 and then refine it.

16 So the decision by I believe the Mexican
17 government was to stick with the international standard and
18 U.S. Customs standard for certainly my lifetime, which says
19 that 99.5 and higher is refined sugar, and not open up a
20 whole new can of worms, specifically to cut out my business.

21 MR. CASSIDY: The World Customs Organization
22 harmonized commodity description and coding system defines
23 raw cane sugar to be 99.5 polarity or less than 99.5
24 polarity, and the harmonized tariff schedule of the United
25 States defines it the same way, and that is what the

1 Commerce Department picked as being the definition.

2 COMMISSIONER WILLIAMSON: Okay. Whether it
3 reflects the commercial reality is another matter.

4 MR. CASSIDY: Well, as I understand it, every
5 commercial agreement for sugar has as a first item in the
6 Aeneid, polarity of the sugar being sold.

7 COMMISSIONER WILLIAMSON: Okay, thank you.

8 MS. JEONG: If I may, this is Rosa Jeong,
9 Greenberg Traurig. One point I want to add is in their
10 comments on the draft suspension agreements, both Imperial
11 and AmCane advocated the 99.5 polarity, the distinction
12 between raw and refined. To be fair, AmCane said as an
13 alternative, the Department should adopt a use-based
14 definition. But one of the alternatives they proposed was a
15 99.5 polarity definition based on, to define raw and
16 refined.

17 COMMISSIONER WILLIAMSON: Okay, than you. Ms.
18 Hillman, I was wondering, do you happen to know offhand how
19 many suspension agreements have been entered into under this
20 C provision, if any?

21 MS. HILLMAN: Under the C provision, I do not.
22 I would be happy to submit that in the post-hearing. I do
23 have a book with all of the suspensions in it, but I didn't
24 count them up by C versus B agreements.

25 COMMISSIONER WILLIAMSON: I was just

1 wondering, given the special provisions under -- that comes
2 with this.

3 MS. HILLMAN: We'll answer that in the
4 post-hearing.

5 COMMISSIONER WILLIAMSON: Okay. It's just to
6 get an idea. Let's see. Mr. Farmer, you were talking about
7 -- I just want to get a better idea of where the different
8 groups of refiners might be on this. I guess there's some
9 that bring in the melt sugar, or I guess what you call -- is
10 that what's called melt sugar, in which you're doing the
11 liquid?

12 MR. FARMER: This was gone over extensively in
13 the first hearing. The determination was made that our
14 company is a sugar refiner, because of what the value added
15 that we do to the sugar itself, and that there are other
16 companies, maybe melt houses, where you're literally just
17 adding hot water to sugar. But you're not necessarily
18 purifying it. All of our refineries can purify and take the
19 color out of sugar.

20 COMMISSIONER WILLIAMSON: Actually, what I'm
21 really thinking about is in terms of who supports the
22 agreement and who doesn't, and there seems to be a group of
23 refiners who supported it and then we had petitioners this
24 morning who didn't. I'm just trying to get a better idea of
25 that universe, and why people are where they are.

1 MR. FARMER: Melt houses --

2 COMMISSIONER WILLIAMSON: Let's put that
3 aside. I'm sorry I used that word.

4 MR. FARMER: I believe that certain sectors of
5 the refining business in the United States are trying to use
6 a short period of history to claim that this was the norm,
7 and to try to get guarantees of market share and minimum
8 profits. We're not willing to do that.

9 In our business, you know, we built our
10 refineries in the last five years and, you know, we are the
11 new player. We have come up with a different kind of
12 process and we think we're more competitive. So we're not
13 willing to call the last couple of years the norm.

14 So I think that's really what it comes down
15 to, is that some people have many hundreds of millions if
16 not billions of dollars invested, and they would like things
17 to stay unchanged, and other -- new entrants like Imperial,
18 which is only a couple of years old. They just bought
19 Imperial about three years ago, right. They're trying to
20 grab that unique period of time when the prices were soaring
21 and, as they said, nobody could get sugar.

22 They're trying to say that that's the norm.
23 The refining margins were, say, ten cents a pound, and that
24 we want access to sugar to guarantee that. And I am a small
25 player in industry, basically saying that we should not

1 accept that. The refining industry is the only free market
2 part, and should remain that way and open to competition.

3 COMMISSIONER WILLIAMSON: Okay. Mr. Kaplan,
4 thank you.

5 DR. KAPLAN: I just wanted to point out --
6 Seth Kaplan. I just wanted to point out the producers and
7 the refiners on sides of this issue for your review and
8 answer the question.

9 COMMISSIONER WILLIAMSON: Okay, good. Thank
10 you for that, and I thank you for those answers.

11 CHAIRMAN BROADBENT: Commissioner Johanson.

12 COMMISSIONER JOHANSON: Thank you, Chairman
13 Broadbent. Do you all agree with the Department of
14 Commerce's position that the problems of which AmCane and
15 Imperial complain go beyond and are different from those
16 addressed in the normal operation of the anti-dumping and
17 countervailing duty laws; that is, to paraphrase, that the
18 guarantee of a generous supply of inexpensive raw sugar from
19 Mexico is not within the purview of the AD-CBD laws?

20 MR. GREENWALD: I would agree that the AD-CBD
21 laws do not contemplate generous supplies of anything at any
22 price, except that they're designed to avoid less than fair
23 value pricing. So in that sense, you know -- let me turn
24 more to the issue that AmCane and Imperial are both raising.

25 What they are doing, as we understand it, is

1 raising a red flag about the possible effects of this
2 agreement on a prospective basis. There's an element of
3 speculation that is unavoidable, and we have said to you,
4 and you know, I think we all believe this, that issue is not
5 before you. But it doesn't mean that the concerns are
6 illegitimate.

7 What it does mean is it not to be factored
8 into your decision-making; rather, the suspension agreements
9 themselves contemplate a review process where, for example,
10 the Department of Commerce has said that the availability of
11 sugar supply will be looked at in determining whether the
12 agreements are working in the future as intended.

13 That strikes me as A, reasonable; and B, in
14 fact part of the suspension agreement system that has been
15 put in place. I do believe that both Imperial and AmCane
16 are simply brushing that aside as meaningless, and I would
17 submit to you in fact it is a significant part of the
18 suspension agreement.

19 COMMISSIONER JOHANSON: Along those lines, Mr.
20 Greenwald, a GS -- a JSG report dated December 20, 2014
21 submitted by AmCane and Imperial states that "There's no
22 question in our mind that U.S. refiners and remelters will
23 be injured by the agreement signed last evening." That
24 talks of the future tense. So you're stating that that
25 should not be considered?

1 MR. GREENWALD: I'm saying not only it should
2 not; it cannot. The Commerce could not be expected and
3 would frankly be outside of its expertise. If it had tried
4 to interpret the -- eliminate the injurious effect as
5 eliminate all possible effects in the future, whether
6 related to the agreement or not. I don't think that's part
7 of your mandate.

8 I do understand the concern. Let me emphasize
9 this. Nobody on the petitioning coalition dismisses that as
10 not a potential issue. But it is not an issue that is
11 present, nor is it an issue, as I read the statute, that's
12 before you.

13 MR. CANNON: Could I put a footnote on that
14 John? So by -- think about your practice in normal cases,
15 and you have to look at the whole industry. This was raised
16 this morning. You talked about there being producers and
17 processors. It is not uncommon, in your cases that come
18 before you, for there to be in the U.S. industry, if you
19 decide they're part of the industry, companies that do a
20 small amount of processing relative to fully a integrated
21 company.

22 Sometimes you look at those companies and they
23 may be import, and their data, because of that, are
24 distorted, to where -- to the extent that perhaps they are
25 profitable, where the rest of the industry is losing money,

1 and you decide, under the related party provision, we are
2 not going to include these companies in the industry, for
3 purposes of our analysis.

4 It's not -- I'm not saying that the data here
5 for the two refiners this morning are distorted. I'm saying
6 that when you look at the industry as a whole, you account
7 for the fact that there are companies with different levels
8 of operations, and we have that here. In fact here, we have
9 the agricultural provision. So you also have to consider
10 the impact on the growers.

11 When we talk, as we have now been for quite a
12 few questions, focused on refiners, you had a slide earlier
13 -- we have a slide here. This industry is not just
14 refiners, right. We have growers. We have millers.

15 When the Commission found, going back to the
16 question I was thinking about, because you asked me earlier
17 about the cost-price squeeze. In the preliminary, when you
18 found a cost-price squeeze, when you found that the COGS to
19 sale ratio was increasing, you did not make that finding on
20 the basis of two refiners or even just refiners.

21 You made it on the basis of refiners and
22 processors, all the producers' data, all the millers and the
23 refiners. That was your basis at your preliminary for the
24 squeeze, not just refiners. So to talk about the refiners'
25 margin is going beyond really what was before you at the

1 preliminary stage, and now I made it into way more than a
2 footnote, sorry.

3 COMMISSIONER JOHANSON: Mr. Cannon, would it
4 be possible? I mean under the ideal world, there could be
5 an agreement where both processors and producers are pleased
6 with the final outcome. It seems like a tall order.

7 MR. CASSIDY: Excuse me. The American Sugar
8 Coalition supports the agreements, and the American Sugar
9 Coalition includes among its members refiners.

10 COMMISSIONER JOHANSON: But you have some
11 refiners here who are dependent upon imported Mexican raw
12 sugar, and that seems to be the big issue.

13 MR. CASSIDY: All refiners, I believe -- no
14 wait. I believe all refiners import raw cane sugar.

15 COMMISSIONER JOHANSON: But some perhaps more
16 than others?

17 MR. CASSIDY: I'm sure some more than others,
18 yeah.

19 COMMISSIONER JOHANSON: Mr. Carter.

20 DR. CARTER: Oh thank you. If I can just make
21 a comment on that. I think too little attention has been
22 paid to the volumetric agreement, as Ms. Hillman referred
23 to, and your statement, Mr. Johanson, that they're dependent
24 on raw imports from Mexico sort of ignores the importance of
25 the TRQ imports.

1 Most of the TRQ imports are raw sugar, and in
2 my analysis, I determined that the agreement, the volumetric
3 part of the agreement, would have ensured the very high fill
4 rate on the TRQs, in the past mostly going forward. The
5 U.S. needs calculation that's allocated to Mexico is
6 calculated after the TRQ allocation.

7 MR. BRUNO: And if I may add, this Philippe
8 Bruno. The TRQ imports do not have a floor price. They
9 come at Contract 11 prices, which means they can be more
10 than the Mexican imports in terms of raw sugar. So it's all
11 raw sugar at lower prices in Mexico and again, as Mr. Carter
12 pointed out, they are factored in the formula which is used
13 to determine U.S. needs for the Mexican quota.

14 COMMISSIONER JOHANSON: That must be a very
15 confusing formula. I can only imagine. So you are stating
16 that -- I'm sorry. I'm trying to figure this out, that the
17 TRQ, TRQ sugar will be at a lower price?

18 MR. BRUNO: They can come at -- they can come
19 at any price. They are not subject to any floor price.
20 That was my point. Now at what price they're going to come
21 in, I can't tell you. It is possible they will come at the
22 same price as the floor prices, because that established a
23 new floor in the market. But as of today, those imports are
24 not subject to any floor prices.

25 MR. FARMER: This is Paul Farmer. I'd like to

1 say that TRQ is not subject to any minimum or maximum price.
2 However, virtually all sugar traded into the United States
3 is based on the No. 16 price, which is an openly-traded
4 market. It is possible that say producers in Guatemala may
5 choose to sell, ship their sugar to the United States early
6 in the year, and they discount what would be the Mexican
7 minimum price a little bit to move that.

8 But it's not realistic to think they would
9 discount it by a few cents a pound. The reality is that
10 this agreement basically sets a support level somewhere
11 between 24.50 and 25.50 based as the No. 16 price, and it's
12 not likely that somebody's going to have a fire sale for
13 sugar. The price is going to be basically in those levels,
14 if not higher.

15 COMMISSIONER JOHANSON: All right. Anybody
16 else, because my time is about to expire. I'll just end it
17 here. Thank you.

18 CHAIRMAN BROADBENT: Commissioner Kieff.

19 COMMISSIONER KIEFF: Thanks. Let me, if I
20 could, try to dive back into the legal discussion, and see
21 if we could test the limits of it a little bit, and go with
22 a hypothetical argument.

23 What if your opponents were to say look, we
24 basically agree with you that the inevitable sacrifice one
25 makes to the shortness of life requires one to summarize,

1 and when summarizing, one prioritizes, and the accurate
2 summary of the headline decisions in the preliminary
3 determination are exactly as you've described. Therefore,
4 those are exactly addressed as you've argued.

5 But that doesn't preclude there also to have
6 been decisions, maybe burrowed inside of the preliminary
7 determination, that the harms they're complaining of were
8 occurring, and continue to be occurring, and the peculiar
9 nature of the suspension agreement is that it happens to
10 heighten those harms.

11 Would we be -- if that were the argument and
12 if we burrowed into the documents and found support for the
13 facts, would the law leave them in a good position before us
14 today on those facts, that hypothetical, or would they still
15 lose, because the law isn't designed to accommodate that
16 problem?

17 MR. GREENWALD: They would lose, and I think
18 they would still lose, if I can begin with the precise
19 language of the statute, because what you're asked to look
20 at is whether or not the suspension agreements eliminate the
21 injurious effect singular, and it isn't each individual
22 person, company --

23 COMMISSIONER KIEFF: This is the
24 singular-plural distinction you drew earlier.

25 MR. GREENWALD: Yeah, it matters.

1 COMMISSIONER KIEFF: And if they -- if we
2 disagreed with you on the weight to give to the
3 singular-plural distinction, under the view that a perfect
4 grammarian is not always readily available to aid in a
5 drafting exercise, and therefore we have to always allow
6 some degree of flexibility, would that then require us to go
7 the other way, enable us to go the other way, or would we
8 still be precluded from going the other way?

9 MR. GREENWALD: I have enormous faith that the
10 people that are interpreting the statute, regardless of who
11 may have drafted it, are in fact perfect grammarians, and do
12 understand the difference.

13 COMMISSIONER KIEFF: Oh my. I went to the
14 wrong school then, I'm sorry.

15 MR. GREENWALD: But let's say that you ignore
16 the effect, singular effects plural distinction, and decide
17 that you are in fact --

18 COMMISSIONER KIEFF: And there's color to
19 that, right. It could be ^^^^ a generic word often can be
20 interpreted to cover the singular and the plural, a
21 category. So a category, eliminate harm, generally could be
22 read to eliminate all types of harm.

23 MR. GREENWALD: I enjoy these exchanges
24 enormously. It does seem to me to be qualified by the use
25 of the word "the."

1 COMMISSIONER KIEFF: Okay, that's fair.

2 MR. GREENWALD: But leaving the grammar aside,
3 the question always is do the agreements, if we go back to
4 the chart that shows who thinks they eliminated all the
5 effects, is that residual, whatever it is, enough to leave
6 this Commission to say that the injurious effect captured by
7 the preliminary determination is not eliminated?

8 I mean it seems to me that's ultimately the
9 question, and could you do the wrong thing? Sure. But you
10 know, should you? No.

11 COMMISSIONER KIEFF: Yeah. I mean I take it
12 their view is that it wouldn't be wrong, and if we got
13 there, I take it our view would be that it wasn't wrong,
14 although we get that you urge us not to do it. Is there any
15 comfort you can give the other side? Is there a remedy they
16 have that somehow they could pursue?

17 MR. GREENWALD: Yes, and I'm glad you asked
18 that question. First, if you go back to the testimony by
19 Mr. Cortina, what he said is we have supply in Mexico. To
20 the best of my knowledge, neither Imperial nor AmCane have
21 gone down to try and negotiate the sale of it. So the first
22 thing I would urge them to do is to get down to Mexico. The
23 second thing I would urge them to do is something where we,
24 but not the rows behind me -- well, I shouldn't speak for
25 them -- have a common interest.

1 We care about enforcement. You heard today in
2 the testimony that there were issues. Testing and various
3 other things, about how Customs will enforce that. We would
4 very much welcome going in jointly to make sure this
5 agreement works in practice. So they could do that.

6 MR. GREENWALD: There is an issue which wasn't
7 negotiated by the U.S. Government on a review. Others at
8 this table may discount the affects of imports from Mexico.
9 We don't. And so when we look at this as the Petitioners in
10 this case, we are not prepared to say that their concerns
11 simply won't happen. We are saying it is speculative, but
12 if it should arise there's a provision in the agreement to
13 deal with it. We urge them to do that with us. So, are
14 there things to do, yes, there really are.

15 COMMISSIONER KIEFF: So, maybe press a little bit
16 further to see if there's any other limit here. If,
17 hypothetically, Commerce were to find themselves negotiating
18 a suspension agreement in a future case and it had a
19 heterogeneous industry with diverse business models and to
20 stick with the slide that's currently up of a pie chart with
21 the dietician special slice carved out of it, the thinnest
22 possible slice of pie, is it -- and we assume that that
23 ultrathin slice happens to be a distinctly different
24 business model, a subgroup among the many groups in the
25 industry. And it represents or it comprises some polarity

1 of firms. Let's say three, four, five, but it just so
2 happens when you add up all the numbers it's a tiny
3 percentage of the overall industry, but it is a distinctly
4 different business model. Can Commerce, in effect, address
5 the overarching volume and price impacts that we assess in
6 our preliminary and do so in a way that happens to have a
7 dramatic, negative, dispirit impact on the business model
8 described by the thing slice? Can it do that, or is there
9 some limit in our review process to Commerce's ability to do
10 that.

11 Put differently, to borrow a phrase from this
12 morning, or a concept. I won't get the quote right, but
13 something akin to unless they know we will check them on it
14 they won't have the incentive to have the interest of the
15 diverse members of the community at heart. Is it okay for
16 them to make that move or are we limited in our ability to
17 provide that check?

18 MR. GREENWALD: Well, I don't think the check
19 that you described is the check that's within you province
20 because your issue -- I mean you're up here as judges,
21 frankly, and there's a standard prescribed by law. Could
22 Commerce do a better job on a wide range of things? Yes,
23 they really could. Could Imperial, for example, have
24 accepted our invitation to join with Petitioners? They
25 could've, but they didn't.

1 And as to the Commerce/Imperial or the
2 Commerce/AmCane dynamic, I frankly can't comment on it, but
3 I have no doubt that as with any agency of the U.S.
4 Government there's always room for improvement. But that
5 doesn't really address the issue that's before you.

6 COMMISSIONER KIEFF: Thank you. I see my time
7 has expired.

8 MR. GALLARDO: Could I add something, please?
9 From our point of view, the Mexican Government and the
10 Mexican industry want this agreement to work. It has been a
11 very disruptive past year. I think the elements are there,
12 and it's very difficult for us to envision what can happen
13 in the future, especially the dire consequences the
14 gentlemen this morning spoke of.

15 In fact, when in the past none of them happened.
16 So, I would suggest that they come down to Mexico and try to
17 negotiate sugar supply, which sugar is available, and you
18 know, it's there. And let's make this thing work.

19 CHAIRMAN BROADBENT: Commissioner Schmidtlein.

20 COMMISSIONER SCHMIDTLEIN: I have to say all this
21 talk of going down to Mexico is distracting me. I think
22 that we should all go right now, given the weather.

23 So, I wanted to follow up on a comment that was
24 being made in the line of questioning about the TRQ and the
25 price of raw sugar. And specifically that the TRQs are not

1 subject to a floor price, and we understand that raw sugar,
2 under the suspension agreement, is subject to a floor price,
3 22.25 cents. And so the point was made, the TRQ sugar could
4 come in at a price lower than that because it has no floor.

5 And this morning we heard the panel say, well,
6 the amount of Mexican raw sugar that comes in is greater
7 than the combined, you know, 37 next countries with TRQs out
8 of the 40, or something. So, the price of raw sugar, if
9 it's coming in at 22 cents, in order for Mexico to import
10 it, it would have to be at that price. Isn't it true that
11 the TRQ price is probably going to hover right around that
12 because of the large amount of Mexican sugar?

13 So, while it could come in because it's not
14 technically subject to floor prices and the market dynamic
15 going to be that it's probably close to that price. Now, I
16 don't know about the timing and if Guatemala is selling
17 early.

18 MR. FARMER: So, the people responsible for
19 selling the TRQ in all the different countries and all the
20 different mills in those countries, certainly, went to
21 better schools than I did. And they can look at the USDA
22 supply and demand projection and see that a 13 percent
23 supply and demand is going to basically, based on past
24 history, put the price at a certain number at the end of the
25 year. And then all the players involved they're looking at

1 exactly the same thing, and they're all betting on where the
2 market's going to settle out.

3 So, you're right, it's going to settle out pretty
4 much close to that price, unless there's some change, like
5 somebody expects that the weather in Mexico is going to get
6 bad and they might not fill the quota, or the feed harvest
7 is bad, or something like that. But generally speaking, the
8 number 16 price is the price based on the expectations for
9 the end of the year, based on USDA predictions.

10 And if they predict the stock ratio is going to
11 be 17 percent, the price is going down. If they predict
12 it's going to be 15 percent it's going to be neutral. And
13 if it's 13 percent, it probably will be -- rise a little
14 bit. But it changes a little bit. People have different
15 ideas, but you know you're not buying half-price sugar in
16 Guatemala. That was 40 years ago. It's not today.

17 COMMISSIONER SCHIMDTLEIN: But the same isn't
18 true for the price of refined sugar.

19 MR. FARMER: It's exactly the same thing for
20 refined sugar.

21 COMMISSIONER SCHIMDTLEIN: It is the same.

22 MR. FARMER: Refined sugar is not trade on an
23 exchange, so it really comes down to more of a logistics
24 play, whether or not you can get your customers to accept
25 the quality or the mill. There's a long process. I mean if

1 you want to sell a U.S. industrial company sugar it could
2 take up to two years to even get the quality or the mill
3 approved to sell refined sugar. So, this expectation that
4 there's going to be this enormous flood of Mexican refined
5 sugar showing up I can tell you from my personal business it
6 takes forever to get this stuff done. It's much more
7 difficult to ship refined sugar. It's much more difficult
8 to sell it forward. And it may happen some point in the
9 future that, yeah, 53 percent of the Mexican quota may come
10 here, but I don't see it happening any time in the short
11 term.

12 COMMISSIONER SCHIMDTLEIN: But when the same
13 isn't true, and you said, no, it is exactly the same. This
14 morning, though, according to the Petitioners they don't
15 believe that the price of Mexican refined sugar can set the
16 price of -- the TRQs I should say, the other imported sugar,
17 but you disagree with that.

18 MR. FARMER: What I would tell you is that, you
19 know, it comes down to the size of the player. So, Mexico,
20 you know, their refined sugar quota is going to be about
21 700,000 tons or 750,000 tons. The beet crop is 5 million
22 tons, so who sets the price of refined sugar? It's really
23 the beet sugar crop -- the beet sugar growers, depending on
24 what they look at the end-of-the-year numbers on.

25 It really comes down to who becomes the price

1 setter, and that goes back to the original argument, which
2 is did Mexico set the price or did they meet the price or
3 did they undercut. I would say Mexico met the price, met
4 the price from U.S. beet sugar growers and cane growers who
5 basically set the price. A 5 million ton in the United
6 States, which is beet sugar growers, they determine the
7 price at the beginning of the year. They're the ones who
8 are selling sometimes two and three years forward, right,
9 and everybody else kind of has to meet that.

10 The reality is you don't know what the cane
11 supply is going to be two years forward because you don't
12 know what the quotas are going to be. So, a cane sugar
13 refinery they're trying to sell forward margins at
14 profitable levels, but they really don't know what the
15 market is going to be, and you don't know whether it'll be 7
16 million tons of raw sugar available between U.S. domestic
17 production and quota or 5 million tons. You have no idea.

18 And that's why you have huge variability in the
19 refining margins over a long period of time. You just don't
20 know. You have to be an eternal optimist if you want to be
21 a refinery owner in the United -- cane refiner in the United
22 States because you're betting that somewhere down the road
23 there's going to be a beet sugar crop problem and that
24 you're going to have massive imports of raw sugar, which
25 would increase the margin, but you have no idea.

1 COMMISSIONER SCHMIDTLEIN: Mr. Kaplan.

2 MR. KAPLAN: Excuse me. I think I know what your
3 question is. Tell me if I'm wrong. I think that the floor
4 price in the agreement will set the floor price in the
5 United States because Mexico --for raw -- because Mexico is
6 the marginal supplier to the United States.

7 But with respect to refined, that's not the case.
8 Mexico is relatively small, and the refined price, as
9 testified to this morning, could fall below the price in the
10 agreement, and at that price there will be no imports from
11 Mexico. Is that what you were --

12 COMMISSIONER SCHMIDTLEIN: That was essentially
13 my question. Do you agree?

14 MR. KAPLAN: Yes, I agree with it. Paul, do you
15 agree with that?

16 MR. FARMER: Yes.

17 MR. KAPLAN: Okay, so we were talking about the
18 determination he was more about determination, not relative
19 to the floor, so I think everybody agrees.

20 COMMISSIONER SCHMIDTLEIN: And so to follow up
21 on something you just said you don't expect Mexico to
22 fulfill the quota with 53 percent of refined sugar this year
23 from the Mexican Sugar Chamber?

24 MR. FARMER: No, I don't. It's harder than it
25 looks to ship Mexican refined sugar to end user customers in

1 the United States. It costs more. There area quality
2 issues, transportation issues. It'll take many years before
3 they become efficient at that and before the U.S. industrial
4 community will readily accept it. And even with that, you
5 still don't know what the quota is until shortly before the
6 quota year. So, as beet sugar companies can sell two, three
7 years forward and fix the price and be happy, you can't do
8 that for Mexico because you don't know what the quota is
9 going to be, which means Mexico will always have to be
10 reserved about how much refined sugar they sell forward
11 because they don't know what the quota is.

12 The degree of difficulty for Mexico to sell end
13 use customers' refined sugar in the United States is much
14 higher than anybody else.

15 COMMISSIONER SCHMIDTLEIN: And do the Mexican
16 representatives agree with that?

17 MR. GALLARDO: Especially for this year. This
18 year the bulk of U.S. buying of sugar, which is most refined
19 sugar, it's already been sold because of agreements, because
20 of the anti-dumping investigation Mexico just started
21 selling sugar very late, in fact, maybe a few weeks ago.

22 So, basically, I think the bulk of it will have
23 to go for refineries and for people that are going to do the
24 service that Paul was talking about, and we're not going to
25 sell, or if we sell, we're going to sell a very small

1 quantities of refined sugar in the U.S. It's too late for
2 this this year.

3 COMMISSIONER SCHMIDTLEIN: Ms. Hillman, did you
4 have something you wanted to add?

5 MS. HILLMAN: Commissioner, I was only going to
6 add to make it clear that there's nothing in the suspension
7 agreement that changes the provisions with respect to the
8 TRQ being -- USTR and USDA are allowed to raise the TRQ
9 levels above it, if there is a need. So, in other words,
10 Mexico has, if you will, a right of first refusal. But if
11 Mexico is not supplying sufficient amounts of raw, there's
12 nothing that would preclude the TRQ levels from being raised
13 if there is more demand for raw sugar beyond which is able
14 to be met by the combination of U.S. supply, plus Mexico.

15 COMMISSIONER SCHMIDTLEIN: Is that correct
16 because is the change in the TRQ is based on an increase in
17 demand for human consumption? In other words, is it an
18 increase in demand for sugar for direct consumption, or is
19 it a need for raw sugar to maximize capacity at U.S. sugar
20 refineries? That was going to be another one of my
21 questions.

22 MR. FARMER: It's based on the total use. It has
23 nothing to do with the use for refining purposes.

24 COMMISSIONER SCHMIDTLEIN: Right. It's based on
25 demand.

1 MR. FARMER: Actual demand.

2 COMMISSIONER SCHMIDTLEIN: That's right.

3 MR. FARMER: And the thing to point out is in the
4 last five years the Mexican -- this year the Mexican sugar
5 crop is about 6 million tons, which is about what it was
6 last year. In the last five years, it's been 5 million tons
7 and it's been 7 million tons. And when it's 5 million tons,
8 they don't export much to the United States. So, when you
9 talk about variability of raw sugar supply or where it's
10 going to come from that's always going to be a variable.
11 That's part of the cane refining industry. It's boom and
12 bust. And you have no idea what it's going to be two years
13 forward.

14 COMMISSIONER SCHMIDTLEIN: Okay. So, the last
15 question I had was having to do with more of a legal
16 question about what we're looking at and what Commerce
17 looked at and so forth.

18 And so listening to some of the other
19 conversations, I wondered what your response would be to the
20 question of should Commerce -- you know, since you're
21 advocating that we look at the prelim decision here. Is
22 that what Commerce should've looked at? And since they
23 didn't, at least in their memo it doesn't really say that.
24 Is that a problem? We're sort of in this odd position
25 where, you know, you said the governments got together and

1 negotiated this. You weren't in the room. Commerce has
2 come up with this determination. They've written two memos.
3 You weren't there, but now you're here telling us to look at
4 our prelim decision, which wasn't reviewed by them. So,
5 does that even matter for our analysis?

6 MR. GREENWALD: As a matter of fact, it would
7 surprise me if they didn't look at your prelim.

8 COMMISSIONER SCHMIDTLEIN: But it's not cited as
9 a support -- you know, at least explicitly.

10 MR. GREENWALD: I understand that, but it's not
11 cited, and I can't get behind what Commerce actually
12 considered, but that was the only finding of injurious
13 affect that they could possibly rely on. They have no
14 independent authority to find or not find injury. They have
15 to, if you're dealing with an injurious affect, look at an
16 injurious affect found to exist and that is your injurious
17 affect finding. And it seems to me the only question, the
18 real question for you is -- forgetting what Congress did or
19 didn't do, does the agreement address -- the agreements
20 address the injurious affects that you found and eliminated.
21 And we say look at volume. It's constrained. Look at
22 price. It's part of the suspended of the belt. Look at the
23 way in which the agreement addresses the burden on the
24 program. And I understand that there's no question that
25 that is gone as well.

1 So, it seems to me that that is the construct
2 that you have, and what Commerce did or didn't do in their
3 reasoning shouldn't dictate what you do.

4 COMMISSIONER SCHMIDTLEIN: Okay. Thank you.

5 CHAIRMAN BROADBENT: Mr. Greenwald, I think I
6 heard you express skepticism at the reference price for
7 refined sugar will become the market price in the United
8 States for refined sugar. And you can just respond to that
9 first, and then I have a follow up.

10 MR. GREENWALD: I did. I do not understand why
11 it is that a reference price for -- if you're talking about
12 refined sugar from a relatively minor supplier of sugar to
13 the U.S. market dictates the U.S. price. The assumption
14 underlying it seems to be, first, that Mexico will choose to
15 export at the floor price rather than at a higher,
16 profitable price. I don't know why, but that seems to be
17 one assumption that I think is difficult -- at least it's
18 difficult for me to accept.

19 And then the other one is that everybody else in
20 the market, producers that account for a lot more refined
21 sugar are somehow going to pay what they sell to the
22 availability of Mexican supply, which is finite. I mean
23 understand you're not just dealing with price floors.
24 You're dealing with a combination of a quantitative limit
25 that cuts back supply, plus a minimum price. And it may

1 very well be that my expectations, which are that markets
2 work in ways that are very different from what you heard
3 this morning. I may be wrong, but that is entirely
4 speculative regarding the future.

5 CHAIRMAN BROADBENT: Well, I guess we're sort of
6 in this no discernible type standard, and I'm just wondering
7 don't we have to sort of think about the worse case
8 scenarios for these refineries, that U.S. prices could fall
9 to the reference price and what would happen to them?

10 MR. GREENWALD: But that's not the injurious
11 affect that Commerce could possibly have considered. I mean
12 that is, frankly, what happens if the agreements, as posited
13 this morning, create a new injury? My answer to that, as a
14 legal matter, is the statute doesn't address that. It
15 can't. The statute gives Commerce the right to enter into
16 suspension agreement to cure past injury. And I would say
17 only injurious finding they have is your preliminary, and
18 therefore that's what they must cure.

19 CHAIRMAN BROADBENT: So, we need to put blinders
20 on to anything that -- any injury that may be caused by this
21 agreement?

22 MR. GREENWALD: Well, I wouldn't say you have to
23 put blinders on, but you have to understand that the
24 agreements themselves provide a mechanism for addressing any
25 future problems that may arise. There is a review process

1 that, as I said, was deliberately structured to take into
2 account, for example, shortages of raw sugar, but that's
3 perspective. It may or may not happen. And if it does
4 happen, then there is a review process in the agreement for
5 that.

6 I'm saying that your statutory responsibility is
7 to assess whether or not the injury that existed at the time
8 the agreements entered into affect were addressed by the
9 agreement.

10 CHAIRMAN BROADBENT: Mr. Kaplan.

11 MR. KAPLAN: Yes, I just want to point out that
12 the injury that you noted, which is the U.S. price falling
13 below the floor price, as I understand it, at that point
14 would prohibit imports from Mexico. So, while the
15 agreements are supposed to stop the injurious affects due to
16 the subject imports, if the U.S. price falls below the floor
17 price, imports are zero. So, if you call that injury -- you
18 might or you might not -- but plainly it can't be due to the
19 imports because there are no imports if it does.

20 CHAIRMAN BROADBENT: Okay.

21 MR. KAPLAN: So, I hope that mollifies your
22 concern that if someone's injured the agreement addresses
23 it. It has an advance because there's no imports at that
24 point. Thank you.

25 CHAIRMAN BROADBENT: Okay.

1 MR. FARMER: I'd like to just mention about
2 current market prevents -- the suspension agreement been in
3 operation for just a very short period of time. And I can
4 tell you in the first months our company probably bought a
5 hundred, between 100 to 200,000 tons of raw sugar for
6 shipment in vessels to refineries. And we had a very
7 difficult time actually getting it hedged in the Number 16
8 market. And I would say we got most of it hedged and the
9 price was about 25 percent a pound in the Number 16 market.

10 The cheapest refined sugar that I've been able to
11 find, which I think is too high, but I'm not willing to pay
12 it, but I know it's trading there; is from Mr. Armero,
13 quoting 28 cents a pound. So, when you want to talk about
14 whether these minimum prices set the market price, currently
15 they're not.

16 CHAIRMAN BROADBENT: Okay.

17 Just a point of clarification for myself, Mr.
18 Farmer, I remember in the preliminary phase that CSC's
19 operations were designed to refine a higher polarity sugar
20 than most other refiners. In fact, my recollection is that
21 the Petitioners recommended excluding CSC from the domestic
22 industry. They were calling it a melt house. And I was
23 just wondering what we can pull from the record on whether
24 CSC's operations are representative of what refiners are g
25 doing generally.

1 MR. FARMER: So, since that hearing, we have
2 imported sugar from Brazil, Guatemala, Costa Rica, Columbia
3 -- raw sugar, the same raw sugar that anybody else would
4 receive, and we have processed it the same way we process
5 Mexican sugar. It certainly cost us a little bit more, as
6 it would cost any refiner a higher cost to process little
7 bit lower quality sugar. But I can tell you we receive
8 sugar that looks like raw sugar and we process it just fine.

9 CHAIRMAN BROADBENT: Okay.

10 And I just have one request for the record. It
11 would be helpful to me if the parties -- all parties could
12 put on the record here -- I guess in the post-hearing would
13 be best -- a response to the following questions.

14 What is the share of refined imported sugar as
15 defined by the agreements that is actually destined for
16 further refinement? What is the share of other imported
17 sugar, as defined by the agreement, that is actually
18 destined for human consumption, and what is the basis for
19 your estimates? If you could outline that for us in the
20 post-hearing brief that would be helpful.

21 That, I think, is the end of most of my
22 questions. I'm going to yield to Vice Chairman Pinkert.

23 VICE CHAIRMAN PINKERT: Thank you, Madam
24 Chairman. I have a follow up for Mr. Farmer.

25 What percentage of CSC's purchases of raw sugar

1 are from Mexico? And if you can't answer it during the
2 hearing, I'd like you to answer it in the post-hearing.

3 MR. FARMER: It certainly depends on the year.
4 If you go back three years ago, it was probably, you know,
5 10 to 15 percent. In the POI, it was probably 60 to 70
6 percent. We buy sugar from most quota countries under the
7 TQR. We're probably buying about half a million tons out of
8 the 1.2 million ton TRQ at origin, but the Mexican quantity
9 goes up and down. Some years it's a few hundred thousand
10 tons. In one year it was a million and a half tons.

11 VICE CHAIRMAN PINKERT: And if we're looking at
12 the next year or so, would you expect that that percentage
13 would be towards the low end of the range that you just
14 identified or could it be anywhere?

15 MR. FARMER: So, this year Mexico has got a
16 quote, theoretically, if about a million six, and I would
17 estimate that probably 3 to 400,000 tons of that will be
18 move as finished product to an end consumer, and the balance
19 would move as raw sugar. And out of that I hope to get all
20 of it. I mean I won't get all of it, but I would hope to.
21 I mean, realistically, I think our company will move
22 probably 7 or 800,000 tons of that. And most of that, quite
23 frankly, goes to ASR and Imperial. Our company uses about
24 350,000 tons for our own refining process and the rest of it
25 goes to ASR and Imperial.

1 VICE CHAIRMAN PINKERT: Thank you. Now, a follow
2 up for Mr. Cannon. I understand your argument about whether
3 we have to make a determination that the agreement will
4 prevent price undercutting, but let's just say that I come
5 to the conclusion that I'd have to make a determination on
6 the issue of whether the agreement or the agreements will
7 prevent price undercutting. If I do have to make that
8 determination, then presumably I have to have some idea of
9 what the U.S. prices will be in the near future. And I
10 would ask you to try to give me your best analysis of that.
11 I understand that as Ms. Hillman has testified that there
12 are a lot of things that would impact that U.S. price level
13 going forward, but if I have to make a determination, and I
14 understand you don't think I do, but if I have to make a
15 determination about that price undercutting issue, how will
16 I do the analysis?

17 MR. CANNON: We get to take this on in
18 post-hearing?

19 VICE CHAIRMAN PINKERT: Absolutely. So that
20 means you're going to take it on in the post-hearing?

21 MR. CANNON: Yes.

22 (Laughter.)

23 VICE CHAIRMAN PINKERT: You get to.

24 MR. CANNON: I would initially say that in the
25 statute the consideration of specifically whether there's

1 underselling, it's not in H. Right. It's under C. Right.
2 In terms of the statute it's one of the criteria -- well,
3 Commerce has to decide this issue. But under H in your
4 review, the statute doesn't say that you have to look at
5 underselling.

6 VICE CHAIRMAN PINKERT: In any event, if you
7 could give us your best analysis of that issue in the
8 post-hearing, that would be helpful.

9 MR. CANNON: Will do.

10 VICE CHAIRMAN PINKERT: Thank you.

11 Now, you may recall that I asked the earlier
12 panel about whether there was a significant difference
13 between what the two sides were projecting regarding the
14 likely quota on Mexican sugar that the CBD agreement would
15 impose. And I believe that Mr. Spak testified that you
16 weren't that far apart. Would you agree with that
17 characterization?

18 MR. CANNON: I believe that what Mr. Spak has
19 done is pointed to the 2014-2015 U.S. needs calculation
20 which has actually been done. So he' taken 2014-2015 and he
21 said it's 1.6 million, then he's looked backwards and said,
22 Mexican imports peaked at 2.1 million, therefore the
23 difference between those is half a million and that's where
24 he comes up with his number. Okay. That is not what we
25 did. We simply did, "but for" analysis, Dr. Carter did.

1 Dr. Kaplan came up with more or less the same figure in the
2 range of 1.2 to 1.3 million tons of Mexican sugar would not
3 have entered the U.S. market during the period of
4 investigation if the suspension agreement had been in
5 effect.

6 So fundamentally our timeframe that we looked at,
7 the nature of our analysis because we were looking
8 backwards, or looking forward, it was very different. As to
9 whether we agree or disagree, well, it's a fact that there
10 are numbers out right now for Mexico would set the U.S.
11 needs at 1.6. So we don't disagree with that.

12 VICE CHAIRMAN PINKERT: Dr. Kaplan?

13 DR. KAPLAN: Yeah, the other part about the CBD
14 agreement in particular is that they do the calculation of
15 U.S. needs. And we went backwards to give us that bar chart
16 of actual imports during the POI and before, but it really
17 tightens up the amount of imports that could come in at any
18 time. So there's a history of over the last 20 years of
19 USDA messing up just a little bit and letting in a little
20 too much.

21 The forfeiture you saw in 2012-13 is one of four
22 since 1981. And what happens is they're letting too much,
23 and then suddenly, oh, my God, the beet or the cane stuff
24 goes crazy and there's an oversupply in the market. And
25 they let in too many imports. Now they're very strict on

1 how much imports they let in early in the season, and
2 they're constantly checking it. So that's another avenue
3 that affords more protection to the domestic industry to
4 cause an oversupply situation and a price decline. So it's
5 just in addition to what everyone had said.

6 VICE CHAIRMAN PINKERT: Thank you. I don't want
7 to mischaracterize what we heard from the earlier panel, but
8 it was my interpretation of one of the comments that there
9 was some concern that the interest of the high fructose corn
10 syrup producers in the United States were given more weight
11 than the interest of the destination refiners in negotiating
12 these agreements. And I wanted to give you an opportunity
13 to respond to that even if that's not exactly what they
14 said, that was what I took from it.

15 MR. CASSIDY: We have no idea what weight, if any
16 whatsoever the Department of Commerce and USDA and the trade
17 representatives office may have given to producers of HFCS,
18 we're not aware that they had anything to do with this
19 process.

20 VICE CHAIRMAN PINKERT: Any other comments on
21 that issue?

22 (No response.)

23 VICE CHAIRMAN PINKERT: All right. Then finally,
24 there's a discussion in the McEnerny memo and also there was
25 some discussion today about the effect of these agreements

1 is to bring Mexico under the constraints of the sugar
2 program. And I'm wondering, is it your testimony that the
3 treatment of Mexico is now consistent with the treatment of
4 other countries under the sugar program?

5 MR. GREENWALD: With other countries it's
6 different. But is it our contention that Mexico is now
7 brought into the regime that is consistent with the U.S.
8 sugar program. The answer to that is yes.

9 The core problem you had was a market that is
10 regulated. U.S. suppliers are limited in what they can put
11 on the market. All other countries but Mexico were and
12 whenever you had a very, very large profit in Mexico, it
13 wasn't only that they brought in a lot, but their ability,
14 the available supply was even greater than they brought in
15 and prices reacted to that.

16 Under the suspension agreements that can't
17 happen. The U.S. needs calculation gives Mexico residual
18 supply. And then it imposes on Mexico limits that are not
19 imposed on TRQ countries in terms of both pricing and in
20 terms of how much refined sugar they can bring in. But it
21 is consistent in the sense that the program can work very
22 easily with this agreement -- these agreements in effect and
23 it could not work when Mexico was the only source of
24 unregulated supply.

25 VICE CHAIRMAN PINKERT: Any other comments on

1 that issue? Perhaps from the Mexican representatives?

2 MR. CORTINA GALLARDO: As I mentioned earlier,
3 NAFTA gave us ability to be able to sell any sugar quantity
4 and quality into the U.S. That has been completely changed
5 with agreements. Also fructose is completely unimpeded in
6 its entrance to Mexico. So as I said earlier, that more or
7 less ties our hands in that sense. But we completely agree
8 that this agreement helps both industries to solve a problem
9 that happened in 2013 that it won't happen again. It also
10 will guarantee that the U.S. program continues to be a
11 non-cost program to the U.S. government which I think it was
12 also important. And I think there's the basis for this
13 thing to be very successful going forward because as we were
14 mentioning earlier, we were brought into the U.S. sugar
15 program because of quantities that Mexico can export into
16 the U.S. are going to be managed by the USDA and their
17 parameters.

18 VICE CHAIRMAN PINKERT: Thank you very much.

19 Thank you, Madam Chairman.

20 CHAIR BROADBENT: Commission Williamson.

21 COMMISSIONER WILLIAMSON: Just one final
22 question. One argument supporting the agreement is that the
23 referenced prices are in line with recent and historical
24 market prices. How much weight should we give this given
25 that recent prices were for a period in which we found

1 preliminary injury? And, also, given that historical prices
2 are not adjusted for inflation?

3 MR. GREENWALD: The prices are higher than the
4 prices that existed -- you have the chart up there -- during
5 the period where there was the injury. So what I would
6 suggest to you, if they're saying that it was in line with
7 non-injurious prices, it definitionally means prices are in
8 line with prices before the market collapsed. Now, they're
9 not at the very high levels that existed three years ago.
10 But they are well above injurious price levels.

11 COMMISSIONER WILLIAMSON: Okay.

12 MR. CANNON: And I would add to that --

13 COMMISSIONER WILLIAMSON: Mr. Cannon?

14 MR. CANNON: -- that you're going to have a
15 volume effect of the agreement too, apart from the price
16 effect. And a lot of the reason for the preliminary -- or
17 part of the reason in your analysis is the fact that the CCC
18 had to step in, the U.S. government had to spend whatever,
19 \$259 million to support the industry that the sales were
20 made at the loan rate, at these very low forfeiture prices.
21 The quantity aspects of the agreement should prevent that
22 aspect from happening. And so I would just point out that
23 in addition to looking just at the historical prices, look
24 at that protection on the side, all that production will now
25 be able to go for human consumption.

1 COMMISSIONER WILLIAMSON: Thank you. Dr. Kaplan?

2 DR. KAPLAN: I think when looking at the POI and
3 just the period since the NAFTA which was 2008 when
4 restrictions fell for Mexico, what you see is that world
5 prices went up. And went up above the price floor. So you
6 can see anywhere from 1981 to, you know, around 2007, world
7 prices were below the price floor and that's where prices
8 stayed. And that period where prices went up, had a lot to
9 do with what happened for world prices. And when world
10 prices came down, U.S. prices came down. So as mentioned
11 this morning by the earlier group, that was a period where
12 no one could get sugar. The prices went very high. And
13 it's somewhat of an anomalous period. So I would agree in
14 the context of the history of sugar prices and the anomalous
15 period we've just seen, that what Mr. Greenwald said, the
16 prices in the agreement eliminate injury, I think we agree
17 with that.

18 COMMISSIONER WILLIAMSON: Okay. Thank you. I
19 would just note that 1981 is the first time I worked on
20 sugar. Thank you for that answer.

21 And with that, I have no further answers -- I
22 have no further questions. Excuse me.

23 CHAIR BROADBENT: Commissioner Johanson.

24 COMMISSIONER JOHANSON: Thank you, Chairman
25 Broadbent. I have just one more question. And Mr.

1 Greenwald, you might be the best person to answer this.
2 Commerce performed a forward-looking analysis stating that
3 the requirement in the suspension agreements prevent price
4 suppression and undercutting is by definition
5 forward-looking and would require an examination of some
6 time period after the agreement is in place. Commerce did
7 not perform an explicit retrospective analysis of how the
8 terms of the suspension agreement eliminate each of the
9 injurious effects identified by the Commission. Is it
10 appropriate for us to apply a different approach than
11 Commerce in these reviews?

12 MR. GREENWALD: I think the short answer to that
13 is, sure. I mean, you're not bound by what Commerce did.
14 The reason for the review is to have an independent agency
15 that is the agent is in fact charged with analyzing the
16 injurious effect of imports, look at what Commerce did in
17 terms of its own finding and its own analysis. I think what
18 Commerce did, as we've said all along, eliminates the
19 injurious effect but I wouldn't even begin to suggest that
20 you are somehow bound to follow the Commerce methodology or
21 do anything other than bring your independent judgment to
22 bear on now what Commerce did in terms of how it did it, or
23 not even what it said it did, but what the agreements
24 themselves do.

25 COMMISSIONER JOHANSON: Thank you. That

1 concludes my questions.

2 CHAIR BROADBENT: Commissioner Kieff.

3 COMMISSIONER KIEFF: Thank you, Madam Chairman.

4 Just a brief indulgence, I guess, to follow up on your
5 discussions with Commissioners Johanson, Pinkert, and
6 Schmidlein. A hypothetical. A senior political staffer at
7 Commerce writes an on-line tell-all blog posting about the
8 great political maneuvering she accomplishes by meeting the
9 domestic frozen -- the domestic high fructose corn syrup
10 interests in a deal with Mexico that happens to perhaps have
11 some effects that resemble addressing our preliminary
12 determination, but can't manage to write that in the report
13 that Commerce writes, and so doesn't. But knows,
14 nonetheless, a lot of the domestic industry players will, in
15 the sugar industry, be quite happy for some other set of
16 political reasons with substance of the deal. Even though
17 it gives the very, very short end of the stick to a subgroup
18 in the industry. Let's assume that all happened and we
19 believe it. And, you know, the facts might resemble this.
20 Right? We get Commerce reports that don't mention -- that
21 don't explicitly say they're addressing our preliminary
22 determination. And we could imagine -- fantasize about
23 backroom deals, if all of that were true, are you still
24 saying that's just all beside the point because the affect
25 is as you've described under the legal approach you've

1 described?

2 In other words, let's imagine a bad case, surely
3 you would say, not this one, but a bad case nonetheless, is
4 it your view that that would still really not be the kind of
5 thing we under this part of the statute would be able to pay
6 much attention to?

7 MR. GREENWALD: The short answer is yes. The
8 longer answer is, which you probably don't want me to go
9 into. You're judges. You have a statutory provision you
10 have to apply. It may be that Commerce did something that
11 the domestic industry says, as a whole, eliminates the
12 injury for entirely the wrong reasons. But the reasons they
13 did it are what somebody might say in a blog or -- I mean,
14 that strikes me as beside the point. Your task is to look
15 at what was done, look at what you found, and decide whether
16 or not the agreements do as we say they do, eliminate the
17 injury.

18 COMMISSIONER KIEFF: Thank you very much.

19 As with the morning panel, we really appreciate
20 everybody engaging the diverse perspectives and helping us
21 think this through. It is in fact very helpful. So thank
22 you all very much.

23 CHAIR BROADBENT: Okay. Commissioners, I don't
24 think have any other questions. Does the staff have any
25 questions?

1 MS. HAINES: Elizabeth Haines, the staff has no
2 questions.

3 CHAIR BROADBENT: Okay. Thank you.

4 Do those in support of the petition have any
5 questions for this panel?

6 MR. SPAK: We have no questions, Chairwoman.

7 CHAIR BROADBENT: Thank you. In that case I want
8 to thank this panel for their testimony and you're
9 dismissed.

10 With that, we come to rebuttal statements. Those
11 in support of the petition have reserved five minutes from
12 their oral presentation for rebuttal. Those in opposition
13 have not reserved any time for their oral presentation for
14 rebuttal.

15 We will hear from the witnesses in support of the
16 petitions.

17 MR. MAGNUS: Is it okay to do a rebuttal from
18 back here?

19 CHAIR BROADBENT: Sure. Yeah. Absolutely.

20 REBUTTAL REMARKS BY THOSE IN SUPPORT OF THE PETITIONS

21 MR. MAGNUS: Just a couple of quick points, after
22 a long day, mainly where we stand at the end of a long day.

23 You've heard an explanation of why these
24 agreements are poorly constructed, why they don't do what
25 supporters claim they do. Why they're biased, why they

1 address injury experienced by one segment of the industry,
2 that aggravate the injury expressed by another. All of that
3 remains uncontradicted.

4 You've heard about injury that's baked into
5 existing contracts, that require future deliveries at low
6 prices that were occasioned by Mexico's binge of refined
7 sugar dumping. The agreements can't possibly and they don't
8 purport to eliminate the injurious effect. The domestic
9 industry -- the entire domestic industry has told you either
10 today or previously, that this overhang will continue
11 through the current crop cycle and beyond. Our opponents
12 today haven't offered a theory much less an explanation as
13 to how this injurious effect has been eliminated.

14 You've read that the suspension agreements doom
15 destination refiners to operating at between 61 and 66
16 percent of capacity. You heard about the difficulty such
17 low throughput presents with regard to covering substantial
18 fixed costs of this segment. That explanation remains
19 uncontradicted. And you've heard unanimous agreement that
20 the Commission should be looking to see whether all the
21 element of injury found in preliminary including the cost of
22 goods sold to revenue squeeze in the underselling have been
23 eliminated by the suspension agreements.

24 You've also seen and you've heard irrefutable
25 evidence for the domestic industry's refining segment, these

1 elements of injury found at preliminary worsen rather than
2 improving under the agreements. That explanation remains
3 uncontradicted.

4 Just two other quick points. The significance of
5 what you heard with regard to the forfeiture, rates and what
6 those represent, you heard counsel to the coalition -- the
7 American Sugar Alliance explain to you that those rates are
8 indeed well below cost. That forfeiture is in the nature of
9 calamity and that there certainly has to be a category of
10 pricing above forfeiture levels that is still injurious.
11 What's the significance of that? Nobody has contradicted
12 that. The significance of that is that the one and only
13 defense offered by the Commerce Department for what it did
14 has now been blown out of the water. So if you are going to
15 side with Commerce, you cannot do it for the reasons that
16 Commerce itself has articulated.

17 Commerce's argument is this is fine because
18 anything that allows the sugar program to run the way USDA
19 thinks it should run is by definition not injurious. That's
20 off the table now. So if you were feeling deferential or
21 feeling like you might want to do something that looks like
22 deference, that's off the menu.

23 Mr. Kaplan's attack on the concept of
24 underselling is an interesting one. You know, we don't need
25 to get into the theological debate about whether sugar can

1 undersell sugar, but what he had to say and what Mr.
2 Greenwald had to say about the refined sugar reference price
3 makes no sense at all. Okay. You heard from Mr. Kaplan
4 that if the U.S. market clearing price for refined sugar
5 goes below that reference price, there won't be any Mexican
6 sugar. Well, that's great. Our problem isn't that we can't
7 get to it, we can't get anywhere near it. We're pinned six
8 cents above it. Okay. And that is where underselling is
9 not just likely to occur, but certain to occur. Nobody is
10 suggesting that Mexican refined sugar is going to come in
11 below the refined sugar reference price. It's going to come
12 in right at it or above it and below us. And we can't get
13 anywhere near it. Why can't we get anywhere near it,
14 because we're pinned by these agreements, pinned to the
15 cardboard six cents higher up the chain.

16 Okay. And that is underselling and that
17 continues. It's not removed by the suspension agreements.

18 I wouldn't have pulled this up except she
19 mentioned it twice. You heard twice that somehow these
20 agreements reduce the subsidization. They don't. They do
21 not reduce the subsidization. They address the
22 subsidization by controlling volume. They do reduce the
23 dumping. They do not reduce the subsidization. And the
24 subsidization of this particular product was intense.
25 Really eyebrow raising.

1 Lastly, most importantly, please this idea that
2 somehow that what really matters is numbers and weighted
3 voting is something that we really hope the Commission will
4 put out of its head when it decides this case. All right.
5 It's not about who represents what share of the industry,
6 and, again, these companies are not entitled to what they're
7 entitled to because they expressed an opinion, but because
8 of the facts that they have brought forward and proved. The
9 facts are that these elements of injury, these injurious
10 effect still remain, are not removed by the agreements. And
11 that's what the statute directs you to focus to. It's not a
12 popularity contest. It doesn't matter where anybody sits in
13 terms of the government's diagram and what's in the
14 newspaper. What matters is the fact that have been proved
15 in this review.

16 MR SPAK: Unless my co-counsel has anything else,
17 that concludes our rebuttal.

18 CHAIRMAN BROADBENT: Okay.

19 MR. SPAK: That's it thank you very much.

20 CHAIRMAN BROADBENT: All right. I want to
21 express our appreciation for all of our witnesses today. I
22 think we have worked hard here, and my fellow Commissioners
23 I congratulate your staying power. I think we have together
24 been able to shed a little bit of light on what I think is a
25 fairly dare I say esoteric or eccentric provision of the

1 statute, but we are looking forward to your briefs and we
2 appreciate all the work you have done to participate here
3 today.

4 Your second written submission and corrections to
5 the transcript must be filed on February 26, 2015. When
6 filing your second written submission on e-list please use
7 the category brief post-hearing conference for document type
8 and with that this oral proceeding is adjourned.

9 (Whereupon, at 5:03 p.m., the meeting was
10 adjourned.)

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INVESTIGATION NO.: 704-TA-1 and 734-TA-1

HEARING DATE: 02/19/2015

LOCATION: Washington, D.C.

NATURE OF HEARING: Review

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