

UNITED STATES INTERNATIONAL TRADE COMMISSION

In the Matter of:)	
)	Investigation No.:
GLASS CONTAINERS FROM)	701-TA-630 (Final)
CHINA)	

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Tuesday,
May 12, 2020

Teleconference
U.S. International
Trade Commission
500 E Street, S.W.
Washington, D.C.

The hearing commenced, pursuant to notice, at 9:32 a.m., before the Commissioners of the United States International Trade Commission, the Honorable DAVID S. JOHANSON, Chairman, presiding.

APPEARANCES:

On behalf of the International Trade Commission:

Commissioners:

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RANDOLPH J. STAYIN, COMMISSIONER
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and Countervailing Duty Orders:

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on behalf of

American Glass Packaging Coalition

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Ardagh Glass, Inc.

John T. Shaddox, Chief Commercial Officer,
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Thomas Holz, Chief Financial Officer,
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In Support of the Imposition of Antidumping
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Don Leclair, Director, Anchor Glass Corporation's
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Of Counsel

Daniel B. Pickard
Derick G. Holt

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In Opposition to the Imposition of Antidumping
and Countervailing Duty Orders:

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on behalf of

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Of Counsel

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on behalf of

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Jose de Diego Arozamena, Chief Executive Officer,
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In Opposition to the Imposition of Antidumping
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Of Counsel

Jared R. Wessel
Michael G. Jacobson

CHAIRMAN JOHANSON: Good morning. I hereby reconvene the hearing for Glass Containers from China, Investigation No. 701-TA-630 (Final).

In accordance with 19 U.S.C. § 1677c(a)(1), the Commission has not canceled its hearing, but in light of the restrictions on access to the Commission building due to COVID-19 events, the Commission has conducted its hearing through a series of written questions, submissions of written testimony, written responses to questions, post-hearing briefs, limited Commissioner questions and answers with counsel, and closing arguments and rebuttal remarks, as set forth in my remarks at the opening of the hearing process.

As the parties have been informed, no new information may be provided in the closing arguments and rebuttal remarks during today's proceeding, nor should CBI information be shared.

1 We will first entertain limited Commissioner
2 questions with counsel. The Commissioners will then ask any
3 follow-up questions. We will then move to closing arguments
4 from those in support of the petitions, followed by closing
5 arguments from those in opposition to the petitions.
6 Following closing arguments, we will hear rebuttal remarks
7 from those in support of the petitions, followed by rebuttal
8 remarks from those in opposition to the petitions.

9 Mr. Secretary, are there any preliminary matters?

10 MR. BISHOP: Mr. Chairman, I would note that all
11 witnesses for today's proceeding have been sworn in. I would
12 also note that joining us to answer Commissioner questions
13 are, on behalf of Petitioners, the American Glass Packaging
14 Coalition, Daniel B. Pickard and Derick G. Holt, counsel with
15 Wiley Rein, as well as Amy E. Sherman, International Trade
16 Analyst with Wiley Rein.

17 Joining us on behalf of Respondents, on behalf of
18 Respondent TricorBraun Incorporated are Jeffrey S. Neeley and
19 Stephen Brophy, counsel with Husch Blackwell, as well as
20 James P. Dougan and Jerrie Mirga of the Economic Counseling
21 Services. Also joining us on behalf of Respondent Berlin
22 Packaging is Jared R. Wessel of Hogan Lovells.

23 There are no other preliminary matters.

24 CHAIRMAN JOHANSON: Thank you, Mr. Secretary. We
25 will begin with Commissioner Schmidtlein.

1 COMMISSIONER SCHMIDTLEIN: Okay, thank you. I'd
2 just like to thank counsel and the witnesses who are
3 participating today for their patience with us as we try to
4 refine these procedures to allow everyone a fair chance to
5 present their case.

6 So I'm going to start with a question about price
7 linkages, and, Petitioners, you argue at pages 10 to 14 or so
8 of your responses to the first set of questions that volume
9 was lost to Chinese imports -- that volume lost to Chinese
10 imports of a certain type of glass container forces domestic
11 producers to accept lower prices in order to maintain
12 capacity utilization rates. That was the first point.

13 Second point, and then you also argue that there
14 are emails demonstrating that there are Chinese prices --
15 that they use Chinese prices to leverage down U.S. producer
16 prices along the range of the product line.

17 So I just want to make sure I understand the first
18 point, which is that U.S. producers are lowering prices on
19 some products even when the buyer isn't pointing to Chinese
20 prices to leverage down prices because the U.S. producer
21 needs to maintain capacity utilization.

22 So, in other words, the buyer could be considering
23 as an alternative non-subject imports or another U.S.
24 producer, but your argument is that since they've lost other
25 sales of perhaps a different type of glass containers to

1 Chinese imports, that they may have to accept a lower price
2 on the next contract. Do I have that correct?

3 MR. PICKARD: Good morning, Commissioner. This is
4 Dan Pickard. Yeah, I believe that's essentially correct,
5 that one of the main arguments that we've made was that this
6 is an industry with high fixed costs, capital-intensive, so
7 that when the domestic industry loses certain volumes as a
8 direct result of Chinese imports, let's say they lose a large
9 amount of volume of wine sales, it's imperative that the
10 domestic industry, because of these high fixed costs, has to
11 keep certain high capacity utilization rates, and,
12 consequently, that lost volume creates downward pressure on
13 other product offerings throughout the product line because
14 of the need to keep those high capacity utilization rates.

15 Or, maybe put a different way, Chinese wine bottles
16 have, first, a direct effect on U.S. wine bottles, but then
17 it also has subsequent effects throughout the product line in
18 regard to the capacity utilization rates.

19 And then, on top of that -- and then I think this
20 goes to the second point you were making, Commissioner -- as
21 the domestic industry loses prices, or either loses volumes
22 or is forced to lower prices as a direct result of Chinese
23 imports, for example, in regard to wine, that also has
24 effects in regard to their pricing decisions for food or
25 spirit or other products throughout the product line.

1 COMMISSIONER SCHMIDTLEIN: And so do most of the
2 producers produce more than one type of glass container?

3 MR. PICKARD: Yes, Commissioner. So the top three
4 U.S. producers certainly all make beer, wine, food, spirits,
5 to the best of my knowledge, and I think that's all reflected
6 in the questionnaire responses.

7 COMMISSIONER SCHMIDTLEIN: Okay. So wouldn't
8 this -- I guess I've never seen this argument before, but we
9 have a lot of cases where industries have the need for high
10 capacity utilization, right? Because of the nature of the
11 industry, they need to keep their lines running. And so are
12 you aware of another case where this kind of argument's been
13 made where it's not really a direct -- it's more of an
14 indirect effect, it seems like, that you're arguing, that
15 because of the subject imports' impact on, you know, the lost
16 sale for that particular product, it's affecting these other
17 sales that don't involve perhaps subject imports, in other
18 words, because the buyer could be competing with another
19 domestic producer, right, or the domestic producer in
20 question could be competing with another domestic producer.

21 MR. PICKARD: So I think your question is, is there
22 a precedent at the ITC for this type of consideration, and
23 it's yes, but it goes pretty far back. So I really started
24 in the Trade Bar in the late '90s, and by that time, a lot of
25 the steel cases were a mix of -- the domestic industry was

1 both a mix of integrated producers, which are, I think,
2 analogous to the domestic glass industry, right, that you
3 have to operate 24/7, and mini mills.

4 But prior to those cases, really in the late '90s
5 when you were seeing the vast majority of the domestic
6 industry being integrated producers, meaning that they were,
7 again, the high fixed costs, capital-intensive that had to
8 run 24/7 because it's kind of similar to glass, right, that
9 if you turn the furnace off, either if you're making steel,
10 or you're making glass, right, then that -- it cools, and
11 then that furnace no longer becomes operative.

12 So in, I think, a lot of those, you know, pre mid-
13 '90s cases when you had a U.S. steel industry that were very
14 analogous, these issues came up a lot, and the Commission
15 recognized that, yeah, that there were, for lack of a better
16 term, indirect effects as it -- as that loss of volume and
17 the need for capacity utilization had knock-on effects.

18 I've also got an --

19 COMMISSIONER SCHMIDTLEIN: Can you --

20 MR. PICKARD: I'm sorry. After you.

21 COMMISSIONER SCHMIDTLEIN: Well, I was going to say
22 maybe, just in the interest of time, maybe you could provide
23 us with those in the post-hearing --

24 MR. PICKARD: Sure. Happy to do so.

25 COMMISSIONER SCHMIDTLEIN: -- some examples of

1 those cases. That would be helpful.

2 So let me just follow up. I've got a couple other
3 questions on price that I want to get to before my time's up,
4 but in this particular argument, given that there's also been
5 a pretty substantial demand -- decrease in demand for beer
6 bottles, as well as an increase in non-subject imports that
7 also gained market share, wouldn't the producers face that
8 kind of pressure from those two factors as well --

9 MR. PICKARD: Yeah. So --

10 COMMISSIONER SCHMIDTLEIN: -- in terms of keeping
11 their capacity utilization high? That they -- that, because
12 of those two things, they would also be faced with the choice
13 of accepting lower prices in order to maintain their
14 capacity?

15 MR. PICKARD: Certainly. All of the effects of
16 subject imports take place within the context of demand and
17 supply conditions, so you're absolutely right. So, as demand
18 is decreasing, for example, and subject imports are
19 increasing, there's almost kind of a double effect, right?
20 The decreasing market, plus the increase in Chinese imports,
21 both of those are going to force pricing pressures down.

22 I would point out, right, that the largest other
23 source of Chinese -- or the other source of non-subject
24 imports, Mexico, were lower on a value basis every year of
25 the period of investigation, lower than China, both

1 absolutely and by market share. But, yeah, that all
2 contributes, but what we --

3 COMMISSIONER SCHMIDTLEIN: Wouldn't we have an
4 attribution or a non-attribution problem then?

5 MR. PICKARD: So, to be clear --

6 COMMISSIONER SCHMIDTLEIN: Maybe a non-attribution
7 problem.

8 MR. PICKARD: So there's not an obligation to
9 quantify the effects of other imports, but the question goes
10 is there then sufficient information in regard to the causal
11 nexus between subject imports and the price effects for the
12 domestic industry? And I think the answer is yes.

13 And you see it in a couple of different places, but
14 some of the most blatant are the fact that you've got emails
15 on the record now from the major importers saying things to
16 the domestic industry such as you must lower your price or
17 this business is going to go to China, or you're going to
18 have to cancel price increases because, otherwise, this
19 business is going to China, or here are Chinese prices, I
20 want you to specifically limit or lower your prices, for
21 example, for certain food products or wine products to meet
22 the Chinese price.

23 I think that that alone sufficiently addresses the
24 attribution issue, but, on top of that, you also have all of
25 the issues connected with facilities that never made beer

1 also being closed down during the period of investigation,
2 which also is a direct causal evidence -- direct evidence of
3 the causal connection between the significant presence of
4 subject imports and the deteriorating performance of the
5 domestic industry.

6 COMMISSIONER SCHMIDTLEIN: Okay. All right, let me
7 move on to a couple more questions about price. I wanted to
8 ask about your price suppression argument. You argue that
9 the domestic industry has been prevented from raising prices
10 that they otherwise would have done. Can you be more
11 specific? Are you arguing that they would have been able to
12 raise prices in every segment? If not, which segment are you
13 arguing they should have been able to raise prices?

14 MR. PICKARD: So I guess, when you're talking about
15 specifically price suppression, which I believe was your
16 question, it's -- the evidence shows that they weren't
17 capable of increasing prices even commensurate with costs,
18 right? And that is kind of the classic ITC price suppression
19 analysis when COGS increases as a percentage of net sales.

20 And I think probably what your next question would
21 be is, well, aren't their arguments connected with other
22 factory costs increasing, and to what extent is that not
23 related to subject imports? And just --

24 COMMISSIONER SCHMIDTLEIN: Well, so just to --

25 MR. PICKARD: I'm sorry. After you.

1 COMMISSIONER SCHMIDTLEIN: I'm sorry to interrupt,
2 but just in the interest of time because we're trying to keep
3 to a very strict time schedule here, so when I look at the
4 record I see that, you know, demand went down overall.
5 Spirits is the only segment where you could say demand went
6 up a small amount. Total COGS actually -- total COGS, not on
7 a per unit basis, but total COGS went down, right? Except
8 for a small increase, total COGS overall went down.

9 When you break it down, there was a small increase
10 in other factory costs on a total basis, right? So, when you
11 have that and you have demand going down overall, why would
12 you be -- why would you think you could raises prices? Why
13 would the domestic industry think they could raise prices, or
14 why were they expecting to be able to raise prices? And,
15 obviously, there's more than just cost driving the COGS
16 ratio, right?

17 MR. PICKARD: Mm-hmm.

18 COMMISSIONER SCHMIDTLEIN: So just because the COGS
19 ratio went up doesn't necessarily mean their cost went up.

20 MR. PICKARD: Exactly, right? So if -- so I think
21 there's two parts of that. So, for price suppression, you're
22 not even really talking about your price going up. The
23 difference between COGS to price, right -- I'm sorry. Let me
24 state this a different way.

25 There's obviously a variety of things going on,

1 and, yes, as demand decreases for -- over the period of
2 investigation, you would imagine that that puts downward
3 pressure on U.S. prices. That's absolutely true. And that's
4 demand in the aggregate.

5 COMMISSIONER SCHMIDTLEIN: So yeah.

6 MR. PICKARD: You also have demand considerations
7 where, because these are substitutable products, demand
8 specifically, the demand curve for U.S. produced products, is
9 being pushed down because consumers or distributors
10 predominantly are moving from U.S. produced product to
11 Chinese product. So it's not just the aggregate demand,
12 there's also a demand for the domestic product.

13 So, yes, that has downward pricing pressure, but on
14 top of it, we know that there's additional downward pricing
15 pressure, if for no other reason because there's documentary
16 evidence of the U.S. industry either passing on price
17 increases or specifically lowering prices directly
18 attributable to Chinese prices, right? And it's not our kind
19 of contention. These are the emails that are coming from the
20 distributors and the major importers.

21 So I think your question is it's not a single
22 factor test. There are changes going on in demand. There
23 are also increases in supply as subject imports increase, and
24 there are some increases in non-subject imports, and all of
25 these contribute to downward pressure.

1 And what do we see, right? What you see,
2 basically, the COGS as a percentage of net sales increase,
3 plus, on an absolute basis, you see the decreases in prices,
4 similar to our most -- the most significant declines where
5 competition is fiercest.

6 COMMISSIONER SCHMIDTLEIN: Okay. All right. I
7 don't know if I can continue. We've only got this giant
8 clock in front of me. That's so funny. It's like the D Day
9 clock. I think I'll stop right there just because I think
10 the next question will definitely take us over the 15-minute
11 timeline for -- or time limit for me. So thank you.

12 COMMISSIONER KEARNS: Thank you. I guess I'm next
13 in the order. I guess I wanted to start from the premise of
14 your answer to Commissioner Schmidtlein's first question. I
15 think you were explaining how a surge in imports I think
16 from -- in the wine segment -- subject imports in the wine
17 segment then has follow-on effects in other segments, but
18 what can you point to to really show a surge in subject
19 imports in the wine segment? I'm looking at, you know, Table
20 4-6 of our staff report, and I don't really see a surge
21 there, so what do you point us to in terms of numbers that
22 shows a massive increase in subject imports in that segment?

23 MR. PICKARD: Sure. So -- and I will try and be as
24 concise with these answers as possible, Commissioner, because
25 I know we're close on the clock, but happy to expand on any

1 of them.

2 So here's one of the very important things to
3 remember about those tables in Section 4 and Appendix E. As
4 I'm sure you're well aware, the Commission's got two ways of
5 looking at import volumes: the official import statistics or
6 the questionnaire responses.

7 So the staff has consistently, through, basically,
8 the Appendix C charts -- you'll look at -- is using the
9 official import statistics because so much of the importer
10 data is missing. Now I'm sure you've got that number easily
11 available. It's been treated as business proprietary. But,
12 basically, the -- that Section 4 table and everything in
13 Appendix E is the data from 24 out of 120 importers.

14 COMMISSIONER KEARNS: Right. If I could interrupt?

15 MR. PICKARD: Yeah.

16 COMMISSIONER KEARNS: Sorry. Yes, I get that.
17 But, if we use the HTS data, the HTS data isn't broken down
18 by wine segment, is it?

19 MR. PICKARD: No, but it's broken down by size, and
20 that is exactly the point I was going to. Sorry if I was
21 being a little long-winded.

22 COMMISSIONER KEARNS: Oh, no.

23 MR. PICKARD: So the Section 4 data -- and we're
24 not saying it has no value, but it's obviously missing a huge
25 part of the imports. But you've got some pretty clean HTS

1 numbers, and if you look at the HTS number that is -- that
2 covers the vast majority of the wine bottles, you see that
3 significantly increases from '17 to '18, to '18 and '19,
4 right? And that's pretty comprehensive data.

5 So is it perfect data? No, but it's certainly more
6 comprehensive than what's driven or what's drawn from the
7 importer questionnaire database, and that shows the
8 consistent increase throughout the POI, all the way through
9 2019.

10 COMMISSIONER KEARNS: Okay. Thank you. Actually,
11 so then just getting to the question more broadly about
12 official import data versus the questionnaire responses, you
13 contend the Commission should conduct an analysis of the
14 subject import volume by HTS subheading at the 10 digit level
15 instead of or at least in addition to our import
16 questionnaire data. Doesn't the staff report already include
17 data from official import statistics that have been adjusted
18 to remove imports of out-of-scope merchandise?

19 MR. PICKARD: Yeah, sure. So I'm going to try and
20 do this super quick, being mindful of your time. Yeah, so
21 Appendix C and a lot of those other tables include an
22 analysis based on the official import statistics. I was
23 specifically referencing or that part of the brief
24 specifically references some of the information in regard to
25 the Section 4 tables, that I think it would be helpful there

1 because, obviously, the Section 4 tables and the Appendix C
2 have -- well, there are two major issues kicking around, one,
3 the lack of coverage, and, two, especially in the Appendix C,
4 the fact that it doesn't cover any -- or doesn't even address
5 sales to distributors, which is a major part of this whole
6 story.

7 COMMISSIONER KEARNS: Okay. Okay. And -- all
8 right. Maybe I'll skip that question then. Since you
9 mentioned the importance of sales to distributors, we, of
10 course, have this table -- I guess I'm anticipating your
11 answer here -- we've got this table in Section 2 of our
12 report that doesn't seem to show a major increase in sales to
13 distributors or sales to distributors from subject imports.

14 I guess what you would answer to that is, again,
15 your point is, if you -- yes, that's right if you look at
16 questionnaire responses, but you don't think that's the right
17 approach, there's not enough coverage there, and, instead, we
18 would have to reach that conclusion based on something else?

19 MR. PICKARD: Yeah, I think that's fair. And I can
20 tell you what the something else is. If you look at the
21 domestic producers' data set, which is -- I think everybody
22 would agree is comprehensive, if you look at the shipments to
23 distributors, that percentage decrease, it's also treated as
24 business proprietary, but it is a huge number. It's a
25 multiple of even the largest estimate of any decrease in

1 demand.

2 COMMISSIONER KEARNS: Okay. Okay, thank you.

3 MR. PICKARD: And which is, again -- I'm sorry,
4 after you, Commissioner.

5 COMMISSIONER KEARNS: No, please go ahead.

6 MR. PICKARD: And I'm just going to say, so you see
7 this in kind of the questionnaire data for the domestic
8 industry, which also is corroborated by the official import
9 statistics, and then which is also corroborated by the
10 statements against interest, essentially, by the Respondents
11 in their email communications.

12 COMMISSIONER KEARNS: Okay. Okay, thank you.
13 Okay, I want to turn to the issue of long-term contracts and
14 what impact that may have had on 2019. You know, there was
15 some back and forth between you all and Respondents about,
16 you know, how do we explain the decline in the condition of
17 the U.S. industry in 2019 given that imports had backed off a
18 little bit at that time. And I think your answer was that in
19 2017 and 2018, given that we have annual and even longer-term
20 contracts, that low prices were locked in in 2017 and 2018,
21 and that then has an impact on 2019.

22 I mostly understand that answer. The only problem
23 I have is I don't see how that would explain a deterioration
24 from 2018 to 2019 in the financial conditions. In other
25 words, you know, the prices that were being locked in in 2017

1 and 2018 I would have thought were sort of -- you know,
2 basically, the point is the same in 2019 as they were in
3 2018, so how can that explain a deterioration in the
4 financial condition in 2019?

5 MR. PICKARD: Sure. Because it's --

6 COMMISSIONER KEARNS: Does that make sense?

7 MR. PICKARD: Yep. No, it makes perfect sense.
8 Because there's two parts to it. There's the volume effect
9 and the price effect. So what you see is revenues, the
10 negative effects of the Chinese imports, you're correct, '17,
11 '18 being locked in on a price level, which contributes on --
12 so you get those -- essentially what you said. '17 and '18
13 negative price effects directly contribute to decreased
14 financial performance.

15 That is aggravated further by additional contracts
16 continue to be entered into into 2019 also at lower prices,
17 pushing the financial performance even down further, and the
18 domestic industry continues to lose also volume of sales,
19 also forcing its pressure -- its financial performance down.

20 If you look at just the amount in the decreased
21 value of sales from '17 to '19 for the domestic industry,
22 it's a decrease of \$200 million, right? That's a huge
23 number. And that's a function of both lost volumes and price
24 effects.

25 COMMISSIONER KEARNS: But no lost volumes in 2019

1 due to subject imports. Maybe due to non-subject imports,
2 which seems to have, I think, completely displaced the
3 subject imports. But you seem to be saying that not only did
4 they lock in a low price for 2019, but they also reduced
5 their quantity. But you can't blame subject imports for
6 that, can you?

7 MR. PICKARD: Yeah, you can prior to the 301 and
8 the post-petition effects. I think, in large part, what the
9 Respondents would like you to do is just kind of look at two
10 data points and say look at '17 and look at the end of '19,
11 and if one's higher or one's lower, that's outcome
12 determinate, and that's clearly not -- the Commission has
13 never conducted that type of simplistic analysis.

14 The domestic industry was -- and in our pre-hearing
15 briefs, what you start to -- or what we've provided is a half
16 year analysis so you get to see imports increasing, and the
17 imports into the first half of 2019, if I remember correctly,
18 are still increasing significantly, and there are lost sales
19 there.

20 Now, by the end of the period of -- by the end of
21 '19, when you average it all together, there were certainly
22 effects of the 301 and the post-petition effects, but that's
23 not to say that the domestic industry wasn't losing sales to
24 Chinese imports beginning in the period -- for -- in the
25 beginning of 2019. Does that make sense?

1 COMMISSIONER KEARNS: Yes, I think so. Thank you.

2 MR. PICKARD: All right.

3 COMMISSIONER KEARNS: And then, turning to the
4 product pricing -- the pricing product issues that you have
5 raised, you know, I think, overall, one of the points I think
6 you're making is less aggregated data would have been more
7 helpful, particularly with respect to packaging.

8 But -- and I'm thinking back -- I'm not sure if I
9 have the page number right, but I believe it's Berlin's
10 answers on pages 35 and 36 -- you know, I think what I hear
11 them pointing out there is, given that the U.S. industry --
12 given that there is no subject import coverage or very little
13 subject import coverage with respect to the large purchasers,
14 you would think then, if we were to distinguish and break
15 out -- if we could have broken out bulk packaging from case
16 packaging, I would assume that bulk packaging is then mostly
17 the large purchasers, and you would then have no, you know,
18 subject import coverage for that new pricing product, so you
19 would just further weaken, you know, any sort of coverage
20 that we have of subject imports if you were to do that, I
21 would think.

22 Am I wrong about that? I don't know if the
23 question's clear. If you break out bulk and case packaging,
24 it seems to me that you would then see even less of a
25 connection between subject imports and domestic product

1 because subject imports are largely absent from the large
2 purchasers' segment of the market.

3 MR. PICKARD: So I'd have to give thought in regard
4 to what that would do as far as coverage, but would -- it
5 would undeniably contribute more to an apples-to-apples
6 comparison. So even if we assume --

7 COMMISSIONER KEARNS: Right, but there wouldn't be
8 any apples. That's my thing, is there wouldn't be any
9 apples, no subject import apples.

10 MR. PICKARD: And I'm not sure that argument -- and
11 maybe I -- and this might be more appropriate to address in
12 the post-hearing brief. I'm not sure that holds up. The
13 idea that if you controlled for packaging you wouldn't have
14 any meaningful samples, I don't believe that's factually
15 correct, but I could probably put more probably business
16 proprietary information around that.

17 But what we do know, right, is that even if you
18 make some reasonable adjustments to the pricing product data,
19 as we've suggested, you end up with more than 50 percent
20 incidences of underselling. And there's -- and it's not
21 all -- all of the noise in the pricing product data isn't
22 attributable to the definitions, right? What's now starting
23 to become more clear is there are real questions regarding
24 the integrity of some of the pricing product data that was
25 reported by the Respondents, as seen by data that is

1 internally inconsistent in their questionnaires, data that's
2 inconsistent between the prelim and the final, and also other
3 evidence of what appears to be gamesmanship.

4 COMMISSIONER KEARNS: Mm-hmm. Okay. Thank you.
5 Let's see here. I don't have a whole lot of time left. Let
6 me see. What could I clean up with here. I guess you've
7 talked a bit about price suppression with Commissioner
8 Schmidtlein, but just to cover this again, I mean, it seems
9 to me that you have a reduction in apparent consumption and
10 that that alone, given that, as Commissioner Schmidtlein
11 pointed out, COGS to sales ratio, you know, the denominator
12 of that is about the sales, and if you have a drop in sales,
13 then you're going to have an increase in the COGS to sales
14 ratio.

15 And I know you've said there could be more than one
16 cause to a COGS to sales ratio increase, but, I mean, I don't
17 know if you want to do this post-hearing, but if you can
18 maybe distinguish the various causes? Because it seems to me
19 that most of it at least would be attributable to the decline
20 in demand, especially given that we're talking about beer.
21 Go ahead.

22 MR. PICKARD: I think I could do it real quick in
23 the minute that's left. There's two parts to a cost price
24 squeeze, right? Even if cost is moving up, to the extent
25 that there's price depression from the top, that's a negative

1 impact due to subject imports. That's one part.

2 The second part is I think all of the parties have
3 agreed that wine was supposed to be a bright spot during this
4 Period Of Investigation, that the wine market itself was
5 growing and had great promise, and what do you see for COGS
6 as a percentage of net sales for wine bottles or the absolute
7 prices for wine bottles? All decreasing or significantly
8 decreasing throughout the POI.

9 So even in the parts that were not supposed to be
10 negatively impacted as a result of demand conditions, you see
11 the negative price issues there. But we can certainly
12 address that further in the post-hearing.

13 COMMISSIONER KEARNS: Okay. And also for post-
14 hearing, because I have just a second left, if you could just
15 explain how -- why we should expect that you should be able
16 to pass along your other factory costs just as you would your
17 raw material costs and so forth, you know, in this market,
18 that would be helpful as well.

19 MR. PICKARD: Happy to do so, Commissioner.

20 COMMISSIONER KEARNS: Thank you very much.

21 CHAIRMAN JOHANSON: All right. Next up is
22 Commissioner Stayin.

23 COMMISSIONER STAYIN: Going back to the pricing
24 question, which is a constant issue in each one of our minds
25 as we go forward, our data, the ITC data, shows mostly

1 overselling by significant margins for the same products
2 which you are saying have been -- have suffered because of
3 declining prices, have suffered because of low-priced imports
4 from China. How can you attribute this downward pressure in
5 U.S. prices when Chinese product is higher priced?

6 MR. PICKARD: Sure. That's a great, Commissioner
7 -- or a great question, Commissioner. So price effects under
8 the statute obviously could be shown predominantly in two
9 ways. The statute specifically addresses price suppression
10 or price depression on the one hand, or through evidence of
11 underselling, and the Commission finds negative price effects
12 by either of those.

13 So -- and regarding negative price effects, we see
14 price depression throughout the POI, and if adjusted for
15 inflation, which we're not suggesting need be, you don't need
16 to incorporate inflation in your analysis, but, if you do,
17 then the price depression becomes even greater.

18 On top of that we've got price suppression, as
19 we've talked about, in regard to COGS increasing as a
20 percentage of net sales. So that alone would be sufficient
21 to justify a negative price effects determination.

22 On top of that, your specific question goes to,
23 well, what about the pricing product data? And what our
24 position is -- and we never argued that the Commission should
25 turn a blind eye to data but that there are objective pieces

1 of evidence that raise questions regarding the reliability of
2 the underselling data and specifically the data that was
3 reported by the Respondents.

4 So -- and this was going to some of my comments
5 earlier to Commissioner Kearns. There are pricing product
6 data that the Commission knows must be faulty for, if no
7 other reason, it's internally inconsistent, and we call this
8 out in our answers to questions.

9 There's other pricing product data where -- and
10 you've highlighted this in some of your answers to
11 questions -- where there are missing volumes or the answers
12 are inconsistent from the prelim to the final. There are
13 also issues with the pricing data in regard to not
14 controlling for weight or for packaging.

15 We're not saying discount all of that. Our pre-
16 hearing brief takes that very methodically and goes through
17 all of the various kind of questionable reporting issues and
18 then makes what I think are reasonable conservative
19 suggestions for how you can take the noise out of the pricing
20 product data.

21 And once you do, what's it show? It shows that
22 you've got underselling by Chinese imports in significantly
23 more than 50 percent of the underselling data or -- yes, in
24 more than 50 percent of the comparisons.

25 And then, on top of that, because I think this goes

1 to your fundamental concern, how do we really know if Chinese
2 imports are having a negative effect on the domestic
3 industry? You've got the price suppression, you've got the
4 price depression. If the Commission kind of cleans up the
5 pricing product data, now you've got underselling.

6 And that's all further corroborated by the fact
7 that you've got numerous emails demonstrating that major
8 importers and distributors were requiring U.S. producers to
9 lower their prices or not pass through price increases,
10 specifically citing the pressure of Chinese imports.

11 COMMISSIONER STAYIN: Granted. And, certainly, we
12 understand that there was pressure from distributors going to
13 the Petitioners trying to drive down the prices, claiming
14 that the -- they were claiming prices for Chinese imports
15 that were very much underselling U.S. prices, and they're
16 basically saying, look, Chinese imports, this is the price,
17 you've got to meet this price or you're not going to get --

18 MR. PICKARD: Yeah.

19 COMMISSIONER STAYIN: -- this contract. Again, it
20 goes -- you know, I go back to the overselling data that we
21 have, and I know you've just gone through your explanation,
22 but with our overselling data, you know, it brings to mind,
23 was there an effort here to sell the idea of lower-cost
24 Chinese products in order to pressure the domestic producers
25 to I guess accept lower prices?

1 MR. PICKARD: So, if I understand your question,
2 Commissioner, are you asking about why is there maybe some
3 tension in regard to the pricing product data and kind of
4 the -- all of the evidence of the price negotiations that
5 used Chinese prices to leverage prices down?

6 COMMISSIONER STAYIN: Yeah. And the question is,
7 were those prices that they were quoting, were those
8 accurate? You know, when going back to our data showing
9 overselling throughout, then, you know, where do they come up
10 with the Chinese pricing being underselling and trying to
11 force down the prices that we're willing to accept?

12 MR. PICKARD: Sure. So I think that's a great
13 question because it really goes to the issue of even if the
14 representations made on the other side regarding what the
15 prevailing Chinese price were incorrect, right? Let's say
16 they incorrectly lowered the Chinese price in order to force
17 U.S. producers to lower their price. That's still directly
18 attributable to leveraging Chinese prices to force the U.S.
19 industry to lower their prices, and we see that it worked
20 because the domestic industry loses revenue as a direct
21 result.

22 But, on top of that, there -- it's not just kind of
23 the contention of the importers and the distributors, hey,
24 the Chinese price is lower. And this is really where I think
25 it starts to get interesting. In the email communications

1 that we've given you, you actually have documentation where
2 they're saying here's the Chinese price for this, lower your
3 price, and there are kind of schematics, drawings, technical
4 requirements in there.

5 So it's possible that there was puffery on the side
6 of the distributors and the importers to force the prices
7 down even further for the domestic industry. But it's
8 clearly tied to those negotiations using Chinese prices.

9 COMMISSIONER STAYIN: Okay. How do the subject
10 imports' pricing for contracts -- how -- what effect does it
11 have on the contracts already in place? We have a tradition
12 of long-term pricing between beer companies and the
13 Petitioners, so then you have these Chinese products coming
14 into place, the imports. What impact does that have, if any,
15 on the long-term contracts? Do the U.S. producers try to go
16 back to their beer customers and try to talk them into
17 modifying the contract, or they just have to absorb it?

18 MR. PICKARD: Sure. So there's -- I think there's
19 two parts of this. There's the volume part and the price
20 part. And I could talk about this kind of at the 30 foot --
21 30,000 foot level, and then we can provide additional
22 proprietary information if you'd like.

23 So the first part of the question goes to kind of
24 the price effects. And there are long-term contracts. The
25 vast majority of all the domestic sales and all of the

1 imported sales are as a result of contracts one year or
2 longer. So, as we've talked about before, there's the price
3 effect of that, that it locks in prices, and prices that have
4 been depressed at the time of the Chinese surge continue to
5 injure the domestic industry in '17, '18, '19, and '20.

6 But then I think what you're going for,
7 Commissioner, is, well, isn't there a volume component as
8 well? Wouldn't the long-term contracts, for example, work to
9 protect the domestic industry?

10 And the answer to that is no because -- and this
11 really starts to go to the proprietary information -- is that
12 even with those contracts in and the negative price effects,
13 we also see a significant volume effect where importers
14 choose not to take product under contract, or decrease
15 product, or decrease their purchases from the domestic
16 industry throughout the Period Of Investigation.

17 COMMISSIONER STAYIN: There seems to be or has been
18 an allegation or a suggestion that the domestic producers
19 were resistant and, therefore, to make the products that the
20 Chinese were coming in to serve, that the domestic industry's
21 only interested in long-term contracts and they weren't
22 interested in smaller-term contracts and maybe different
23 kinds of products, a suggestion that, for example, that the
24 domestic industry wasn't into the wine industry and that the
25 wine industry is served primarily by Chinese products, and

1 yet we know that, in fact, they do sell to the wine industry.

2 This is kind of a jumbled question. But then it
3 goes back to a suggestion that there are segments in the
4 market that the U.S. producers do not supply and, therefore,
5 should not be considered. There's a lot wrapped up in that
6 long question, but give me your best.

7 MR. PICKARD: Sure. So I think there are probably
8 three or four key points there, and I'll -- I will try and do
9 them very quickly. So maybe to begin, what we see is,
10 historically, the domestic industry had served a lot of small
11 and medium enterprises through the distribution channel. As
12 the major distributors started to source from China, you saw
13 the domestic industry starting to sell more and more to small
14 and medium enterprises.

15 I think there's two key points, I think factual
16 points, I'd like to make. First off, it's been a major
17 argument of the Respondents that the domestic industry,
18 although they're in the business of selling glass, just has
19 no interest in selling to small and medium manufacturers
20 while omitting the Do Not Call provisions, which is a
21 significant material omission.

22 So, at the same time Respondents and others have
23 made arguments that we're not interested in selling to that
24 segment, they are fiercely negotiating the inclusion of
25 language in our contracts in an attempt to prevent to sell to

1 the domestic industry or to the small and medium enterprises.

2 I think that's a material consideration.

3 But, factually, I think while it's not directly
4 misleading, here are the dangers of looking at percentage
5 sales. And I think what the Respondents have essentially
6 said is the domestic industry only sells X to small and
7 medium enterprises, they sell 10X to larger, we sell 10X to
8 smaller companies but only X to large companies.

9 So you wouldn't be blamed for thinking, oh, that
10 must mean that subject imports support -- sell more to small
11 and medium companies than the domestic industry. But that's
12 factually incorrect, right? If you look at Appendix E,
13 you'll see that the domestic industry sells more, absolutely,
14 to small and medium companies than subject imports do. We
15 are there, and those sales amount to tens of millions of
16 dollars of revenue every year. That is significant.

17 And, on top of that, maybe just the one final point
18 is they consistently point to Appendix E for these arguments
19 in regard to attenuation and competition, and while we've
20 already discussed the fact that Appendix E is missing huge
21 chunks of data, what it's also missing in its entirety are
22 sales for the U.S. industry to distributors, right? And
23 that's a key component because a large part of the story and
24 a large part of our lost sales allegation from the very
25 beginning of this case has been about distributors moving to

1 China and the domestic industry losing that volume.

2 COMMISSIONER STAYIN: Thank you. I have another
3 question and it relates to the no call provision in the
4 contracts. Enlighten me as to what that is, what effect it
5 has, and what effect does it have vis-a-vis the import
6 products and contracts that might be going to them.

7 MR. PICKARD: Sure. So I'll do this briefly
8 because I know my time is coming up, but we'll certainly put
9 more information in. What it is is it's an attempt by -- and
10 understandably, for the distributors to try and keep the
11 domestic producers from selling to small and medium
12 enterprises, which is understandable, right? The
13 distributors want that business.

14 But, as the distributors went more and more to
15 China, the domestic industry started focusing more and more
16 on their sales to small and medium enterprises. And you see
17 this, for example, with the example of Ardagh Direct. And
18 the U.S. industry has been successful in selling more and
19 more. As a matter of fact, I think the testimony from
20 Ardagh's CEO is that they have picked up 400 new small
21 wineries on the West Coast during the Period If
22 Investigation.

23 But what it demonstrates, I think it goes to the
24 credibility of some of the arguments made by the Respondents
25 in that, at the same time they're telling you the domestic

1 industry isn't interested in these sales, these major
2 importers are at the same time so concerned about the
3 domestic industry increasing their sales to small and medium
4 enterprises that they are fiercely negotiating and including
5 contractual language attempting to keep them away from those
6 distributors.

7 But we can -- and I see I've gone over my limit.
8 With my apologies, we'll put a lot more facts about that in
9 our post-hearing brief.

10 COMMISSIONER STAYIN: I'd appreciate that. Thank
11 you.

12 MR. PICKARD: Sure.

13 COMMISSIONER STAYIN: That's all for me.

14 MR. PICKARD: Thank you, Commissioner.

15 CHAIRMAN JOHANSON: Commissioner Karpel?

16 COMMISSIONER KARPEL: Okay. Thank you. And, also,
17 thank you to all the parties participating in this hearing
18 today. I know it's hard working under these circumstances,
19 so I definitely appreciate all your efforts here.

20 I did want to sort of circle back to some of the
21 questions other Commissioners have already asked and, in
22 particular, about the data. And I'm struck by some of what
23 you've said today, and it has me thinking about what data at
24 all we're supposed to use in our staff report if we were to
25 find in the affirmative here.

1 I've heard you point out that Appendix E tables,
2 which have some good data in terms of different types of
3 glass containers and sales to different types of users,
4 whether small or large, but I -- I hear you raising questions
5 about the reliability of that data, given it's a small set
6 based on the questionnaires because it doesn't represent
7 distributors.

8 I also have heard you talk about the Table 4 --
9 tables in Section 4, again citing this is questionnaire data
10 and there's a small level of participation at least on the
11 importer side. And then you've also spent a lot of time, at
12 least in your written submissions, talking about Exhibit 31
13 and the official import data that you compiled in that
14 exhibit.

15 Are we supposed to throw out the tables in
16 Section 4 and the E tables and come to our conclusion based
17 on your Exhibit 31, or how are we supposed to sort of
18 reconcile some of your criticism of the data we do have in
19 our staff report with what we need to make our decision on?

20 MR. PICKARD: Sure. So, no, we'd never argue that
21 the Commission should throw out data. As a matter of fact, I
22 think, consistent with your statutory obligations, you can't
23 turn a blind eye to any piece of the record. But the
24 Commission, as the finder of fact, has to make certain
25 determinations regarding the probative value of different

1 pieces of evidence.

2 So, I mean, maybe to start with your macro picture,
3 well, is there accurate data that's sufficient to support an
4 affirmative determination in this case? Yes. Clearly,
5 right? You've got official import statistics that show the
6 surge, you've got objective data points in regard to long-
7 term contracts, you've got data in regard to COGS as a
8 percentage of net sales increasing, you've got the emails,
9 you've got the decreases in the performance of the domestic
10 industry. So there's plenty of data there that's sufficient
11 to support an affirmative determination.

12 But then your question is, well, what about those
13 other data points that we've highlighted are concerns? We're
14 not saying it has no value. It's we're just urging the
15 Commission to be aware of where there are issues where some
16 data probably should be afforded less probative value.

17 So, for example, some of the Section 4 tables are
18 missing huge chunks of imports. That doesn't mean that it
19 has no value; it just means that in any consideration of the
20 value of the Section 4 data, that we would respectfully
21 suggest the Commission should be cognizant of all of the
22 importing data, and, to the extent that it directly
23 contradicts, for example, official import statistics as to
24 trends, one is more probative than another.

25 In regard to Appendix E, for example, it has some

1 value, but there are two major limitations to it. If a large
2 part -- and I don't think this is immediately apparent from
3 some of the Respondents' arguments, the idea that Appendix E
4 doesn't cover any of the sales from the U.S. industry to
5 distributors, and that is a major part of all of the lost
6 sales and lost revenue allegations and kind of the
7 fundamental theory of the case. But the --

8 COMMISSIONER KARPEL: But can I interrupt you for a
9 second? So in the -- if I'm looking at the E tables, though,
10 if you look at, you know, for example, sales by U.S.
11 importers to small wine producers, and you look at U.S.
12 shipments to small wine producers, you're seeing data there
13 that doesn't seem to coincide with Petitioners' position. So
14 what are we to make of this information, for example, in
15 Table E-2 that doesn't support your theory of the case?

16 MR. PICKARD: I think you need to be aware that
17 there are two pieces of missing information here. One, it
18 completely omits all of sales from U.S. producers to
19 distributors, which is a huge part of the market.

20 COMMISSIONER KARPEL: Right, but if we are looking
21 at direct sales, it does show a picture of that.

22 MR. PICKARD: But you're also aware that it is
23 missing approximately 80 percent of the importers' data.
24 That part's public.

25 COMMISSIONER KARPEL: Okay. And are we supposed to

1 assume that if those importers had responded it would show a
2 different trend than we see from the ones who did?

3 MR. PICKARD: Or, at the very least, recognize that
4 this data has huge holes in it and be cautious in regards to
5 the probative value that you afford it. Yes.

6 COMMISSIONER KARPEL: Okay. And in terms of your
7 Exhibit 31 and the data we have in the C table, they're both
8 drawn from official import statistics.

9 MR. PICKARD: Correct.

10 COMMISSIONER KARPEL: But the trends are different
11 in terms of value of subject imports. What are we supposed
12 to do with that?

13 MR. PICKARD: I think they're actually consistent,
14 Commissioner. I think, if I know what you're looking at
15 specifically in regard to Exhibit 31, if we're talking about
16 HTS numbers specific to the category that covers the majority
17 of wine and spirit bottles, that is a subset of the overall
18 data. So maybe without -- and I want to be mindful of your
19 time. We can tease out how, actually, those -- all of that
20 data is fully consistent in a post-hearing brief, if that
21 makes sense, just to be respectful of time.

22 COMMISSIONER KARPEL: Okay.

23 MR. PICKARD: But --

24 COMMISSIONER KARPEL: So moving --

25 MR. PICKARD: I'm sorry. Go ahead.

1 COMMISSIONER KARPEL: If you had more to say on
2 that question, but I had another. Okay.

3 MR. PICKARD: After you, Commissioner.

4 COMMISSIONER KARPEL: So going back, Commissioner
5 Schmidtlein was asking us in her first question to you about
6 the sort of theory that lost volume in one type of glass
7 product has spillover effects into all types of glass
8 products as domestic producers try to maintain capacity
9 utilization. So the implication of that is in these glass
10 products that aren't maybe facing surges in subject import
11 volumes, nonetheless, domestic producers are trying to move
12 that volume, pricing them lower, and that's having a negative
13 impact on the domestic industry.

14 But I wanted to ask you specifically, what evidence
15 are you relying on to support the position that prices of
16 domestic glass containers are declining overall? We have
17 mixed information with respect to the pricing products on
18 that, the AUV data doesn't seem to support that argument.
19 Are you hanging your hat on these emails and these
20 allegations of lost sales for that assertion?

21 MR. PICKARD: No, Commissioner. I think there's a
22 couple of different data points that you can look at in
23 regard to that. So, obviously, there are some issues with
24 the pricing product data, but you see negative price effects
25 there, you see the COGS as a percentage of net sales data,

1 you also see, obviously, the information on --

2 COMMISSIONER KARPEL: But that's not evidence of
3 declining prices, that's evidence of --

4 MR. PICKARD: Right.

5 COMMISSIONER KARPEL: -- lost volume and having to
6 spread your costs over smaller amounts of units.

7 MR. PICKARD: I don't think that's -- I'm sorry.

8 COMMISSIONER KARPEL: Go ahead.

9 MR. PICKARD: I don't think that's actually the
10 whole picture, right, so -- because there's two elements of
11 the cost price squeeze, right? And I guess maybe to look at
12 this a different way, there are two major problems with that
13 argument by Respondents. One is they're saying, in regard to
14 -- and now we're talking about the cost price squeeze, right?

15 Prices relative to their increased cost. One, that those
16 increased costs had nothing to do with subject imports, and,
17 two, it's focused on just looking at costs.

18 But if you look at our answers to questions, you
19 could see, for example, that a large part of the increased
20 costs are directly attributable to subject imports. For
21 example, we provide specific data in regard to facilities
22 that never made beer and weren't affected by changes in beer
23 demand, but who had to close production operations as the
24 result of subject imports, and, obviously, that increases
25 their other factory costs, right? So the whole idea that --

1 COMMISSIONER KARPEL: My time's limited so -- but I
2 just want to make sure I understand where the evidence of
3 declining U.S. domestic producer prices is coming from, from
4 your perspective. Is it your analysis of the pricing data in
5 Section 5 if we take those adjustment that you suggest, or is
6 it the emails that you cite, or where are we supposed to look
7 that this knock on effect is actually having a price
8 depressing effect across the market?

9 MR. PICKARD: I think you see it in three places,
10 as you were saying, Commissioner. You see in the pricing
11 product data, especially once it's adjusted for inflation,
12 you see it in the AUV data once it's adjusted for product mix
13 -- and this is broken out in our pre-hearing brief -- and you
14 also see anecdotal evidence of the price depression and
15 suppression in all of the email communications. And then you
16 also see that transmitted, ultimately, in the financial
17 performance of the domestic industry.

18 COMMISSIONER KARPEL: Okay. And sorry to cut you
19 off so much, it's just we have such little time. I
20 appreciate all your answers. If we were in a full hearing
21 I'd let you go on, I promise. I think we're doing a part of
22 our hearing here today in these questions, but we've
23 obviously had a robust exchange in written form, and I really
24 appreciate that aspect of it, too, and we can follow up in
25 post-hearing.

1 So I wanted to ask you more about non-subject
2 imports, particularly with respect to Mexico, and some of the
3 acknowledgments you have made that Mexican imports are
4 particularly prominent in the beer bottle segment and so
5 forth. I think you note this in footnote 186 of the
6 responses to questions.

7 But can you talk more about what the impact of non-
8 subject imports from Mexico have been on the domestic
9 industry? It does seem that there is some displacement of
10 domestic product from non-subject imports from Mexico.

11 MR. PICKARD: Sure. And I'll try and keep my
12 answers concise, consistent with the concerns you just
13 indicated. So, first off, in regard to imports from Mexico,
14 I think it's important to start with the recognition that --
15 and, again, consistent with Commission practice, we've
16 suggested that value is probably the best way of taking a
17 look at this industry in the aggregate -- that the imports
18 from Mexico are smaller every year of the POI on an absolute
19 basis, and on a market share basis, smaller than Chinese
20 imports.

21 That being said, are Mexican imports potentially
22 having a negative impact on the domestic industry? We've
23 consistently said that there are concerns about that, and
24 that the domestic industry is keeping its eye on that
25 situation, but that China has consistently and overwhelmingly

1 been the priority because it's the Chinese imports that are
2 being used to leverage down prices. That's what you see in
3 the email communications.

4 Now is it possible that Mexico is also contributing
5 to the injury to the domestic industry? Absolutely. But as
6 you're well aware, the standard for the Commission, right, is
7 that there's a variety -- a material injury determination
8 could be affirmative if there's a variety of different causes
9 that are affecting the domestic industry.

10 Mexico might be one of them, although they are
11 smaller than China, and you don't see in the email
12 communications people leveraging prices based off of a Mexico
13 price. All of the evidence of record in this investigation
14 demonstrates it's off of the China price.

15 COMMISSIONER KARPEL: Despite the AUV data we have
16 on Mexican imports.

17 MR. PICKARD: Yeah, because -- and, as the
18 Commission's well aware, right, AUV data only have limited
19 probative value on the basis of if there's a large difference
20 in product mix, and, overwhelmingly, the Mexican imports are
21 more concentrated in beer, which is going to limit -- which
22 is going to create a lower AUV.

23 So, consistent with what the Commission does
24 whenever looking at AUV data, it has limited probative value
25 if there's large differences in the product mix. And because

1 Mexico is more heavily focused on beer bottles, not
2 surprisingly, it has a lower AUV.

3 COMMISSIONER KARPEL: Okay. All right. I have one
4 question on -- well I have a few more questions, but there's
5 been a lot of discussion on both sides about looking our
6 injury analysis by looking at different categories of glass
7 containers. If we are doing that should we be focused on
8 different types of glass containers, different market
9 purchasers? Where should we be focusing? All of them, or
10 should we be looking at the market as a whole?

11 MR. PICKARD: So here's one of the greatest quotes
12 from one of my clients, that a glass furnace is agnostic,
13 right? It melts glass, and the glass that comes out, the
14 furnace doesn't care if it's going into a beer bottle, a wine
15 bottle, a food bottle.

16 So, yes, I think you need to look at the domestic
17 industry in the aggregate because this is one domestic like
18 product, but, by examination of certain parts of the market,
19 it's instructive in regard to the injury caused by imports.
20 Specifically, right, taking a look at the wine and spirit
21 bottle participation goes directly to kind of the diamond saw
22 blades causation standard.

23 So I think it's instructive for the Commission,
24 but, obviously, the legal standard is the Commission has to
25 take a look at the industry in the aggregate, but, being

1 mindful of the fact that imports can be concentrated in
2 certain sections, and also being mindful, for example, of
3 Ardagh, for example, who 70 percent or more of its production
4 are non-beer bottles. They are kind of significant factors
5 for the Commission to consider when conducting its analysis.

6 COMMISSIONER KARPEL: All right. I'll have a
7 follow up for that, but since my time is up, I will rest
8 here.

9 CHAIRMAN JOHANSON: Thank you for being here
10 today.

11 My question is, can subject imports compete
12 economically for large volume beer bottle orders? And
13 is there reason to believe that their ability to do so
14 will increase in the imminent future?

15 MR. PICKARD: I believe the answer to that
16 is yes, Commissioner. I think the answer to that is
17 based off of, and this actually follows right off the
18 most recent question, in regard to furnaces being
19 agnostic, right? The furnace melts the glass, right?
20 And it doesn't make any difference essentially where
21 it goes into.

22 Have the Chinese predominantly been focused
23 in wine and food and now into spirits more and more
24 throughout the period of investigation? Yes.
25 Absolutely.

1 But if you take a look at the Chinese
2 capacity and their predicted capacity utilization
3 numbers, are they capable of producing mass numbers?
4 Yes.

5 And would the large beer distributors if the
6 Chinese price kept low enough be interested in
7 sourcing that? Absolutely.

8 If you just look at the percentage increases
9 of the Chinese beer producers' participation in the
10 market over the POI, while admittedly it started very
11 small the percentage increases are pretty significant.

12 So does China have the capacity and is
13 there --

14 (Interruption.)

15 CHAIRMAN JOHANSON: I might ask that folks
16 go on mute.

17 I'm sorry, Mr. Pickard, did you have
18 anything else to add to that?

19 MR. PICKARD: No. I think the point is,
20 Commissioner, that there's more than adequate
21 capacity, decreasing capacity utilization that there
22 would be motivation and ability to be able to service
23 that. Especially if these downward pricing trends
24 continue.

25 CHAIRMAN JOHANSON: Okay. Thank you for

1 that explanation.

2 Now you spoke about beer and now I'm going
3 to move to a different product, wine. I believe that
4 you asserted in answer to a question to Commissioner
5 Kearns that wine is a bright spot and could be used to
6 help us understand price suppression. Yet Table 4-6
7 seems to indicate that apparent consumption of wine
8 bottles declined as well. So doesn't that leave us
9 with the same problem where demand is falling,
10 deteriorating COGS ratios do not necessarily indicate
11 price suppression?

12 MR. PICKARD: No, I don't believe that's
13 correct, Commissioner, and I'll tell you why.

14 First off, the testimony from the domestic
15 industry, and I think this has been consistent with
16 what the Respondents have argued as well, that wine
17 could have been a bright spot for the domestic
18 industry during the period of investigation. That
19 consumer trends have moved from more beer consumption
20 to wine and liquor.

21 What the domestic industry has had happen,
22 and there's testimony to this as well, that they were
23 denied that opportunity, that potential bright spot in
24 the market as Chinese imports increased. And this is,
25 I think this goes to one of the questions that we've

1 been talking about as far as what has more probative
2 value.

3 As you're going to start taking a look at
4 Section 4, certain of those tables you have to be
5 mindful of the fact that it is missing a huge chunk of
6 the import data which goes directly to concepts of
7 ADC, right? But if you look at the official import
8 statistics for the HTS number that is directly tied by
9 physical characteristics to, and where most of the
10 wine bottles enter, you see a huge surge in Chinese
11 imports there.

12 And then what happens to U.S. prices? If
13 pricing products 1 through 3 are specific to wine
14 bottles. So if wine was supposed to be the bright
15 spot where demand should have been increasing, that
16 would be inconsistent with the pricing trends that you
17 see for those products.

18 I think that answers your question.

19 CHAIRMAN JOHANSON: Okay yeah, thank you. I
20 appreciate it.

21 I might move on to another issue which has
22 been the subject of a fair amount of discussion today
23 and that is long term contracts.

24 MR. PICKARD: Uh-huh.

25 CHAIRMAN JOHANSON: Respondents assert that

1 the industry's long term contracts largely involve
2 large customers and not small ones, and this is
3 explained in Berlin's answers at page 29.

4 Can you estimate what percentage of U.S.
5 industry sales to small and medium producers use long
6 term contracts?

7 MR. PICKARD: We can certainly provide that
8 in our post-hearing brief, Commissioner. I don't have
9 that number off the top of my head.

10 I would point out obviously some of those
11 largest customers in long term contracts are in fact
12 the Respondents. That is one of the fundamental
13 concerns. But to put specific points around the
14 prevalence of long term contracts in regard to small
15 and medium customers, we can get that for you in the
16 post-hearing brief.

17 CHAIRMAN JOHANSON: Okay, then I have a
18 follow-up question to that. That is according to page
19 5-4 of the Staff Report, most purchasers buy daily or
20 weekly in contracts between one and eight suppliers.
21 Why would an industry characterized by long term
22 contracts involve frequent purchasers and diverse
23 suppliers?

24 MR. PICKARD: I'll have to take a look at
25 that closer, Commissioner, but the data reported by

1 the domestic producers and by the importers are that
2 most purchases are done on a long term contract,
3 overwhelmingly. And that's consistent. It's not just
4 with the domestic industry, that's what the importers
5 have reported as well.

6 However, long term contracts are, deliveries
7 under them can be done in shorter runs, right? And
8 that may be directly what's in reference to those
9 questions but I'll take a look. It is my suspicion
10 that while the overwhelming majority of the domestic
11 industry and importers sell in contracts one year or
12 larger, that those purchases that are referenced are
13 probably a reference to the actual kind of delivery
14 and production runs under those contracts.

15 CHAIRMAN JOHANSON: Okay.

16 I'm going to move on to a completely
17 different subject now.

18 You note the logistical challenges faced by
19 the U.S. industry, its suppliers and customers as a
20 result of the pandemic, and this includes reduced
21 supplies of cullet or glass waste, and you discuss
22 this at page four of your answers.

23 Wouldn't Chinese producers also face
24 logistical challenges in attempting to manufacture and
25 export due to the pandemic?

1 MR. PICKARD: Well, I think, no. I don't
2 think it's equivalent and I think for a couple of
3 different reasons.

4 One is the use of cullet is more prevalent
5 in the domestic industry than it is for the Chinese
6 industry.

7 Two, is COVID-19 probably going to have
8 negative effects on both the U.S. economy and the
9 Chinese economy? Undoubtedly.

10 But what's the evidence show? The evidence
11 shows that the Chinese are surging in 2020. That up
12 until the point of the CVD duties, in January and
13 February, Chinese imports increased significantly over
14 '19 levels.

15 So clearly COVID-19 hasn't prevented that
16 from happening.

17 Then you go to the larger issue of while
18 COVID-19's not going to be good for anybody's
19 business, the Chinese have such massive excess
20 capacity and export-oriented subsidies even to the
21 extent that they have difficulties, that glass has got
22 to go somewhere. And what is one of the largest, most
23 open markets in the world? That's the United States.

24 So consistent with kind of their excess
25 capacity, convertible capacity, export orientation,

1 export subsidies, even with COVID-19 it is highly
2 likely that the Chinese are going to continue to
3 export in greater quantities to the United States.

4 CHAIRMAN JOHANSON: To follow up with your
5 response, I believe in part one of your response you
6 stated that cullet is more of an issue for U.S.
7 producers as opposed to Chinese producers. Is that
8 what you stated?

9 MR. PICKARD: I'm sorry, Commissioner. You
10 broke up a little bit there.

11 CHAIRMAN JOHANSON: I believe you stated it
12 in part one of your response, that cullet is more of
13 an issue for the U.S. industry as opposed to the
14 Chinese industry. Is that what you stated? And if
15 so, why is that the case?

16 MR. PICKARD: The U.S. industry has
17 historically used more cullet than Chinese producers
18 in the manufacture of glass. What's the historical
19 reason for that? I think it's in large part to the
20 fact that the U.S. industry has a more developed
21 recycling program than the Chinese do.

22 CHAIRMAN JOHANSON: Also looking at page
23 four of your answers you discuss possible reductions
24 in the amount of cullet for use by the U.S. industry
25 due to a possible recession. Could you expand upon

1 that a little bit?

2 MR. PICKARD: Certainly. What you're
3 beginning to see is municipalities throughout the
4 United States canceling their glass recycling
5 programs. So there's going to be less available
6 cullet.

7 So for example, I live in Alexandria,
8 Virginia. About a couple of months ago Alexandria has
9 stopped recycling glass. That is only going to
10 contribute to potentially increased cost for the
11 domestic industry, further making them vulnerable to
12 another surge in Chinese imports.

13 Does that make sense?

14 CHAIRMAN JOHANSON: Yeah, it does. I'm just
15 a little surprised by that, but anyway. If you could
16 follow up at all in your post-hearing that would be
17 helpful on that issue.

18 MR. PICKARD: Yes. I'm Certainly happy to
19 do so.

20 CHAIRMAN JOHANSON: Okay. Suppose we find
21 that the analysis of underselling in the pre-hearing
22 staff report is essentially correct. How would
23 subject imports then depress or suppress domestic
24 prices?

25 MR. PICKARD: Sure. I think you could way

1 first off, just kind of basic Econ 101. Even if you
2 assume for the sake of the argument that the imports
3 oversold the domestically produced product, increasing
4 supply of something during a period of flat or
5 decreasing demand, even at higher prices, is going to
6 force prices down. That's kind of basic supply and
7 demand.

8 So I think if you take that from kind of the
9 macro level, that increase in supply of products
10 creates downward pressure on price equilibrium. But
11 on top of that, as you're aware, the Commission
12 doesn't have to find underselling in order to justify
13 a negative price effect. You also have the cost
14 percentage of net sales.

15 But I think specifically in your question,
16 well what would we point to if we still said the
17 underselling data was valid? Well, I think you could
18 still very well say all right, here are eight pricing
19 products. Some showing decreasing prices. Even if we
20 don't adjust for any of the obvious problems, there's
21 still over-selling as to those eight specific
22 products. But on top of that we have contemporaneous
23 business records showing the actual leveraging down of
24 prices by the major distributors using Chinese prices.

25 And that doesn't necessarily have to be

1 incompatible. You can have both at the same time.

2 CHAIRMAN JOHANSON: Okay. Thanks for your
3 response there.

4 TricorBraun asserts that the increase in the
5 domestic industry's COGS ratio resulted from increased
6 other factory costs which in turn were caused by
7 declining capacity utilization. They discuss this at
8 page 31 of their answers.

9 Could you explain why you would see them as
10 correct or not correct on this point?

11 MR. PICKARD: Sure. I think they're wrong
12 as to the facts and they're wrong as to their
13 analysis. Right?

14 They're wrong as to the facts saying that
15 the increase in other factory costs is completely
16 divorced from subject imports. And as just an example
17 of that in our answers to questions you see an example
18 of the closing of a furnace at a U.S. facility that
19 never made beer, which directly contributed to its
20 other factory costs. So there's a part of that where
21 their factual premise is incorrect. The increasing
22 cost is at least in part attributable to the increase
23 in subject imports.

24 But on the other part of that, their
25 fundamental analysis is wrong. Right? All they're

1 really saying is hey, if you take out some costs,
2 their costs go lower. Well that doesn't tell you
3 anything. The fact of the matter is, even if the
4 increase in costs were completely divorced from
5 subject imports, the fact is the domestic industry
6 wasn't capable of passing along those costs is
7 evidence of price suppression and that would be true
8 regardless of the cost, right?

9 If raw material costs increased through the
10 period of investigation, right? Let's assume for the
11 sake of the argument completely unrelated to the
12 subject imports. But the price suppressing effect of
13 imports prevented the domestic industry from passing
14 along those raw material costs. That's price
15 suppression.

16 So they're wrong as a factual matter and
17 their analysis is only looking at the cost part, not
18 the price part, which is the whole point of a cost
19 price squeeze analysis.

20 CHAIRMAN JOHANSON: Okay, thank you.

21 My time has expired, so we will now move to
22 the follow-up, possible follow-up questions and post-
23 hearing request of Petitioners' counsel.

24 We'll begin with Commissioner Schmidtlein.

25 COMMISSIONER SCHMIDTLEIN: I guess I just

1 had one quick question as a point of clarification on
2 the do not call list. And Im' a little bit confused
3 about that.

4 How does this argument relate to subject
5 imports?

6 MR. PICKARD: So it goes to the question of
7 causation, Commissioner.

8 One of the basic arguments of Respondent has
9 been there's a lack of a causal connection between the
10 deteriorating performance of the domestic industry and
11 the health of, I'm sorry, the deterioration of the
12 health of the domestic industry and the presence of
13 subject imports.

14 One of the things that they've said is that
15 there's a lack of interest by the domestic industry in
16 selling to small and medium enterprises. But what
17 they've omitted to tell you is that they include do
18 not call provisions in their contracts in an attempt
19 prevent the domestic industry from selling into these
20 very customers.

21 So while that's Certainly of value in regard
22 to a credibility determination regarding their
23 arguments, that they would make such a statement and
24 have such a material misrepresentation or material
25 omission. That's one part.

1 But specifically to your question, how is
2 that relevant? It goes to causation. If they're
3 saying there's no causal connection because the U.S.
4 industry isn't attempting to sell into the small and
5 medium enterprises? The existence of these contracts
6 directly refutes that argument because it's evidence
7 of the fact that the domestic industry is attempting
8 to sell into that, is in fact selling into it, and
9 that the distributors are trying to limit that
10 competition themselves.

11 COMMISSIONER SCHMIDTLEIN: All right, thank
12 you.

13 CHAIRMAN JOHANSON: Okay, Commissioner
14 Kearns, do you have any follow-up questions?

15 COMMISSIONER KEARNS: I do, thank you. I
16 think just two.

17 The first one is, I want to go back to the
18 wine discussion we had earlier. I believe the HTS
19 you're pointing us to for wine bottles ends in 5019,
20 is that right?

21 MR. PICKARD: I believe that's correct,
22 Commissioner.

23 COMMISSIONER KEARNS: Okay, and I think that
24 covers all bottles that do not have a wide mouth and
25 that are between .4731 liters and 1 liter. And I

1 guess, and I think you all have recognized that that
2 includes not just wine bottles but also spirits
3 bottles, is that right?

4 MR. PICKARD: That is correct. Although
5 it's our understanding that the vast majority are in
6 fact wine. But those specific characteristics will
7 include wine and spirits. Correct.

8 COMMISSIONER KEARNS: Okay, and I can think
9 of a lot of spirit bottles that I would think would
10 fit in that size. So I'm not that surprised by this.

11 But my question is, so if you look at our
12 tables 4-6 and I think it's 4-7 if I remember
13 correctly. What you see is, you know, on these data
14 you see fairly constant shipments, particularly if you
15 look at U.S. shipments which I think you believe are
16 accurate, you see no growth, no real decline in wine
17 shipments. If you look at spirits, everyone is
18 growing pretty dramatically.

19 So I guess my question is, given what we
20 know from that, why would we want to look at the HTS
21 data and assume that the growth there is in wine when
22 everything else seems to point to growth in spirits,
23 not in wine?

24 MR. PICKARD: So you broke up a little bit
25 there, Commissioner, over the internet. So what I

1 think I heard you say, and I'm getting a signal that
2 it's kind of a poor connection.

3 I think what you asked was you see some --

4 COMMISSIONER KEARNS: I can repeat it.

5 MR. PICKARD: -- flat wine sales and
6 increased spirit sales?

7 Would you mind?

8 COMMISSIONER KEARNS: Yeah, sure.

9 In that --

10 MR. PICKARD: Would you be so kind as to
11 repeat? Okay.

12 COMMISSIONER KEARNS: Sure.

13 The HTS category covers both wine and
14 spirits. We have other data that you see mostly in
15 Tables 4-6 to 4-7, I believe, that show a pretty
16 dramatic increase across the board for all suppliers
17 of spirits sales. You don't see that with wine. So
18 why should we look at the HTS data and assume that the
19 growth is in wine when everything else seems to
20 suggest the growth is in spirits?

21 MR. PICKARD: Because in large part it's
22 consistent with testimony on both sides of this issue
23 as well as objective industry publications talking
24 about the increase in apparent domestic consumption
25 for wine. And that's fully consistent with kind of

1 the overarching argument here that while clearly there
2 have been declines in beer demand, and while food has
3 been relatively flat, imports are taking more and more
4 of that business. We can point to objective evidence
5 outside of this that indicates that demand for wine
6 should have been increasing but the domestic producers
7 were prohibited from or prevented from participating
8 in what could have been that bright spot in the market
9 by the increase in subject imports which are
10 documented in the official import statistic.

11 But we can break that out certainly in a
12 more kind of granular detail in the post-hearing brief
13 if you'd like.

14 Or put a --

15 COMMISSIONER KEARNS: Okay.

16 MR. PICKARD: -- different way -- I'm sorry.

17 COMMISSIONER KEARNS: Go ahead.

18 MR. PICKARD: I was just going to point out
19 if you're looking at flat trends for the domestic
20 industry but you're looking at significantly increases
21 in the Chinese import volume measured by the official
22 import statistics, I think that demonstrates your
23 buying effect. But we'll tease that out more in the
24 post-hearing brief for you.

25 COMMISSIONER KEARNS: Okay, thank you.

1 And then the last question I had, I'm
2 remembering that the Respondents, I think it was Mr.
3 Dogan in his testimony on page two was pretty
4 critical of one of the graphs that you all put
5 together. It's a proprietary graph, I think it's from
6 page 25 of your pre-hearing brief, where as I
7 understand it essentially you've created a graph that
8 has two different metrics. One on the right side, one
9 on the left, even though the metric is the same and
10 it, according to Respondents, sort of suggests a much
11 more dramatic relationship between subject imports and
12 U.S. shipments than the more typical way of presenting
13 that data would suggest. I just wanted to give you a
14 chance to respond to that.

15 Why did you all present the graph in this
16 way instead of the way the Respondents have laid it
17 out?

18 MR. PICKARD: Because it provides a
19 meaningful example of what happens to domestic
20 shipments relative to subject imports.

21 There was no hiding the ball here. The
22 various axes on both sides are clearly labeled as far
23 as scale. So it shows specifically what's happening
24 to each with both Y axes specifically labeled so you
25 understand the scale.

1 In regard to questionable representation of
2 material effects, quite frankly there are at least
3 five major concerns in regard to some material either
4 misrepresentations or omissions on the other side.
5 Quite frankly, this just looks like an excuse to try
6 and find something to complain about for the domestic
7 industry.

8 COMMISSIONER KEARNS: Okay. Thank you very
9 much.

10 CHAIRMAN JOHANSON: All right. Commissioner
11 Stayin?

12 COMMISSIONER STAYIN: Yes.

13 Respondents argue that only quantity
14 measurements will let us see which market segments are
15 having an impact on shipments and production. Do you
16 agree?

17 MR. PICKARD: No. I think consistent with
18 what we've always argued, the Commission should look
19 at all of the evidence. But the Commission's practice
20 for 20-odd years has always been to take a look
21 primarily on value judgments or value measurements
22 when there's a wide range in product value. This goes
23 all the way back to kind of the ball bearing days and
24 it's been repeated in numerous cases afterwards. And
25 it's particularly applicable here where you have

1 sometimes a gross of products going for five or six
2 dollars, and then evidence in the record of other
3 products going for several hundred dollars or even in
4 excess of a thousand dollars.

5 So we've always suggested that the primary
6 focus for the Commission, consistent with its
7 practice, is to look at value indicators. We're not
8 suggesting that you ignore volume data. Clearly it's
9 our position that the volume data is also supportive
10 of material injury but with this huge spread in prices
11 that value is more probative.

12 Otherwise, just to be clear, you would be
13 treating one unit valued at a couple of pennies, one
14 bottle at a couple of pennies, equivalent to a bottle
15 that is worth \$100 and that would clearly be
16 distortive.

17 COMMISSIONER STAYIN: Very quickly, what is
18 the causal link between imports from China and injury
19 to the U.S. injury?

20 MR. PICKARD: The causal link is probably
21 most clearly demonstrated in two pieces of
22 information. The surge in the volume of imports and
23 increase in market share from '16 and '17, '17 into
24 '18, and the fact that the damaging effects of those
25 were locked in through what everybody admits is the

1 general practice of long term contracts.

2 In addition to the explicit emails from the
3 importers stating that they're buying Chinese product
4 at lower prices or that the U.S. industry's got to
5 lower their prices to meet a Chinese price. Or the
6 U.S. industry cannot push through price increases,
7 otherwise they will move their product to China. That
8 demonstrates a significant volume impact, a
9 significant price impact, and you see that reflected
10 in the deteriorating financial performance of this
11 domestic industry which has lost a thousand workers,
12 which has got an abundance of red ink and decreasing
13 sales and profits throughout the period of
14 investigation.

15 COMMISSIONER STAYIN: Thank you. That's all
16 from me.

17 CHAIRMAN JOHANSON: Commissioner Karpel?

18 COMMISSIONER KARPEL: Hang on just a moment,
19 I'm sorry. I have some background noise.

20 (Pause.)

21 COMMISSIONER KARPEL: I wanted to follow up
22 again, this is something probably for the post-hearing
23 brief so you can look at the data and try to help us
24 understand that, but going back again to the
25 comparison between our C table data and the data you

1 have on official import statistics in Exhibit 31 of
2 your pre-hearing brief.

3 What I'm noticing there is in the C table we
4 took out certain data from there to account for out-
5 of- scope merchandise. So the value numbers we have
6 on the C table should be less than I presume what you
7 have on Exhibit 31 because you have not (technical
8 interference) out of this out of scope merchandise.
9 You've just used the ten-digit HTS and run your
10 numbers on that.

11 If that's correct, why are we seeing
12 actually higher value numbers in the C table and lower
13 value numbers total in your Exhibit 31? Why is there
14 a disconnect?

15 If you wanted to study that more and get
16 back to me in post-hearing, because this is an
17 important question because this affects the AUV
18 trends. And I misspoke earlier when I said the volume
19 trends. It's the AUV trends that are different in
20 your Exhibit 31 and in the C table, and I'm trying to
21 understand why that would be, particularly given that
22 you would think the numbers in the C table would be
23 smaller because something is being taken out of that
24 just pure ten-digit HTS value run.

25 Does that make sense?

1 MR. PICKARD: It makes perfect sense,
2 Commissioner. So we'll look at those data points and
3 we'll address it in the post-hearing brief.

4 COMMISSIONER KARPEL: Okay.

5 Then a couple of other items for you to
6 address in the post-hearing brief.

7 Again, with respect to Exhibit 31 it would
8 be really helpful if for each of the ten-digit HTS you
9 list there you could then describe the products that
10 fall under those HTS and how they match up with the
11 product categories we've generally been talking about
12 in this investigation. Wine bottles, beer bottles,
13 spirit bottles, et cetera, food containers. That
14 would be great.

15 MR. PICKARD: Happy to do that.

16 COMMISSIONER KARPEL: Okay. And the other
17 is with respect to the plant closures, there seems to
18 be quite a bit of disagreement between Petitioners and
19 Respondents on the reasons for these closures. I know
20 Petitioners have submitted witness declarations and
21 testimony giving their account of why these plants
22 closed, but it would be helpful in us sort of teasing
23 out whose evidence is more probative if you could very
24 clearly lay out for each closure, each curtailment of
25 production, contemporaneous statements, press

1 releases, investor statements that support your view
2 that those closures at that time were indeed
3 considered to be being done because of subject imports
4 and not some other cause.

5 I think that, oh, lastly, you're citing some
6 information from 2020 about trends including in
7 Exhibit 31, for example. And if you could just
8 clarify if you're asking us to look at that for
9 present material injury purposes or if this is more
10 for your threat arguments instead. And if it's for
11 your material injury arguments, present material
12 injury, if you could explain the basis for us going
13 outside the POI for that analysis.

14 Thank you.

15 MR. PICKARD: We'll do so. Thank you,
16 Commissioner Karpel.

17 CHAIRMAN JOHANSON: I have just one matter
18 for you to follow up on. That is, if you can please
19 provide any updated information regarding how the
20 Coronavirus has affected or is likely to affect glass
21 bottle supply and demand in China and in the United
22 States. And also how it is affecting the relative
23 desirability of U.S. purchases sourcing from the
24 United States or China.

25 You can feel free to answer that to the

1 extent you want to right now or just provide it in
2 your post-hearing.

3 MR. PICKARD: Sure, Commissioner.

4 I would point out quickly that we've put in
5 a decent amount of information in regard to what we've
6 seen in regard to domestic demand conditions in the
7 last recession, in '08 and '09 and how that
8 detrimentally affects, that had detrimental effects on
9 the U.S. industry.

10 We've also put in information in regard to
11 what we're seeing in China in regard to their over-
12 supply export orientation.

13 But we'll be happy to address that further.

14 In large part there is a Respondents' exhibit that I
15 think is cited for only half of the story and we'll be
16 providing additional information that further supports
17 that if anything COVID is going to make the Chinese
18 more oriented or more incentivized to export to the
19 United States and the U.S. industry more vulnerable.

20 CHAIRMAN JOHANSON: Thank you. That
21 concludes the questions I have.

22 I think we're now ready to move on to the
23 Respondent parties.

24 In this section of today's proceeding
25 Commissioners will provide an initial round of

1 questions and answers to Respondents' counsel, so if
2 Respondents' counsel could please get ready for this.

3 I think we'll just go ahead and get started up.

4 The first Commissioner to ask questions of
5 Respondents is Commissioner Kearns.

6 COMMISSIONER KEARNS: Thank you very much.
7 Thank you all for appearing with us today.

8 I wanted to start with a question for Berlin
9 regarding beer shipments. While no importers reported
10 pricing data for pricing products four through six
11 which encompass beer bottles, importers did report
12 U.S. shipments to beer end users. You suggest that
13 this may be due to the fact that importers do not
14 participate in beer sales to large manufacturers.

15 Are you in essence suggesting that the
16 pricing products are more tailored to large beer
17 manufacturers? Why would these bottles be much
18 different from the other beer bottles?

19 MR. WESSEL: Thank you, Commissioner Kearns,
20 for the question.

21 I think as we explained in our Q&A, in
22 Berlin's experience our import of beer bottles are
23 generally not the standard shape that are generally
24 sold to the Anheuser-Busch's, what we call mass beer.

25 So one of the reasons that you did not see beer in

1 the pricing product data but you did see a very
2 limited amount of beer sales in the data writ large
3 was because of this, the fact that there's a more
4 standard shape that goes to mass beer that is
5 generally catered to by the domestic industry and
6 different sizes that Berlin, I'm sorry, different
7 shapes that Berlin used to sell to a very small
8 percentage of domestic beer companies.

9 COMMISSIONER KEARNS: Okay, thank you.

10 I don't know if you have, it may just be my
11 own personal interest, but I'm curious if you have
12 specific examples of that, of what kind of beer
13 bottles we're talking about that are of Chinese
14 origin. Either now or post-hearing.

15 MR. WESSEL: We can certainly provide that.

16 But again, I mean it is a difference between a
17 standard shape versus a non-standard shape.

18 COMMISSIONER KEARNS: Okay, thank you.

19 If packaging is one component that limits
20 comparability, case packs versus bulk, did you comment
21 in the draft questionnaires about the significance of
22 this change to the pricing product definitions from
23 the prelim to the final.

24 MR. WESSEL: I'd have to go back and look at
25 our comments as opposed to bulk versus case pack, but

1 again, I think in our general experience the imports
2 are more geared to the case pack as opposed to bulk.

3 COMMISSIONER KEARNS: Okay. Thank you.

4 And then I wanted to ask about attenuated
5 competition. I think as I understand it you all put
6 quite a bit of emphasis on large versus small
7 purchasers. It seems to me, though, that we see
8 domestic producers in both large and small and so I'm
9 not sure how far that gets you.

10 But what I wanted to ask is shouldn't we
11 focus more instead on the various tables in Part 4
12 demonstrating that a focus on any individual portion
13 of the market on this record does not appear to
14 demonstrate any injury to the domestic industry by
15 reason of subject imports regardless of whether you're
16 looking at wine or beer or spirits or food. That if
17 you just look at those individual segments you just,
18 in none of them does there seem to be, you know, much
19 of an increase in subject imports.

20 MR. DOUGAN: Commissioner Kearns, this is
21 Jim Dougan. Can you hear me?

22 COMMISSIONER KEARNS: Yes, I can. Thank
23 you.

24 MR. DOUGAN: Okay good, thank you.

25 So as to the latter part of your question I

1 think the reason that we, or to both parts of your
2 question, the reason that we placed so much emphasis
3 on the breakdown maybe between large and small in the
4 different segments is because we very much did want to
5 present a picture of attenuated competition.

6 Now in our view, the fact that subject
7 import market share for the market as a whole is so
8 low, I think the exact numbers are BPI, but whether
9 you look at it for volume or for value you're talking
10 about single digit market shares and you're talking
11 about changes in market share that are fractions of a
12 percentage point.

13 So in our view that weighs against a finding
14 of significant volume effects for the market as a
15 whole. Particularly, by the way, when you have non-
16 subject import penetration that's much larger and
17 increased by more. And if Petitioners' argument is
18 well, if the market's over-supplied then any supply in
19 the market even at high prices causes price effects to
20 the domestic industry, well then from our view, we
21 don't necessarily believe that. But if that's true
22 then it's definitely coming more from non-subject
23 sources than from subjects.

24 But to your other point, at the prelim,
25 although I was not personally involved, our arguments

1 were look, we serve segments of the market that are
2 not unserved but under-served by domestic producers
3 for which it is not a focus, it is not an emphasis for
4 them. So our presence in these segments is not
5 causing harm to them.

6 So it's not just you look at what the market
7 share is and then you put that against all sectors.
8 You would look at it at each of the individual
9 segments.

10 This is important particularly because, as
11 you know, so much of the decline in the volume and
12 with it the production is associated with the beer
13 segment of the market where the subject imports have
14 very little presence at all.

15 I can answer more specific questions if
16 you'd like, but I think, does that answer your overall
17 question?

18 COMMISSIONER KEARNS: It does. It does.

19 If you can also just follow up again on the
20 issue of the tables in Part 4, the various segments
21 there. If you have any responses here or post-hearing
22 to what we heard from Petitioners as to why we should
23 instead rely more, not instead, but in addition to
24 what we see in those tables, maybe rely on the HTS
25 data that we have that shows they would say more of an

1 increase in subject imports of wine bottles than we
2 see in those tables. If you have any response to
3 that.

4 MR. DOUGAN: Sure. To the first point about
5 the coverage, I think we understand that the coverage
6 from the importers' questionnaires is not complete.
7 It is, I think Petitioners have used a bit of sleight
8 of hand in talking about how low the coverage is by
9 referring to the number of responses as opposed to the
10 actual volume of the coverage.

11 The volume of the coverage is, I think I can
12 safely say in public, is a majority, over half for
13 subject sources. It's not necessarily true for non-
14 subject sources.

15 So if you were going to take that into
16 consideration you'd also have to consider the Section
17 4 tables and in Appendix E that the volume of non-
18 subject imports would also be higher.

19 We can do for post-hearing, if we assume
20 that the distribution of the products across the
21 different segments for the importers who didn't
22 respond is similar to those who did respond, we could
23 do sort of a gross-up analysis for you and provide
24 that in post-hearing so you could see what the overall
25 penetration would look like. We're happy to do that.

1 We don't think that it's going to show significantly
2 different trends, as you say, amongst the different
3 segments.

4 With regard to the HTS data, the commission
5 is free to look at whatever information is available
6 to it. I would say that the information available
7 from those codes is not necessarily "clean". I think
8 we would agree that the code ending in 19 probably
9 contains mostly wine and spirit bottles. I think your
10 observation was also correct, though, that given the
11 increase in the spirit segment as opposed to wine,
12 there's no basis to necessarily attribute that
13 increase to one.

14 One other point I would like to make, and
15 this is something that Commissioner Karpel put her
16 finger on. The Exhibit 31 data presented by
17 Petitioners does not use landed duty paid value which
18 is the Commission's standard practice. It uses
19 customs value which is why the AUVs are both lower and
20 go in the opposite direction from what you see in the
21 staff report.

22 So not only do they not adjust for the
23 exclusion of non-subject merchandise, they use the
24 value from a totally different level of trade.

25 And by the way, they don't annotate that

1 anywhere in their brief or in the exhibit. We had to
2 figure that out by trying to recreate their data.

3 So the volume data are probably fine. We
4 were able to recreate that. We can talk about what
5 implications that has for the market shares. But when
6 you're talking about the AUVs and the trends, I'm
7 sorry, but you need to disregard that argument
8 completely.

9 COMMISSIONER KEARNS: Okay, thank you.

10 And can you address Petitioners' counsel's
11 argument from this morning that the do not call
12 provisions in Respondents' contracts with the
13 purchasers in the U.S. market explain the domestic
14 industry's inability to penetrate the small to medium
15 end users compared to larger ones?

16 MR. NEELEY: Let me speak to that for a
17 couple of seconds.

18 I think honestly the best way to address
19 that issue is for us to supply the contracts and let
20 you look at them yourselves. We'll be glad to do that
21 in the post-hearing.

22 The reality is that distributors, I mean
23 this is not unusual. Distributors and suppliers,
24 producers who also sell to end users often have these
25 sorts of provisions. There's nothing nefarious about

1 it. There's nothing unusual about it. And Certainly
2 somebody like TricorBraun doesn't have sufficient
3 market power, let's say, to affect decisions of Ardagh
4 if they didn't want to go there.

5 And that's pretty apparent when you look at
6 the contracts. Because the no-call provisions are not
7 just that the Ardagh, for example, could not call on
8 certain customers of TricorBraun but it goes the other
9 way. It goes the other way simply because people,
10 when they're entering into these contracts, don't want
11 people poaching on their other customers.

12 I think this is really a red herring. I
13 think it really is immaterial to this case. But we'll
14 be more than happy to put on the record what those
15 provisions actually say.

16 MR. WESSEL: I think the record also shows
17 the converse of that, in that a lot of the
18 distributors tell a story of graduations from the
19 smaller runs for SMEs, and once those SMEs become
20 bigger they attract the attention of the U.S. industry
21 and they're essentially graduated into supply by the
22 U.S. industry. So we actually state the converse of
23 that, it's supported on the record.

24 COMMISSIONER KEARNS: Okay, thank you.

25 We also discussed earlier with Petitioners'

1 counsel what's going on with demand for wine versus
2 demand for spirits. I believe Mr. Pickard suggested
3 there is agreement about a surge in demand for wine.

4 Do you all have any comments on that? I
5 recognize that might be a question that your clients
6 could answer better than you can, so post-hearing is
7 fine as well.

8 MR. DOUGAN: Commissioner Kearns, this is
9 Jim Dougan. I think we can follow up with our clients
10 and try to get the best information we can about this.

11 The evidence that we have on the record
12 doesn't support that and it's not about an increase in
13 demand that should have happened but was somehow taken
14 away by -- I mean subject imports didn't make the
15 demand go down, right? To the degree that they caused
16 the domestic producers to ship fewer units, we'd argue
17 that's not the case. We have information in our pre-
18 hearing brief that shows that's not the case. But
19 again, I would remind the Commission, and I'm sorry, I
20 want to make this quick. The vast majority of
21 domestic industry sales to the wine segment are to
22 large wine producers and that is not a segment where
23 subject imports have much of a presence at all, if
24 any. So to the degree there's a volume decline there,
25 that's not being replaced by subject imports. That's

1 just an actual decline in demand.

2 COMMISSIONER KEARNS: Okay, thank you.

3 I wanted to ask about export shipments. In
4 response to the Commission's questions, Petitioners
5 argue that one domestic firm accounted for a majority
6 of the export shipments and produced these exports to
7 keep its plan running at high utilization rates given
8 the capital intensive nature. They argue that due to
9 curtailments caused by subject imports this firm
10 reduced capacity and the export shipments declined as
11 a consequence.

12 Does this undercut your argument, Mr.
13 Dougan, that export shipments may be an alternative
14 cause of injury?

15 MR. DOUGAN: Jim Dougan from ECS.

16 Commissioner, I don't know that export, we
17 were arguing that export shipments were an alternative
18 cause of injury as much as we were trying to say look,
19 if there is a decline in volume across the board -- I
20 guess in a way it is a contribution to the decline of
21 the financial performance of the industry. And the
22 decline in the export shipments made a significant
23 contribution to the decline in industry production and
24 shipments. That may have had an effect on their
25 ability to spread the fixed costs.

1 Now one thing I'll note is that if the
2 utilization -- sorry. Can I keep going?

3 If the utilization remained the same and the
4 overall capacity was declined, that would not
5 necessarily have shown up in how they spread their
6 fixed costs.

7 I'll take a look at this question a little
8 bit more for post-hearing, and I know you're over your
9 time. My apologies.

10 COMMISSIONER KEARNS: Okay, thank you. I
11 appreciate it.

12 CHAIRMAN JOHANSON: Commissioner Stayin?

13 COMMISSIONER STAYIN: Thank you.

14 Petitioner argues that documentation
15 submitted in its pre-hearing brief, Exhibits 15-25,
16 shows that importers use lower subject import prices
17 as target prices to force price concessions from
18 domestic producers. If this is true, would this be
19 evidence that purchasers were using lower Chinese
20 prices to obtain price concessions? And is that
21 evidence of injury?

22 MR. NEELEY: I'll start and I'll let Mr.
23 Dogan speak to part of that as well.

24 I think part of the answer to that is simply
25 that there are negotiations between buyers and

1 sellers. I think that was referred to earlier in this
2 hearing, that people say that I can get this price
3 from somebody whether it's from Mexico or China or
4 wherever, and they negotiate and they say we'd like to
5 get this particular price. Obviously the buyers want
6 it to be lower, the sellers want it to be higher.

7 But I think what's probably more important
8 is that even assuming that this was lost somehow, and
9 they're really talking more about the lost sales, I
10 guess, when you get down to it is these really are
11 immaterial to any injury to the U.S. industry.

12 I think I'll let Mr. Dougan speak to that a
13 little bit.

14 MR. DOUGAN: Sure, hello Commissioner
15 Stayin.

16 I would agree with Mr. Neeley. Some of this
17 may have been negotiation tactics and gamesmanship on
18 the part of the purchasers. There are not only supply
19 available from China but also from Mexico and other
20 non-subject sources that they may use as part of their
21 negotiation strategy to get their suppliers to give
22 them better prices.

23 But I think the fact that Petitioners have
24 put so much weight on these anecdotal emails really
25 speaks to the fact that the record as a whole doesn't

1 support their contentions about under-selling. Very
2 often, this morning you heard Petitioners' counsel
3 circle back to the emails over and over and over
4 again. And I think that that says something when the
5 weight of the record evidence is in your favor,
6 particularly with regard to price effects, you point
7 to the Staff Report and you point to other data there
8 and they're not able to do that. So they're placing a
9 lot of weight on these emails that we say don't amount
10 to much in the context of the market as a whole, even
11 if they are presented and portrayed accurately.

12 COMMISSIONER STAYIN: Let me ask you this.
13 We see in the Staff Report that there is significant
14 evidence of over-selling. Assuming that this is
15 accurate, what does that say about the efforts by
16 distributors coming in and saying look, if you've got
17 these low prices from imports from China you have to
18 meet these prices in order to be able to get the deal.
19 That's very inconsistent.

20 Does it mean if there was a predominant
21 over-selling, it suggests that these statements and
22 these pressures were at best mistaken or ignored in
23 efforts to pressure the Petitioners to lower their
24 prices.

25 MR. DOUGAN: Commissioner, this is Jim

1 Dougan.

2 I think there is, to the degree there is an
3 inconsistency between these two different data
4 sources, it may very well be what you're pointing to
5 which is the fact that it is negotiation tactics on
6 some parts sometimes. Also it may be a function of
7 who's being sold to and whether they're getting what
8 they need at the time they need it.

9 There are also anecdotal evidence that we've
10 put on the record as Respondents, so we can call that
11 anecdotal evidence as well, but of situations where
12 there was difficulty in getting timely delivery and
13 fulfillment from certain domestic producers at certain
14 times. Sometimes, if that capacity is not necessarily
15 being allocated to you, if that supply is not
16 necessarily being allocated to you, and you know, you
17 mentioned that some of the smaller wineries, for
18 example, they don't have bottling capacity on their
19 own. They rent shared bottling capacity.

20 So when they've got time on the bottling
21 machine they better have the bottles because they're
22 not going to get time on that bottling machine again
23 for a few months.

24 So in those instances would they be willing
25 to pay more to get a bottle if it's available from an

1 imported source? I think they would because then they
2 can actually produce their wine.

3 So there are a lot of things going on in
4 these data, part of which is who's actually the
5 customer that's being represented in those sales.

6 COMMISSIONER STAYIN: The Petitioner argues
7 that subject imports are mostly standard sizes and
8 shapes, not customized. And thus there is direct
9 competition between the production of the domestic
10 industry with the imports.

11 Do you agree that there is direct
12 competition in all of the segments between the
13 domestic industry and the imports?

14 MR. DOUGAN: Commissioner Stayin, this is
15 Jim Dougan.

16 I think the evidence will show, that's on
17 the record, shows that there isn't direct competition
18 between subject imports and domestic industry in all
19 segments of the market. This doesn't necessarily have
20 to do with the design of the bottle, but it certainly
21 has to do with the types of customers that are being
22 sold to, and this is most observed in data between
23 large and small and medium customers.

24 Without getting into proprietary
25 information, subject import presence to large

1 customers is extraordinarily small where it exists at
2 all. This is evidence I think of what Mr. Wessel was
3 talking about, that at a certain volume small and
4 medium customers graduate to being more on the radar,
5 if you will, of the domestic producers.

6 So that has to do with supply chain, that
7 has to do with channels of different customers.
8 That's not to do with the product design. But I don't
9 think the evidence supports competition across the
10 market as a whole. I'll leave to my colleagues any
11 points on the actual product to product comparisons.

12 MR. WESSEL: Commissioner Stayin, this is
13 Jerry Wessel. I'd just make one point.

14 There are large swaths of the market
15 including what the Petitioners have labeled the heart
16 of the market, where there simply are no Chinese
17 imports. Obviously we think that's, the best evidence
18 you could possibly have is attenuated competition.
19 Especially in the beer area where Petitioners stated
20 before, was the significant source of their financial
21 issues.

22 So yes, you can't put too fine of a point on
23 it, but the complete absence of Chinese imports in
24 some of these really important areas is evidence of
25 attenuated competition.

1 COMMISSIONER STAYIN: The Petitioners argue
2 that due to the high fixed costs in this industry that
3 they need to have high capacity utilization. Thus
4 even a very small amount of market share can result in
5 a furnace being closed.

6 Do you agree that the nature of the industry
7 makes it more vulnerable to the effects of lost
8 production volumes?

9 MR. DOUGAN: Commissioner Stayin, this is
10 Jim Dougan.

11 I don't think we have a dispute with the
12 characterization of the industry as being a high fixed
13 cost. I don't think we have a dispute with the idea,
14 with Petitioners over the idea that these producers
15 would seek to optimize their capacity utilization.

16 I'll point out though, for one, most of the
17 industry did, and as pointed out in my testimony, I
18 don't have a slide reference for you right now, but
19 most of the "idle capacity" that's shown in the record
20 is attributable to one single domestic producer rather
21 than to the industry as a whole. The industry as a
22 whole absent this producer actually does have very
23 high capacity utilization which suggests that this is
24 a problem that is with a single producer as opposed to
25 the industry as a whole.

1 But it also goes to the idea that if this is
2 about capacity utilization, and as you heard from
3 Petitioners' counsel this morning, the furnace is
4 agnostic, the Commission needs to keep in mind the
5 massive difference in magnitude of the decline in
6 volume to the beer segment as opposed to the other
7 segments.

8 I can't talk about proprietary information,
9 but we are talking about volume declines in the
10 millions and millions of gross as opposed to potential
11 shifts in market share of some of these segments of
12 thousands of gross. So if you're talking about the
13 materiality of any impact in shifts in volume and what
14 impact that may have on the industry's ability to
15 absorb its fixed costs, I'm sorry, it's all about that
16 decline in beer. It dwarfs everything else.

17 MR. WESSEL: Commissioner Stayin, Jerry
18 Wessel, if I may.

19 I think the one disagreement we do have
20 about the nature of production is really succinctly
21 captured in something that didn't come up earlier this
22 morning, the introduction of Arglass as a U.S.
23 producers.

24 Arglass has come in with a distinct model
25 and a distinct production model that really accurately

1 fits what Respondents have been telling you. A
2 different production model that is geared towards
3 small and medium runs that even according to Arglass'
4 press statements were designed to compete with subject
5 imports.

6 And I think importantly, too, this was all
7 done pre-petition.

8 So the big key where Respondents disagree on
9 the production is, again, I think really captured in
10 the entrance of Arglass into this market and how
11 they've chosen to conduct their production.

12 MR. NEELEY: If I could just add to that. I
13 don't want to take much time on it, but that's
14 absolutely the case. This isn't just one side saying
15 one thing and the other side saying something else.
16 Arglass has actually put substantial amounts of money
17 on this issue in creating the plant in Georgia. So I
18 think that does have a great deal of credibility, or
19 should have a great deal of credibility with the
20 Commission. Thanks.

21 MR. WESSEL: And Jerry Wessel, not to
22 belabor the point, but smart buy. You know, that's
23 significant money from smart people in the industry
24 and smart private equity investors. So if you
25 disagree with the Arglass story and Arglass' theory of

1 the market you essentially have to say that that money
2 is, I don't want to say dumb money, but misinformed
3 money, and we don't think that's a reasonable
4 assumption to make vis-a-vis Arglass.

5 COMMISSIONER STAYIN: Considering the
6 obvious decline in demand for beer and beer bottles,
7 it would seem that it would make sense that the
8 domestic industry would be making efforts to find
9 other sources of customers in order to make more use
10 of its capacity that has been freed up as a result of
11 the decline of beer.

12 According to the Petitioners, they're saying
13 they have been doing this. That they're out there
14 trying to sell to the small and medium sized customers
15 even to the point where they have specialized
16 machinery that they can move from one to another, type
17 of bottle, size of bottle, and therefore this is an
18 area they're making great effort. That in fact they
19 are competing in all segments of the market as opposed
20 to being limited to a single segment.

21 What is your response to that?

22 MR. DOUGAN: Commissioner Stayin, we're not
23 arguing that they are limited in a single segment, and
24 the data do support the fact that they have made, you
25 know, have increased their shipments to the spirit

1 segment and they are present in all sorts of different
2 products throughout the market.

3 But it's also important to recognize where
4 they actually overlap with subject imports. They may
5 be shipping more spirits, they may be shipping more
6 food, they may be shipping more other beverages to end
7 users, but those are segments where the subject
8 imports really aren't present to any great degree and
9 the evidence in the small and medium -- and by the
10 way, that is more geared towards their model of doing
11 longer production runs at higher volumes to optimize
12 their capacity utilization. So if anything it seems
13 like that's where they're targeting their efforts
14 first. And any volume that they might have lost to
15 imports, either subject or otherwise, in the small or
16 medium customers is simply immaterial in the context
17 of the market.

18 COMMISSIONER STAYIN: Thank you Mr. Dougan
19 and my time is up.

20 CHAIRMAN JOHANSON: Commissioner Karpel?

21 COMMISSIONER KARPEL: Thank you.

22 I wanted to ask you about distributors.
23 Earlier we heard from Petitioners arguing that a
24 significant gap in our record is the lack of data on
25 sales to distributors reflected in Appendix E. And

1 that if we had that data, they suggest that it would
2 show significant shifts of sales from domestic
3 producers to subject imports citing some support,
4 examples from the emails they put in the record.

5 Assuming you disagree with this argument,
6 what evidence would you point to to support your view
7 of things?

8 MR. DOUGAN: Commissioner Karpel, hi. This
9 is Jim Dougan from ECS.

10 First of all the idea that distributors are
11 a massive part of the market is over-stated. If you
12 look at, it's Exhibit 7 to our pre-hearing brief where
13 we break down apparent consumption into shipments to
14 distributors, shipments to retailers, and shipments to
15 end users. If you add all of that up you can sort
16 eyeball the numbers. But if you add all that up you
17 can see that the shipments to end users, that is the
18 data that is actually covered by our Section 4 and
19 Appendix E, is the vast majority, the overwhelming
20 majority of apparent consumption in this marketplace.

21 So while shipments to distributors are not
22 nothing, they are hardly the heart of the market.
23 They are hardly explaining everything that's going on.

24 Now we recognize that these data don't have
25 complete coverage on questionnaires. So as I

1 mentioned to Commissioner Kearns earlier, we can
2 attempt to maybe fill this out a little bit for you in
3 post-hearing and gross these numbers up. But we would
4 remind you that not only is the coverage below 100
5 percent for subject imports, it's also below 100
6 percent for non-subject imports. So to understand the
7 market share shifts and the volume shifts and where
8 these things might be going, it's important to
9 consider grossing up the non-subject imports as well.

10 I would also point out that these data show
11 that shipments to distributors overall declines from
12 all sources except for shipments to distributors from
13 non-subject sources. So domestic producer shipments
14 to distributors went down; subject import shipments to
15 distributors went down. Non-subject shipments to
16 distributors went up.

17 So I think what you have here is, first of
18 all it's a less significant portion of the market than
19 Petitioners would have you believe. But also to the
20 degree that there's a decline and what the causation
21 to that is, we have a non-attribution issue with
22 regard to non-subject imports.

23 COMMISSIONER KARPEL: Thank you.

24 Turning to a different issue, Petitioners
25 suggest that we should discount the 2019 data for

1 example with respect to market shares lost and focus
2 more on 2018, 2017-2018.

3 Is this a reasonable approach given the
4 impact of the Section 301 duties? And if not, how
5 should we take into account that subject imports may
6 have temporarily decreased because of the Section 301
7 duties?

8 And I ask this taking note of your point and
9 disagreement that these are temporary duties, but
10 setting that aside, how would you respond to my
11 question?

12 MR. DOUGAN: Commissioner Karpel, Jim Dougan
13 again.

14 I don't think we dispute, in fact we say
15 clearly in our responses to questions that the Section
16 301 tariffs had to explain in part a decline in
17 subject import volume from 2018 to 2019. So first of
18 all, and we can talk about that in a second.

19 First of all, I want to address the 2017 to
20 2018 situation.

21 Again, we're talking about magnitude here.
22 We're talking about materiality. And when you hear
23 this characterized as a surge, even the increase in
24 subject import market share from 2017 to 2018 is less
25 than a percentage point. Whether you measure it by

1 volume or value.

2 So we're talking about very, very small
3 changes in market share. Very small changes in market
4 share. And we would argue that those aren't material
5 period, even if you're just looking at 2018.

6 If you look at 2019, we don't think you
7 should discount those data. We think that they tell
8 you something about the conditions of competition in
9 the marketplace. The fact that the subject import
10 volume declined without any particular -- and the
11 market share declined without any particular benefit
12 to the domestic industry either in terms of its market
13 share or its financial condition, we think supports
14 our theory of the case.

15 With regard to market share, subject import
16 share was essentially replaced by non-subject share
17 between '18 and '19, and we think that that supports
18 our theory of the case that there are segments of the
19 market that are under-served. Not unserved but under-
20 served by domestic producers. If non-subject imports
21 are fairly traded and the only reason that subject
22 imports have a presence in the market is due to
23 something in subsidies, then one would expect that
24 domestic producers would be on equal footing in
25 competition with non-subject imports in regaining that

1 share when the subject imports retreated somewhat from
2 the market. You don't really see that in the
3 evidence.

4 And you also don't see a particular benefit
5 to the domestic industry's financial condition between
6 2018 and 2019. So to the degree there was a retreat
7 from the market by subject imports and to the degree
8 that was caused by the Section 301 tariffs, you're not
9 seeing the domestic industry benefit. Its financial
10 condition declined.

11 Again, so we would argue that that supports
12 our contention that the reason for that decline do not
13 rest with subject imports but with other factors.

14 MR. WESSEL: Commissioner Karpel, if I may,
15 Jerry Wessel. I don't want to take too much time
16 because I think you understand our legal position.
17 But I don't think that we can say but for the Section
18 301 duties X, Y, Z would have happened.

19 I understand why that's done with post-
20 petition effects, but the 301s are a condition of
21 competition. They strengthened as a condition of
22 competition since the prelim because of the fact that
23 there are no pending exclusions for glass products.

24 COMMISSIONER KARPEL: So how do we take that
25 condition of competition then into account? It

1 obviously is affecting the import numbers and in
2 theory making it harder for Petitioners to prove their
3 case.

4 So should we be looking at the 301 duties as
5 having that impact on the ability to substantiate
6 these cases in general? How do we reconcile that?

7 MR. NEELEY: I would just add to what Mr.
8 Wessel said that as a condition of competition you
9 take it into account as something that yes, is a
10 barrier to entry for Chinese products coming into the
11 United States. Just as if there were, say the
12 Commission often takes into account things like Buy
13 American provisions or similar provisions where it
14 makes it more difficult for a particular country to
15 sell into the United States. I think it's somewhat
16 similar to that.

17 Yes, it's a barrier to entry, there's no
18 doubt about it. How much of a barrier to entry I
19 think can be discussed and you can try to quantify
20 that. But that I think is the correct approach under
21 the law.

22 MR. DOUGAN: Commissioner Karpel, this is
23 Jim Dougan again. If I may just add one thing to
24 that.

25 You've seen a lot of cases recently, and

1 we've done a lot of cases recently, and in some
2 markets, in some industries when the Section 301
3 tariff went into effect or at least when it increased
4 to the 25 percent level you saw imports from China
5 fall off a cliff. You saw them just almost entirely
6 exit the market.

7 You didn't really see that here. You saw a
8 decline but subject imports are still present in the
9 market at comparatively similar market share to where
10 they were in 2017 and 2018. And we think that this
11 also supports our theory of the case, that there is
12 attenuated competition, that there's portions of the
13 market, certain customers, certain segments where they
14 are sourcing from China for reasons having nothing to
15 do with price.

16 COMMISSIONER KARPEL: Thank you.

17 Shifting to a related question, it's a
18 question in terms of your arguments that domestic
19 producers don't serve SMEs or are not trying to serve
20 SMEs. And looking at the data that we have in
21 Appendix E it doesn't seem to quite jive with that
22 assertion.

23 So can you walk me through your basis for
24 saying that they aren't serving SMEs? The domestic
25 producers.

1 MR. DOUGAN: Commissioner Karpel, I think at
2 least I would never say that they are not serving but
3 rather it's a portion of the market that is not a
4 priority for them. It's not a focus for them.

5 The reason that at least in my view this is
6 relevant and important is because Petitioners said
7 we're sort of playing semantics by comparing
8 percentages of shipments that went to the large versus
9 small. But it's not semantics and it is relevant.

10 Now we understand that because the domestic
11 industry has a much larger market share, a dominant
12 market share, then even a small portion of their
13 shipments might appear in absolute volume comparable
14 or similar to the volumes coming from subject imports.

15 However, why this is relevant is because the
16 industry's financial condition is directly tied to its
17 volume numbers and its production and its ability to
18 absorb its fixed costs. And when the overwhelming
19 majority of the industry's shipment is going into
20 large customers where that's a focus for them and the
21 decline in, and the overwhelming majority of their
22 decline in volume is attributable to those larger
23 segments, and that is relevant to understanding
24 whether any overlap that they have with subject
25 imports in these smaller customer segments is ending

1 up resulting in changes in volume that would be
2 material relative to their changes in volume to large
3 customers in such a way that it might credibly be said
4 to be affecting their financial condition.

5 And we would submit that given the vast
6 disparity in the volumes that are at issue here and
7 the highly attenuated nature of that competition, we
8 would argue that it does not.

9 MR. WESSEL: Commissioner Karpel, if I could
10 just add. I think Arglass' statements do a pretty
11 good job, their public statements. They talk about
12 how small volume beverage and food producers have had
13 to rely on imports, suffering from poor customer
14 service and limited options. I think that's a pretty
15 succinct version of the point that we're trying to
16 make.

17 MR. NEELEY: I would add to that, I agree
18 completely with Mr. Wessel. As Mr. Dougan said at the
19 outset, we're not saying this is an unserved part of
20 the market, we're saying it's under-served. And as
21 Mr. Wessel completely, just pointed out and we
22 completely agree with, we see that in the Arglass --

23 COMMISSIONER KARPEL: In that regard, it's
24 unfortunate that Yamamura did not submit a response to
25 our questions or is not here today. But do you have

1 any information or could you obtain any information
2 about the orders that Arglass is apparently receiving
3 from these SMEs and the reason for that?

4 MR. NEELEY: We can Certainly ask them.
5 They're not our client, but we're in contact with
6 them. We can certainly find out. We'll see what we
7 can do.

8 COMMISSIONER KARPEL: Thank you. I
9 appreciate that.

10 Okay, and I wanted to ask, the Staff Report
11 notes at page 2-2 5 that all reported U.S. shipments
12 of imports from China were small end user
13 manufacturers versus large manufacturers. Could you
14 in your post-hearing brief, or now if you're able,
15 please describe any attempts made by Respondents to
16 sell to the large U.S. manufacturers and what the
17 results of these attempts were. Have there been
18 efforts that have maybe not succeeded, but nonetheless
19 there have been attempts?

20 And if there have been unsuccessful
21 attempts, what are the barriers to subject imports
22 trying to compete for these contracts or these sales
23 to large manufacturers?

24 MR. NEELEY: This is Jeff Neeley. It's
25 probably something we ought to address since a lot of

1 that would be confidential, either way, in the post-
2 hearing. So we'd be glad to do that.

3 COMMISSIONER KARPEL: Mr. Dougan, I think
4 you touched on this a bit. But if you all have any
5 further comments you can offer on Exhibit 31 of
6 Petitioners' pre-hearing brief I'd appreciate it. I
7 asked them specific questions about that in terms of
8 specifying what the ten-digit HTS codes correspond to
9 in terms of the product groupings we've been talking
10 about in this investigation, but if you have other
11 analysis or rebuttal you'd like to provide on Exhibit
12 31, I'd appreciate you following up with that in the
13 post-hearing.

14 MR. DOUGAN: Sure. I absolutely will do
15 that.

16 And really quickly, I don't know if you
17 heard my response to Commissioner Kearns, but the
18 discrepancy in the value to AUVs that you observed and
19 the difference in the trends is attributable not to
20 the fact that these aren't adjusted for non-subject
21 merchandise but because they use customs value
22 instead of blended duty base value without notating or
23 explaining why they did that.

24 COMMISSIONER KARPEL: Thank you.

25 CHAIRMAN JOHANSON: Okay, I think it's my

1 time to speak.

2 Petitioners say that subject imports
3 increased ten percent in the first two months of 2020
4 compared to the same period in 2019. And this is in
5 Petitioners' answers at page two.

6 Why did this happen, and what does this say
7 about Chinese producers' ability to export despite the
8 Coronavirus?

9 MR. DOUGAN: Hi, Chairman Johanson. This is
10 Jim Dougan.

11 I don't know the answer to the last one so
12 I'll let my colleagues maybe weigh in on that. We may
13 want to get information from the client.

14 We think the reason for the increase in
15 January and February of 2020 is the filing of this
16 case. Petitioners have argued that there's post-
17 petition effects, and this might be a post-petition
18 effect.

19 The idea, by the way, that that would be
20 observed in 2019 is a little absurd when the petition
21 was filed at the end of January and there's a three-
22 month lead time in getting shipments from China. So
23 we don't think there were any post-petition effects
24 that are observed on the record of this investigation.
25 Certainly not with regard to import volume. So we

1 don't think that's really the case.

2 But in early 2020 this may be evidence of
3 importers who were looking to get volume in before the
4 preliminary duties went into effect. And we can put
5 the evidence on the record in our brief, but the
6 January to March comparison is down compared to the
7 prior year so obviously that was a temporary bump.

8 CHAIRMAN JOHANSON: But does that bump not
9 show that China is capable of upping its exports
10 during this period of the Coronavirus?

11 MR. NEELEY: If I could add one thing to
12 that, and hopefully that will help in answering this.

13 The increase was very modest. I mean it was
14 such that the domestic industry didn't even make a
15 critical circumstances allegation at the Commerce
16 Department, which as we all know often happens.

17 So there was a slight bump-up for sure. I'm
18 sure that certain importers wanted product, wanted to
19 get it in before any duties went into effect. But it
20 actually was quite small compared to many other cases.

21 I think there's a certain amount of
22 inventory out there in China, perhaps and they were
23 able to ship it. We're not saying it sent to zero in
24 China. We've never alleged that that was the case,
25 but it's a very modest increase.

1 CHAIRMAN JOHANSON: Thank you Mr. Neeley and
2 Mr. Dougan.

3 How do you all respond to Petitioners'
4 argument that even if we find that the underselling
5 data in the Staff Report is accurate, the law of
6 supply and demand indicates that increased supply of
7 subject imports would suppress or depress prices?

8 MR. DOUGAN: Hi, Chairman. This is Jim
9 Dougan again.

10 We would disagree with that. We think that
11 there isn't really other evidence on the record that
12 they can point to that's credible to show price
13 depression or suppression by reason of subject imports
14 so they want to basically, they would like you to
15 infer that there has been some on the basis of overall
16 supplies to the market. But my response to that would
17 be even if that's true you have to look at two things
18 and both of them have to do with non-subject imports.

19 Non-subject import volume was much larger
20 than subject import volume and the market share
21 increased which subject import volume did not.

22 So to the degree that supply from any source
23 at any price has a depressing and suppressing effect
24 on the domestic industry's prices, that would
25 Certainly have to come of a much greater magnitude

1 from non-subject imports than it would from subject
2 imports.

3 Secondly, that is not just true of the
4 market in aggregate but it is true based on the
5 relative levels of overlap in competition between non-
6 subject versus subject imports. We put some
7 information in our Q&A responses and it's on the
8 record that shows that the segments in which the non-
9 subject imports are shipped has a much greater overlap
10 with the domestic industry than the subject imports
11 do. So to the degree that there's an over-supply in
12 the market and it's coming from import sources and
13 it's coming into segments that are relevant to the
14 domestic industry, it's much more likely to be coming
15 from non-subject sources. They even conceded this, I
16 think it may have been Commissioner Schmidtlein this
17 morning who pointed out a footnote at 186 in
18 Petitioners' responses to questions where they
19 indicated that the reason that the averaging of value
20 of imports from Mexico was lower than imports from
21 China is because it was much more, imports from Mexico
22 are much more heavily weighted towards shipments to
23 the beer segment.

24 Well if that's the case, and the beer
25 segment is the majority of the domestic industry

1 shipments and the vast majority of their decline in
2 shipments, it seems to me that imports from Mexico
3 would be having a much greater impact on over-supply
4 in that segment.

5 CHAIRMAN JOHANSON: Thanks. You're just
6 talking about the beer segment. I'm going to move
7 onto the wine segment.

8 How do you respond to Petitioners' argument
9 that while demand for wine for home use has increased
10 as a result of the Coronavirus, demand for wine from
11 restaurants has fallen even more?

12 MR. DOUGAN: Hi, Chairman Johanson, this is
13 Jim Dougan.

14 I think we would have to look into that more
15 and get some, talk to our client about this a little
16 bit. I don't know if counsel wants to talk about this
17 a little bit more, but it's so early in the game here
18 that it's very difficult for us to know precisely
19 what's going on, but we'll look into it and try to get
20 you some answers on that.

21 MR. NEELEY: I agree, the best thing is to
22 ask the client. But a lot of I think the discussion
23 of the Coronavirus that we're having unfortunately is
24 going to have to rely on a lot of speculation because
25 nobody really knows what's going on entirely in terms

1 of the effect of the Coronavirus. And as the
2 Commission knows, it really can't rely on that
3 speculation so we need to see what's out there in
4 terms of hard facts and we'll take a look at them.

5 CHAIRMAN JOHANSON: Thank you Mr. Neeley and
6 Mr. Dougan.

7 Commissioner Karpel brought up the issue of
8 Section 301 duties. I have another question in that
9 area.

10 You assert that Section 301 duties did not
11 change subject import volume significantly and this is
12 seen in TricorBraun's answers at page 29. Does this
13 imply that they will not restrain subject imports
14 significantly for purposes of threat?

15 MR. DOUGAN: Hi Chairman Johanson, Jim
16 Dougan again.

17 I think what our answer was getting at there
18 was that while there was a change in subject import
19 volume and probably explained at least in part by the
20 Section 301 duties, the fact that you didn't see it
21 fall off of a cliff, the fact that you didn't see
22 subject imports exit the market entirely, and that
23 there were relatively small changes in market share,
24 we think speaks to the fact that there is attenuated
25 competition and that there are some segments of the

1 market who are sourcing from China for reasons other
2 than price.

3 So we would then argue that that doesn't
4 have any threatening effect on the domestic industry
5 either because if customers are willing to pay the
6 higher prices, they're willing to pay the tariffs to
7 get this supply, then that's not threatening the
8 domestic industry in the future either.

9 CHAIRMAN JOHANSON: Thanks.

10 Petitioner asserts that when subject import
11 reduce volumes of wine bottles that U.S. producers
12 well they must reduce the price of their beer bottles
13 to increase their sales enough to fill capacity. This
14 is discussed in Petitioners' answers at pages 10 to
15 14.

16 Could you all respond to that argument?

17 MR. DOUGAN: Hi, Chairman, this is Jim
18 Dougan.

19 Again, they want the Commission to make an
20 inference here from evidence that's not on the record.

21 They want you to believe something based on
22 conjecture. But there really isn't any evidence
23 that's been presented to support this assertion.

24 So let's assume for the purpose of argument
25 that it's true, that a decline in domestic production,

1 that a decline in volume is going to incent the U.S.
2 producers to basically offer or accept lower prices in
3 other products just to fill up their capacity, just to
4 produce more.

5 Well if that is the case, and again we're
6 not conceding that that's necessarily so, but if
7 that's the case then we would argue that the millions
8 and millions and millions of gross of the decline in
9 the beer market would be much more likely to be having
10 an impact on the domestic producers' incentive to
11 accept lower prices in other segments of the market
12 than the other way around.

13 We think the causation is going, to the
14 degree that it exists at all, we think the causation
15 is going in the opposite direction that they assert.

16 CHAIRMAN JOHANSON: I have a very similar
17 question but I'm going to ask it since I think it's
18 relevant.

19 Since glass bottle manufacturers need to
20 fill their capacity to maintain capacity, will a lost
21 sale in any segment affect the prices in the other
22 segments by increasing the manufacturer's need to fill
23 capacity by lowering price?

24 MR. DOUGAN: That's a related question and
25 it's right on the same concept.

1 I don't think we have evidence on the record
2 to support that. I mean I suppose there's some logic
3 to it, but Petitioners want you to believe that small
4 shifts in volume that happened in the small and medium
5 customers, maybe in their wine segment are really
6 driving this and when you compare any shift in the
7 small and medium wine producers they are absolutely
8 dwarfed by changes in shipments to the beer industry.

9 I mean literally 100-fold. Literally 100 times the
10 volume difference.

11 So we would think that to the degree this is
12 happening at all, it's not the tail wagging the dog
13 here. This is definitely, to the degree this is
14 happening, it's being driven by beer.

15 CHAIRMAN JOHANSON: Thank you, Mr. Dougan.

16 Mr. Dougan, you mentioned that some
17 customers graduate from small status to larger status
18 where they may be of interest to larger U.S.
19 producers. In such cases wouldn't the U.S. and
20 imported products be competing based on price even if
21 the U.S. company's underselling the imports on large
22 orders?

23 MR. DOUGAN: Sorry, could you repeat the
24 second half of that question?

25 CHAIRMAN JOHANSON: In such cases wouldn't

1 U.S. and imported products be competing, still be
2 competing on the basis of price even if a U.S. company
3 is underselling the imports on large orders?

4 MR. NEELEY: Maybe I can jump in for a
5 second. I'll let Jim speak as well. I think when we
6 see the record what we see that's happening is the
7 quality and availability are more important to
8 customers than price. And so what's really been
9 hampering the U.S. industry from getting certain
10 customers, or customers they really weren't interested
11 in was not so much the quality perhaps but certainly
12 the availability.

13 Now that that availability is there, if
14 because they're suddenly interested in them because
15 they're large volume folks, then it really is
16 something that would go to them and price is really
17 secondary.

18 MR. WESSEL: Jared Wessel very quickly. I
19 think it gets to the minimum order quantities.

20 There's ample evidence on the record that
21 there are multiple order quantities. There are
22 disagreements about what the sizes may be and I think
23 the answer to that is, you know, there may be
24 different minimum order quantities for different
25 customers based on what they're asking to be produced.

1 But there are minimum order quantities and as these
2 customers go from small to large the possibility of
3 getting fulfilled by a U.S. producer because they have
4 passed that minimum order quantity becomes a reality.

5 CHAIRMAN JOHANSON: Okay.

6 MR. DOUGAN: I would echo, the domestic
7 producers optimize their production assets which is
8 what I think they are primarily focused in doing, and
9 it's the economics of the way that they have organized
10 their operations.

11 CHAIRMAN JOHANSON: Okay, thank you for your
12 responses. My times's about to expire so we'll now
13 move to Commissioner Schmidtlein.

14 COMMISSIONER SCHMIDTLEIN: Thank you very
15 much.

16 I guess I wanted to, let's just follow up on
17 that point about minimum order quantities.

18 The Petitioners have argued that that's
19 essentially about price. Do you want to respond to
20 that argument?

21 MR. WESSEL: I think the evidence that
22 Berlin has placed on the record, if you look at those
23 exchanges, they were not price based denials. So it
24 was not as if the Petitioners were saying wow that's a
25 small run but we'll do it at X, Y, Z price.

1 The response that the, and I should say the
2 U.S. industry would respond with was sorry, we can't
3 do that.

4 Again, if you look at those emails you don't
5 see it as a price, you see it as a we will not do.

6 COMMISSIONER SCHMIDTLEIN: Okay.

7 Again, this is a follow-up to some of the
8 answers that you all were just discussing.

9 Mr. Dougan, I think, maybe it was
10 Commissioner Johanson that was just asking you about
11 the linkage argument and you said there's no evidence
12 on the record that that's actually been happening, and
13 one of the arguments that the Petitioners made was
14 that this is just basic economics. It's Econ 101,
15 right? That if you are in an industry that needs to
16 run at high capacity utilization you experience a loss
17 in volume, you're going to make up for that in some
18 other way by ensuring that you are able to produce
19 volume in some other product, even if you have to take
20 a lower price, and that that was just Econ 101. In
21 other words, you don't need evidence.

22 MR. DOUGAN: It would really help to have
23 evidence for you to rely on in writing your
24 determination though, right? I mean I think the
25 concept has some logic to it. But again, we would say

1 that even if that's true and we don't have evidence to
2 support it, but even if it is true we think the
3 causation runs in the opposite direction from the way
4 that Petitioners would argue that it did. They would
5 be under-utilized because of the decline in the beer
6 segment and looking to use that volume somehow, and
7 perhaps to the degree they were willing to accept
8 lower prices.

9 But I think there's also evidence, and I
10 think we mentioned it in some places in our responses
11 to questions where the average unit values from
12 domestic producers in certain segments actually went
13 up over the POI. We can look at that. Again, we
14 realize there's a product mix element to that.

15 But we're not entirely sure that it has
16 happened overall. I'll just leave it there.

17 COMMISSIONER SCHMIDTLEIN: Let me follow
18 upon something that TricorBraun said in its answers at
19 page 3 where it clarified that price is sometimes a
20 deciding factor in customers' purchasing decisions.
21 And I wonder if you could elaborate on this. Are
22 there certain types of sales or particular customers
23 that are more sensitive to price than others?

24 MR. DOUGAN: I think I'll let Mr. Neeley
25 expand on this as well. But I think that maybe even

1 one of our witnesses said at the staff conference,
2 price is sometimes a factor in a purchase decision,
3 and this is not a novel statement that all else being
4 equal in terms of quality, availability, delivery
5 time, customer service. You know, if all of those
6 boxes are kind of checked off, are there some
7 instances where the price comparison is what drives
8 the decision? There may be. This is a market with a
9 lot of transactions that happen.

10 But I think what we're saying is all else
11 isn't equal and that certainly the pricing data that
12 is on the record supports the idea that at least in
13 some instances customers are willing to pay higher
14 prices to secure the supply at the time they need it
15 in the quantities they need it with the assurance that
16 it will arrive on time from subject sources.

17 So price is a factor but it certainly isn't
18 the determining or driving factor in all these
19 instances.

20 MR. NEELEY: I think you put it well, Jim.
21 It goes back to our prior discussion with regard to
22 sort of the factors that a customer looks at of
23 quality, of availability and then of price. And if
24 the first two line up, you find good quality and you
25 find that a product's available, then certainly price

1 can come into it. I don't think we can say it never
2 happens. Certainly it happens at times.

3 But I think when we look at a number of
4 factors including AUVs, including pricing products,
5 including things of that sort, we're seeing that
6 really price is not the primary thing that's driving
7 most of the transactions here or you wouldn't have the
8 data that you found. Not only in the pricing
9 products, for example, in the current part of the
10 investigation, the final determination, but in the
11 preliminary phase of the investigation. You just
12 don't see under-selling. And I think that's really
13 indicative of the fact that pricing is not coming into
14 account very much.

15 MR. DOUGAN: And if I may add to what Mr.
16 Neeley has said, this is, if the market really did
17 operate the way that Petitioners claim that it does or
18 price drives everything and the imports from China
19 have the lowest prices and they're always going to
20 come in and they're going to take business on the
21 basis of price why is their market share so small? I
22 mean it's very small. Especially relative to a lot of
23 other cases where you have imports from China that are
24 subject to the investigation. And it didn't move by
25 very much at all.

1 So if price drives everything and producers
2 in China have large excess available capacity, you'd
3 see a much different record than you have.

4 Maybe we're asking you to make an inference
5 here too which is it can't really be so because you
6 would see a much different picture in terms of market
7 penetration. You'd see a much different picture not
8 just in terms of the pricing data but really market
9 penetration and you'd see much more leeway being made
10 into say for example the larger customers with the
11 buyers from China than you do.

12 So we would just submit that that doesn't
13 support the contention that price is what's driving
14 this.

15 COMMISSIONER SCHMIDTLEIN: I suppose they
16 would respond that the import data's under-counted
17 because we didn't get sufficient response in the
18 questionnaires.

19 MR. DOUGAN: That is not true with respect
20 to the overall market. That's only true with respect
21 to the segment data. So the C tables are still
22 accurate insofar as we know. Those are pretty small
23 market shares and they don't move by very much.

24 COMMISSIONER SCHMIDTLEIN: Okay.

25 MR. DOUGAN: And then non-subject shares are

1 larger.

2 COMMISSIONER SCHMIDTLEIN: This is sort of a
3 segue to my last question really I think, which is
4 we've talked a lot about attenuated competition and I
5 know that several Commissioners have had questions
6 about this. I'm not sure if any of them asked
7 specifically about the chart that the Petitioners
8 included at page 21 of their first answers to
9 questions where they break out the absolute volumes of
10 shipments to the small end users in each of those
11 categories and point out that U.S. producers shipped
12 more to small and medium size customers than subject
13 imports did during each year of the POI. In each of
14 those when you look at absolute volumes rather than
15 just the percentages.

16 So I guess my question for you all is
17 doesn't that mean there's meaningful competition in
18 those segments where the Chinese imports are? So
19 while China might not be in large end user segments,
20 where they are competing, you do see U.S. producers
21 also competing.

22 Is that really a question of attenuated
23 competition? Or is really your argument more about
24 materiality that well, even if they're competing there
25 that those segments account for such a small portion

1 of the market and the subject imports are a smaller
2 portion of that. That whatever impact they're having
3 isn't material.

4 MR. DOUGAN: This is Jim Dougan. I would
5 argue both. It's both about attenuation and
6 materiality and the one leads to the other. Because
7 again, we're not arguing that there's no competition
8 that attenuated means no competition, but that there
9 are large swaths of the market of domestic producers
10 shipments where they face no or virtually no subject
11 import competition.

12 So it's not head to head throughout the
13 marketplace. There is an attenuation of that
14 competition. It's not full force everywhere. So we
15 would argue that's attenuation and that it's a
16 minority of domestic industry shipments. That
17 attenuation then leads you to an analysis of
18 materiality because the reason that this is important,
19 again, this is more than just about market share and
20 more just about presence in individual segments.
21 Because volumes are directly tied to the domestic
22 industry's financial condition because what's driving
23 it is their absorption of fixed costs. Right? Their
24 net sales values increased by enough to more than
25 recover any other increases in costs they had. Their

1 decline in financial performance is explained by their
2 ability to absorb their fixed costs. There's a direct
3 relationship.

4 So when you are then in the view of the
5 market with this attenuation where there are segments,
6 there aren't only segments, but there are segments of
7 the market where there's an overlap, but these are
8 limited segments of the market, are any volume shifts
9 that are experienced by domestic producers that could
10 be attributed not to subject imports even if it was
11 all on the basis of price? Assume for purposes of
12 that argument that the subject imports presence is
13 because of under-selling, even though the record
14 really doesn't support that. Let's say that's the
15 case.

16 You compare those shifts in volume to the
17 shifts in volume for the other segments where the
18 subject imports aren't present and we would argue that
19 it's not material. We're literally talking a factor
20 of 100 in terms of the difference in volume shifts
21 that occur in these other segments as compared to
22 where there's overlap. So we think it's a little bit
23 of both, but it is relevant to your consideration.

24 COMMISSIONER SCHMIDTLEIN: Okay. All right.
25 I have no further questions. Thank you.

1 CHAIRMAN JOHANSON: All right, we will now
2 move to Commissioners' follow-up questions and post-
3 hearing requests with Respondents' counsel, and we
4 will begin this with Commissioner Kearns.

5 COMMISSIONER KEARNS: Thank you. I think
6 just two quick ones.

7 Mr. Dougan, if I heard you right I think you
8 said something like if price drives everything then
9 why does China have such a small market share? It's
10 just strange to me that you all say it that way.
11 Isn't the answer because China is over-selling, that
12 the prices are too high?

13 I see this throughout your briefs, too, and
14 your answers that like price doesn't matter. But
15 that's kind of surprising. Wouldn't that account for
16 the small market share?

17 MR. WESSEL: If Petitioners' theory about
18 price and how price is received in the marketplace is
19 accurate, then why do they have such a small market
20 share? What this indicates is that at least some
21 portion of the market, and maybe it's a limited
22 portion of the market, that the subject imports are
23 able to address, they may be a segment that is less
24 concerned with price than their ability to, with their
25 availability and their ability to get it in the form

1 and on the time line that they need it.

2 So it's not so much that price isn't
3 important, but it's how does it factor into the
4 purchasing decisions?

5 So our contention is not that nobody thinks
6 about price so that it might not be an important part
7 of a purchase decision, but Petitioners'
8 characterization of it as the driving force in
9 purchasing decisions is inaccurate.

10 COMMISSIONER KEARNS: Thank you.

11 My last question, I don't have this at my
12 fingertips but I recall reading in one of your briefs
13 that when we look at cogs to sales ratios and the
14 increase in the cogs to sales ratios that there are
15 two producers, and this is business proprietary so I
16 can't say too much, but there are two producers that
17 have much higher increases, I believe it is, in cogs
18 to sales ratios than others.

19 I'm wondering, I guess this will probably
20 mostly need to be in the post-hearing brief, but I'd
21 like to understand that better, specifically to what
22 extent those two producers increase in their ratios
23 accounts for the overall increase in the ratio for the
24 industry as a whole. In other words, how significant
25 those two producers are for the overall industry

1 trends.

2 If you can do that post-hearing. If you
3 have anything to say about it now, I'd welcome that as
4 well.

5 MR. WESSEL: Commissioner Kearns, this is
6 Jared Wessel. I'll be quick and very gentle because
7 you're correct, it does involve a lot of BPI.

8 I think the question that you're asking is
9 consistent with the beer story and particularly the
10 mass beer story that we have been trying to tell. So
11 you would expect to see the more the entity is tied to
12 beer the more you would see these issues appear in
13 their financial statements, and we think that's what
14 you see in what is inherent in your question.

15 COMMISSIONER KEARNS: Okay, so if you can
16 just flesh that out a little bit more post-hearing
17 because it would be very helpful to the extent that as
18 you're pointing out beer seems to be fairly segmented
19 away from subject imports, that if we're seeing a cogs
20 to sales ratio increasing due to the beer segment it
21 would be really good to have that explained further.
22 So I appreciate that.

23 Thank you very much. That's all I have.

24 CHAIRMAN JOHANSON: Next is Commissioner
25 Stayin.

1 COMMISSIONER STAYIN: Just a couple of quick
2 mentions and ask you to respond in the post-hearing.

3 The no-call provision that distributors
4 negotiate with U.S. producers, it comes into kind of a
5 restraint of trade concept. I don't understand it.
6 Maybe you can explain it to me. Is the no-call
7 provisions that is negotiated with distributors a
8 factor in the Commission's statutory injury framework?

9 MR. WESSEL: Commissioner, this is Jared
10 Wessel. I'd like to answer that in the BPI filings
11 just because contracts are very confidential
12 information, so we'll take that up in our post-
13 hearing.

14 COMMISSIONER STAYIN: Okay. I thank you
15 very much.

16 MR. DOUGAN: Commissioner Stayin, this is
17 Jim Dougan.

18 Mr. Neeley mentioned earlier in response to
19 I think a similar question on this topic, we can put
20 this evidence on the record but these do not call
21 provisions work both ways. It's not only that
22 domestic producers are forbidden from calling on
23 particular customers of the distributors, but the
24 distributors are also forbidden from calling on
25 certain customers of the domestic producers. So I

1 think, and that is not an unusual scenario in which
2 you have a supplier entering into a contract with a
3 distributor to serve end user customers. You don't
4 want to be poaching each other's customers. This is
5 not a novel concept that's unique to this industry and
6 it's not nefarious.

7 But the unbelievable amount of weight that
8 Petitioners have put on this particular point is
9 really quite overblown, and we can explain more in
10 post-hearing.

11 MR. NEELEY: Yeah, we'll be glad to do that
12 and I would just say, Commissioner Stayin, that we'll
13 give you some other examples of similar provisions.
14 This is not at all unusual in distributor and producer
15 agreements. It's mutually advantageous, I would say.
16 So we'll be glad to address it.

17 COMMISSIONER STAYIN: Thank you.

18 To TricorBraun, why didn't TricorBraun
19 report higher quantities in pricing products one, two
20 and three for wine bottles despite being the largest
21 importer of wine bottles from China?

22 MR. DOUGAN: First of all, there was an
23 allegation made that there was some sort of subterfuge
24 going on in how the data were changed in what
25 TricorBraun reported between the prelim and the final.

1 That's a consequence of a change in the definition of
2 the pricing products that was instituted by
3 Petitioners.

4 So it was an honest response to the change
5 in specification. But as we pointed out in our pre-
6 hearing brief, and I don't have the exhibit hand. I
7 think it's Exhibit 2 but I might be wrong. As we
8 pointed out, the product as defined is something that
9 TricorBraun mostly gets from domestic producers and
10 from non-subject suppliers. So the reason that they
11 didn't report more import sales of this product is
12 because for those products as defined, they're not
13 getting it from China. They're getting it from the
14 domestic producers. And also from non-subject
15 suppliers.

16 So I can give you a more specific reference,
17 but we'll provide that in post-hearing.

18 COMMISSIONER STAYIN: That's a good answer.

19 I think that that is all that I have. Thank
20 you very much.

21 CHAIRMAN JOHANSON: Commissioner Karpel?

22 COMMISSIONER KARPEL: Yes. Thank you.

23 I have a couple of follow-ups. One concerns
24 Respondents' argument that domestic manufacturing
25 facilities are just not built to economically handle

1 shorter run productions or specialized container
2 designs, and that this is why they have less of a
3 priority or less of an interest in trying to serve
4 smaller purchasers.

5 Can you elaborate a little bit on that? And
6 I could see that creating a special bottle for a
7 purchaser who only wants a small volume of that might
8 not make economic sense, but to the extent some of
9 these smaller purchasers are buying standard size
10 containers or bottles, it seems selling them a smaller
11 portion or smaller volume than they might sell to
12 other purchasers would make economic sense to them.

13 Can you elaborate a little bit on your
14 arguments in this regard?

15 And since I'm talking about domestic
16 producers' production in their facilities, if domestic
17 producers or Petitioners want to respond to this
18 question post-hearing in their brief, of course they
19 should do so as well.

20 MR. NEELEY: Let me try and then I'll let
21 others jump in as well.

22 One thing I would say is I think this was
23 more, the idea that they aren't correctly configured
24 was more of the Arglass argument rather than ours. I
25 don't believe that was something that we really talked

1 about. So Arglass may be the correct entity to put
2 that question to.

3 But in terms of their, when they are doing a
4 run, the experience of our clients has been certainly
5 they will take the smaller orders. I mean they're not
6 going to turn them away in that instance. That's not
7 really what we're saying. And you see them. When
8 they put in data about some of their so-called smaller
9 customers, I think that's reflective of that fact.

10 I think the bigger problem is, if you're a
11 small to medium sized company and you go to them and
12 they don't happen to be running that particular
13 product at that particular moment, you may have to
14 wait a very long time to get --

15 (Technical interference)

16 And as Mr. Dougan testified, and as we've
17 said in the preliminary as well, I mean that's just
18 unacceptable for say a small winery that is unable to
19 get the product that it needs at the time it wants.
20 So I think that --

21 (Technical interference)

22 COMMISSIONER KARPEL: Okay. You were
23 breaking up a little bit there in your answer, so if
24 you want to just address this in your post-hearing
25 submission as well, that would be helpful.

1 Just one final question for follow-up in
2 your post-hearing submission, when I asked this of
3 Petitioners as well, noting that you each have fairly
4 different views about why various plants closed or why
5 production at various facilities was curtailed or
6 furnaces turned off. Just to help me in comparing the
7 two sets of arguments there, if you could for each of
8 these alleged shutdowns or closures, if you could
9 point us to the contemporaneous documentation that
10 supports your view of why these closed, that would be
11 helpful. I know you've done some of this already in
12 your submissions, but if you want to just do a
13 collection of cites where you've already said that,
14 I'm just looking for something that would make it easy
15 for me to compare the two positions and the evidence
16 that each side is relying on to support their
17 positions in this regard.

18 MR. WESSEL: We're obviously happy to do
19 that. But again, I think our main point is this. The
20 facilities were either beer, the closer was either
21 attributed to beer even though it didn't make beer,
22 and the Ardagh Seattle facility is a great example of
23 that where they said they were going to redeploy beer
24 capacity, and that redeployment caused them to shut
25 down Seattle. Or they give a reason publicly that is

1 not subject importer such as loss of a Smuckers
2 contract, for example.

3 So again, beer, the plant made beer, the
4 plant didn't make beer but it was closed because of
5 beer, and some other non-subject reason. Those are
6 the three reasons for the closures.

7 COMMISSIONER KARPEL: And, with that, I
8 don't have any further questions. Thank you. Thank
9 you all.

10 CHAIRMAN JOHANSON: I have no follow up
11 questions. Commissioner Schmidtlein?

12 COMMISSIONER SCHMIDTLEIN: Oh, I just had
13 one. You know, we've heard some of your responses to
14 the Petitioners' arguments with regard to the
15 adjustments that should be made to the pricing product
16 data, and so I would just request that you respond to
17 all of the potential adjustments that they've ask that
18 we make to the pricing product information in your
19 post-hearing.

20 MR. NEELEY: Okay, we will do, Commissioner.
21 Will do.

22 COMMISSIONER SCHMIDTLEIN: Okay, thank you.

23 CHAIRMAN JOHANSON: Okay, that concludes
24 Commissioners' follow up questions.

25 MR. BISHOP: We would like to thank this

1 panel very much for your responses. You can go ahead
2 and disable your microphones and web cams, if you
3 would, please, and we will move on to closing
4 arguments.

5 Closing arguments by those in support of the
6 petitions will be given by Daniel B. Pickard of Wiley
7 Rein. Mr. Pickard, if you would please go ahead and
8 activate your web cam and microphone. You have 10
9 minutes.

10 MR. PICKARD: Great. Thank you, Mr. Bishop,
11 and thank you, Commissioners, and my thanks to the
12 staff. Whenever you have a new industry and a new
13 case, that could be complicated. And especially in
14 light of everything that's going on with COVID-19,
15 this is, obviously, a particularly complicated case.

16 So what I would like to do is really kind of
17 summarize the major points that we believe are
18 appropriate for the Commission to consider. So as a
19 starting point, to begin with, this is obviously an
20 industry that's been in injured stated from 2017 to
21 2019.

22 And I'm not going to go through all of the
23 indicia, but U.S. sales declined by \$200 million,
24 1,000 workers lose their job, operating income drops
25 by \$250 million, which is a 72 percent decrease,

1 operating income margins decreased from 7.9 percent to
2 2.4 percent, barely break even, and the net income and
3 net income margin numbers are BPI, but they clearly
4 demonstrate an injured domestic industry.

5 So the question before the Commission
6 becomes whether the Chinese imports contributed to
7 this industry sufficient under the by reason of
8 standard.

9 So the Commission traditionally looks at
10 volume price in regard to finding whether this impact
11 is essentially causally connected. So the major facts
12 in regard to volume really don't appear to be subject
13 to dispute. Imports surge from '16-'17, '17 to '18,
14 and then the injurious effects of these imports are
15 locked in as a result of the long term contracts.

16 Then there are a variety of questions in
17 connection with the probative value of the 2019 data,
18 specifically in regard to the 301 and application of
19 the post-petition effects provision of the statute. I
20 think it's important to remember that even with the
21 301 in place and post-petition effects, imports are
22 still significant in 2019. As a matter of fact, from
23 the public import data, they're in the neighborhood of
24 \$400 million.

25 But what do we know about the effects of the

1 301 in the post -- in the filing of the case? First
2 off, that importers were capable of absorbing the 301
3 duties, right? So they undeniably contributed to some
4 decrease in subject imports, but the major importers
5 have said that they are, and will continue to import
6 regardless of the 301.

7 And just by way of example, you can look at
8 the post-conference brief, or the post-conference
9 transcripts at pages 106 and 134, I believe, where
10 Tricor testifies that they're going to continue to
11 import, regardless of the 301.

12 But what we really see is the imports
13 dropped to their lowest level subsequent to the filing
14 of this case. So that's what the official import
15 statistics show, and it's also fully consistent with
16 what the foreign producers and the importers have
17 said, right?

18 Foreign producers have said that, as a
19 result of the expected increase in antidumping duties
20 as a result of this case, they expected to ship less
21 as a result of the AD CVD case, not the 301. Just by
22 way of example, if you wanted to look at footnote 167
23 in our answers to questions, there's an example.

24 And we also know that importers made a
25 decision to stock up on imports right prior to the

1 collection of CVD duties. And, again, how do we know
2 this? These are actually public statements. So from
3 Berlin's web page, they explicitly state that they're
4 going to increase their inventories prior to the AD
5 CVD duties going into effect.

6 And, as a matter of fact, somewhat
7 surprisingly, I think we heard Mr. Dougan or Mr.
8 Neeley basically say that the surge in 2020 was
9 directly tied to the filing of this case, that it was
10 an effort by the subject imports, or the importers to
11 get imports in prior to the cash deposit requirements,
12 which all of that is important in regard to decreasing
13 the probative value of the 2019 volume data, but it's
14 also certainly relevant in regard to threat of
15 material injury.

16 It shows that, while the 301 had some
17 effects, the majority of the effect is due to the
18 filings of this case. And the corollary would be, in
19 the absence of trade relief, that imports would
20 increase again.

21 So, quickly, in regard price effects, you've
22 clearly got cogs as a percentage of net sales increase
23 through the POI. The attempts to find alternative
24 causes or to completely sever this due to the effect
25 of subject imports are unpersuasive. In regard to

1 price depression, you see significant price
2 depression, and it's even magnified more if you adjust
3 for inflation, which shows the majority of pricing
4 products decreasing.

5 On top of this, you've got email
6 correspondence. And Respondents have faulted us for
7 emphasizing this so much, but I think it's because of
8 the high probative value of these statements. Very
9 quickly, the emails explicitly state that the
10 importers are competing on wine bottles, and that U.S.
11 producers have to lower their prices if the want to
12 keep the busy -- business.

13 There are emails to the domestic industry
14 saying we're competing with Chinese prices, and,
15 accordingly, you're going to need to lower your
16 prices. There is a distributor that states that
17 they're competing against a Chinese price and
18 specifically requests the domestic producer to forego
19 price increases, or explicitly states or that business
20 will likely go to China. There are specific requests
21 to match Chinese prices.

22 And there are other examples in our brief at
23 pages 39, 40, and 41. And even Mr. Neeley and Mr.
24 Dougan admit this is what you would expect. This is
25 price negotiation.

1 And in regard to the pricing product data, I
2 would point out with reasonable corrections to that
3 data, you actually get more than 50 percent instances
4 of underselling, and the fact that this is all logical
5 in regards of price linkages, as Mr. Dougan has
6 conceded. Not only is it logical -- he's incorrect,
7 however, in regard to that there's no evidence of
8 this. There are sworn affidavits that discuss the
9 pricing decisionmaking mechanism by the domestic
10 industry and the delegation of authorities, and how
11 this exactly factors in.

12 So in regards to all of this, the
13 Respondents basically are in a position where they
14 need to sever the causal nexus, and they've got two
15 primary theories. One is that this is all
16 attributable to the decrease in beer demands.
17 However, we know that there are several facilities
18 that didn't predominantly make beer that closed, that
19 some facilities didn't make beer at all and were
20 closed.

21 And while Respondents have come up with now
22 new alternative theories for why it had nothing to do
23 with subject imports for beer, contemporaneous
24 statements, filings with the FCC, SEC, internal
25 communications, company newsletters, public

1 statements, including earnings calls, all attribute
2 these to subject imports.

3 And then the other theory is basically that
4 the domestic industry isn't interested in selling to
5 small and medium enterprises. And I would obviously
6 point out, as Commissioner Schmidtlein recognized,
7 we're actually selling more product there than they
8 are, so there's obviously meaningful competition.

9 And what I would point out is I think
10 Commissioner Kearns asked a question saying, well
11 aren't these do not call provisions evidence that
12 support the attenuation of competition? No. What
13 we're suggesting is it's actual evidence of the head
14 to head competition.

15 Because there is so much head to head
16 competition there, that's why Respondents are fiercely
17 increasing the use of these do not call provisions.
18 Because they're attempting to keep us from what we're
19 -- our meaningful participation, which is growing now.

20 But, as we've indicated, a large part of these sales,
21 right, were at the distributor level.

22 And I think Commissioner Karpel had
23 indicated a concern as if -- that we were saying that
24 the data regarding lost sales to distributors are
25 wholly missing from the record, and I apologize if I

1 misspoke. No. What we're saying is don't look to
2 Appendix E for that. That's wholly missing all of the
3 sales to distributors.

4 But it's present in the staff report. Look
5 at Table 2-7 and you see a massive decrease in the
6 shipments of the U.S. producers to distributors
7 because those distributors have gone to China.

8 And, obviously, price is a factor, as
9 TricorBraun even recognized, right, in their
10 statement: "TricroBraun has never claimed that there
11 is absolutely no competition based on price in the
12 U.S. market. As in any industry, sometimes price is
13 the deciding factor in a customer's purchasing
14 decision". That's the causal connection.

15 And, on top of that, there's an abundance of
16 evidence in regard to threat of material injury as
17 seen by the most recent surge in imports, right, which
18 has happened in 2020: the massive capacity in China,
19 the excess capacity in China, the projected capacity
20 utilization decreases, the export orientation nature
21 of the Chinese industry, and the fact that the United
22 States is one of the most open and largest markets.

23 The Chinese glass is going to have to come
24 somewhere. In the absence of trade relief, it will be
25 coming to the United States. Thank you.

1 MR. BISHOP: Thank you, Mr. Pickard.

2 Closing remarks by those in opposition to
3 the petitions will be given by Jeffrey S. Neeley of
4 Hush Blackwell. Mr. Neeley, you have 10 minutes. If
5 you would please go ahead and activate your camera and
6 microphone. You may begin when you're ready.

7 MR. NEELEY: Okay. Should be on, I think.
8 Thanks to the Commissioners and staff for putting this
9 hearing and briefing schedule together very quickly
10 and under very trying conditions.

11 I'd like to conclude with an overview of
12 what we've heard today, but also to review what we
13 have read and what -- heard during the course of this
14 case.

15 First, I'd like to spend a couple of minutes
16 reminding the Commission of who my client is.
17 TricorBraun and its predecessor companies have been in
18 business since 1902, and TricorBraun is a leader in
19 packaging of every kind. It's headquartered in St.
20 Louis, and it's been a longtime corporate client of my
21 law firm. As a well-established distributor, it knows
22 well that it does well when its suppliers do well.

23 TricorBraun does significant business with
24 the Petitioners, and it will continue to do so, but,
25 for the reasons we've set out, TricorBraun does not

1 believe that any problems that the domestic industry
2 is having are attributable in any material manner to
3 subject imports from China.

4 From the beginning of this investigation,
5 TricorBraun has told the Commission that the
6 overwhelming issue facing the domestic industry is the
7 decline in the beer bottle segment, a segment from
8 which the Chinese imports are almost entirely absent.

9 The Commission gathered the data, and the
10 data bear out our contention. TricorBraun also
11 informed the Commission at the beginning of the case
12 that the domestic industry concentrated, for perfectly
13 good business reasons, on long runs and larger orders.

14 The customers with small and medium sized orders, on
15 the other hand, were primarily served by imports,
16 whether from Europe, China, Mexico, or elsewhere. The
17 data, again, were gathered by the Commission, and the
18 data bear out our contention.

19 On the other hand, Ardagh took the position
20 in the preliminary that beer bottles were not really a
21 major issue in the fortunes of the domestic industry.

22 Most recent version of the Ardagh story seems to be
23 an admission that the decline in beer bottles was
24 harmful to the domestic industry, however, but now
25 Ardagh somehow seeks to blame the price decline for

1 beer bottles on other glass container prices.

2 This is a situation in which the Petitioners
3 wish that this case were not about the data, or at
4 least not about the data that the Commission collects
5 in every case.

6 I don't think that I have ever been involved
7 in a case where the Commissioners have requested that
8 the Commission alter, ignore, inflate, or otherwise
9 manipulate so much of the data on the record, yet even
10 if all the subtractions, additions, and assumptions of
11 the Petitioners are considered, the inescapable fact
12 is that imports of subject merchandise here are very
13 small and had no discernible impact on the domestic
14 industry.

15 In examining our case, we think that the
16 Commission should focus on two main important points:
17 the materiality of any alleged injury and the need to
18 not attribute injury caused by other factors to
19 Chinese imports.

20 In terms of materiality, we should not lose
21 sight of the fact that subject imports from China
22 remain in the single digits in terms of market share
23 throughout the POI, and even the so-called "surge"
24 resulted in an increase of less than one percentage
25 point in market share.

1 Moreover, non-subject imports entered at
2 higher volumes, had a higher market share, and
3 increased both in -- and market share more than
4 subject imports.

5 In terms of non-attribution, we start with a
6 decline in the financial performance of the domestic
7 industry. The decline was directly tied to the
8 industry's decline in production and shipments because
9 there were fewer units across which to spread its
10 fixed costs.

11 The increases in per unit net sales value
12 from 2017 to 2019 would have been enough to cover all
13 of the other increased costs; however, the decline in
14 the industry's volume, and, specifically, where that
15 volume decline occurred, which are witnesses testified
16 to from the beginning was in the beer bottle segment,
17 are crucial to the Commission's causation and to its
18 non-attribution analysis.

19 We add to this ample evidence from
20 purchasers' questionnaires, from witnesses, and from
21 data on the large versus small customer categories
22 showing the attenuation of competition. This does not
23 mean there's absolutely no competition, as Petitioners
24 would have the Commission think we're arguing, but the
25 competition is very limited.

1 Here, the Commission -- the evidence is made
2 more compelling by the testimony information from
3 Arglass, which has put real money on the table in
4 building a plant in Georgia.

5 This brings us to the analysis of the
6 effects of the lack of overlap of competition. Not
7 only have the Chinese imports been overwhelmingly
8 concentrated in the small, medium customers, and
9 domestic producers concentrated on large customers,
10 but for -- the overlap in competition that is more
11 than trivial only occurs in a few small segments of
12 the market.

13 So even if you accept the argument of
14 Petitioners that there was lost volume in these
15 segments based on price, these losses represent an
16 utterly immaterial share of the domestic industry
17 volume. The immateriality in volume means that there
18 is no material impact in the financial performance of
19 the industry.

20 There's a lot of rhetoric from Petitioners,
21 including some arguments that TricorBraun and some
22 other importers somehow were responsible for the
23 decline in the fortunes of the domestic industry, but
24 we are certain that the Commission will get beyond the
25 rhetoric and see that the volume shifts in the small,

1 medium market segment, where most of the Petitioners'
2 arguments have focused, account for a mere 1/100 of
3 the decline of the beer bottle market for the same
4 period.

5 So even if all the sales in this segment
6 were lost by the domestic industry due to price, which
7 is something we certainly do not concede, these
8 alleged lost sales plainly are immaterial to the
9 condition of the domestic industry. It's no wonder
10 that Petitioners did not want to talk about beer
11 bottles in the preliminary phases of this
12 investigation.

13 This brings me to what I think may be my
14 favorite theory of Petitioners which they raised in
15 the question and answers. The new claim is that
16 somehow the lost sales from wine bottles has led to a
17 price suppression and depression in other segments of
18 the market, including even in beer bottles, as
19 domestic producers were supposedly forced to accept
20 lower prices just to keep their capacity utilization
21 up.

22 For Petitioners to think that this argument
23 on cross-segments, if accepted, helps them is
24 difficult to fathom. It seems if there are such
25 cross-effects, then they would work both ways, and if

1 they work both ways, then the documented huge declines
2 in demand and pricing pressure from beer bottles must
3 be considered as causing the suppression or depression
4 of prices for wine bottles and for other containers.

5 Given the importance of the beer bottle
6 segment of the market for Petitioners and the decline
7 in the segment, it seems apparent to us that any
8 causation would work in the opposite direction than
9 the way that Petitioners now are claiming. Their
10 argument does not help them. The new-found theory
11 actually completely undermines their case.

12 We expect that the Commission has noted the
13 changing theories that the Petitioners have put forth.

14 Petitioners were the only parties that had input into
15 the original pricing products in the preliminary
16 determination, but they could not show underselling of
17 any meaningful magnitude in the preliminary, so the
18 Commission gave them another chance to suggest new
19 pricing products for the final. They tried again,
20 but, once again, failed to show meaningful
21 underselling.

22 In an attempt to find price depression, the
23 petitioners next tried the idea of adjusting pricing
24 data for inflation, but the U.S. is not a hyper
25 inflationary economy, and even if it were, the

1 Commission would have to adjust all elements in the
2 record for inflation, including the financial
3 information, and not just pricing data.

4 In addition, in another attempt to show
5 price suppression, they take raw material -- they take
6 raw Census data and make no adjustment to the data, as
7 the staff does, for non-subject products, and they do
8 not -- the Petitioners also skew the data by using
9 customs value rather than standard way that the
10 Commission staff does it on land to duty paid value.
11 And as so many others have pointed out, they've
12 presented data that manipulated the axis so the data
13 are not distorted.

14 Moreover, they've come up with a heart of
15 the market theory which sometimes is wine and spirits
16 and sometimes it's wine and spirits and food, but
17 never, ever includes beer bottles. It plainly is
18 absurd to propose -- to exclude beer bottles, which
19 account for the majority of domestic shipments and the
20 vast majority of the decline in the domestic
21 shipments, from anything being called the heart of the
22 market.

23 Petitioners' theories, in short, simply
24 don't work. The ever changing theories raised at the
25 last minute in these cases --

1 CHAIRMAN JOHANSON: Mr. Neeley, your time
2 has expired.

3 MR. NEELEY: All right. Thank you very
4 much. I'll leave it at that. Thank you.

5 MR. BISHOP: Thank you, Mr. Neeley.

6 We will now turn to rebuttal remarks.
7 Rebuttal remarks on behalf of those in support of
8 petitions will be given by Daniel B. Pickard of Wiley
9 Rein. Mr. Pickard, you have five minutes. You may
10 begin when you're ready.

11 MR. PICKARD: Thanks. So if the
12 Commissioners will excuse me, I'm going to talk very
13 fast because there's a lot that I'd like to cover.

14 We could rebut point by point a lot of the
15 key contentions, for example, that a beer facility
16 that isn't redeployed as the result of subject imports
17 isn't injury, but rather than get into kind of micro
18 points, I believe that the fundamental question that
19 the Commission's got to answer is whether there's a
20 causal connection between imports and the subject
21 imports and the deterioration of the health of the
22 domestic industry.

23 So regardless of what's said during this
24 case, I think there is great probative value in
25 looking at what was said prior to this case internally

1 and to external parties.

2 And, Commissioner Karpel, we will answer
3 this in our post-hearing brief, but here are a couple
4 of quick examples. In a July 2018 newsletter to its
5 employees, Ardagh says, "During the past 13 years, 10
6 glass container manufacturers' facilities throughout
7 the U.S. have closed. This astounding number is a
8 realization that the U.S. glass container industry is
9 under attack from imported glass containers".

10 It continues on to say, "During the last
11 five years, the volume of Chinese glass containers in
12 the U.S. has increased by 40 percent. During the same
13 time period, domestic glass container manufacturing
14 plants witnessed an eight percent decrease in
15 shipments. China accounted for roughly half of all
16 empty, unfilled glass container imports into the US".

17 I see that it seems like my screen is
18 locked, but I will hope that you can still hear me.
19 Yes?

20 (No response.)

21 MR. PICKARD: Okay.

22 MR. BISHOP: Dan, you keep fading in and
23 out. If you would please just make sure that you
24 include this in your post-hearing brief.

25 (No response.)

1 MR. BISHOP: We're unable to hear anything
2 at this point, Dan. You're still frozen. We can see
3 you. Go ahead and try to talk. No, we're not able to
4 hear you.

5 MR. PICKARD: How about now?

6 MR. BISHOP: Yeah, now we can. Yes.

7 MR. PICKARD: Okay. So why don't I -- did
8 you lose me just as I started to talk about the quotes
9 from the actual newsletters?

10 MR. BISHOP: Yes.

11 MR. PICKARD: Okay. So very quickly then,
12 the July 2018 newsletter, well before the filing of
13 the case, indicating the threat of Chinese imports,
14 2018 financial statement specifically saying that the
15 industry is facing competition from firms that carry
16 out specific export operations at low prices.

17 Continues to say that such instances of the
18 importing of glass containers into the United States
19 from lower-cost countries, despite the general
20 regional nature of the glass packaging market, these
21 export operations could have a material negative
22 impact on our business, financial condition, and
23 results of operations.

24 What else has been said publicly, well
25 before the filing of this case? Second quarter 2018

1 earnings call the chairman of Ardagh says the U.S.
2 glass market is being adversely impacted by a
3 substantial rise in glass containers being imported
4 from China and Mexico. Continues on to say we've
5 recently suspended production at one of our furnace's
6 at the Ruston, Louisiana plant.

7 In a October 2018 email correspondence to
8 the employees, the CEO and president of Ardagh, again,
9 October 2018, well before the filing of the case,
10 specifically ties the closure of the Seattle plant and
11 the Ruston, Louisiana plant to, "the ongoing pressure
12 on demand from U.S. glass, and continued pressure from
13 low priced imports".

14 There are additional examples in
15 communications from January 2019 to employees. The
16 second quarter earning call from 2019, again, prior to
17 the filing of the case, specifically states, "As we've
18 previously set out, the closure of our Lincoln,
19 Illinois facility took place in April. Overall, the
20 North American glass market continues to see
21 significant levels of imports".

22 2019 financial statement specifically ties
23 closure of facilities to the increase in the imports
24 of empty glass containers into the United States.

25 Here's the last one. These are just

1 illustrative examples, but if the question is is there
2 evidence out there that -- external evidence prior to
3 the filing of this case directly establishing the
4 causal connection?

5 Here's one last one. August 2019, a
6 statement from Ardagh to its employees talking about
7 the fact that the Ardagh Group has taken steps
8 necessary to align our capacity needs to continue
9 working on enhancing its cost-competitives, and is
10 leading the industry to combat the harmful impact of
11 Chinese imports.

12 There are other factors affecting the
13 domestic industry, but, as the industry has
14 consistently said, including internally and to
15 external sources, well before filing of the case,
16 Chinese imports are negatively impacting this
17 industry.

18 On behalf of the domestic industry and its
19 workers, we would respectfully request an affirmative
20 determination. Thank you.

21 MR. BISHOP: Thank you, Mr. Pickard.

22 Providing rebuttal remarks on behalf of
23 those in opposition to the petitions will be Gerald R.
24 Wessel with Hogan Lovells. Mr. Wessel, you have five
25 minutes. If you would please activate your web cam

1 and microphone. You may begin when you're ready.

2 MR. WESSEL: Thank you for the Commission
3 for the opportunity appear before you today, and
4 thanks to the staff for really doing yeoman's work in
5 an incredibly trying circumstance to develop what we
6 think is an accurate and telling staff report.

7 But first, my wife asked that I thank the
8 Commission for making this a visual hearing, as it
9 forced me to shave for the first time since the COVID
10 crisis. So she asked that I thank all of you.

11 But on a more serious note, in order for the
12 Commission to make an affirmative determination, we
13 respectfully think that you would have to ignore three
14 key pieces of both facts and argument.

15 The first is Arglass. The reasonable and
16 compelling argument is that Arglass detected a void in
17 the U.S. producers' production model in the United
18 States, and in order to fill that void they decided to
19 set up a plant.

20 And that's hundreds of millions of dollars
21 of, as I mentioned before, really smart money that
22 essentially made the same bet on the market that the
23 Respondents have presented to you, i.e., that the
24 Petitioners have been focused on beer, not focused on
25 SMEs, and that their minimum order quantities caused

1 the Chinese to supply a small segment of the market.

2 Second, the staff report. Again, I think
3 the Commission staff did, really, yeoman's work in
4 developing a staff report, notwithstanding COVID, and
5 notwithstanding the very odd decision -- not illegal
6 or not unprecedented, but the odd decision to not
7 align the countervailing and antidumping duty case.

8 Against that staff report, the Petitioners
9 ask you to do really unprecedented variations and
10 adjustments to the data that simply go against the
11 Commission's precedent.

12 And I think, lastly, there is something to
13 be said for the simple nature of the Respondents'
14 argument versus the incredibly complex bending over
15 backwards that Wiley Rein has had to go through in
16 order to present a case for you.

17 You know, nothing from our side about the
18 heart of the markets, nothing about 1990 era decisions
19 by the Commission, but a very straightforward argument
20 about beer that is supported in the financial
21 statements of the Petitioners, and a very
22 straightforward statement about the complete lack of
23 underselling in the record here.

24 Against these facts, against Arglass' entry,
25 against the staff report, I think what Petitioners are

1 simply asking you to accept is that because it's a
2 China case, China has to be cheap.

3 And while that might be the case in a lot of
4 circumstances, we have consistently told you a story
5 that in this industry, and because of the difference
6 in focus on big companies versus the focus on SMEs,
7 China is not a low cost supplier, and we think that
8 has been born out in the data.

9 And, again, I think to get to where
10 Petitioners would like to have you go, you have to
11 accept these stereotypes, and you have to accept some
12 kind of nefarious issues with the data that we simply
13 don't see.

14 So, finally, you know, the International
15 Trade Commission, I think, has long been upheld as the
16 preeminent fact-finding body in United States trade
17 policy, and I think against the backdrop of where
18 stereotypes and non-fact-based decisions are so
19 troublesome in our current world, we think it's really
20 important that the ITC continue to be the gold
21 standard for fact-based decisionmaking, and we
22 respectfully submit that if you look at the facts in
23 this case and make a decision based on these facts,
24 the only reasonable decision is a negative
25 determination both on threat and material injury.

1 I thank you very much for your time.

2 MR. BISHOP: Thank you, Mr. Wessel.

3 Mr. Chairman, that concludes direct
4 testimony from all of our witnesses.

5 CHAIRMAN JOHANSON: All right, thank you. I
6 would like to thank all parties for appearing here
7 today, and I will now make the closing statement. On
8 behalf of the Commission, I want to thank all parties
9 for participating in today's proceeding during this
10 hearing on Glass Containers from China, Investigation
11 No. 701-TA-630 (Final).

12 Post-hearing briefs, corrections to the
13 transcript, and responses to Commissioner questions
14 are due not later than 5:15 p.m. on Friday, May 15,
15 2020, with the public version due on Monday, May 18,
16 2020.

17 The Commission appreciates everyone's
18 patience and flexibility while we refine our
19 procedures during this difficult time. The hearing on
20 this final investigation is hereby adjourned.

21 (Whereupon, at 1:12 p.m., the hearing in the
22 above-entitled matter was concluded.)

23 //

24 //

25 //

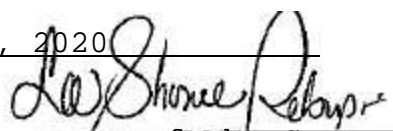
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TITLE: Glass Containers from China
INVESTIGATION NO.: 701-TA-630 (Final)
HEARING DATE: May 12, 2020
LOCATION: Washington, D.C.
NATURE OF HEARING: Committee Hearing

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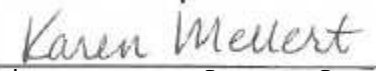
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