



A-357-820
CCR (Export Tax Differential)
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May 5, 2020

MEMORANDUM TO: Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

FROM: Steven Presing
Acting Senior Director, Office VII
Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the
Changed Circumstances Review of the Antidumping Duty Order:
Biodiesel from Argentina

I. SUMMARY

The Department of Commerce (Commerce) analyzed the comments submitted by interested parties in the changed circumstances review (CCR) of the antidumping duty (AD) order on biodiesel from Argentina following the *Preliminary Results*.¹ We recommend that you approve the positions below in the “Discussion of Issues” section of this memorandum. Below is a complete list of the issues for which we have received comments and rebuttal comments from the interested parties.

Issues:

Comment 1: Relevance of the GOA’s Changes after the Preliminary Results
Comment 2: Whether Commerce Properly Initiated the CCR
Comment 3: Whether a Particular Market Situation Still Exists

II. BACKGROUND

On July 1, 2019, Commerce issued the *Preliminary Results* and placed additional information on the record of the CCR, pursuant to 19 CFR 351.301(c)(4).² In the *Preliminary Results*, Commerce found that the “particular market situation” (PMS) regarding the price of soybeans as an element of the cost of production of biodiesel in Argentina still existed.³ As such, Commerce

¹ See *Biodiesel from Argentina: Preliminary Results of Changed Circumstances Reviews of the Antidumping and Countervailing Duty Orders*, 84 FR 32714 (July 9, 2019) (*Preliminary Results*); see also *Biodiesel from Argentina and Indonesia: Antidumping Duty Orders*, 83 FR 18278 (April 26, 2018) (*AD Order*).

² See Memorandum, “Additional Information Concerning the Preliminary Changed Circumstances Reviews of Biodiesel,” dated July 1, 2019 (Additional Information Memo).

³ See *Preliminary Results*, 84 FR at 32715.



found that there were insufficient changed circumstances warranting reconsideration of the cash deposit rates under the *AD Order*.⁴ On July 5, 2019, Commerce provided interested parties until July 12, 2019 to place additional factual information on the record in order to rebut, clarify, or correct information placed on the record by Commerce.⁵

On July 12, 2019, the National Biodiesel Board Fair Trade Coalition (the petitioner), and LDC Argentina S.A. (LDC Argentina) and Vicentin S.A.I.C. (Vicentin) submitted additional factual information.⁶ On August 2, 2019, Commerce put a hold on the deadlines for case and rebuttal briefs.⁷ On September 5, 2019, Commerce reinstated deadlines for case and rebuttal briefs and for requesting a hearing.⁸

On September 11, 2019, the petitioner requested an indefinite suspension of the deadlines for briefs and the final determination.⁹ On September 12, 2019, the Government of Argentina (GOA) responded, stating that a short extension of the deadlines was acceptable.¹⁰ On September 12, 2019, Commerce issued a short extension of deadlines.¹¹

The petitioner and the GOA submitted case briefs on September 17, 2019.¹² On September 23, 2019, the petitioner and the GOA submitted rebuttal briefs.¹³

On October 16, 2019, Commerce placed additional factual information on the record of this proceeding.¹⁴ In response, the petitioner placed additional factual information on the record on October 24, 2019.¹⁵

⁴ *Id.*, 84 FR at 32716-17.

⁵ See Additional Information Memo.

⁶ See Petitioner's Letter, "Biodiesel from Argentina: Factual Information Pursuant to 19 CFR 301(c)(4)," dated July 12, 2019 (Petitioner's Factual Information); see also LDC Argentina and Vicentin's Letter, "Biodiesel from Argentina: Additional Information Concerning the Preliminary Changed Circumstances Reviews of Biodiesel," dated July 12, 2019.

⁷ See Memorandum, "Changed Circumstances Reviews of the Antidumping and Countervailing Duty Orders on Biodiesel from Argentina: Holding of Deadlines," dated August 2, 2019.

⁸ See Memorandum, "Changed Circumstances Reviews of the Antidumping and Countervailing Duty Orders on Biodiesel from Argentina: Publication of Verification Report and Reinstatement of Deadlines," dated September 5, 2019.

⁹ See Petitioner's Letter, "Biodiesel from Argentina: Request for Meeting and Extension of Briefing Schedule," dated September 11, 2019.

¹⁰ See GOA's Letter, "Biodiesel from Argentina: Response from the GOA to Petitioner's Request for Meeting and Extension of Briefing Schedule," dated September 12, 2019.

¹¹ See Memorandum, "Changed Circumstances Reviews of the Antidumping and Countervailing Duty Orders on Biodiesel from Argentina: Deadline for Case and Rebuttal Briefs and Hearing Requests; Rejection of New Factual Information," dated September 12, 2019.

¹² See Petitioner's Case Brief, "Biodiesel from Argentina: Petitioner's Case Brief," dated September 17, 2019; see also GOA's Case Brief, "Biodiesel from Argentina Changed Circumstances Review: Government of Argentina Case Brief and Statement with Respect to Public Hearing," dated September 17, 2019 (GOA Case Brief).

¹³ See Petitioner's Rebuttal Brief, "Biodiesel from Argentina: Rebuttal Brief on Behalf of the National Biodiesel Board Fair Trade Coalition," dated September 23, 2019; see also GOA's Rebuttal Brief, "Biodiesel from Argentina: Rebuttal Brief in AD Changed Circumstances Review," dated September 23, 2019.

¹⁴ See Memorandum, "Ex Parte Meeting with the National Biodiesel Board and the American Soybean Association," dated October 16, 2019.

¹⁵ See Petitioner's Letter, "Biodiesel from Argentina: Petitioners' Submission to Rebut, Clarify, or Correct Information Placed on the Record," dated October 24, 2019.

On December 17, 2019, Commerce placed additional factual information on the record regarding a new decree issued by the GOA concerning export taxes (Decree 37/2019).¹⁶ Commerce also opened the record for additional factual information and comments regarding the change. Commerce received new factual information (NFI) and comments from the petitioner and the GOA.¹⁷ Eleven days later, Commerce received rebuttal information and comments from the petitioner and the GOA.¹⁸

On March 11, 2020, Commerce placed additional factual information on the record regarding a second new decree issued by the GOA concerning export taxes (Decree 230/2020).¹⁹ Commerce also opened the record for additional factual information and comments regarding the change. Commerce received NFI and comments from the petitioner, the GOA, and LDC.²⁰

III. FINAL RESULTS OF REVIEW

For these final results of review, Commerce continues to find that there are insufficient changed circumstances to warrant reconsideration of the PMS found in the final determination or any other aspect of the final determination, or an adjustment to the cash deposit rate.

IV. DISCUSSION OF THE ISSUES

Comment 1: Relevance of the GOA's Changes after the Preliminary Results

As explained above, Commerce provided an opportunity for all interested parties to comment on two decrees issued by the GOA after Commerce's preliminary results. The first (Decree 37/2019) raised the export tax on soybeans to 30 percent and the export tax on biodiesel to 27 percent. The second (Decree 230/2019) raised the export tax on soybeans to 33 percent and the export tax on biodiesel to 30 percent.

Petitioner's Decree 37/2019 Comments

¹⁶ See Memorandum, "New Factual Information," dated December 17, 2019 (Decree 37 NFI).

¹⁷ See Petitioner's Letter, "Biodiesel from Argentina: Petitioner's New Factual Information," dated December 27, 2019 (Petitioner Decree 37 Comments); and GOA's Letter, "Biodiesel from Argentina: Changed Circumstances Reviews – GOA's comments and submission of new factual information," dated December 27, 2019 (GOA Decree 37 Comments).

¹⁸ See Petitioner's Letter, "Biodiesel from Argentina: Petitioner's Rebuttal Comments to the GOA's New Factual Information Submission," dated January 7, 2020 (Petitioner Decree 37 Rebuttal) and GOA's Letter, "Biodiesel from Argentina: Changed Circumstances Reviews – GOA's rebuttal comments," dated January 7, 2020 (GOA Decree 37 Rebuttal).

¹⁹ See Memorandum, "Changed Circumstances Reviews of the Antidumping and Countervailing Duty Orders on Biodiesel from Argentina – Opportunity for Further Comment," dated March 11, 2020 (Decree 230 NFI).

²⁰ See Petitioner's Letter, "Biodiesel from Argentina: Petitioner's Comments on Commerce's NFI Memorandum," dated March 20, 2020 (Petitioner Decree 230 Comments), GOA's Letter, "Biodiesel from Argentina: Changed Circumstances Reviews – GOA's comments and submission of new factual information," dated March 20, 2020 (GOA Decree 230 Comments), and LDC's Letter, "Biodiesel from Argentina: Changed Circumstances Reviews – Louis Dreyfus Company, Argentina S.A.'s comments and submission of new factual information," dated March 20, 2020.

- Almost immediately upon taking office, President Fernandez increased the export tax rate on soybeans. On December 14, 2019, President Fernandez issued Decree 37/2019, which resulted in an export tax rate of 30 percent on soybeans — the exact same rate that was in effect at the time of Commerce’s AD investigation.²¹
- Argentine domestic soybean prices were on average 34 percent lower than world market soybean prices from September 2018 through November 2019, again virtually the same level of distortion that existed during the POI (and that Commerce observed in the *Preliminary CCR Results*).²²

GOA’s Decree 37/2019 Comments

- The export tax differential between soybeans and soybean oil, on one side, and biodiesel on the other side, remains unchanged at 3 percent.²³
- As the recitals of Decree 37/2019 make abundantly clear, the purpose of these changes is purely related to revenue-collection in the context of a very serious fiscal situation Argentina is currently undergoing. Furthermore, the sharp depreciation of the Argentine currency experienced during 2018 and 2019, was specially taken into consideration when designing Decree 37/2019.²⁴
- Finally, the GOA reiterates that the U.S. retrospective system carried out through administrative reviews makes these changes (and any hypothetical future changes) irrelevant, so long as excessive duties do not fully prevent and make commercially impractical exports to the United States. Not only is the export tax differential unchanged with the recent law, but the Department will be able to review any potential future changes in an administrative review.²⁵

Petitioner’s Decree 37/2019 Rebuttal Comments

- The GOA’s attempts to characterize the new measures as “purely related to revenue-collection” are misplaced as the purpose of the measures is irrelevant to the PMS finding.
- Regardless, of the relevance of the GOA’s intent, the export tax regime has always served multiple policy objectives, including economic development.

GOA’s Decree 37/2019 Rebuttal Comments

²¹ See Petitioner Decree 37 Comments at 3.

²² *Id.* at 4.

²³ See GOA Decree 37 Comments at 2.

²⁴ *Id.* at 3.

²⁵ *Id.* at 3-4.

- The export tax differential is very different now than it was in the investigation. It is now three percent and is unaffected by the new measures, which explicitly leave the applicable older measures in place.
- The petitioners misinterpret their own evidence. They claim the gap between Argentine and world market prices remains constant, but the fact that this happens despite changes to the export tax on soybeans proves there is no connection between the two. This lack of correlation has been demonstrated previously and the petitioner's new information only supports the same conclusion.

Petitioner's Decree 230/2020 Comments

- The enactment of Decree 230/2020, which *significantly increased* the export tax on soybeans to 33 percent – three percentage points higher than during the AD investigation – further distorts Argentine soybean prices and confirms the existence of a PMS.
- The constantly shifting export tax rates that are emblematic of Argentina's export tax regime, most recently reflected in Decree 230/2020, render any effort to assess the impact of a PMS on biodiesel costs of production in the context of this CCR a near impossibility.

GOA's Decree 230/2020 Comments

- Decree 230/2020 raises the export taxes on goods in the soy value chain (soybean oil, soybean meal, and soybeans) to 33 percent (from 30 percent) and raises the export tax on biodiesel to 30 percent (from 27 percent). Thus, there is no change to the export tax differential, which remains at 3 percent.²⁶
- Decree 230/2020 also affirms Commerce's conclusion that the export tax program is a revenue raising measure. Decree 230 states, "it is essential to improve tax revenues in an economic context of indebtedness, high inflation, growing recession, widespread unemployment and food emergency."²⁷
- Commerce should continue to recognize the significant changes in the Argentine export tax regime that went into effect after the conclusion of the underlying AD and CVD investigations. The undisputed changes in the Argentine export tax regime reduced the export tax differential significantly, and the recent Decree maintains that reduction at the same level.²⁸

LDC's Decree 230/2020 Comments

- Decree 230/2020 does not change the 3 percent differential between the export taxes on biodiesel and products in the soy value chain that existed at the initiation of the CCR and at the time of the preliminary determination.

²⁶ See GOA Decree 230 Comments at 2.

²⁷ *Id.* at 4.

²⁸ *Id.* at 7.

- The USDA's assumptions (in the USDA report Commerce placed on the record) about price divergence are too simplistic and rely too heavily on assumptions. Specifically, the precise impact on the price of soybeans sold in the domestic market (including for biodiesel production, which also faces export taxes) versus soybeans sold in the export market is more complex than explained in the report.²⁹
- The export tax differential between biodiesel and soy value chain products is the most relevant fact in this proceeding and for the subject merchandise: biodiesel. The differential remains unchanged by Decree 230/2020 and the Decree should not influence the final determination.³⁰

Commerce's Position: As explained in detail below, Commerce continues to find that there are insufficient changed circumstances to warrant an adjustment to the cash deposit rate or to otherwise reconsider the PMS adjustment from the final determination. As the petitioner argues, the export tax on soybeans is even higher now than before, having risen from 28.3 percent during the period of investigation (POI) to 33 percent as of March of this year, and a significant gap between Argentine and world soybean prices continues to exist as a result. Moreover, as the petitioner argues, the shifting export tax rates, most recently revised by Decree 230/2020, render any effort to reassess the effects of a PMS on biodiesel costs of production in the context of a CCR problematic.

Since the POI examined in the final determination, the tax regime has changed at least seven times:

- Decree 1343/2016: called for a monthly reduction of the tax on soybeans by 0.5 percent;
- Decree 1025/2017: increased the tax on biodiesel to 8 percent;
- Decree 486/2018: increased the tax on biodiesel to 15 percent;
- Decree 793/2018: repealed Decree 1343/2016 and reduced the tax on soybeans to 18 percent; however, the decree also imposed temporary taxes on both soybeans and biodiesel until December 2020, resulting in taxes of 28.3 percent and 25.3 percent, respectively, depending on the peso-USD exchange rate;
- Decree 37/2019: amended Decree 793/2018 and set the taxes on soybeans and biodiesel to 30 percent and 27 percent, respectively, until December 2020;
- Law 27.541/2019: provided authority for taxes up to 33 percent on both soybeans and biodiesel;
- Decree 230/2020: set the taxes on soybeans and biodiesel to 33 percent and 30 percent, respectively.³¹

²⁹ See LDC Decree 230 Comments at 3.

³⁰ *Id.*

³¹ See Verification Report at 2-3, GOA Decree 37 Comments, and GOA Decree 230 Comments.

Notably, because the rates set by Decree 37/2019 expire in December 2020 (as indicated above),³² the regime must change again before the year is over. Likewise, Law 27.541/2019 expires in December 2021, leading to additional uncertainty over the future of the tax rates.³³

The GOA argues that any hypothetical future changes to the regime are irrelevant given the retrospective nature of the U.S. system. In the view of the GOA, if the regime changes in the future, Commerce can simply conduct an administrative review, once there are entries, to examine the effects of such changes. Cash deposits must not be excessive, therefore, so as not to prevent commercially practical exports to the United States such that an administrative review can take place. Commerce disagrees. Although the GOA is correct that, in the event of an administrative review, assessment rates would be calculated on the basis of the tax regime in existence at that time, the deposits paid upon entry are an estimate of what may ultimately take place upon assessment.

Regardless, as discussed in detail below under Comment 3, Commerce continues to find for these final results that high export taxes on soybeans remain in place in Argentina, that there is a significant gap between Argentine and world prices, that there are therefore insufficient changed circumstances to warrant modifying the PMS finding or adjusting the cash deposit rates from the final determination. None of the comments submitted above indicate that there is a possibility that the export tax rate on soybeans will be lowered in the near future, and the GOA does not make such an assertion.

Regarding the GOA's arguments that there is no link between a high export tax on soybeans and the gap seen between Argentine and world soybean prices and that whatever PMS might have existed in the POI was remedied through the reduction of the differential between the export taxes on soybeans and biodiesel, Commerce addresses both arguments in detail below.

Comment 2: Whether Commerce Properly Initiated the CCR

Petitioner's Comments:

- While the statute does not define “changed circumstances,” the vast majority of CCRs address either one of two issues: 1) whether revocation of an order, in whole or in part, is appropriate when the domestic industry lacks interest in an order, and 2) whether cash deposit assessment rates apply to another entity due to a change in the corporate structure of a foreign producer or exporter. The statutory scheme does not contemplate a CCR as a vehicle for recalculating cash deposit rates, rather calling for such analysis in administrative reviews.

³² The expiration date is set by Decree 793/2018 at Article 1. *See* Request for CCR at Attachment 2. The amendments made by Decree 37/2019 to Decree 793/2018 do not affect the expiration date, which continues to apply to the new rates set by Decree 37/2019. *See* GOA Decree 37 Comments at Exhibit – GOA – 1.

³³ *See* GOA Decree 37 Comments at 5 (“This new law merely allows the President to raise the level of the export taxes a few percentage points, if he so decides, until 31 December 2021.”); *see also* USDA: Oilseeds and Products Update (placed on the record by Decree 230 NFI) (noting a period of “policy uncertainty” for Argentine oilseeds including soybeans and outlining changes to the export tax regime since early 2015).

- Commerce has previously stated that CCRs are not intended for recalculating cash deposit rates because those functions are already performed in administrative reviews.³⁴ Congress effectively ratified this interpretation by re-enacting the AD/CVD law numerous times without change to this statutory provision.³⁵ Departing from this policy/practice without a reasonable basis to do so is arbitrary and unlawful. In addition to Commerce's policy being consistent with the statutory framework, it is also practical because recalculating cash deposit rates in a CCR would inevitably lead to a massive number of requests by both foreign and domestic interested parties.
- Commerce's initiation of the CCR unlawfully renders administrative reviews superfluous and violates principals of finality of agency decision-making.
- Precedent cited by Commerce to justify initiation of the CCR is inapposite. In *Aluminum Extrusions*,³⁶ Commerce self-initiated a CCR merely to ensure the AD cash deposit was in compliance with a redetermined CVD rate. In *Steel Nails*,³⁷ Commerce did not review or redetermine the amount of dumping, but sought to determine whether collapsing two companies was appropriate. Commerce did not revise its calculation of the AD rates; it merely applied existing AD rates to the collapsed entity. In *Magnesium from Canada*, the changed circumstances reviewed were an outgrowth of suspension agreement negotiations. During the investigation, Commerce had already determined that such changes might eliminate the subsidy at issue.³⁸ By contrast, in this case, Commerce never addressed the significance of potential post-POI developments in its final determination, nor did it signal to parties that such changes could result in revised findings of dumping or a change to the PMS analysis.
- Commerce lacked a sufficient factual basis to initiate this CCR. The GOA presented no evidence that the distortion in domestic soybean prices was reduced or eliminated since the POI, including by providing evidence of how Argentine soybean prices compared to world market prices, the comparison that Commerce made in the investigation when finding a PMS that distorted soybean prices. The GOA maintains an export tax on soybeans that is virtually identical to the export tax that Commerce considered in the investigation (28.3 percent vs. 30 percent).

³⁴ See *Certain Iron Metal Castings from India: Adjustment of Countervailing Duty Deposit Rate*, 46 FR 38398 (July 27, 1981); see also *Ceramic Tile from Mexico, Preliminary Results of Administrative Review of Countervailing Duty Order*, 47 FR 53087 (November 24, 1982); and *Certain Pasta from Turkey: Final Results of Countervailing Duty Changed Circumstances Review*, 74 FR 54022 (October 21, 2009), and accompanying Issues and Decision Memorandum (IDM) at Comment 1 (upheld by *Marsan Gida Sanayi Ve Ticaret A.S. v. United States*, 35 C.I.T. 222 (2011)).

³⁵ See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of the statute and to adopt that interpretation when it reenacts a statute without change.").

³⁶ See *Aluminum Extrusions from the People's Republic of China: Initiation and Preliminary Results of Expedited Changed Circumstances Review*, 83 FR 34548 (July 20, 2018) (*Aluminum Extrusions*).

³⁷ See *Certain Steel Nails from Malaysia: Final Results of the Changed Circumstances Review*, 82 FR 34476 (July 25, 2017) (*Steel Nails*).

³⁸ See *Initiation of Changed Circumstances Countervailing Duty Administrative Reviews; Pure Magnesium and Alloy Magnesium From Canada*, 57 FR 41473 (Sept. 10, 1992) (*Magnesium from Canada*).

- Logic dictates that “good cause” must constitute a separate set of facts from the changed circumstances themselves, a conclusion upheld by the U.S. Court of International Trade CIT.³⁹ The supposed closure of the U.S. market to Argentine shipments does not constitute “good cause.” It is unsurprising that Argentine producers have been unable to ship to the United States at the same volume that they achieved prior to the imposition of the orders, as they achieved such volumes only through unfair trade practices. Argentine producers may gradually grow their shipments to the United States after establishing that they can do so at fairly traded prices.

GOA’s Rebuttal Comments:

- Commerce properly exercised discretion provided to it by Congress in initiating the CCR. Commerce considered comments provided by both the GOA and the NBB in making its decision, and its initiation decision explained in detail why it chose to exercise its discretion to conduct a review and why the GOA’s request properly satisfied the “good cause” requirement of the statute.
- The NBB makes much of the fact that the changes in *Pure Magnesium and Alloy Magnesium from Canada* had been mentioned during the investigation and that that CCR involved only a single company. There is no apparent reason why these facts should be interpreted as limiting Commerce’s discretion in future cases in which significant changes occur after the final order.
- CCRs exist to examine changes after the order and the good cause requirement allows Commerce to ensure that it reviews only those cases justified by the circumstances that have changed.

Commerce’s Position: Neither the Act, the SAA, or the regulations offer a definition of the term “changed circumstances” nor do they explain what aspects of a determination may be reconsidered in light of such changed circumstances. The Act simply refers to “a review” of “a determination.” In practice, Commerce has conducted CCRs to address a wide variety of issues, some of which could also be addressed in the context of an administrative review.⁴⁰ The courts have recognized that “[t]he scope of Commerce’s authority to initiate changed circumstances reviews under {section 751(b) of the Act} is delimited only by the general requirement that there be ‘changed circumstances sufficient to warrant a review’ of the antidumping order.”⁴¹

Section 751(b)(4) of the Act provides that Commerce may not conduct a CCR of an investigation determination within 24 months of that determination in the absence of “good cause.” The petitioner is unable to demonstrate any limitations on what constitutes good cause. As the CIT

³⁹ See *Inmax SDN v. United States*, 277 F. Supp. 3d 1367, 1371 (CIT 2017) (*Inmax*).

⁴⁰ See, e.g., *Aluminum Extrusions*, 83 FR 34548 (finding sufficient information to initiate a CCR to recalculate certain cash deposit rates); see also *Steel Nails*, 80 FR 71772 (finding sufficient information and “good cause” to initiate a CCR to evaluate whether a company was properly utilizing the correct cash deposit rate); *Magnesium From Canada – Initiation*, 57 FR at 41473 (finding sufficient information and “good cause” to initiate a CCR to evaluate changes to the major subsidy program at issue in the underlying investigation).

⁴¹ See *Mittal Steel, Inc. v. United States*, 461 F. Supp. 2d 1325, 1332 n.7 (CIT 2006) (“Commerce’s discretion is broad, and the range of matters subject to changed circumstances reviews is wide.”).

noted, “‘good cause’ is a term of art . . . that translates simply to a ‘legally sufficient reason.’”⁴² The CIT also ruled that the good cause standard “requires something more than just changed circumstances, or more simply, changed circumstances ‘plus.’”⁴³ Commerce does not read this language as meaning there must be two distinct findings for initiation: one for changed circumstances, and one for good cause. Rather, we believe the Court’s ruling simply means that the factual basis for initiating a CCR within 24 months of a final determination must be more than the factual basis for initiating a CCR after 24 months. Commerce believes it adequately described the factual basis for both initiating and for finding good cause.⁴⁴

Comment 3: Whether a PMS Still Exists

GOA’s Comments:

- Commerce noted three reasons for finding a PMS in the investigation:
 - Numerous studies indicating that the export tax on soybeans was designed to generate a low-cost surplus of soybeans for domestic use;
 - The export tax on soybeans was not intended as an ordinary revenue measure, but rather was unique to soybeans; and
 - Argentine prices for soybeans were nearly 40 percent lower than world market prices for soybeans during the POI.
- Commerce’s *Preliminary Results* considered irrelevant the imposition of a specific export tax on biodiesel in its AD analysis. However, the studies relied upon in the first prong above in fact consider the export tax differential between soybeans and biodiesel as the cause of the distortion, not merely the export tax on soybeans alone. Thus, the differential should be relevant to Commerce’s analysis. Additionally, because the differential has greatly decreased, the distortion analysis of the various studies and reports is no longer applicable and the studies themselves are no longer relevant.
- With regard to the second prong, Commerce explicitly found in the *Preliminary Results* that the export tax is no longer designed for downstream development purposes, but is part of an overall revenue improvement measure and tax scheme applied to exports of both agricultural and industrial commodities.
- With regard to the third prong, Commerce’s analysis ignores other significant factors affecting soybean prices such as efficiencies and comparative advantages in the Argentine soybean industry.
- Additionally, Commerce’s PMS theory assumes that the Argentine biodiesel producers enjoy a cost reduction resulting from the export tax regime because of the increased

⁴² See *Inmax*, 277 F. Supp. 3d at 1371.

⁴³ *Id.*

⁴⁴ See *Initiation Notice*, 83 FR at 56302.

supply of domestic soybeans. Therefore, Commerce's world market data comparison under the third prong should be considered only in conjunction with an analysis that compares changes in the export tax to the quantity of soybeans sent to crushing in Argentina; and an analysis comparing changes in the export tax to changes in the prices of Argentine soybeans. Because the export tax supposedly creates a surplus of soybeans for domestic use, a correlation between the export tax and the quantity of soybeans available for the biodiesel industry is of utmost importance in the "distortion" analysis. Accordingly, under Commerce's theory any increase in the export tax on soybeans should decrease Argentine soybean prices. However, evidence provided by the GOA demonstrates that changes in the export tax on soybeans do not consistently correlate with changes in the quantity of soybeans sent to crushing or Argentine soybean prices, which undermines Commerce's theory.

- Even assuming *arguendo* that the export tax regime that existed during the POI made more soybeans available for crushing and correlated to lower prices, the changes to the export tax regime examined in this CCR justify a change in the deposit rates. Relative export taxes (not only absolute values) have an impact on the decision whether to export soybeans or biodiesel. It is unreasonable to assume that the changes to the export tax regime had no effect on the supposed distortion in the soybean market.
- The record demonstrates that Argentina imported soybeans from the United States and other countries, suggesting strongly that the soybean market is functioning normally.
- The AD cash deposit rate should be adjusted to recognize that any cost benefit to biodiesel producers from low cost soybeans has been neutralized by the increased tax imposed on biodiesel exports.

Petitioner's Rebuttal Comments:

- The export tax on soybeans remains at a level nearly identical to where it was during the POI and Argentine soybean prices continue to be significantly depressed relative to world market prices.
- The studies and reports cited by Commerce were cited solely for the proposition that export taxes on soybeans distort internal soybean prices. Commerce correctly concluded in the *Preliminary Results* that the effects of the tax differential played no role in its distortion analysis in the investigation.
- Even if the differential were relevant to the distortion analysis, a three percent differential remains.
- Commerce correctly observed in the *Preliminary Results* that "the PMS provisions of the Act do not require a strict causal finding between the distortive government action and the observed distorted price." The CIT recently affirmed this interpretation, noting that

“{t}here is no language . . . that would require a causal analysis between a specific government action and the PMS.”⁴⁵

- The GOA’s intent as reflected in the design and structure of its export tax regime is irrelevant to the distortion analysis.
- Commerce’s conclusions in the CVD CCR do not compel any particular outcome in the AD CCR. The conclusions of the two investigations rely on separate and distinct analysis.

Commerce’s Position: Commerce continues to find that there are insufficient changed circumstances to warrant any adjustments to the cash deposit rates under the *AD Order*. As described in detail in the *Preliminary Results*, the PMS determination in the investigation rested on three findings: 1) numerous studies indicating that the export tax on soybeans was designed to generate a low-cost surplus of soybeans for domestic use, thereby artificially depressing soybean prices for domestic consumption; 2) the fact that the export tax on soybeans was not intended as an ordinary revenue measure, but rather was unique to soybeans, as soybeans were the only commodity subject to an export tax during the POI; and 3) record evidence that Argentine prices for soybeans were nearly 40 percent lower than world market prices for soybeans during the POI.⁴⁶ As a result, Commerce did not rely on the soybean prices paid by the respondents in the AD investigation as part of the cost of production calculation, finding that such prices “did not accurately reflect the cost of production in the ordinary course of trade.”⁴⁷ Instead, Commerce relied on market-determined prices.⁴⁸

In this CCR, Commerce considered the record evidence and determined in the *Preliminary Results* that the record of the CCR indicated a change only under the second finding. Specifically, we recognized that “the design and structure of the export tax regime has changed, which affects the ‘ordinary revenue measure’ prong.”⁴⁹ Although the petitioner disputes the *Preliminary Results* on this point, we continue to find that new taxes on additional commodities beyond soybeans under the export tax regime present “changed circumstances” relevant to our prior PMS determination from the investigation.

With respect to the first finding, as we did in the *Preliminary Results*, we continue to find that multiple publications on the record of both the investigation and the CCR concluded that the export tax leads to lower soybean prices (and it was intended to do so). Further, we continue to find that the GOA did not provide countering evidence in the form of studies, publications, or detailed analyses to undermine these publications, or to demonstrate that the export tax on

⁴⁵ See *Vicentin S.A.I.C. v. United States*, Slip Op. 2019-120 (CIT 2019) (*Vicentin*) at 26, n. 27.

⁴⁶ See *Preliminary Results*, 84 FR at 32716 (citing *Biodiesel from Argentina: Preliminary Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, in Part*, 82 FR 50391 (October 31, 2017) (*AD Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM) at 23-24, unchanged in *Biodiesel from Argentina: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, In Part*, 83 FR 8837 (March 1, 2018) (*AD Final Determination*), and accompanying IDM at Comment 3).

⁴⁷ *Id.* (citing *AD Preliminary Determination* PDM at 23-24; and *AD Final Determination* IDM at Comment 3).

⁴⁸ *Id.* (citing *AD Preliminary Determination* PDM at 23-24; and *AD Final Determination* IDM at Comment 3).

⁴⁹ *Id.*, 84 FR at 32717.

soybeans no longer impedes external trade and competitive domestic pricing for soybeans.⁵⁰ Furthermore, Commerce does not agree that the revisions to the export tax regime (*i.e.*, the increase to the tax on biodiesel) alter the conclusions to be drawn from the studies and reports on the record. While a differential tax rate between soybeans and biodiesel may affect the overall incentive to produce one product instead of the other by affecting their relative profitability, we would not expect it to be relevant to the simple question of whether soybean prices are distorted (the PMS allegation under consideration in this AD CCR). If, for example, the world soybean price is \$350 per ton, and the export tax is 30 percent, Argentine soybean producers/exporters will have to reduce their export prices to approximately \$270 per ton to stay competitive.⁵¹ Therefore, in the domestic market, the producers/exporters will now be willing to accept prices as low as \$270 per ton also (since they cannot do any better on the world market). A “gap” between world and domestic prices of approximately \$80 per ton is thus expected as a result of the 30 percent export tax. Another way of thinking of this result is to consider the export tax to be a type of penalty on exports, limiting export prices for soybeans to \$270 per ton, and thereby making cheap soybeans available domestically. The export tax on biodiesel plays no role in this outcome. The export tax on biodiesel only influences the decision to convert the soybeans to biodiesel before exporting.

As the OECD report explains:

*Export duties raise the cost of exported products, resulting in decreased export volumes. Reduced exports may divert some supply to the domestic market, leading to a downward pressure on domestic prices. Through this supply-side effect on international and domestic markets, export duties can create a differential between the price available to domestic processors and the price charged to foreign processors.*⁵²

Likewise, in comparing export tax rates on soybeans, soy meal, and oil, a 2013 study prepared for the U.S. Soybean Export Council concludes: “Because most Argentine soybean products are exported, export taxes reduce local prices. From the perspective of an Argentine crusher, a higher soybean tax rate reduces the local cost of soybeans by more than the reduction caused by export taxes in the revenues from the meal and oil.”⁵³ In other words, export taxes reduce domestic prices for the products to which they are applied (*i.e.*, an export tax on soybeans reduces the domestic price of soybeans, regardless of the level of the export tax on biodiesel). Thus, the existence or degree of the differential tells us nothing about whether soybean prices are distorted or not.

To emphasize this point, Commerce notes the following excerpt from the same study:

⁵⁰ *Id.*

⁵¹ $\$269.23 \times 30\% = \80.77 . $\$269.23 + \$80.77 = \$350$.

⁵² See Commerce’s Factual Information Submission at Attachment 1 (Exhibit CVD-ARG-07 at 21) (emphasis added). Elsewhere, the OECD report explains that the “advantage to domestic downstream processors” is dependent on differential export taxes; *e.g.*, “Export restrictions provide downstream processing industries with an advantage. Differential export duty rates play an important role in this regard: higher rates for raw materials or input products while lower rates apply for finished products.” *Id.* at 18.

⁵³ See Petitioner’s Factual Information at Exhibit CVD-ARG-22 at S1.

When export taxes are applied on beans and products, they reduce their internal prices. This is because a seller will require, at a minimum, a price equal to that it could receive by selling to the export market. When a trader sells soybean products to the world market, the net revenue equals the c.i.f. prices in Rotterdam, the pivotal point of reference for import prices in world trade in soybean products, *minus* freight costs from Argentina to Rotterdam (this yields the f.o.b. Argentina price) and *minus* the export tax (to derive the f.a.s. price).

A higher export tax, therefore, reduces the price that Argentine sellers receive from selling soybean products on the export market. As long as Argentina remains a net exporter of a product, the export tax will reduce the price that its producers can command domestically.⁵⁴

Thus, once again, whether soybean prices are distorted is solely a function of the export tax on soybeans. The GOA never attempts to identify a flaw in this basic economic logic as summarized by the reports above.

Again, Commerce emphasizes that a PMS determination rests on whether prices for inputs are distorted, and thus outside the ordinary course of trade. Section 773(e) of the Act states that Commerce's decision to make use of "another calculation methodology" in determining the respondents' costs hinges on whether the costs reported by the respondents (*i.e.*, the prices they pay for their inputs) "accurately reflect the cost of production in the ordinary course of trade." There is no requirement that Commerce consider whether the distortion is to the benefit of the respondent nor whether the distortion is designed to encourage production or exportation of the subject merchandise. The lack of such a requirement results from the fundamental nature of the AD sections of the Act versus the CVD sections of the Act. While the CVD law is concerned with concepts such as "financial contribution" and "benefit," the AD law is concerned with comparing U.S. prices to "normal" or "fair" value. Commerce believes that the purpose of the TPEA's revisions to section 773(e) is to ensure that normal value is accurately calculated,⁵⁵ and that the discretion afforded to Commerce under section 773(e), stating that Commerce "may" rely on an alternative calculation means that Commerce *should* rely on an alternative calculation when Commerce considers the alternative to result in a more accurate, market-driven calculation of normal value. Commerce's discretion under the PMS provisions is therefore intended as a means of allowing Commerce to select the most accurate cost values or home market prices, not to consider whether the respondent is benefitting from the market distortion.

The expectation that high export taxes on soybeans result in a gap between Argentine and world prices is borne out by the data on the record of this CCR, which indicates that a significant gap between Argentine and world prices has continued since the final determination, despite the fact that the GOA has closed the differential between soybean and biodiesel export tax rates to nearly zero. The gap still exists because the tax rate on soybeans is even higher now than during the investigation (33 percent now, versus 30 percent then). Specifically, according to the GOA's data, since September 2018 (when the export tax on biodiesel was raised to 25.3 percent), the gap between domestic and world prices has ranged between \$50 per ton to nearly \$100 per ton,

⁵⁴ *Id.* at 2 (emphasis in the original).

⁵⁵ See *Trade Preferences Extension Act of 2015*, Pub. L. No. 114-27, 129 Stat. 362, dated June 29, 2015 (TPEA).

or, in terms of a percentage, domestic prices have been 30 percent lower than world prices from last September through March 2019.⁵⁶ This is almost the same gap that existed during the POI.⁵⁷ Additional information submitted by the petitioner indicates the gap has been 34 percent between September 2018 and November 2019.⁵⁸ The gap is consistent as well. In eight months of the fifteen-month period from September 2018 through November 2019, the gap was higher than 35 percent.⁵⁹ In only two months was it below 30 percent.⁶⁰

The GOA argues that the observed price differences may be the result of “efficiencies” and comparative advantage. Likewise, in its questionnaire response, the GOA suggested other possible causes, including: currency fluctuations, trade measures imposed by China on U.S. soybean shipments, and the weather. The GOA, however, does not elaborate on these causes, or provide studies, publications, or other detailed analysis documenting the significance of these causes to the price gap between Argentine and world market prices.

The GOA asserts there is no correlation between the export tax on soybeans and Argentine prices. However, the data and analysis offered by the GOA mischaracterizes the issue. The question is whether Argentine soybean prices are lower than what they would be in the ordinary course of trade (*i.e.*, in the absence of the export tax on soybeans). Commerce measures the degree of deviation by comparing Argentine domestic prices with world prices. Thus, the concern (as explained at length already) is that the export tax creates a gap between domestic and world prices. By contrast, the GOA looks for a correlation between the export tax and Argentine soybean prices, not for a correlation between the export tax and the difference between Argentine soybean prices and world prices.⁶¹ Obviously many factors will cause soybean prices to go up and down globally (including in Argentina), but the consistent gap between Argentine and world prices indicates Argentine producers face an impediment in reaching the world market.

The GOA also offers an analysis of the so-called “crushing ratio,” which is the ratio that compares the volume of soybeans crushed in Argentine facilities to the overall Argentine harvest. Essentially, the GOA argues a steady crushing ratio indicates changes in the export tax rate have had no effect on domestic consumption. This analysis is also misplaced. Commerce’s finding in this AD CCR does not turn on whether the export tax on soybeans encourages downstream processing, such as the production of soy meal, soybean oil, or biodiesel. It hinges solely on our finding that the export tax on soybeans has led to unreliable and distorted soybean prices. Whether soybeans are crushed and further processed before being exported may very well be the result of differentials between export taxes on soybeans, soy oil, soymeal, and biodiesel. As the differentials decrease – *i.e.*, as the tax policy becomes neutral, the tax incentive to export one product or the other decreases. Therefore, we would expect a correlation between

⁵⁶ See GOA’s February 21, 2019 Initial Questionnaire Response (GOA IQR) at 14.

⁵⁷ See *AD Final Determination* IDM at Comment 3; see also Additional Information Memo at Attachment 3, at 45, and Exhibit 37-B.

⁵⁸ See Petitioner Decree 37 NFI at Attachment 6.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See, *e.g.*, GOA Case Brief at 10 (presenting a chart comparing export tax rates with Argentine soybean prices, with no indication of world prices or any other benchmark indicating whether Argentine prices are relatively lower than they would be absent the export tax).

the crushing ratio and the differentials between soybeans, soy oil, soymeal, and biodiesel, not between the crushing ratio and the export tax on soybeans alone.

Regardless, as Commerce explained in the *Preliminary Results*, “the PMS provisions of the Act do not require a strict causal finding between the distortive government action and the observed distorted price.”⁶² As the petitioner notes, this conclusion was recently upheld by the CIT, which ruled “{t}here is no language {} that would require a causal analysis between a specific government action and the PMS. . . . Moreover, to the extent that any causal link is implied by the statute or Commerce’s past practice, Commerce relied upon ample record evidence indicating that the GOA’s export tax regime distorts domestic soybean prices.”⁶³ In addition, Commerce describes in considerable detail in the *Preliminary Results* “a discernible correlation between the size of the so-called price gap and the amount of the export tax.”⁶⁴

The GOA next argues that, even assuming *arguendo* that the export tax on soybeans results in lower soybean prices, a change to the deposit rate is nevertheless justified because relative export taxes affect whether to export soybeans or biodiesel (the same point Commerce has just made above). This is not the right question to be asking. Rather, as explained in our *Preliminary Results*, and repeatedly above, the issue in a PMS analysis is simply whether the price of the input is distorted. Commerce’s concern in this AD CCR is only with whether it has an accurate measure of biodiesel production costs, and thus normal value, not with how the relative tax rates might create an incentive to export one product or another or at what price. Commerce believes it has adequately demonstrated that the soybean price is distorted, thus warranting an affirmative PMS finding for the various reasons provided in the *Preliminary Results*, the final determination, and recapitulated above.

The GOA offers one final argument for revising the cash deposit rate in consideration of the export tax on biodiesel: essentially, because we have adjusted soybean prices upwards to offset the price suppression caused by the export tax on soybeans, we should make a corresponding upward adjustment to reported U.S. prices for biodiesel in consideration of the price suppression caused by the export tax on biodiesel. The Act, however, expressly addresses the treatment of export taxes in determining the net U.S. price of subject merchandise. Specifically, section 772(c)(2)(B) of the Act calls for the *deduction* of export taxes from U.S. price if Commerce determines that the export tax has been included in U.S. price. Commerce followed this directive and made a deduction to U.S. price in the investigation to account for the small export tax on biodiesel in effect during the POI.⁶⁵ There is no authority under the Act to make an upward adjustment to the U.S. price of subject merchandise in consideration of what such prices might have been without the (presumably) distortive effects of the export tax on biodiesel. The PMS provisions are applicable to normal value, not U.S. sales prices. Therefore, Commerce is making no additional adjustment to U.S. price to account for the current export tax on biodiesel.

V. RECOMMENDATION

⁶² See *Preliminary Results*, 84 FR at 32717.

⁶³ See *Vicentin*, Slip Op. 2019-120, at 26, n. 27.

⁶⁴ See *Preliminary Results*, 84 FR at 32717.

⁶⁵ See *AD Preliminary Determination PDM* at 17.

For the reasons above, we continue to find that changed circumstances do not exist warranting any changes under the *AD Order*.



Agree

Disagree

5/5/2020

X



Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance