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CCR (Export Tax Differential)
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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 Countervailing Duty Order:
Biodiesel from Argentina

I. SUMMARY

The Department of Commerce (Commerce) has analyzed the comments submitted by interested parties in the changed circumstances review (CCR) of the countervailing duty (CVD) 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 Commerce Properly Conducted the CCR
Comment 4: Whether a Financial Contribution 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 export tax rates on soybeans and biodiesel had converged in the period

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 the Republic of Argentina and the Republic of Indonesia: Countervailing Duty Orders*, 83 FR 522 (January 4, 2018).

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



since the CVD order.³ Commerce preliminarily found that this shift demonstrated that the Government of Argentina (GOA) is no longer using those tax regimes to benefit or encourage the development of the domestic biodiesel industry.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 July 29, 2019, the petitioner requested that Commerce conduct a verification of factual information.⁷ The petitioner claimed that there was “good cause” to request a verification in this CCR because the “complexity of the record compel{led} a more thorough understanding of the {Government of Argentina} (GOA)’s recent export tax modifications.”⁸ Recognizing that verification would impede Commerce’s ability to meet its original September 19, 2019 deadline, the petitioner also requested an extension of the final deadline.⁹ On August 2, 2019, Commerce put a hold on the deadlines for case and rebuttal briefs until after verification of the GOA.¹⁰

Commerce issued its Verification Agenda on August 2, 2019.¹¹ The petitioner submitted its pre-verification comments on August 19, 2019.¹² Commerce conducted its verification of the GOA on August 26, 2019.¹³ On September 5, 2019, Commerce released its verification report regarding the GOA.¹⁴

On September 5, 2019, Commerce reinstated deadlines for case and rebuttal briefs and for requesting a hearing.¹⁵ On September 11, 2019, the petitioner requested an indefinite suspension

³ See *Preliminary Results*, 84 FR at 32717-19.

⁴ *Id.*

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 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 Petitioner’s Letter, “Biodiesel from Argentina: Petitioner’s Request for Verification,” dated July 29, 2019.

⁸ *Id.* at 3.

⁹ *Id.* at 4-5.

¹⁰ See Memorandum, “Changed Circumstances Reviews of the Antidumping and Countervailing Duty Orders on Biodiesel from Argentina: Holding of Deadlines,” dated August 2, 2019.

¹¹ See Memorandum, “Changed Circumstances Review of the Countervailing Duty Order on Biodiesel from Argentina: Verification of Information Submitted by the Government of Argentina,” dated August 2, 2019.

¹² See Petitioner’s Letter, “Biodiesel from Argentina: Coalition’s Comments Regarding Commerce’s Verification of Government of Argentina,” dated August 19, 2019.

¹³ See Memorandum, “Changed Circumstances Review of the Countervailing Duty Order on Biodiesel from Argentina: Verification Date,” dated August 7, 2019.

¹⁴ See Memorandum, “Changed Circumstances Review of the Countervailing Duty Order on Biodiesel from Argentina: Verification of Information Submitted by the Government of Argentina,” dated September 5, 2019 (Verification Report).

¹⁵ 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.

of the deadlines for briefs and the final determination.¹⁶ The petitioner requested that Commerce accept new factual information also on September 11, 2019.¹⁷ On September 12, 2019, the GOA responded, stating that a short extension of the deadlines was acceptable.¹⁸ On September 12, 2019, Commerce issued a short extension of deadlines.¹⁹ Commerce rejected the petitioner's request to include new factual information on the record on September 18, 2019.²⁰

On September 17, 2019, the petitioner requested a public hearing regarding the CCR.²¹ The petitioner and the GOA submitted case briefs on September 17, 2019.²² On September 23, 2019, the petitioner and the GOA submitted rebuttal briefs.²³ Pursuant to the petitioner's request, Commerce held a public hearing on September 26, 2019.²⁴

On October 16, 2019, Commerce placed additional factual information on the record of this proceeding regarding biodiesel prices.²⁵ In response, the petitioner placed additional factual information on the record on October 24, 2019 regarding the biodiesel market.²⁶

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).²⁷ 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

¹⁶ See Petitioner's Letter, "Biodiesel from Argentina: Request for Meeting and Extension of Briefing Schedule," dated September 11, 2019.

¹⁷ See Petitioner's Letter, "Biodiesel from Argentina: Request to Expand Record to Include Factual Information Regarding Political Developments in Argentina," dated September 11, 2019.

¹⁸ 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.

¹⁹ 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.

²⁰ See Memorandum, "Changed Circumstances Review of the Countervailing Duty Order on Biodiesel from Argentina: Rejection of Document from the Administrative Record," dated September 18, 2019.

²¹ See Petitioner's Letter, "Biodiesel from Argentina: Petitioner's Hearing Request," dated September 17, 2019.

²² See Petitioner's Case Brief, "Biodiesel from Argentina: Petitioner's Case Brief," dated September 17, 2019 (Petitioner's Case Brief); *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's Case Brief).

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

²⁴ See Hearing Transcript, "In the Matter of: The Changed Circumstances Review of the Countervailing Duty Order on Biodiesel from Argentina," dated September 26, 2019.

²⁵ See Memorandum, "Ex Parte Meeting with the National Biodiesel Board and the American Soybean Association," dated October 16, 2019.

²⁶ See Petitioner's Letter, "Biodiesel from Argentina: Petitioners' Submission to Rebut, Clarify, or Correct Information Placed on the Record," dated October 24, 2019 (Petitioner's October 24, 2019 Letter).

²⁷ See Memorandum, "New Factual Information," dated December 17, 2019 (Decree 37 NFI).

GOA.²⁸ Eleven days later, Commerce received rebuttal information and comments from the petitioner and the GOA.²⁹

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).³⁰ 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, the GOA, and LDC.³¹

III. FINAL RESULTS OF REVIEW

When Commerce initiated the CCRs, we did so pursuant to the GOA's request that we "ensure that the CVD deposit rate be removed or, at a minimum, adjusted to reflect this significant change in circumstances."³² Cash deposit rates are intended to be based on an estimate of "prospective dumping and subsidization."³³ Moreover, Commerce has no obligation to adjust prospective cash deposit rates outside of an administrative review. In relevant portion, section 751(a) of the Act ("Periodic Review of Amount of Duty" or "administrative review") states that, "if a request for such a review has been received,"³⁴ Commerce "shall – (A) review and determine the amount of any net countervailable subsidy," and that "the determination under this paragraph shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties."³⁵ By contrast, section 751(b) of the Act ("Reviews based on changed circumstances") conditions the review of a final determination on a demonstration of "sufficient" changed circumstances. As explained below, for the final results of this review, we have concluded – based largely on changes to the record since the preliminary results – that there are not sufficient changed circumstances upon which we can accurately review the final determination or adjust the cash deposit rates.

²⁸ 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).

²⁹ 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).

³⁰ 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).

³¹ 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.

³² See Request for CCR at 2.

³³ "{T}he purpose of the CCRs is to consider whether circumstances have changed since the end of the POIs such that the cash deposit rates established by the final determinations (and put into effect by the *Orders*) are no longer *the best* estimates of prospective dumping and subsidization and therefore are no longer appropriate for purposes of collecting deposits." *Preliminary Results*, 84 FR at 32716 (emphasis added).

³⁴ See Section 751(a)(1) of the Act.

³⁵ See Section 751(a)(2)(C) of the Act.

Our decision to consider such an adjustment was based on the GOA's suggestion that there was a straightforward, simple change to the export tax regime designed to eliminate the subsidy.³⁶ In the rare instances in the past where Commerce has determined to adjust cash deposit rates outside of an administrative review, it has been when the alleged change was clear cut and discrete, and the effect of the change on the cash deposit rate was likewise straightforward. For example, in *Iron Metal Castings*,³⁷ Commerce reexamined cash deposit rates when the government of India offered evidence of a simple change to its bounty rate (grants awarded for exporting), a reduction from 12.5 percent to 5 percent. Because the subsidy rate was equal to the bounty rate, the implication of the change was clear: the subsidy rate for the program was now 5 percent, and all cash deposit rates were now 7.5 percentage points lower than before.³⁸

A year after *Iron Metal Castings*, Commerce noted concerns with following that precedent in the future. Among our concerns, as discussed in *Ceramic Tile*,³⁹ we noted that foreign governments had an incentive to report only changes to subsidization of subject merchandise that were favorable to their own industry: "The obvious problem is that such a policy is inherently biased toward decreases which governments will expeditiously report."⁴⁰

In the current CCR, there are no longer clear cut and discrete changes to examine and it is no longer certain whether Commerce has the full subsidy picture before it (as discussed below). The export tax regime is a system that appears to be in a state of near constant flux and Commerce has no assurances that the system will not change again in the immediate future.

Since the period of investigation examined in the final determination (2016), 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

³⁶ See generally Request for CCR (a short, five-page narrative describing a "dramatic" change that "virtually eliminated" the subsidy).

³⁷ See *Certain Iron Metal Castings from India: Adjustment of Countervailing Duty Deposit Rate*, 46 FR 38398, 38399 (July 27, 1981) (*Iron Metal Castings*); see also *Certain Iron Metal Castings from India: Countervailing Duty Order*, 45 FR 68650 (October 16, 1980). Comparing the adjusted rates with the order rates shows that all are 7.5 percentage points lower after the adjustment (e.g., Uma Iron and Steel was 16.8 percent in the order and 9.3 percent after the adjustment).

³⁸ See also *Preliminary Results of Changed Circumstances Administrative Reviews: Pure Magnesium and Alloy Magnesium from Canada*, 57 FR 47619 (October 19, 1992) (*Magnesium from Canada*). In *Magnesium from Canada*, Commerce revised a cash deposit rate after examining a single amended contract between the respondent and a Canadian utility company. Comparing the initiation date with the preliminary results date shows it took only one month for Commerce to make the preliminary decision. See *Initiation of Changed Circumstances Countervailing Duty Administrative Reviews: Pure Magnesium and Alloy Magnesium From Canada*, 57 FR 41473 (September 10, 1992) (*Magnesium from Canada – Initiation*).

³⁹ See *Ceramic Tile from Mexico; Preliminary Results of Administrative Review of Countervailing Duty Order*, 47 FR 53087 (November 24, 1982) (*Ceramic Tile from Mexico*).

⁴⁰ *Id.* at 53088.

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.⁴¹

Notably, because the rates set by Decree 37/2019 expire in December 2020 (as indicated above),⁴² 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.⁴³

Of additional concern, the new GOA administration shows signs of resorting once again to the use of differential export taxes as a development tool for specific industries, and potentially abandoning the policy of neutrality underlying the initiation of this CCR. A draft version of the bill enacted as Law 27.541/2019 states: “{e}xport duties will be reduced for goods whose production implies a greater added value from the inputs used and the National Executive Power will develop stimulus policies for the producer.”⁴⁴ While this language was deleted from the final legislation enacted less than one week later, it nevertheless indicates that the use of export taxes for development purposes is something once again contemplated by the Argentine congress.

Likewise, a platform development document of the Justicialist Party, a member of the coalition supporting the election of President Fernandez, proposed to expand soybean production and the adoption of a “set of policies . . . promoting the development of exports and products associated with them with added value.”⁴⁵ Thus, a return to the use of export taxes to encourage soybean derivatives is contemplated by the ruling coalition of Argentina.⁴⁶

Decree 230/2020 states: “That it is essential to establish inclusive policies for the export activity of regional economies that improve their performance and increase the competitiveness of the export of goods and services as their added value increases” (*i.e.*, promote downstream products),⁴⁷ and the underlying customs statute provides that, among other goals, the permissible aims of the president’s authority under the customs law are to “ensure the maximum added value

⁴¹ See Verification Report at 2-3, GOA Decree 37 Comments, and GOA Decree 230 Comments.

⁴² 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.

⁴³ 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).

⁴⁴ See Petitioner Decree 37 Comments at Attachment 5 (Draft Emergency Bill at Article 49).

⁴⁵ *Id.* at Attachment 8.

⁴⁶ The CVD Petition detailed Argentina’s long history of using differential export taxes for development purposes. See CVD Petition at 21-23 (placed on the record of this proceeding in Additional Information Memorandum at Attachment 1).

⁴⁷ See Decree 230 NFI (preamble to Decree 230/2020).

possible in the country in order to obtain an adequate income for national labour” {i.e., promote downstream products like biodiesel} and to “stabilize domestic prices at convenient levels or maintain the supply volume that is appropriate to domestic requirements” (i.e., keep cheap materials (like soybeans) available for downstream products (like biodiesel)).⁴⁸

Thus, there are not simple or discrete changed circumstances that allow Commerce to determine with any confidence the prospective rate of subsidization. As noted above, the record indicates that the export tax regime will be different in the near future and may once again be designed to promote the production of biodiesel.⁴⁹ Commerce emphasizes that the sole purpose of initiating the CCRs was to adjust cash deposit rates to apply to *future* entries. There is nothing currently suspended for which Commerce must determine an assessment rate. Thus, given that the purpose of the CCRs is to determine the best rate applicable to future shipments, we must have evidence of changed circumstances that can reliably indicate that a revised rate would be a better estimate of prospective subsidization than the rate currently in place.

In addition, the evidence gathered since the preliminary results discussed above gives Commerce reason to believe that an examination of the export tax regime alone may no longer provide a fair assessment of even the current state of biodiesel subsidization in Argentina. As noted above, one concern Commerce has expressed in the past is with a process “inherently biased toward decreases which governments will expeditiously report.”⁵⁰ Here, evidence cited above demonstrates a renewed interest in developing value added industries and soybean derivatives in particular.⁵¹ Thus, accounting for changes in the export tax regime without accounting for whatever other changes might be in place encouraging biodiesel production would result in a biased adjustment disfavoring the domestic industry. By contrast, in an administrative review, a complete review of changes since the final determination, including new subsidy programs, would be undertaken.

Finally, while Commerce also considered the inability of Argentine biodiesel producers to export to the United States in determining good cause existed to initiate the CCR,⁵² that consideration must be balanced against our ability to find facts sufficient to warrant an adjustment to the cash deposit rate. Commerce did not make a commitment to revising the rates – certainly not to making a speculative revision – because of the difficulties faced by Argentine exporters.

In order to avoid such speculative and incomplete results, Commerce must in the future be presented with evidence that there is some finality to changed circumstances alleged to warrant a cash deposit adjustment (e.g., a legislative termination of a program with no residual benefits), that the adjustment would be clear cut and discrete (e.g., the straightforward change to the bounty rate in *Iron Metal Castings* discussed above), or that additional changes have not taken place (and may not soon take place) adverse to the party making the request.

⁴⁸ See GOA IQR at Appendix VIII (Law No. 22.415 at Article 755).

⁴⁹ See *supra* page 6 (e.g., discussion of expiration dates in Decree 37/2019 and Law 27.541/2019, the draft version of Law 27.541/2019, the party platform).

⁵⁰ See *Ceramic Tile*, 47 FR at 53088.

⁵¹ See, e.g., *supra* n.44, n.45, n.47, and n.48.

⁵² See *Initiation Notice*, 83 FR at 56301-56302.

For all of the preceding reasons, Commerce determines for these final results of review that the GOA has not demonstrated sufficient changed circumstances to warrant a revision to the cash deposit rates determined in the final determination.

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

- 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 removed the AR\$3 or \$4 cap on the export tax applicable to all exports, resulting in an additional 12 percent tax on soybeans and biodiesel. Notably, the 30 percent rate is exactly the same rate that was in effect during the CVD period of investigation when Commerce found Argentina's export tax regime conferred countervailable subsidies.⁵³
- These changes to Argentina's export tax regime, and those that are on the horizon, reflect a policy or intention to stimulate production and profitability of downstream, value-added products such as biodiesel. Even before President Fernandez took office, news reports indicated that Mr. Fernandez was expected to adopt export tax policies that incentivized downstream processing industries such as biodiesel.⁵⁴
- Argentine domestic soybean prices were on average 33 percent lower than world market soybean prices from January 2017 through November 2019 (*i.e.*, since the CVD period of investigation), almost exactly the same level of discount that Commerce observed during the CVD investigation, demonstrating the substantial benefits that the Argentine biodiesel industry continues to receive through Argentina's export tax regime.⁵⁵
- Commerce explained in the *Preliminary CCR Results* that the purpose of the CVD changed circumstances review was to estimate future subsidization. The record in this review, coupled with recent developments under Argentina's new administration, make clear that Argentina's export tax regime continues to subsidize downstream processors such as the biodiesel industry. Petitioner recognizes that the situation in Argentina is highly fluid, with new leadership and changes to export tax and industrial policy occurring almost daily. In these circumstances, it would be backward-looking — and

⁵³ See Petitioner Decree 37 Comments at 4.

⁵⁴ *Id.* at 5.

⁵⁵ *Id.* at 7.

unreasonable — for Commerce to eliminate the existing CVD cash deposit requirements through a changed circumstances review.⁵⁶

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 three percent.⁵⁷
- 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 37/2019.⁵⁸
- 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 Commerce will be able to review any potential future changes in an administrative review.⁵⁹

*Petitioner's Decree 37/2019 Rebuttal Comments*⁶⁰

- The GOA asserts that the increase to the export tax rates applicable to soybeans and biodiesel, as implemented by Decree 37/2019, “is purely related to revenue-collection.” The GOA is wrong. As the Coalition established during this proceeding, the GOA’s export tax regime has always served multiple policy objectives, including economic development, and these new export tax measures enacted by the GOA do so as well.
- Even a three percent export tax differential is distortive and confers countervailable subsidies. This has been recognized by the USDA and the USTR and has been demonstrated thoroughly on the record of this proceeding.

*GOA's Decree 37/2019 Rebuttal Comments*⁶¹

- Newspaper and magazine articles should carry little, if any, evidential weight in attempting to establish the GOA’s intent in issuing new measures of its intent for the future. Rather, Commerce should rely on the stated intent of the measures themselves. Likewise, Commerce should not consider draft provisions that never came into force.

⁵⁶ *Id.* at 8.

⁵⁷ *See* GOA Decree 37 Comments at 2.

⁵⁸ *Id.* at 3.

⁵⁹ *Id.* at 3-4.

⁶⁰ *See* Petitioner Decree 37 Rebuttal Comments at 2-8.

⁶¹ *See* GOA Decree 37 Rebuttal Comments at 1-5.

- The petitioner’s conclusion that the situation in Argentina is highly fluid is mere conjecture. The fact that the differential between the two taxes remained unaltered despite the Argentine financial crises and through several regulatory changes demonstrates a commitment to continuity.
- The petitioner does not provide a single official statement directly addressing an eventual change to the export tax differential.
- The retrospective system carried out through administrative reviews makes this and any hypothetical future changes immaterial, insofar as Commerce will be able to review any potential future changes in an administrative review provided that excessive duties do not fully prevent exports to the United States.

Petitioner’s Decree 230/2020 Comments

- The most recent legislative decrees reverse prior policy and have *significantly increased the export tax* higher than the rate in effect during the POI. Moreover, the GOA continues to carefully calibrate its export tax rates to maintain a lower rate on downstream, value added products such as biodiesel.⁶²
- The fluidity and uncertainty of Argentina’s export tax policy render any effort to estimate future subsidization in the context of this CCR a near impossibility. Decree 230/2020 and its changes to Argentina’s export tax regime mark only the latest in a series of export tax policy changes and reversals that raise questions as to what is next and make any estimate of future subsidization in the context of this CCR a fool’s errand.⁶³
- It is worth noting that the failure to establish changed circumstances sufficient to revise cash deposit rates does not leave Argentina without options. As the Coalition has consistently stated, the Argentine parties can and should avail themselves of the administrative review process if they seek a recalculation of CVD cash deposit rates. The retrospective nature of the administrative review process would allow Commerce to examine whether imports of subject merchandise benefited from countervailable subsidies by examining a respondent’s production and sales during a fixed period of time, which it failed to do in this CCR. Such a process would yield more reliable data and more accurate measures of subsidization.⁶⁴
- The GOA, through the recent enactment of Law 27541 and now Decree 230/2020, has increased the export tax on soybeans to 33 percent — *three percentage points higher than the export tax on soybeans during the investigation*. As a result, the restraints imposed on Argentine soybean producers that depress domestic soybean prices are now greater than they were during the POI.⁶⁵

⁶² See Petitioner Decree 230 Comments at 2.

⁶³ *Id.* at 4.

⁶⁴ *Id.* at 6.

⁶⁵ *Id.* at 8.

- Commerce should find no changed circumstances exist in its final results and confirm that the GOA continues to provide a financial contribution in the form of soybeans for Less Than Adequate Renumeration (LTAR), with current cash deposit rates providing the best estimate of the benefits provided to Argentina's biodiesel producers.⁶⁶

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 three percent.⁶⁷
- 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."⁶⁸
- 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.⁶⁹

LDC's Decree 230/2020 Comments

- Decree 230/2020 does not change the three 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.
- 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.⁷⁰
- 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.⁷¹

⁶⁶ *Id.* at 12.

⁶⁷ *See* GOA Decree 230 Comments at 2.

⁶⁸ *Id.* at 4.

⁶⁹ *Id.* at 7.

⁷⁰ *See* LDC Decree 230 Comments at 3.

⁷¹ *Id.*

Commerce's Position: As explained in detail above, we agree with the petitioner that the export tax regime is in such a state of flux that there are no changed circumstances allowing us to determine with any confidence the prospective rate of subsidization, and that additional changes are likely to happen in the near future. We do not agree with the GOA that we must limit our conclusions to the texts of the measures themselves. Throughout this proceeding, as well as in the investigation, Commerce has considered third-party sources as evidence, and, in fact, Commerce routinely considers third-party sources in many proceedings. Limiting our examination of evidence solely to what a foreign government has included in recitals or preambular language of decrees, regulations, and statutes would allow for the possible manipulation of outcomes, especially when the documents are generated after a proceeding is underway. Nevertheless, our final results above do, in fact, quote the GOA's own documents in concluding that more changes are likely and that such changes might implement the GOA's stated goal of encouraging value added industries, such as biodiesel. The fact that two of the measures at issue, Decree 37/2019 and Law 27.541/2019, are set to expire in the near future is itself a strong indication that impending change is likely. Moreover, while the GOA is correct that the three percent differential has been maintained for approximately a year and a half, that is no guarantee that it will be maintained in the near future, particularly since the GOA administration has appears to be contemplating the use of export taxes for development purposes. There is no statutory requirement that a three percent differential be maintained and the differential could, in fact, be expanded tomorrow simply through executive decree.

Additionally, LDC in its comments takes issue with the conclusions of the USDA in the report Commerce placed on the record.⁷² Specifically, it takes issue with the report's conclusions regarding how the higher export tax on soybeans will affect soybean prices.⁷³ LDC considers the conclusions too simplistic and lays out alternative scenarios under which prices might behave differently than what the USDA predicts.⁷⁴ In our view, this argument seems actually to support the conclusion that any revisions to the cash deposit rate assigned to the export tax program should be left for a complete administrative review, when there are actual exports of biodiesel to the United States, and Commerce can actually measure how the tax rates in place at that time have affected various prices for soybeans and biodiesel, rather than engaging in assumptions about how the current differential no longer provides a benefit to biodiesel producers. Regardless, it does not undermine the report's assessment that the Argentine system now exists in a state of policy uncertainty.

Given that Commerce is finding for these final results insufficient changed circumstances warranting a cash deposit adjustment, we do not need to revisit issues concerning the existence of a financial contribution under the current circumstances. Therefore, the parties' comments concerning the GOA's motives in issuing Decree 30/2019 and Decree 230/2020 are moot, as well as their arguments regarding the significance of a three percent differential.

Finally, 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

⁷² See Decree 230 NFI at Attachment.

⁷³ See LDC Decree 230 Comments at 2

⁷⁴ *Id.* at 3.

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.

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.
- Commerce has previously stated that CCRs are not intended for recalculating cash deposit rates because those functions are already performed in administrative reviews.⁷⁵ Congress effectively ratified this interpretation by re-enacting the AD/CVD law numerous times without change to this statutory provision.⁷⁶ 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 principles of finality of agency decision-making.
- Precedent cited by Commerce to justify initiation of the CCR is inapposite. In *Aluminum Extrusions*,⁷⁷ Commerce self-initiated a CCR merely to ensure the AD cash deposit was in compliance with a redetermined countervailing duty (CVD) rate. In *Steel Nails*,⁷⁸ Commerce did not review or redetermine the amount of dumping, but sought to

⁷⁵ See *Certain Iron Metal Castings from India: Adjustment of Countervailing Duty Deposit Rate*, 46 FR 38398 (July 27, 1981) (*Iron Metal Castings Adjustment*); see also *Ceramic Tile from Mexico, Preliminary Results of Administrative Review of Countervailing Duty Order*, 47 FR 53087 (November 24, 1982) (*Ceramic Tile*); and *Certain Pasta from Turkey: Final Results of Countervailing Duty Changed Circumstances Review*, 74 FR 54022 (October 21, 2009) (*Pasta from Turkey*) 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) (*Marsan Gida Sanayi*)).

⁷⁶ See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (*Lorillard*) (“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.”).

⁷⁷ 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*).

⁷⁸ See *Certain Steel Nails from Malaysia: Final Results of the Changed Circumstances Review*, 82 FR 34476 (July 25, 2017) (*Steel Nails*).

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.⁷⁹ 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 a negative subsidy finding.

- Commerce lacked a sufficient factual basis to initiate this CCR. 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). The GOA did not refer to any impact of tax rate changes on Argentine soybeans prices, which would have been informative of whether the GOA eliminated the countervailable program.
- Logic dictates that “good cause” must constitute a separate set of facts from the changed circumstances themselves, a conclusion upheld by the CIT.⁸⁰ 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 National Biodiesel Board (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 identified during the investigation and that the CCR cited 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.

⁷⁹ See *Initiation of Changed Circumstances Countervailing Duty Administrative Reviews; Pure Magnesium and Alloy Magnesium from Canada*, 57 FR 41473 (September 10, 1992) (*Magnesium from Canada*).

⁸⁰ See *Inmax SDN v. United States*, 277 F. Supp. 3d 1367, 1371 (CIT 2017) (*Inmax*).

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. In fact, there is no implication that there are any limitations. The Act simply refers “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.⁸¹ 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.”⁸²

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 noted, “‘good cause’ is a term of art . . . that translates simply to a ‘legally sufficient reason.’”⁸³ The CIT also ruled that the good cause standard “requires something more than just changed circumstances, or more simply, changed circumstances ‘plus.’”⁸⁴ Commerce believes it adequately described the factual basis for both initiating and for finding good cause.⁸⁵

Comment 3: Whether Commerce Properly Conducted the CCR

Petitioner’s Comments:

- At the outset of the CCR, the NBB urged Commerce to conduct a rigorous, comprehensive review of all relevant facts since the end of the period it investigated in the underlying investigation, and not limit its consideration to the limited facts and cherry-picked time period showcased by the GOA in its request for review. These procedures include establishing an appropriate period of review (POR) and soliciting factual information from individual company respondents. Failing to establish these procedures undermines the integrity and lawfulness of Commerce’s Preliminary Results.

GOA’s Rebuttal Comments:

- Commerce did not err by not establishing a POR. Commerce has the discretion to request information relevant to the changed circumstances that it is examining. In fact, Commerce placed no temporal limitation on the review, and the information examined spanned the period prior to, during, and after the investigation.

⁸¹ 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).

⁸² 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.”).

⁸³ See *Inmax*, 277 F. Supp. 3d at 1371.

⁸⁴ *Id.*

⁸⁵ See *Initiation Notice*, 83 FR at 56302.

- Commerce did not err by failing to examine any private exporters. Clearly the changes under examination were changes to the GOA's export tax program, not changes to the private biodiesel exporters' operations.

Commerce's Position: As explained above, the Act and regulations provide very little in terms of restrictions on what Commerce may or may not examine within a CCR. Commerce therefore believes its conduct of this proceeding was consistent with the discretion provided to it under the Act. Additionally, as described in the background section at the outset of this memorandum, Commerce solicited and considered comments from all interested parties throughout this proceeding. Commerce examined the complete history of the changes to the regime since the CVD investigation was completed.⁸⁶ Commerce also sought and examined extensive information concerning the design and structure of the current export tax regime.⁸⁷ In addition, Commerce followed the petitioner's suggestion to examine the complete administrative files of the GOA concerning the relevant regime changes at verification.⁸⁸ Also at verification, Commerce held discussions with officials of the GOA concerning the history, purpose, and operation of the regime changes.⁸⁹

Comment 4: Whether a Financial Contribution Still Exists

Petitioner's Comments:

- Commerce's final determination in the investigation that the GOA entrusted and directed soybean suppliers to provide soybeans to biodiesel producers for LTAR did not in any way hinge on the existence of a biodiesel export tax or any differential between soybean and biodiesel export tax rates.
- Language from third-party sources cited by Commerce in the Preliminary Results is from the CVD petition, but was never quoted in full in the preliminary or final determinations.
- The extent of any export tax on biodiesel, and the relative export tax rates on soybeans and biodiesel are surely relevant to analyzing incentives to export biodiesel, but such incentives are irrelevant to a domestic production subsidy. Ensuring access to cheap soybeans for domestic production and incentivizing the export of biodiesel are separate and distinct programs and policy objectives. Several sources on the record recognize this distinction.
- The export tax on soybeans is virtually unchanged since the POI and Argentine soybean prices continue to be well below world market prices.
- If Commerce continues to find that the relative export tax rates on soybeans and biodiesel are relevant, it should nevertheless conclude that the export tax regime continues to

⁸⁶ See GOA IQR at 1-21 (repeating the questions asked by Commerce concerning all changes since January 2018).

⁸⁷ *Id.*

⁸⁸ See GOA Verification Report at 4-6 (discussing the "expedientes" examined at verification).

⁸⁹ *Id.* at 1-8.

confer a countervailable subsidy, because the export tax on soybeans remains three percentage points higher than the export tax on biodiesel.

- Evidence on the record indicates that even a three percent differential is enough to benefit downstream producers and even to encourage exports.
- Argentina's export tax regime has always satisfied multiple objectives, including economic development, general revenue collection, and economic stability. The record demonstrates that the GOA continues to account for the profitability and competitiveness of the biodiesel industry as one of these objectives.
- Neither the IMF proposal nor the OECD report corroborate a change in Argentina's export tax policy. The IMF proposal is largely focused on economic policies only tangentially related to its export tax regime. The OECD report is from 2010 and is not relevant to understanding the 2018 changes to the export tax regime.

GOA's Comments:

- The verification of the GOA supports the preliminary finding that the export tax regime is not a countervailable subsidy. The documents examined at verification confirmed that the changes to the export tax regime were designed and structured to facilitate fiscal consolidation.

Petitioner's Rebuttal Comments

- The GOA cites no evidence on the record demonstrating that its export tax on soybeans no longer distorts domestic soybean prices.
- The GOA cites no evidence on the record for its claim that its export tax regime is now designed only for fiscal consolidation. To the contrary, verification confirmed that the GOA's export tax regime continues to serve multiple purposes and explicitly accounts for the economic interests of the biodiesel industry.
- Moreover, the GOA admitted at verification that it was "unrealistic" for biodiesel producers to pay an additional three percent in export taxes. That the GOA believes it is unrealistic for biodiesel producers to pay the same export tax rate as soybean farmers evinces an important purpose of the GOA's export tax regime – namely, to ensure that any cost of an export tax on biodiesel is less than the economic benefit from depressed soybean prices.

GOA's Rebuttal Comments

- Commerce correctly recognized that the dramatic change from a 30 percent differential to a three percent differential reflected a change in the design of the export tax regime, one relevant to the allegation as described in the petition and elsewhere in the investigation.

- To be a countervailable subsidy, certain legal tests must be met, including the requirement of a financial contribution by the government. Only if such requirements are satisfied does the question arise as to how best to quantify the benefit, which is, at times, an imperfect quantification methodology.
- The petitioner erroneously argues that the three percent differential between the export taxes on soybeans and biodiesel continues to incentivize biodiesel exports. The petitioner's argument once again conflates financial contribution with the quantification of benefit. Commerce properly focused on the fact that subjecting the biodiesel exporters to a significant burden – an export tax – changed the conception of the program and removed all doubt that the program was directing and entrusting soybean growers to benefit the biodiesel industry. The continued differential of three percent does not change that conclusion or alter that analytical framework.
- The GOA is interested – as are all governments – in financial stability, which also includes the ability to collect taxes, which, in Argentina, include export taxes. To say the GOA is favoring the biodiesel industry with countervailable subsidies because it taxes the industry at 15 percent rather than 18 is wrong and without support in the record of this review.

Commerce's Position: As explained at length above, Commerce has concluded there are not sufficient changed circumstances to warrant a revision to the cash deposit rates determined in the final determination. Therefore, the issue of whether a financial contribution exists under the current circumstances is now moot.

V. RECOMMENDATION

For the reasons above, we find that sufficient changed circumstances do not exist warranting a recalculation of the CVD deposit rates in the order.

☒

☐

Agree

Disagree

5/5/2020

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler

Assistant Secretary

for Enforcement and Compliance