UNITED STATES
INTERNATIONAL TRADE COMMISSION

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

Pages: 1 through 159
Place: Washington, D.C.
Date: May 12, 2020

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THE UNITED STATES INTERNATIONAL TRADE COMMISSION

In the Matter of: 

GLASS CONTAINERS FROM CHINA

Investigation No.: 701-TA-630 (Final)

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.

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On behalf of the International Trade Commission:

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  John T. Shaddox, Chief Commercial Officer, Ardagh Glass, Inc.

  Thomas Holz, Chief Financial Officer, Ardagh Glass, Inc.

In Support of the Imposition of Antidumping and Countervailing Duty Orders:

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Proceedings

(9:32 a.m.)

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

On May 6, 2020, the Commission opened hearing on this final investigation. The purpose of this final investigation is to determine whether an industry in the United States is materially injured or threatened with material injury or the establishment of an industry in the United States is materially retarded by reason of imports of glass containers from China.

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.

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

Mr. Secretary, are there any preliminary matters?

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

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

There are no other preliminary matters.

CHAIRMAN JOHANSON: Thank you, Mr. Secretary. We will begin with Commissioner Schmidtlein.
COMMISSIONER SCHMIDTLEIN: Okay, thank you. I'd just like to thank counsel and the witnesses who are participating today for their patience with us as we try to refine these procedures to allow everyone a fair chance to present their case.

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

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

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

So, in other words, the buyer could be considering as an alternative non-subject imports or another U.S. producer, but your argument is that since they've lost other sales of perhaps a different type of glass containers to
Chinese imports, that they may have to accept a lower price on the next contract. Do I have that correct?

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

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

And then, on top of that -- and then I think this goes to the second point you were making, Commissioner -- as the domestic industry loses prices, or either loses volumes or is forced to lower prices as a direct result of Chinese imports, for example, in regard to wine, that also has effects in regard to their pricing decisions for food or spirit or other products throughout the product line.
COMMISSIONER SCHMIDTLEIN: And so do most of the producers produce more than one type of glass container?

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

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

MR. PICKARD: So I think your question is, is there a precedent at the ITC for this type of consideration, and it's yes, but it goes pretty far back. So I really started in the Trade Bar in the late '90s, and by that time, a lot of the steel cases were a mix of -- the domestic industry was
both a mix of integrated producers, which are, I think, analogous to the domestic glass industry, right, that you have to operate 24/7, and mini mills.

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

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

I've also got an --

COMMISSIONER SCHMIDTLEIN: Can you --

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

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

MR. PICKARD: Sure. Happy to do so.

COMMISSIONER SCHMIDTLEIN: -- some examples of
those cases. That would be helpful.

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

MR. PICKARD: Yeah. So --

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

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

I would point out, right, that the largest other source of Chinese -- or the other source of non-subject imports, Mexico, were lower on a value basis every year of the period of investigation, lower than China, both
absolutely and by market share. But, yeah, that all
contributes, but what we --

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

MR. PICKARD: So, to be clear --

COMMISSIONER SCHMIDTLEIN: Maybe a non-attribution
problem.

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

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

I think that that alone sufficiently addresses the
attribution issue, but, on top of that, you also have all of
the issues connected with facilities that never made beer
also being closed down during the period of investigation, which also is a direct causal evidence -- direct evidence of the causal connection between the significant presence of subject imports and the deteriorating performance of the domestic industry.

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

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

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

COMMISSIONER SCHMIDTLEIN: Well, so just to --

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

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

MR. PICKARD: Mm-hmm.

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

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

There's obviously a variety of things going on,
and, yes, as demand decreases for -- over the period of
investigation, you would imagine that that puts downward
pressure on U.S. prices. That's absolutely true. And that's
demand in the aggregate.

COMMISSIONER SCHMIDTLEIN: So yeah.

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

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

So I think your question is it's not a single
factor test. There are changes going on in demand. There
are also increases in supply as subject imports increase, and
there are some increases in non-subject imports, and all of
these contribute to downward pressure.
And what do we see, right? What you see, basically, the COGS as a percentage of net sales increase, plus, on an absolute basis, you see the decreases in prices, similar to our most -- the most significant declines where competition is fiercest.

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

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

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

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

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

COMMISSIONER KEARNS: Right. If I could interrupt?

MR. PICKARD: Yeah.

COMMISSIONER KEARNS: Sorry. Yes, I get that.

But, if we use the HTS data, the HTS data isn't broken down by wine segment, is it?

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

COMMISSIONER KEARNS: Oh, no.

MR. PICKARD: So the Section 4 data -- and we're not saying it has no value, but it's obviously missing a huge part of the imports. But you've got some pretty clean HTS
numbers, and if you look at the HTS number that is -- that covers the vast majority of the wine bottles, you see that significantly increases from '17 to '18, to '18 and '19, right? And that's pretty comprehensive data.

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

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

MR. PICKARD: Yeah, sure. So I'm going to try and do this super quick, being mindful of your time. Yeah, so Appendix C and a lot of those other tables include an analysis based on the official import statistics. I was specifically referencing or that part of the brief specifically references some of the information in regard to the Section 4 tables, that I think it would be helpful there
because, obviously, the Section 4 tables and the Appendix C have -- well, there are two major issues kicking around, one, the lack of coverage, and, two, especially in the Appendix C, the fact that it doesn't cover any -- or doesn't even address sales to distributors, which is a major part of this whole story.

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

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

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

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

COMMISSIONER KEARNS: No, please go ahead.

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

COMMISSIONER KEARNS: Okay. Okay, thank you.

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

I mostly understand that answer. The only problem I have is I don't see how that would explain a deterioration from 2018 to 2019 in the financial conditions. In other words, you know, the prices that were being locked in in 2017
and 2018 I would have thought were sort of -- you know, basically, the point is the same in 2019 as they were in 2018, so how can that explain a deterioration in the financial condition in 2019?

Mr. Pickard: Sure. Because it's --

Commissioner Kearns: Does that make sense?

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

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

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

Commissioner Kearns: But no lost volumes in 2019
due to subject imports. Maybe due to non-subject imports, which seems to have, I think, completely displaced the subject imports. But you seem to be saying that not only did they lock in a low price for 2019, but they also reduced their quantity. But you can't blame subject imports for that, can you?

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

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

Now, by the end of the period of -- by the end of '19, when you average it all together, there were certainly effects of the 301 and the post-petition effects, but that's not to say that the domestic industry wasn't losing sales to Chinese imports beginning in the period -- for -- in the beginning of 2019. Does that make sense?
COMMISSIONER KEARNS: Yes, I think so. Thank you.

MR. PICKARD: All right.

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

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

Am I wrong about that? I don't know if the question's clear. If you break out bulk and case packaging, it seems to me that you would then see even less of a connection between subject imports and domestic product.
because subject imports are largely absent from the large purchasers' segment of the market.

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

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

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

But what we do know, right, is that even if you make some reasonable adjustments to the pricing product data, as we've suggested, you end up with more than 50 percent incidences of underselling. And there's -- and it's not all -- all of the noise in the pricing product data isn't attributable to the definitions, right? What's now starting to become more clear is there are real questions regarding the integrity of some of the pricing product data that was reported by the Respondents, as seen by data that is
internally inconsistent in their questionnaires, data that's inconsistent between the prelim and the final, and also other evidence of what appears to be gamesmanship.

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

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

MR. PICKARD: I think I could do it real quick in the minute that's left. There's two parts to a cost price squeeze, right? Even if cost is moving up, to the extent that there's price depression from the top, that's a negative
impact due to subject imports. That's one part.

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

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

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

    MR. PICKARD: Happy to do so, Commissioner.

    COMMISSIONER KEARNS: Thank you very much.

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

    COMMISSIONER STAYIN: Going back to the pricing question, which is a constant issue in each one of our minds as we go forward, our data, the ITC data, shows mostly
overselling by significant margins for the same products which you are saying have been -- have suffered because of declining prices, have suffered because of low-priced imports from China. How can you attribute this downward pressure in U.S. prices when Chinese product is higher priced?

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

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

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

On top of that, your specific question goes to, well, what about the pricing product data? And what our position is -- and we never argued that the Commission should turn a blind eye to data but that there are objective pieces
of evidence that raise questions regarding the reliability of the underselling data and specifically the data that was reported by the Respondents.

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

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

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

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

And then, on top of that, because I think this goes
to your fundamental concern, how do we really know if Chinese imports are having a negative effect on the domestic industry? You've got the price suppression, you've got the price depression. If the Commission kind of cleans up the pricing product data, now you've got underselling.

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

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

MR. PICKARD: Yeah.

COMMISSIONER STAYIN: -- this contract. Again, it goes -- you know, I go back to the overselling data that we have, and I know you've just gone through your explanation, but with our overselling data, you know, it brings to mind, was there an effort here to sell the idea of lower-cost Chinese products in order to pressure the domestic producers to I guess accept lower prices?
MR. PICKARD: So, if I understand your question, Commissioner, are you asking about why is there maybe some tension in regard to the pricing product data and kind of the -- all of the evidence of the price negotiations that used Chinese prices to leverage prices down?

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

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

But, on top of that, there -- it's not just kind of the contention of the importers and the distributors, hey, the Chinese price is lower. And this is really where I think it starts to get interesting. In the email communications
that we've given you, you actually have documentation where they're saying here's the Chinese price for this, lower your price, and there are kind of schematics, drawings, technical requirements in there.

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

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

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

So the first part of the question goes to kind of the price effects. And there are long-term contracts. The vast majority of all the domestic sales and all of the
imported sales are as a result of contracts one year or longer. So, as we've talked about before, there's the price effect of that, that it locks in prices, and prices that have been depressed at the time of the Chinese surge continue to injure the domestic industry in '17, '18, '19, and '20.

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

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

COMMISSIONER STAYIN: There seems to be or has been an allegation or a suggestion that the domestic producers were resistant and, therefore, to make the products that the Chinese were coming in to serve, that the domestic industry's only interested in long-term contracts and they weren't interested in smaller-term contracts and maybe different kinds of products, a suggestion that, for example, that the domestic industry wasn't into the wine industry and that the wine industry is served primarily by Chinese products, and
yet we know that, in fact, they do sell to the wine industry. This is kind of a jumbled question. But then it goes back to a suggestion that there are segments in the market that the U.S. producers do not supply and, therefore, should not be considered. There's a lot wrapped up in that long question, but give me your best.

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

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

So, at the same time Respondents and others have made arguments that we're not interested in selling to that segment, they are fiercely negotiating the inclusion of language in our contracts in an attempt to prevent to sell to
the domestic industry or to the small and medium enterprises. I think that's a material consideration.

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

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

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

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

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

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

But what it demonstrates, I think it goes to the credibility of some of the arguments made by the Respondents in that, at the same time they're telling you the domestic
industry isn't interested in these sales, these major
importers are at the same time so concerned about the
domestic industry increasing their sales to small and medium
enterprises that they are fiercely negotiating and including
contractual language attempting to keep them away from those
distributors.

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

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

MR. PICKARD: Sure.

COMMISSIONER STAYIN: That's all for me.

MR. PICKARD: Thank you, Commissioner.

CHAIRMAN JOHANSON: Commissioner Karpel?

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

I did want to sort of circle back to some of the
questions other Commissioners have already asked and, in
particular, about the data. And I'm struck by some of what
you've said today, and it has me thinking about what data at
all we're supposed to use in our staff report if we were to
find in the affirmative here.
I've heard you point out that Appendix E tables, which have some good data in terms of different types of glass containers and sales to different types of users, whether small or large, but I -- I hear you raising questions about the reliability of that data, given it's a small set based on the questionnaires because it doesn't represent distributors.

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

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

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

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

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

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

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

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

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

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

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

COMMISSIONER KARPEL: Okay. And are we supposed to
assume that if those importers had responded it would show a
different trend than we see from the ones who did?

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

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

MR. PICKARD: Correct.

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

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

COMMISSIONER KARPEL: Okay.

MR. PICKARD: But --

COMMISSIONER KARPEL: So moving --

MR. PICKARD: I'm sorry. Go ahead.
COMMISSIONER KARPEL: If you had more to say on that question, but I had another. Okay.

MR. PICKARD: After you, Commissioner.

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

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

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

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

MR. PICKARD: Right.

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

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

COMMISSIONER KARPEL: Go ahead.

MR. PICKARD: I don't think that's actually the whole picture, right, so -- because there's two elements of the cost price squeeze, right? And I guess maybe to look at this a different way, there are two major problems with that argument by Respondents. One is they're saying, in regard to -- and now we're talking about the cost price squeeze, right? Prices relative to their increased cost. One, that those increased costs had nothing to do with subject imports, and, two, it's focused on just looking at costs.

But if you look at our answers to questions, you could see, for example, that a large part of the increased costs are directly attributable to subject imports. For example, we provide specific data in regard to facilities that never made beer and weren't affected by changes in beer demand, but who had to close production operations as the result of subject imports, and, obviously, that increases their other factory costs, right? So the whole idea that --
COMMISSIONER KARPEL: My time's limited so -- but I just want to make sure I understand where the evidence of declining U.S. domestic producer prices is coming from, from your perspective. Is it your analysis of the pricing data in Section 5 if we take those adjustment that you suggest, or is it the emails that you cite, or where are we supposed to look that this knock on effect is actually having a price depressing effect across the market?

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

COMMISSIONER KARPEL: Okay. And sorry to cut you off so much, it's just we have such little time. I appreciate all your answers. If we were in a full hearing I'd let you go on, I promise. I think we're doing a part of our hearing here today in these questions, but we've obviously had a robust exchange in written form, and I really appreciate that aspect of it, too, and we can follow up in post-hearing.
So I wanted to ask you more about non-subject imports, particularly with respect to Mexico, and some of the acknowledgments you have made that Mexican imports are particularly prominent in the beer bottle segment and so forth. I think you note this in footnote 186 of the responses to questions.

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

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

That being said, are Mexican imports potentially having a negative impact on the domestic industry? We've consistently said that there are concerns about that, and that the domestic industry is keeping its eye on that situation, but that China has consistently and overwhelmingly
been the priority because it's the Chinese imports that are being used to leverage down prices. That's what you see in the email communications.

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

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

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

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

So, consistent with what the Commission does whenever looking at AUV data, it has limited probative value if there's large differences in the product mix. And because
Mexico is more heavily focused on beer bottles, not surprisingly, it has a lower AUV.

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

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

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

So I think it's instructive for the Commission, but, obviously, the legal standard is the Commission has to take a look at the industry in the aggregate, but, being
mindful of the fact that imports can be concentrated in
certain sections, and also being mindful, for example, of
Ardagh, for example, who 70 percent or more of its production
are non-beer bottles. They are kind of significant factors
for the Commission to consider when conducting its analysis.

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

CHAIRMAN JOHANSON: Thank you for being here
today.

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

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

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

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

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

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

So does China have the capacity and is there --

(Interuption.)

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

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

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

CHAIRMAN JOHANSON: Okay. Thank you for
that explanation.

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

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

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

What the domestic industry has had happen, and there's testimony to this as well, that they were denied that opportunity, that potential bright spot in the market as Chinese imports increased. And this is, I think this goes to one of the questions that we've
been talking about as far as what has more probative value.

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

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

I think that answers your question.

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

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

MR. PICKARD: Uh-huh.

CHAIRMAN JOHANSON: Respondents assert that
the industry's long term contracts largely involve
large customers and not small ones, and this is
explained in Berlin's answers at page 29.

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

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

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

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

MR. PICKARD: I'll have to take a look at
that closer, Commissioner, but the data reported by
the domestic producers and by the importers are that most purchases are done on a long term contract, overwhelmingly. And that's consistent. It's not just with the domestic industry, that's what the importers have reported as well.

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

CHAIRMAN JOHANSON: Okay.

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

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

Wouldn't Chinese producers also face logistical challenges in attempting to manufacture and export due to the pandemic?
MR. PICKARD: Well, I think, no. I don't think it's equivalent and I think for a couple of different reasons.

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

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

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

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

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

So consistent with kind of their excess capacity, convertible capacity, export orientation,
export subsidies, even with COVID-19 it is highly likely that the Chinese are going to continue to export in greater quantities to the United States.

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

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

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

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

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

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

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

Does that make sense?

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

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

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

MR. PICKARD: Sure. I think you could way
first off, just kind of basic Econ 101. Even if you
assume for the sake of the argument that the imports
oversold the domestically produced product, increasing
supply of something during a period of flat or
decreasing demand, even at higher prices, is going to
force prices down. That's kind of basic supply and
demand.

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

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

And that doesn't necessarily have to be
incompatible. You can have both at the same time.

CHAIRMAN JOHANSON: Okay. Thanks for your response there.

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

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

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

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

But on the other part of that, their fundamental analysis is wrong. Right? All they're
really saying is hey, if you take out some costs, their costs go lower. Well that doesn't tell you anything. The fact of the matter is, even if the increase in costs were completely divorced from subject imports, the fact is the domestic industry wasn't capable of passing along those costs is evidence of price suppression and that would be true regardless of the cost, right?

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

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

CHAIRMAN JOHANSON: Okay, thank you.

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

We'll begin with Commissioner Schmidtlein.

COMMISSIONER SCHMIDTLEIN: I guess I just
had one quick question as a point of clarification on the do not call list. And I'm a little bit confused about that.

How does this argument relate to subject imports?

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

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

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

So while that's Certainly of value in regard to a credibility determination regarding their arguments, that they would make such a statement and have such a material misrepresentation or material omission. That's one part.
But specifically to your question, how is that relevant? It goes to causation. If they're saying there's no causal connection because the U.S. industry isn't attempting to sell into the small and medium enterprises? The existence of these contracts directly refutes that argument because it's evidence of the fact that the domestic industry is attempting to sell into that, is in fact selling into it, and that the distributors are trying to limit that competition themselves.

COMMISSIONER SCHMIDTLEIN: All right, thank you.

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

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

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

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

COMMISSIONER KEARNS: Okay, and I think that covers all bottles that do not have a wide mouth and that are between .4731 liters and 1 liter. And I
guess, and I think you all have recognized that that includes not just wine bottles but also spirits bottles, is that right?

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

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

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

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

MR. PICKARD: So you broke up a little bit there, Commissioner, over the internet. So what I
think I heard you say, and I'm getting a signal that it's kind of a poor connection.

I think what you asked was you see some --

COMMISSIONER KEARNS: I can repeat it.

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

Would you mind?

COMMISSIONER KEARNS: Yeah, sure.

In that --

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

COMMISSIONER KEARNS: Sure.

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

MR. PICKARD: Because in large part it's consistent with testimony on both sides of this issue as well as objective industry publications talking about the increase in apparent domestic consumption for wine. And that's fully consistent with kind of
the overarching argument here that while clearly there
have been declines in beer demand, and while food has
been relatively flat, imports are taking more and more
of that business. We can point to objective evidence
outside of this that indicates that demand for wine
should have been increasing but the domestic producers
were prohibited from or prevented from participating
in what could have been that bright spot in the market
by the increase in subject imports which are
documented in the official import statistic.

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

Or put a --

COMMISSIONER KEARNS: Okay.

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

COMMISSIONER KEARNS: Go ahead.

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

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

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

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

There was no hiding the ball here. The various axes on both sides are clearly labeled as far as scale. So it shows specifically what's happening to each with both Y axes specifically labeled so you understand the scale.
In regard to questionable representation of material effects, quite frankly there are at least five major concerns in regard to some material either misrepresentations or omissions on the other side. Quite frankly, this just looks like an excuse to try and find something to complain about for the domestic industry.

COMMISSIONER KEARNS: Okay. Thank you very much.

CHAIRMAN JOHANSON: All right. Commissioner Stayin?

COMMISSIONER STAYIN: Yes.

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

MR. PICKARD: No. I think consistent with what we've always argued, the Commission should look at all of the evidence. But the Commission's practice for 20-odd years has always been to take a look primarily on value judgments or value measurements when there's a wide range in product value. This goes all the way back to kind of the ball bearing days and it's been repeated in numerous cases afterwards. And it's particularly applicable here where you have
sometimes a gross of products going for five or six
dollars, and then evidence in the record of other
products going for several hundred dollars or even in
excess of a thousand dollars.

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

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

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

MR. PICKARD: The causal link is probably
most clearly demonstrated in two pieces of
information. The surge in the volume of imports and
increase in market share from '16 and '17, '17 into
'18, and the fact that the damaging effects of those
were locked in through what everybody admits is the
general practice of long term contracts.

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

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

CHAIRMAN JOHANSON: Commissioner Karpel?

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

(Pause.)

COMMISSIONER KARPEL: I wanted to follow up again, this is something probably for the post-hearing brief so you can look at the data and try to help us understand that, but going back again to the comparison between our C table data and the data you
have on official import statistics in Exhibit 31 of
your pre-hearing brief.

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

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

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

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

COMMISSIONER KARPEL: Okay.

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

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

MR. PICKARD: Happy to do that.

COMMISSIONER KARPEL: Okay. And the other is with respect to the plant closures, there seems to be quite a bit of disagreement between Petitioners and Respondents on the reasons for these closures. I know Petitioners have submitted witness declarations and testimony giving their account of why these plants closed, but it would be helpful in us sort of teasing out whose evidence is more probative if you could very clearly lay out for each closure, each curtailment of production, contemporaneous statements, press...
releases, investor statements that support your view that those closures at that time were indeed considered to be being done because of subject imports and not some other cause.

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

Thank you.

MR. PICKARD: We'll do so. Thank you,

Commissioner Karpel.

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

You can feel free to answer that to the
extent you want to right now or just provide it in
your post-hearing.

MR. PICKARD: Sure, Commissioner.

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

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

But we'll be happy to address that further.

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

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

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

In this section of today's proceeding
Commissioners will provide an initial round of
questions and answers to Respondents' counsel, so if Respondents' counsel could please get ready for this. I think we'll just go ahead and get started up. The first Commissioner to ask questions of Respondents is Commissioner Kearns.

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

I wanted to start with a question for Berlin regarding beer shipments. While no importers reported pricing data for pricing products four through six which encompass beer bottles, importers did report U.S. shipments to beer end users. You suggest that this may be due to the fact that importers do not participate in beer sales to large manufacturers. Are you in essence suggesting that the pricing products are more tailored to large beer manufacturers? Why would these bottles be much different from the other beer bottles?

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

I think as we explained in our Q&A, in Berlin's experience our import of beer bottles are generally not the standard shape that are generally sold to the Anheuser-Busch's, what we call mass beer. So one of the reasons that you did not see beer in
the pricing product data but you did see a very
limited amount of beer sales in the data writ large
was because of this, the fact that there's a more
standard shape that goes to mass beer that is
generally catered to by the domestic industry and
different sizes that Berlin, I'm sorry, different
shapes that Berlin used to sell to a very small
percentage of domestic beer companies.

COMMISSIONER KEARNS: Okay, thank you.

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

MR. WESSEL: We can certainly provide that.
But again, I mean it is a difference between a
standard shape versus a non-standard shape.

COMMISSIONER KEARNS: Okay, thank you.

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

MR. WESSEL: I'd have to go back and look at
our comments as opposed to bulk versus case pack, but
again, I think in our general experience the imports are more geared to the case pack as opposed to bulk.

COMMISSIONER KEARNS: Okay. Thank you.

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

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

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

COMMISSIONER KEARNS: Yes, I can. Thank you.

MR. DOUGAN: Okay good, thank you.

So as to the latter part of your question I
think the reason that we, or to both parts of your
question, the reason that we placed so much emphasis
on the breakdown maybe between large and small in the
different segments is because we very much did want to
present a picture of attenuated competition.

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

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

But to your other point, at the prelim,
although I was not personally involved, our arguments
were look, we serve segments of the market that are not unserved but under-served by domestic producers for which it is not a focus, it is not an emphasis for them. So our presence in these segments is not causing harm to them.

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

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

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

COMMISSIONER KEARNS: It does. It does.

If you can also just follow up again on the issue of the tables in Part 4, the various segments there. If you have any responses here or post-hearing to what we heard from Petitioners as to why we should instead rely more, not instead, but in addition to what we see in those tables, maybe rely on the HTS data that we have that shows they would say more of an
increase in subject imports of wine bottles than we see in those tables. If you have any response to that.

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

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

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

We can do for post-hearing, if we assume that the distribution of the products across the different segments for the importers who didn't respond is similar to those who did respond, we could do sort of a gross-up analysis for you and provide that in post-hearing so you could see what the overall penetration would look like. We're happy to do that.
We don't think that it's going to show significantly different trends, as you say, amongst the different segments.

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

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

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

And by the way, they don't annotate that
anywhere in their brief or in the exhibit. We had to figure that out by trying to recreate their data. 

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

COMMISSIONER KEARNS: Okay, thank you.

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

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

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

The reality is that distributors, I mean this is not unusual. Distributors and suppliers, producers who also sell to end users often have these sorts of provisions. There's nothing nefarious about
it. There's nothing unusual about it. And Certainly somebody like TricorBraun doesn't have sufficient market power, let's say, to affect decisions of Ardagh if they didn't want to go there.

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

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

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

COMMISSIONER KEARNS: Okay, thank you.

We also discussed earlier with Petitioners'
counsel what's going on with demand for wine versus
demand for spirits. I believe Mr. Pickard suggested
there is agreement about a surge in demand for wine.

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

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

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

COMMISSIONER KEARNS: Okay, thank you.

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

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

MR. DOUGAN: Jim Dougan from ECS.

Commissioner, I don't know that export, we were arguing that export shipments were an alternative cause of injury as much as we were trying to say look, if there is a decline in volume across the board -- I guess in a way it is a contribution to the decline of the financial performance of the industry. And the decline in the export shipments made a significant contribution to the decline in industry production and shipments. That may have had an effect on their ability to spread the fixed costs.
Now one thing I'll note is that if the utilization -- sorry. Can I keep going?

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

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

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

CHAIRMAN JOHANSON: Commissioner Stayin?

COMMISSIONER STAYIN: Thank you.

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

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

I think part of the answer to that is simply that there are negotiations between buyers and
sellers. I think that was referred to earlier in this hearing, that people say that I can get this price from somebody whether it's from Mexico or China or wherever, and they negotiate and they say we'd like to get this particular price. Obviously the buyers want it to be lower, the sellers want it to be higher.

But I think what's probably more important is that even assuming that this was lost somehow, and they're really talking more about the lost sales, I guess, when you get down to it is these really are immaterial to any injury to the U.S. industry. I think I'll let Mr. Dougan speak to that a little bit.

MR. DOUGAN: Sure, hello Commissioner Stayin.

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

But I think the fact that Petitioners have put so much weight on these anecdotal emails really speaks to the fact that the record as a whole doesn't
support their contentions about under-selling. Very often, this morning you heard Petitioners' counsel circle back to the emails over and over and over again. And I think that that says something when the weight of the record evidence is in your favor, particularly with regard to price effects, you point to the Staff Report and you point to other data there and they're not able to do that. So they're placing a lot of weight on these emails that we say don't amount to much in the context of the market as a whole, even if they are presented and portrayed accurately.

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

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

MR. DOUGAN: Commissioner, this is Jim
Dougan.

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

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

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

So in those instances would they be willing to pay more to get a bottle if it's available from an
imported source? I think they would because then they can actually produce their wine.

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

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

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

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

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

Without getting into proprietary information, subject import presence to large
customers is extraordinarily small where it exists at all. This is evidence I think of what Mr. Wessel was talking about, that at a certain volume small and medium customers graduate to being more on the radar, if you will, of the domestic producers.

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

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

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

So yes, you can't put too fine of a point on it, but the complete absence of Chinese imports in some of these really important areas is evidence of attenuated competition.
COMMISSIONER STAYIN: The Petitioners argue that due to the high fixed costs in this industry that they need to have high capacity utilization. Thus even a very small amount of market share can result in a furnace being closed.

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

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

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

I'll point out though, for one, most of the industry did, and as pointed out in my testimony, I don't have a slide reference for you right now, but most of the “idle capacity” that's shown in the record is attributable to one single domestic producer rather than to the industry as a whole. The industry as a whole absent this producer actually does have very high capacity utilization which suggests that this is a problem that is with a single producer as opposed to the industry as a whole.
But it also goes to the idea that if this is about capacity utilization, and as you heard from Petitioners' counsel this morning, the furnace is agnostic, the Commission needs to keep in mind the massive difference in magnitude of the decline in volume to the beer segment as opposed to the other segments.

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

MR. WESSEL: Commissioner Stayin, Jerry Wessel, if I may. I think the one disagreement we do have about the nature of production is really succinctly captured in something that didn't come up earlier this morning, the introduction of Arglass as a U.S. producers.

Arglass has come in with a distinct model and a distinct production model that really accurately
fits what Respondents have been telling you. A different production model that is geared towards small and medium runs that even according to Arglass' press statements were designed to compete with subject imports.

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

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

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

   MR. WESSEL: And Jerry Wessel, not to belabor the point, but smart buy. You know, that's significant money from smart people in the industry and smart private equity investors. So if you disagree with the Arglass story and Arglass' theory of
the market you essentially have to say that that money is, I don't want to say dumb money, but misinformed money, and we don't think that's a reasonable assumption to make vis-a-vis Arglass.

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

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

What is your response to that?

MR. DOUGAN: Commissioner Stayin, we're not arguing that they are limited in a single segment, and the data do support the fact that they have made, you know, have increased their shipments to the spirit
segment and they are present in all sorts of different products throughout the market.

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

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

CHAIRMAN JOHANSON: Commissioner Karpel?

COMMISSIONER KARPEL: Thank you.

I wanted to ask you about distributors. Earlier we heard from Petitioners arguing that a significant gap in our record is the lack of data on sales to distributors reflected in Appendix E. And
that if we had that data, they suggest that it would show significant shifts of sales from domestic producers to subject imports citing some support, examples from the emails they put in the record.

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

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

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

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

Now we recognize that these data don't have complete coverage on questionnaires. So as I
mentioned to Commissioner Kearns earlier, we can attempt to maybe fill this out a little bit for you in post-hearing and gross these numbers up. But we would remind you that not only is the coverage below 100 percent for subject imports, it's also below 100 percent for non-subject imports. So to understand the market share shifts and the volume shifts and where these things might be going, it's important to consider grossing up the non-subject imports as well.

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

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

COMMISSIONER KARPEL: Thank you.

Turning to a different issue, Petitioners suggest that we should discount the 2019 data for
example with respect to market shares lost and focus

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

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

MR. DOUGAN: Commissioner Karpel, Jim Dougan
again.

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

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

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

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

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

With regard to market share, subject import share was essentially replaced by non-subject share between '18 and '19, and we think that that supports our theory of the case that there are segments of the market that are under-served. Not unserved but under-served by domestic producers. If non-subject imports are fairly traded and the only reason that subject imports have a presence in the market is due to something in subsidies, then one would expect that domestic producers would be on equal footing in competition with non-subject imports in regaining that
share when the subject imports retreated somewhat from
the market. You don't really see that in the
evidence.

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

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

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

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

COMMISSIONER KARPEL: So how do we take that
condition of competition then into account? It
obviously is affecting the import numbers and in
theory making it harder for Petitioners to prove their
case.

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

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

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

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

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

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

COMMISSIONER KARPEL: Thank you.

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

So can you walk me through your basis for saying that they aren't serving SMEs? The domestic producers.
MR. DOUGAN: Commissioner Karpel, I think at least I would never say that they are not serving but rather it's a portion of the market that is not a priority for them. It's not a focus for them.

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

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

However, why this is relevant is because the industry's financial condition is directly tied to its volume numbers and its production and its ability to absorb its fixed costs. And when the overwhelming majority of the industry's shipment is going into large customers where that's a focus for them and the decline in, and the overwhelming majority of their decline in volume is attributable to those larger segments, and that is relevant to understanding whether any overlap that they have with subject imports in these smaller customer segments is ending
up resulting in changes in volume that would be material relative to their changes in volume to large customers in such a way that it might credibly be said to be affecting their financial condition.

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

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

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

COMMISSIONER KARPEL: In that regard, it's unfortunate that Yamamura did not submit a response to our questions or is not here today. But do you have
any information or could you obtain any information about the orders that Arglass is apparently receiving from these SMEs and the reason for that?

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

COMMISSIONER KARPEL: Thank you. I appreciate that.

Okay, and I wanted to ask, the Staff Report notes at page 2-25 that all reported U.S. shipments of imports from China were small end user manufacturers versus large manufacturers. Could you in your post-hearing brief, or now if you're able, please describe any attempts made by Respondents to sell to the large U.S. manufacturers and what the results of these attempts were. Have there been efforts that have maybe not succeeded, but nonetheless there have been attempts?

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

MR. NEELEY: This is Jeff Neeley. It's probably something we ought to address since a lot of
that would be confidential, either way, in the post-hearing. So we'd be glad to do that.

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

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

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

COMMISSIONER KARPEL: Thank you.

CHAIRMAN JOHANSON: Okay, I think it's my
time to speak.

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

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

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

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

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

The idea, by the way, that that would be observed in 2019 is a little absurd when the petition was filed at the end of January and there's a three-month lead time in getting shipments from China. So we don't think there were any post-petition effects that are observed on the record of this investigation.

Certainly not with regard to import volume. So we
don't think that's really the case. But in early 2020 this may be evidence of importers who were looking to get volume in before the preliminary duties went into effect. And we can put the evidence on the record in our brief, but the January to March comparison is down compared to the prior year so obviously that was a temporary bump.

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

MR. NEELEY: If I could add one thing to that, and hopefully that will help in answering this. The increase was very modest. I mean it was such that the domestic industry didn't even make a critical circumstances allegation at the Commerce Department, which as we all know often happens.

So there was a slight bump-up for sure. I'm sure that certain importers wanted product, wanted to get it in before any duties went into effect. But it actually was quite small compared to many other cases. I think there's a certain amount of inventory out there in China, perhaps and they were able to ship it. We're not saying it sent to zero in China. We've never alleged that that was the case, but it's a very modest increase.
CHAIRMAN JOHANSON: Thank you Mr. Neeley and Mr. Dougan.

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

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

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

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

So to the degree that supply from any source at any price has a depressing and suppressing effect on the domestic industry's prices, that would Certainly have to come of a much greater magnitude
from non-subject imports than it would from subject imports.

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

Well if that's the case, and the beer segment is the majority of the domestic industry
shipments and the vast majority of their decline in
shipments, it seems to me that imports from Mexico
would be having a much greater impact on over-supply
in that segment.

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

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

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

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

MR. NEELEY: I agree, the best thing is to
ask the client. But a lot of I think the discussion
of the Coronavirus that we're having unfortunately is
going to have to rely on a lot of speculation because
nobody really knows what's going on entirely in terms
of the effect of the Coronavirus. And as the
Commission knows, it really can't rely on that
speculation so we need to see what's out there in
terms of hard facts and we'll take a look at them.

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

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

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

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

I think what our answer was getting at there
was that while there was a change in subject import
volume and probably explained at least in part by the
Section 301 duties, the fact that you didn't see it
fall off of a cliff, the fact that you didn't see
subject imports exit the market entirely, and that
there were relatively small changes in market share,
we think speaks to the fact that there is attenuated
competition and that there are some segments of the
market who are sourcing from China for reasons other than price.

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

CHAIRMAN JOHANSON: Thanks.

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

Could you all respond to that argument?

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

Again, they want the Commission to make an inference here from evidence that's not on the record. They want you to believe something based on conjecture. But there really isn't any evidence that's been presented to support this assertion.

So let's assume for the purpose of argument that it's true, that a decline in domestic production,
that a decline in volume is going to incent the U.S. producers to basically offer or accept lower prices in other products just to fill up their capacity, just to produce more.

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

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

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

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

MR. DOUGAN: That's a related question and it's right on the same concept.
I don't think we have evidence on the record to support that. I mean I suppose there's some logic to it, but Petitioners want you to believe that small shifts in volume that happened in the small and medium customers, maybe in their wine segment are really driving this and when you compare any shift in the small and medium wine producers they are absolutely dwarfed by changes in shipments to the beer industry. I mean literally 100-fold. Literally 100 times the volume difference.

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

CHAIRMAN JOHANSON: Thank you, Mr. Dougan.

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

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

CHAIRMAN JOHANSON: In such cases wouldn't
U.S. and imported products be competing, still be competing on the basis of price even if a U.S. company is underselling the imports on large orders?

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

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

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

There's ample evidence on the record that there are multiple order quantities. There are disagreements about what the sizes may be and I think the answer to that is, you know, there may be different minimum order quantities for different customers based on what they're asking to be produced.
But there are minimum order quantities and as these customers go from small to large the possibility of getting fulfilled by a U.S. producer because they have passed that minimum order quantity becomes a reality.

CHAIRMAN JOHANSON: Okay.

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

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

COMMISSIONER SCHMIDTLEIN: Thank you very much.

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

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

MR. WESSEL: I think the evidence that Berlin has placed on the record, if you look at those exchanges, they were not price based denials. So it was not as if the Petitioners were saying wow that's a small run but we'll do it at X, Y, Z price.
The response that the, and I should say the U.S. industry would respond with was sorry, we can't do that.

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

COMMISSIONER SCHMIDTLEIN: Okay.

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

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

MR. DOUGAN: It would really help to have evidence for you to rely on in writing your determination though, right? I mean I think the concept has some logic to it. But again, we would say
that even if that's true and we don't have evidence to support it, but even if it is true we think the causation runs in the opposite direction from the way that Petitioners would argue that it did. They would be under-utilized because of the decline in the beer segment and looking to use that volume somehow, and perhaps to the degree they were willing to accept lower prices.

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

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

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

MR. DOUGAN: I think I'll let Mr. Neeley expand on this as well. But I think that maybe even
one of our witnesses said at the staff conference,  
价格有时是购买决策的一个因素，  
而这并不是一个新颖的陈述，所有其他条件都相等。  
你知道，如果所有这些  
箱子都打勾了，是否有些情况下价格比较是决定因素？可能会有。这是一个有着大量交易的市场。  
但我认为我们在说的并不是所有其他条件都相等，并且那些价格数据记录在案支持了这一观点，至少在某些情况下，客户愿意支付更高的价格来确保在需要时能够及时获得所需的数量，从而保证从特定来源的供应。  
所以价格是一个因素，但它肯定不是决定或驱动因素在所有这些情况下。

MR. NEELEY: 我认为你讲得很对，Jim。

它回到了我们之前讨论的关于客户考虑的几种因素的讨论，即品质、可获得性和价格。如果前两个线起来，你会发现好的品质，产品也有了，你就会发现产品的价格。
can come into it. I don't think we can say it never happens. Certainly it happens at times.

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

MR. DOUGAN: And if I may add to what Mr. Neeley has said, this is, if the market really did operate the way that Petitioners claim that it does or price drives everything and the imports from China have the lowest prices and they're always going to come in and they're going to take business on the basis of price why is their market share so small? I mean it's very small. Especially relative to a lot of other cases where you have imports from China that are subject to the investigation. And it didn't move by very much at all.
So if price drives everything and producers in China have large excess available capacity, you'd see a much different record than you have.

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

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

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

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

COMMISSIONER SCHMIDTLEIN: Okay.

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

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

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

Is that really a question of attenuated competition? Or is really your argument more about materiality that well, even if they're competing there that those segments account for such a small portion
of the market and the subject imports are a smaller
portion of that. That whatever impact they're having
isn't material.

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

So it's not head to head throughout the
marketplace. There is an attenuation of that
competition. It's not full force everywhere. So we
would argue that's attenuation and that it's a
minority of domestic industry shipments. That
attenuation then leads you to an analysis of
materiality because the reason that this is important,
again, this is more than just about market share and
more just about presence in individual segments.
Because volumes are directly tied to the domestic
industry's financial condition because what's driving
it is their absorption of fixed costs. Right? Their
net sales values increased by enough to more than
recover any other increases in costs they had. Their
decline in financial performance is explained by their ability to absorb their fixed costs. There's a direct relationship.

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

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

COMMISSIONER SCHMIDTLEIN: Okay. All right.

I have no further questions. Thank you.
CHAIRMAN JOHANSON: All right, we will now move to Commissioners' follow-up questions and post-hearing requests with Respondents' counsel, and we will begin this with Commissioner Kearns.

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

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

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

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

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

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

COMMISSIONER KEARNS: Thank you.

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

I'm wondering, I guess this will probably mostly need to be in the post-hearing brief, but I'd like to understand that better, specifically to what extent those two producers increase in their ratios accounts for the overall increase in the ratio for the industry as a whole. In other words, how significant those two producers are for the overall industry.
If you can do that post-hearing. If you have anything to say about it now, I'd welcome that as well.

MR. WESSEL: Commissioner Kearns, this is Jared Wessel. I'll be quick and very gentle because you're correct, it does involve a loot of BPI. I think the question that you're asking is consistent with the beer story and particularly the mass beer story that we have been trying to tell. So you would expect to see the more the entity is tied to beer the more you would see these issues appear in their financial statements, and we think that's what you see in what is inherent in your question.

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

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

CHAIRMAN JOHANSON: Next is Commissioner Stayin.
COMMISSIONER STAYIN: Just a couple of quick mentions and ask you to respond in the post-hearing. The no-call provision that distributors negotiate with U.S. producers, it comes into kind of a restraint of trade concept. I don't understand it. Maybe you can explain it to me. Is the no-call provisions that is negotiated with distributors a factor in the Commission's statutory injury framework?

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

COMMISSIONER STAYIN: Okay. I thank you very much.

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

Mr. Neeley mentioned earlier in response to I think a similar question on this topic, we can put this evidence on the record but these do not call provisions work both ways. It's not only that domestic producers are forbidden from calling on particular customers of the distributors, but the distributors are also forbidden from calling on certain customers of the domestic producers. So I
think, and that is not an unusual scenario in which
you have a supplier entering into a contract with a
distributor to serve end user customers. You don't
want to be poaching each other's customers. This is
not a novel concept that's unique to this industry and
it's not nefarious.

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

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

COMMISSIONER STAYIN: Thank you.

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

MR. DOUGAN: First of all, there was an
allegation made that there was some sort of subterfuge
going on in how the data were changed in what
TricorBraun reported between the prelim and the final.
That's a consequence of a change in the definition of
the pricing products that was instituted by
Petitioners.

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

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

COMMISSIONER STAYIN: That's a good answer.
I think that that is all that I have. Thank
you very much.

CHAIRMAN JOHANSON: Commissioner Karpel?

COMMISSIONER KARPEL: Yes. Thank you.
I have a couple of follow-ups. One concerns
Respondents' argument that domestic manufacturing
facilities are just not built to economically handle
shorter run productions or specialized container designs, and that this is why they have less of a priority or less of an interest in trying to serve smaller purchasers.

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

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

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

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

One thing I would say is I think this was more, the idea that they aren't correctly configured was more of the Arglass argument rather than ours. I don't believe that was something that we really talked
about. So Arglass may be the correct entity to put that question to.

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

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

(Technical interference)

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

(Technical interference)

COMMISSIONER KARPEL: Okay. You were breaking up a little bit there in your answer, so if you want to just address this in your post-hearing submission as well, that would be helpful.
Just one final question for follow-up in your post-hearing submission, when I asked this of Petitioners as well, noting that you each have fairly different views about why various plants closed or why production at various facilities was curtailed or furnaces turned off. Just to help me in comparing the two sets of arguments there, if you could for each of these alleged shutdowns or closures, if you could point us to the contemporaneous documentation that supports your view of why these closed, that would be helpful. I know you've done some of this already in your submissions, but if you want to just do a collection of cites where you've already said that, I'm just looking for something that would make it easy for me to compare the two positions and the evidence that each side is relying on to support their positions in this regard.

MR. WESSEL: We're obviously happy to do that. But again, I think our main point is this. The facilities were either beer, the closer was either attributed to beer even though it didn't make beer, and the Ardagh Seattle facility is a great example of that where they said they were going to redeploys beer capacity, and that redeployment caused them to shut down Seattle. Or they give a reason publicly that is
not subject importer such as loss of a Smuckers contract, for example.

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

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

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

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

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

COMMISSIONER SCHMIDTLEIN: Okay, thank you.

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

MR. BISHOP: We would like to thank this
panel very much for your responses. You can go ahead and disable your microphones and web cams, if you would, please, and we will move on to closing arguments.

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

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

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

And I'm not going to go through all of the indicia, but U.S. sales declined by $200 million, 1,000 workers lose their job, operating income drops by $250 million, which is a 72 percent decrease,
operating income margins decreased from 7.9 percent to 2.4 percent, barely break even, and the net income and net income margin numbers are BPI, but they clearly demonstrate an injured domestic industry.

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

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

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

But what do we know about the effects of the
301 in the post -- in the filing of the case? First off, that importers were capable of absorbing the 301 duties, right? So they undeniably contributed to some decrease in subject imports, but the major importers have said that they are, and will continue to import regardless of the 301.

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

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

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

And we also know that importers made a decision to stock up on imports right prior to the
collection of CVD duties. And, again, how do we know this? These are actually public statements. So from Berlin's web page, they explicitly state that they're going to increase their inventories prior to the AD CVD duties going into effect.

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

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

So, quickly, in regard price effects, you've clearly got cogs as a percentage of net sales increase through the POI. The attempts to find alternative causes or to completely sever this due to the effect of subject imports are unpersuasive. In regard to
price depression, you see significant price depression, and it's even magnified more if you adjust for inflation, which shows the majority of pricing products decreasing.

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

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

And there are other examples in our brief at pages 39, 40, and 41. And even Mr. Neeley and Mr. Dougan admit this is what you would expect. This is price negotiation.
And in regard to the pricing product data, I would point out with reasonable corrections to that data, you actually get more than 50 percent instances of underselling, and the fact that this is all logical in regards of price linkages, as Mr. Dougan has conceded. Not only is it logical -- he's incorrect, however, in regard to that there's no evidence of this. There are sworn affidavits that discuss the pricing decisionmaking mechanism by the domestic industry and the delegation of authorities, and how this exactly factors in.

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

And while Respondents have come up with now new alternative theories for why it had nothing to do with subject imports for beer, contemporaneous statements, filings with the FCC, SEC, internal communications, company newsletters, public
statements, including earnings calls, all attribute these to subject imports.

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

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

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

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

And I think Commissioner Karpel had indicated a concern as if -- that we were saying that the data regarding lost sales to distributors are wholly missing from the record, and I apologize if I
misspoke. No. What we're saying is don't look to Appendix E for that. That's wholly missing all of the sales to distributors.

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

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

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

The Chinese glass is going to have to come somewhere. In the absence of trade relief, it will be coming to the United States. Thank you.
MR. BISHOP: Thank you, Mr. Pickard.

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

MR. NEELEY: Okay. Should be on, I think.

Thanks to the Commissioners and staff for putting this hearing and briefing schedule together very quickly and under very trying conditions.

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

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

TricorBraun does significant business with the Petitioners, and it will continue to do so, but, for the reasons we've set out, TricorBraun does not
believe that any problems that the domestic industry is having are attributable in any material manner to subject imports from China.

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

The Commission gathered the data, and the data bear out our contention. TricorBraun also informed the Commission at the beginning of the case that the domestic industry concentrated, for perfectly good business reasons, on long runs and larger orders. The customers with small and medium sized orders, on the other hand, were primarily served by imports, whether from Europe, China, Mexico, or elsewhere. The data, again, were gathered by the Commission, and the data bear out our contention.

On the other hand, Ardagh took the position in the preliminary that beer bottles were not really a major issue in the fortunes of the domestic industry. Most recent version of the Ardagh story seems to be an admission that the decline in beer bottles was harmful to the domestic industry, however, but now Ardagh somehow seeks to blame the price decline for
beer bottles on other glass container prices.

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

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

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

In terms of materiality, we should not lose sight of the fact that subject imports from China remain in the single digits in terms of market share throughout the POI, and even the so-called "surge" resulted in an increase of less than one percentage point in market share.
Moreover, non-subject imports entered at higher volumes, had a higher market share, and increased both in -- and market share more than subject imports.

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

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

We add to this ample evidence from purchasers' questionnaires, from witnesses, and from data on the large versus small customer categories showing the attenuation of competition. This does not mean there's absolutely no competition, as Petitioners would have the Commission think we're arguing, but the competition is very limited.
Here, the Commission -- the evidence is made more compelling by the testimony information from Arglass, which has put real money on the table in building a plant in Georgia.

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

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

There's a lot of rhetoric from Petitioners, including some arguments that TricorBraun and some other importers somehow were responsible for the decline in the fortunes of the domestic industry, but we are certain that the Commission will get beyond the rhetoric and see that the volume shifts in the small,
medium market segment, where most of the Petitioners' arguments have focused, account for a mere 1/100 of the decline of the beer bottle market for the same period.

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

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

For Petitioners to think that this argument on cross-segments, if accepted, helps them is difficult to fathom. It seems if there are such cross-effects, then they would work both ways, and if
they work both ways, then the documented huge declines
in demand and pricing pressure from beer bottles must
be considered as causing the suppression or depression
of prices for wine bottles and for other containers.

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

We expect that the Commission has noted the
changing theories that the Petitioners have put forth.
Petitioners were the only parties that had input into
the original pricing products in the preliminary
determination, but they could not show underselling of
any meaningful magnitude in the preliminary, so the
Commission gave them another chance to suggest new
pricing products for the final. They tried again,
but, once again, failed to show meaningful
underselling.

In an attempt to find price depression, the
petitioners next tried the idea of adjusting pricing
data for inflation, but the U.S. is not a hyper
inflationary economy, and even if it were, the
Commission would have to adjust all elements in the record for inflation, including the financial information, and not just pricing data.

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

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

Petitioners' theories, in short, simply don't work. The ever changing theories raised at the last minute in these cases --
CHAIRMAN JOHANSON: Mr. Neeley, your time has expired.

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

MR. BISHOP: Thank you, Mr. Neeley.

We will now turn to rebuttal remarks.

Rebuttal remarks on behalf of those in support of petitions will be given by Daniel B. Pickard of Wiley Rein. Mr. Pickard, you have five minutes. You may begin when you're ready.

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

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

So regardless of what's said during this case, I think there is great probative value in looking at what was said prior to this case internally
and to external parties.

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

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

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

(No response.)

MR. PICKARD: Okay.

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

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

MR. PICKARD: How about now?

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

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

MR. BISHOP: Yes.

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

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

What else has been said publicly, well before the filing of this case? Second quarter 2018
earnings call the chairman of Ardagh says the U.S. glass market is being adversely impacted by a substantial rise in glass containers being imported from China and Mexico. Continues on to say we've recently suspended production at one of our furnace's at the Ruston, Louisiana plant.

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

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

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

Here's the last one. These are just
illustrative examples, but if the question is is there evidence out there that -- external evidence prior to the filing of this case directly establishing the causal connection?

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

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

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

MR. BISHOP: Thank you, Mr. Pickard.

Providing rebuttal remarks on behalf of those in opposition to the petitions will be Gerald R. Wessel with Hogan Lovells. Mr. Wessel, you have five minutes. If you would please activate your web cam
and microphone. You may begin when you're ready.

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

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

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

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

And that's hundreds of millions of dollars
of, as I mentioned before, really smart money that
essentially made the same bet on the market that the
Respondents have presented to you, i.e., that the
Petitioners have been focused on beer, not focused on
SMEs, and that their minimum order quantities caused
the Chinese to supply a small segment of the market.

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

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

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

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

Against these facts, against Arglass' entry, against the staff report, I think what Petitioners are
simply asking you to accept is that because it's a China case, China has to be cheap.

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

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

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

MR. BISHOP: Thank you, Mr. Wessel.

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

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

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

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

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

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

I hereby certify that the foregoing/attached transcript is a true, correct and complete record of the above-referenced proceeding(s) of the U.S. International Trade Commission.

DATE: May 12, 2020

SIGNED: [Signature]

Signature of the contractor or the Authorized Contractor's Representative
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Washington, D.C. 20005

I hereby certify that I am not the Court Reporter and that I have proofread the above-referenced transcript of the proceeding(s) of the U.S. International Trade Commission, against the aforementioned Court Reporter's notes and recordings, for accuracy in transcription in the spelling, hyphenation, punctuation and speaker-identification, and did not make any changes of a substantive nature. The foregoing/attached transcript is a true, correct and complete transcription of the proceeding(s).

SIGNED: [Signature]

Signature of Proofreader

I hereby certify that I reported the above-referenced proceeding(s) of the U.S. International Trade Commission and caused to be prepared from my tapes and notes of the proceedings a true, correct and complete verbatim recording of the proceeding(s).

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