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Remand Redetermination
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Vicentin S.A.I.C. et al. v. United States
Consol. Court No. 18-00111; Slip Op. 19-120 (CIT September 10, 2019)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

I. SUMMARY

The Department of Commerce (Commerce) has prepared these final results of redetermination pursuant to the remand order of the Court of International Trade (the Court) in *Vicentin S.A.I.C. et al. v. United States*, Consol. Court No. 18-00111, Slip Op. 19-120 (CIT September 10, 2019) (*Remand Order*). These final remand results concern *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) (*Final Determination*) and the accompanying Issues and Decision Memorandum (IDM), and the antidumping duty (AD) order on biodiesel from Argentina (*AD Order*).[1] The petitioner is the National Biodiesel Board Fair Trade Coalition (NBB). The respondents selected for individual examination were Vicentin S.A.I.C. (Vicentin), and LDC Argentina S.A. and Louis Dreyfus Company Claypool Holdings LLC (collectively, LDC).[2]

On September 10, 2019, the Court remanded certain aspects of the *Final Determination* to Commerce for further consideration. First, the Court found that Commerce failed to clearly explain the legal basis empowering it to adjust normal value to account for the value of

[1] *See Biodiesel from Argentina and Indonesia: Antidumping Duty Order*, 83 FR 18278 (April 26, 2018).
[2] *See Biodiesel from Argentina: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, in Part*, 82 FR 50391 (October 31, 2017) (*Preliminary Determination*) and accompanying Preliminary Decision Memorandum (PDM).

renewable identification numbers (RINs) for both respondents.[3] Second, the Court held that Commerce's finding of the existence of a particular market situation (PMS) which distorted the cost of the soybean input was in accordance with law and supported by substantial evidence.[4] However, the Court found that Commerce's determination to make a PMS adjustment, although consistent with law, was unsupported by substantial evidence and required Commerce to explain why its determination that soybeans were being provided for less than adequate remuneration in the companion countervailing duty (CVD) investigation did not remedy the distortion.[5] The Court remanded Commerce's determination on both issues for further consideration or explanation.[6]

On January 6, 2020, Commerce issued Draft Remand Results addressing the issues from the *Final Determination* described above.[7] On January 15, 2020, we received comments on the Draft Remand Results from the petitioner, LDC, and Vicentin.[8] All comments are addressed below after the final analysis section.

Pursuant to the Court's *Remand Order*, Commerce has clarified the issues from the *Final Determination* described above. Based on this analysis, Commerce has: (1) clarified and explained the legal authority empowering it to make a RIN adjustment, and made such an adjustment to export price, as opposed to normal value; and (2) explained why it is reasonable to

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[3] *See Remand Order* at 8-15, 30.
[4] *Id.* at 15-30.
[5] *Id.* at 25-30; *see also Biodiesel from the Republic of Argentina, Final Affirmative Countervailing Duty Determination*, 82 FR 53477 (November 16, 2017) (*CVD Final Determination*) and accompanying IDM; *Biodiesel from the Republic of Argentina and the Republic of Indonesia: Countervailing Duty Orders*, 83 FR 522 (January 4, 2018), corrected by *Biodiesel from the Republic of Argentina and the Republic of Indonesia: Countervailing Duty Orders*, 83 FR 3114 (January 23, 2018) (*CVD Order*).
[6] *See Remand Order* at 30-31.
[7] *See* Draft Results of Redetermination, dated January 6, 2020 (Draft Remand Results).
[8] *See* Petitioner's Letter, "Biodiesel from Argentina: Petitioner's Comments on Draft Remand Results," January 15, 2020; *see also* LDC's Letter, "Biodiesel from Argentina: Comments on Draft Remand Redetermination," January 15, 2020 and Vicentin's Letter, "Vicentin's Comments on Draft Remand Redetermination *Biodiesel from Argentina*," dated January 15, 2020 (Vicentin Comments).

apply a PMS adjustment despite the imposition of the CVD remedy. For the purpose of these final results of remand redetermination, we have made certain changes to our calculations; however, after accounting for such changes, the rates upon remand for both LDC and Vicentin remain identical to the rates in the *Final Determination*.[9]

II. FINAL ANALYSIS

1. Authority for RIN Adjustment

A. Legal Framework

Section 772 of the Tariff Act of 1930, as amended (the Act) addresses the calculation of U.S. export price and constructed export price. Section 773 of the Act addresses the calculation of normal value. Sections 772(a) and (b) provide that in determining export price or constructed export price, Commerce begins with the price at which the subject merchandise is "first sold" in the United States, which is to be adjusted pursuant to the enumerated adjustments in section 772(c) and (d), as appropriate. Likewise, section 773(a)(1)(B)(1) provides that in determining normal value, Commerce begins with the price at which the foreign like product is "first sold" for consumption in the comparison market. These are the basic "starting price" provisions.

Pursuant to these provisions, Commerce promulgated 19 CFR 351.401(c), which states that "{i}n calculating export price, constructed export price, and normal value (where normal value is based on price), the Secretary normally will use a price that is net of price adjustments, as defined in section 351.102(b), that are reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable)."[10] Price adjustment is defined by 19 CFR

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[9] *See* "Revised Dumping Calculations Pursuant to Remand for LDC," dated January 6, 2020 (LDC Analysis Memo); *see also* "Revised Dumping Calculations Pursuant to Remand for Vicentin, dated January 6, 2020 (Vicentin Analysis Memo).

[10] *See Antidumping Duties; Countervailing Duties*, 61 FR 7308, 7329 (Feb. 27, 1996) (*1996 Proposed Rule*) ("The Department will continue its practice of adjusting reported gross prices for discounts, rebates and certain post-sale adjustments to price that affect the net price."); *see also Antidumping Duties; Countervailing Duties*, 62 FR 27296,

351.102(b)(38) as "a change in the price charged for subject merchandise or the foreign like product, such as a discount, rebate, or other adjustment, including, under certain circumstances, a change that is made after the time of sale (see section 351.401(c)), that is reflected in the purchaser's net outlay."[11]

Section 773(a) of the Act also provides that: "In determining…whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price…and normal value. In order to achieve a fair comparison with the export price…, normal value shall be determined as follows{.}"[12] The remainder of section 773 provides rules for calculating normal value, including certain enumerated adjustments under section 773(a)(6)-(8). The courts have recognized that the statute generally "seek{s} to produce a fair 'apples-to-apples' comparison between foreign market value and United States price{,}" and "to achieve that end, the statutes and Commerce Department regulations call for adjustments

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27300 (May 19, 1997) (*1997 Final Rule*) ("{The term 'price adjustment'} is intended to describe a category of changes to a price, such as discounts, rebates and post-sale price adjustments, that affect the net outlay of funds by the purchaser."); *id.* at 27344 ("Price adjustments include such things as discounts and rebates that do not constitute part of the net price actually paid by a customer…. This use of a net price is consistent with the view that discounts, rebates and similar price adjustments are not expenses, but instead are items taken into account to derive the price paid by the purchaser."). In a subsequent rulemaking, Commerce made certain changes to the regulations to implement its practice of not granting price adjustments where the terms and conditions were not established and known to the customer at the time of sale because of the potential for manipulation of the dumping margins through post-sale price adjustments. *See Modification of Regulations Regarding Price Adjustments in Antidumping Duty Proceedings*, 81 FR 15641 (March 24, 2016) (*2016 Final Rule*).

[11] In reviewing the pre-2016 version of the regulation, the Court noted that "{t}he regulatory provisions unambiguously require that rebates and other post-sale downward adjustments in the price charged for the foreign like product that are reflected in the purchaser's net outlay be reflected in the starting price Commerce uses for determining normal value." *See Papierfabrik August Koehler AG v. United States*, 971 F. Supp. 2d, 1246, 1257 (Ct. Int'l Trade 2014).

[12] *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. 1 (1994) (SAA) at 820 ("The requirement of Article 2.4 of the Agreement that a fair comparison be made between the export price…and normal value is stated in and implemented by section 773. To achieve such a fair comparison, section 773 provides for the selection and adjustment of normal value to avoid or adjust for differences between sales which affect price comparability.").

to the base value of both foreign market value and United States price to permit comparison of the two prices at a similar point in the chain of commerce."[13]

B. Background on RIN Adjustment

In the *Preliminary Determination*, Commerce found that the U.S. prices reported by LDC and Vicentin, as reflected on their commercial invoices to U.S. customers, included values for both biodiesel and RINs.[14] Commerce explained RINs in the *Preliminary Determination* as follows:

> In order to achieve its renewable fuel volume targets, the U.S. Environmental Protection Agency (EPA) requires an "obligated party," a term which encompasses producers and importers of gasoline or diesel fuel, to meet an annual renewable volume obligation (RVO). The EPA ensures compliance with the RVOs through the use of a tradeable credit system under which obligated parties must submit Renewable Identification Numbers (RINs) to the EPA that equal the number of gallons of renewable fuel in their RVO. RINs are generated through either U.S. production or importation of biodiesel. Under the Renewable Fuels Standard (RFS) program, biodiesel produced domestically or imported into the United States generates RINs. These RINs may be used by the party that generates them to satisfy its own RVO or traded and sold on a secondary market so that other obligated parties may buy RINs and use them to satisfy their RVOs. Once detached from the fuel itself, RINs can be freely traded to anyone that is registered with the EPA as a RIN owner.[15]

Further, because Commerce found that no comparable RIN value was added to biodiesel prices in Argentina, Commerce determined that it was appropriate to correct the imbalance between normal value and U.S. price caused by the RIN value to get a fair comparison as mandated under the Act.[16] Additionally, Commerce found that a PMS exists in the Argentine biodiesel market, and therefore determined it appropriate to base normal value for both LDC and

[13] *See Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995) (*Torrington*).
[14] *See Preliminary Determination* PDM at 28-30.
[15] *Id.* at 28-29 (internal footnotes omitted).
[16] *Id.* at 30.

Vicentin on constructed value when determining a comparable price in the foreign market.[17] Accordingly, in the *Preliminary Determination*, Commerce made a circumstance of sale adjustment under section 773(a)(6)(C)(iii) of the Act to correct the RIN imbalance by adding the value of the RIN to constructed value.[18]

In the *Final Determination*, Commerce instead relied on 19 CFR 351.401(c), allowing it to calculate normal value as "a price that is net of price adjustments."[19] Specifically, as Commerce determined that the gross or starting prices reported to Commerce for U.S. sales of biodiesel were reflective of an upward adjustment for RIN values, Commerce calculated constructed value to be inclusive of an offset addition to match that already embedded in U.S. price.[20]

In making the RIN adjustment, Commerce mainly relied upon information submitted by the petitioner and compiled by third-party sources.[21] Commerce did so because, except for the RIN values associated with LDC's constructed export price sales, the respondents claimed they were unable to estimate RIN values, as they did not participate directly in the RIN creation process upon the biodiesel's importation.[22] For LDC's CEP sales, because the biodiesel was imported by a U.S. affiliate, LDC reported estimated RIN values based on its own knowledge and sources.[23] Commerce noted that the RIN values submitted by the petitioner were nearly identical to those used by LDC to estimate RIN values for its constructed export price sales.[24]

C. Remand Order

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[17] *Id.* 21-23.
[18] *Id.* at 28-30, n.76.
[19] *See Final Determination* IDM at 12.
[20] *See Final Determination* IDM at 12.
[21] *See Preliminary Determination* PDM at 30.
[22] *Id.*
[23] *Id.*
[24] *Id.*

In the *Remand Order*, the Court held that "it is not clear under what statutory authority Commerce adjusted normal value to account for RINs" in the *Final Determination*.[25] The Court states that "{i}t appears there may be two sources of statutory authority upon which Commerce might have relied to adjust normal value to account for the value of RINs."[26] First, the Court noted that "Commerce seems to indicate in the final determination that it may adjust an identified value in order to establish 'the price at which' the foreign like product or subject merchandise 'is first sold.'"[27] According to the Court, Commerce "appears to consider" sections 772(a) and 773(a)(1)(A) and (B)(i) of the Act "as empowering it by virtue of 19 CFR 351.401(c)" to consider the RIN value a price adjustment that it can "neutralize."[28]

Second, the Court recognized that Commerce adjusts normal value pursuant to section 773(a)(6)-(8), which provides for adjustments to normal value to account for various costs and expenses, such as differences in circumstances of sale.[29] The Court also recognized that section 773(a)(8) provides for adjustments to constructed value, as appropriate, and that Commerce's regulation, 19 CFR 351.410(b), pertaining to circumstances of sale adjustments, directs that such adjustments shall generally only be made for direct selling expenses.[30] The Court further explained that Commerce "seems to consider" adjustments to starting price under sections 772(a) and 773(a)(1)(A) and (B)(i) of the Act and 19 CFR 351.401(c) as distinct from the enumerated adjustments under section 773(a)(6)-(8).[31]

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[25] *See Remand Order* at 12.
[26] *Id.* at 9-10.
[27] *Id.* at 10.
[28] *Id.* at 10-11.
[29] *Id.* at 11.
[30] *Id.*
[31] *Id.* at 11-12 (citing *2016 Final Rule*, 81 FR at 15644).

Although the Court understood that Commerce invoked 19 CFR 351.401(c) in making the RIN adjustment to constructed value in the *Final Determination*, the Court found that the statutory basis for Commerce's adjustment was unclear, and that Commerce failed to explain "why it can adjust the normal value as opposed to the U.S. price."[32] Additionally, the Court noted that, before the Court, the Government invoked section 773(a)(8) of the Act as a source of authority for adjusting normal value for RINs, and also referred to Commerce's authority to make a "fair comparison" under section 773(a) generally and to 19 CFR 351.401(c).[33] The Court found that Commerce "may consider" the adjustment appropriate under section 773(a)(8) of the Act, or "may believe" that section 773(a)(1)(B)(i) "implicitly grants Commerce the authority to adjust a price to account for imbedded values in the price, in order to identify 'the price at which the foreign like product is first sold.'"[34]

Accordingly, the Court found that "Commerce's explanation regarding its authority to adjust normal value for RINs is incomplete{, and} Commerce must clearly ground its determination in the statute."[35] Therefore, the Court ordered Commerce to further consider or explain the statutory authority empowering it to adjust normal value for RIN values embedded in U.S. price.[36]

D. Analysis

In the *Remand Order*, the Court recognized that Commerce attempted to adjust constructed value by an estimated value for RINs to account for a "perceived imbalance" between normal value and U.S. price in the *Final Determination* ("the RINs create a value in the

[32] *Id.* at 12-13.
[33] *Id.* at 13-14.
[34] *Id.* at 14.
[35] *Id.*
[36] *Id.* at 15.

United States that Commerce considers an embedded adjustment”).[37] Additionally, the Court held that it may be reasonably discernible that Commerce relied upon section 773(a) and 19 CFR 351.401(c) (“*Commerce appears to consider* {the starting price provisions} as empowering it by virtue of {19 CFR 351.401(c)} to adjust normal value to neutralize an embedded adjustment in export price. . . . Under this reading, the RIN value constitutes a price adjustment under {19 CFR 351.102(b)(38)}, and because {19 CFR 351.401(c)} calls for Commerce to use an export price net of adjustments, *Commerce seems to believe* it can neutralize an embedded RIN adjustment.”).[38] However, the Court still questioned Commerce’s reliance on this provision (“*Perhaps Commerce believes* that in identifying ‘the price at which’ the foreign like product or subject merchandise ‘is first sold’… it may adjust normal value to account for embedded values in the export price.”) and further held that Commerce did not explain why it can adjust normal value as opposed to U.S. price.[39] The Court acknowledged Commerce’s preference for adjusting normal value as opposed to U.S. price, but found this preference did not substitute for a clear explanation of its authority to do so.[40]

In the *Final Determination*, Commerce considered an adjustment under 19 CFR 351.401(c) to be necessary to account for the RIN value “embedded” in U.S. price, but concluded that the adjustment was most appropriately made as an addition to normal value, rather than as a deduction to U.S. price. For purposes of these final remand redetermination results, and in light of the Court’s concerns, Commerce is now revising its analysis as follows:

As further explained below, Commerce finds it appropriate to make an adjustment for RIN values as a deduction to U.S. price, rather than as an addition to normal value. Accordingly,

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[37] *Id.* at 8, n.12.
[38] *Id.* at 10-11 (emphasis added).
[39] *Id.* at 12-13 (emphasis added).
[40] *Id.* at n.13.

Commerce clarifies that the legal basis for making a RIN adjustment to U.S. price consists of sections 772(a) and (b) of the Act (pertaining to export price and constructed export price, respectively) and 19 CFR 351.401(c). Commerce also clarifies that the RIN issue is best characterized as an adjustment already included in the reported invoice price for biodiesel, as opposed to some intangible embedded value in U.S. price, which may have caused some unintended confusion. Although the invoice does not segregate out a biodiesel price from a RIN value, the record demonstrates that the invoice price does not reflect the true "starting price" of biodiesel or "price at which the *subject merchandise* is first sold" because it includes a RIN value. In other words, the invoice price is a price for biodiesel which has already been "adjusted" upwards to include the RIN value. Therefore, to isolate a U.S. starting price for biodiesel, Commerce must deduct the RIN value from the invoice price.

As described above, the basic "starting price" provisions of the Act, in particular, sections 772(a) and (b), provide that in determining export price or constructed export price, Commerce begins with the price at which the subject merchandise is "first sold" in the United States. Pursuant to these provisions, 19 CFR 351.401(c) provides that "{i}n calculating export price, constructed export price, and normal value (where normal value is based on price), the Secretary normally will use a price that is net of price adjustments, as defined in section 351.102(b), that are reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable)." "Price adjustment" is defined by 19 CFR 351.102(b)(38) as "a change in the price charged for subject merchandise or the foreign like product, such as a discount, rebate, or other adjustment, including, under certain circumstances, a change that is made after the time of sale (see section 351.401(c)), that is reflected in the purchaser's net outlay." Although the regulation and regulatory history indicate that a price adjustment is not

limited to discounts, rebates, post-sale price adjustments, or billing adjustments, the basic commonality is that there is *an existing adjustment or change* which is included in the reported price which must be accounted for to arrive at the net price actually paid by the customer for the merchandise under investigation.[41]

The record evidence supports a finding that the RIN values constitute price adjustments contemplated under the statutory and regulatory framework discussed above. As the Congressional Research Service noted: "The {Renewable Fuel Standard} is a market-based compliance system in which obligated parties (generally refiners and/or terminal operators) must submit credits to cover their obligations. These credits—Renewable Identification Numbers, or RINs—are effectively *commodities* that can be bought or sold like other commodities. For each gallon of renewable fuel in the RFS program, one RIN is generated."[42]

Essentially, when a foreign producer/exporter sells RIN-eligible biodiesel to the United States, it is selling two commodities: biodiesel, bundled with a RIN. If a party were to sell biodiesel without a RIN – whether because the biodiesel was not eligible for a RIN, the RIN was already detached and sold separately, or any other reason – the seller's price would reflect solely the value of the biodiesel, and accordingly would be significantly less than biodiesel sold with a RIN. For example, according to data collected by the International Trade Commission (ITC), B99 (a biodiesel blend containing 99.0%-99.9% biodiesel) sold in the United States for $2.27 per

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[41] *See 1996 Proposed Rule*, 61 FR at 7329; *1997 Final Rule*, 62 FR at 27300; *2016 Final Rule*, 81 FR at 15644 ("With respect to the proposed changes to 19 CFR 351.102(b)(38) in the Proposed Rule, these modifications were not intended to foreclose other types of price adjustments, such as billing adjustments and post-sale decreases to home market prices or increases to U.S. prices. Nonetheless, in light of a party's comment, the Department is modifying 19 CFR 351.102(b)(38) to refine the definition of price adjustment and to clarify that a price adjustment is not just limited to discounts or rebates, but encompasses other adjustments as well.").

[42] *See* Petitioner's Letter, "Biodiesel from Argentina: Petitioner's Particular Market Situation Allegations Regarding Respondents' Home and Third Country Market Sales and Cost of Production," dated August 2, 2017 (PMS Allegation) at Exhibit 13, (CRS RIN Analysis) (emphasis added).

gallon in 2016 on average with RINs included,[43] and for $1.01 per gallon when sold without RINs.[44] Thus, the respondents, and all other sellers of biodiesel, adjust their prices upwards when selling biodiesel that is RIN-eligible.

While LDC and Vicentin claim that during the POI they did not separately distinguish and quantify the RIN values, because the values were not separately taken into consideration during price negotiations,[45] such claims do not contradict the conclusion that sales prices charged to U.S. customers contain both a biodiesel component and a RIN component. As stated in the ITC Report: "The price of biodiesel is a function of the product itself, the RIN, if attached, and sometimes a portion of the {blender's tax credit}."[46] For that reason, the ITC collected pricing data on three bases: B100 including a RIN value, B99 including a RIN value, and B99 sold without RINs.[47]

This conclusion is supported by record information regarding the respondents' own practices. As LDC's U.S. affiliate stated at verification: "the price of B99 is comprised of the cost of biodiesel, plus the cost of petrodiesel, *plus a RIN value*, less expenses incurred by the blender. Although RIN values are implicitly factored into the price of biodiesel, they are not explicitly linked to or included as a line item in overall biodiesel pricing."[48] LDC's U.S. affiliate further explained: "{O}bligated buyers are cognizant of the value of RINs associated with a sale and likely factor it in when negotiating a price because they need RINs to meet their EPA

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[43] *Id.* at Exhibit 9 (ITC Preliminary Report) at Table V-4 (price per gallon weight-averaged by quantity in gallons).
[44] *Id.* at Table V-5 (price per gallon weight-averaged by quantity in gallons).
[45] *See* LDC's Letter, "Response to the Sections B and C Supplemental Questionnaire," dated August 18, 2017, at 9-20; *see also* Vicentin's Letter, "Vicentin, OMHSA, Molinos and Patagonia's Supplemental Sections B and C Questionnaire Response," dated August 31, 2017, at 9-14.
[46] ITC Preliminary Report. at 24.
[47] *Id.* at 26.
[48] *See* Memorandum, "Constructed Export Price Sales Verification of LDC Argentina S.A. in the Antidumping Duty Investigation of Biodiesel from Argentina," dated November 30, 2017 at 8 (LDC CEP Verification Report).

obligations."[49] Additionally, LDC itself acknowledged: "{E}veryone is aware of RIN prices in the United States and, as such, the customer has likely considered RIN values, the customer offers a flat price, so RIN values are not discussed."[50] Vicentin similarly stated at verification:

> {A}lthough RIN eligibility is not expressly discussed while negotiating biodiesel sales contracts, the company is informally aware that all U.S. sales must be accompanied by the certifications necessary to establish that the biodiesel is "RIN eligible" upon importation in to the United States. "RIN-eligible" is often included in the offer/confirmation emails between Vicentin and its U.S. customers, but it is not specific on any invoices. Even if RIN eligibility is not explicitly noted on the offer/confirmation, Vicentin knows to only sell RIN-eligible biodiesel to U.S. customers because non-RIN-eligible biodiesel has minimal value in the U.S. market.[51]

Moreover, one U.S. consumer of Argentine biodiesel, Biosphere, noted before the ITC: "the RIN price, is just embedded in the price of the product that we pay for it. So if we buy B-100 with RINs . . . we just look at . . . the RIN as just value components to the product that we're buying."[52]

Thus, regardless of the fact that the RIN value is not a separate line item on the invoice, and regardless of the fact that the RIN value is not separately negotiated between the Argentine seller and the U.S. customer, the invoice price (and entered value) is the price of biodiesel adjusted upwards to reflect the value of the RIN. As Commerce noted in the *Final Determination*, the price adjustment can be described as follows: "if a given RIN has a value of $0.75, it would *add* $0.75 to a gallon biodiesel. . . . {In this example,} in which the RIN value is

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[49] *Id.*
[50] *See* Memorandum, "Verification of the Sales Responses of LDC Argentina S.A. in the Antidumping Duty Investigation of Biodiesel from Argentina," dated November 29, 2017 at 9.
[51] *See* Memorandum, "Verification of the Sales Questionnaire Responses of Vicentin S.A.I.C. and Affiliated Companies in the Antidumping Duty Investigation of Biodiesel from Argentina," dated November 29, 2017 at 26.
[52] *See* Petitioner's Letter, "Factual Information Submission Regarding Vicentin's, OMHSA's, Molinos', and Patagonia's Supplemental Questionnaire Response," dated September 15, 2017 (Petitioner's Rebuttal Factual Information) (including the ITC Staff Conference Transcript as an unnumbered attachment) at p.109 of the ITC Staff Conference Transcript.

$0.75 per gallon, {U.S.} industry participants assume that a gallon of RINless B100 should be $0.75 per gallon less expensive than a gallon of B100 with K1 RINs attached."[53]

Further, RIN values are measurable and easily discernible, being subject to trading and published on a daily basis. For example, LDC's U.S. affiliate provided to Commerce "daily biodiesel reports" published by a broker that included RIN values.[54] Therefore, Commerce must net out the RIN value in order to isolate the starting price of the biodiesel, pursuant to section 772(a) of the Act and 19 CFR 351.401(c). In doing so, Commerce achieves the "apples-to-apples" comparison called for by the overall structure of the Act.[55]

In making the adjustment pursuant to section 772(a) of the Act and 19 CFR 351.401(c), Commerce is taking the same RIN values used in the *Final Determination*, but is now deducting those values from U.S. price. Commerce is placing the revised calculations on the record in the form of Excel spreadsheets.[56] Commerce defines the phrase "potential uncollected dumping duties" (PUDD) as the absolute difference between net U.S. price and normal value per unit (*i.e.*, the "unit margin") multiplied by the number of units sold in the United States on a comparison-specific basis, summed across all comparisons. In other words, it is the dollar value by which all

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[53] *See Final Determination* IDM at 12 (emphasis added). The same Indonesian producer/exporter informed Commerce that "The RIN value is embedded in the total value of each sale. The value is composed of the value of the physical RINless liquid biodiesel, plus the value of the RIN . . . ." *See* Petitioner's Rebuttal Factual Information (including the supplemental section A questionnaire response of Wilmar Trading PTE Ltd., *et al.* in the AD Indonesian investigation as an unnumbered attachment) at p. 20 of the supplemental section A questionnaire response.

[54] *See* LDC CEP Verification Report at 18; *see also* CRS RIN Analysis at 8-9 (providing a chart and analysis of publicly available RIN prices for RINs traded daily during 2013), and PMS Allegation at Exhibit 14 (daily RIN values provided by the petitioner and collected from a third-party publisher).

[55] *See, e.g.*, *Maverick Tube Corporation v. United States*, 861 F.3d 1269, 1274 (Fed. Cir. 2017) ("{A}llowing for duty drawbacks for goods unrelated to the subject merchandise contravenes the statutory goal of making apples-to-apples comparisons between foreign and United States prices."). Commerce recognizes that its reference to the "fair comparison" language in section 773(a) of the Act in the *Final Determination* may have caused some confusion regarding the statutory basis for the RIN adjustment. Commerce is not relying on this language for purposes of these final remand results. We note that the terms "fair comparison" and "apples-to-apples comparison" are sometimes used interchangeably to describe the overall statutory scheme.

[56] *See* LDC Analysis Memo; *see also* Vicentin Analysis Memo.

of a respondent's U.S. sales fall short of normal value. "{T}he statute {} requires that PUDD, the difference between foreign market value and the United States price, serve as the basis for both assessed duties and cash deposits of estimated duties."[57] PUDD is typically divided by the total value of the firm's U.S. sales to arrive at an *ad valorem* weighted-average dumping margin. The PUDD has not changed for either respondent pursuant to this revised calculation. To see this, consider an example where unadjusted normal value is $3 per gallon, unadjusted U.S. price is $2 per gallon, the RIN value is $1 per gallon, and the respondent sells one million gallons to the United States. In the *Final Determination*, Commerce calculated PUDD as follows:

Normal value = $3 + $1 RIN = $4 / gallon

U.S. price = $2 / gallon

Unit margin = $4 - $2 = $2 gallon

PUDD = $2 x 1,000,000 gallons = $2 million.

Pursuant to this Remand Redetermination:

Normal value = $3 / gallon

U.S. price = $2 - $1 RIN = $1 / gallon

Unit margin = $3 - $1 = $2 gallon

PUDD = $2 x 1,000,000 gallons = $2 million.

Thus, under either method, the PUDD is $2 million. The *ad valorem* rate will change dramatically, however, depending on the denominator the PUDD is divided by. If the unadjusted U.S. price is used ($2 / gallon), the *ad valorem* rate will be 100 percent.[58] If the adjusted U.S. price is used ($2 - $1 = $1), the *ad valorem* rate will be 200 percent.[59] If the later rate of 200

[57] *See Torrington Co. v. United States*, 44 F.3d 1572, 1578 (CAFC 1995).
[58] $2 million / ($2 x 1 million gallons) = 100%.
[59] $2 million / ($1 x 1 million gallons) = 200%.

percent is used as the cash deposit rate, there will be a significant overcollection of duties at the border. That is because the invoice value or entered value seen by Customs and Border Protection (CBP) is inclusive of the both the biodiesel and RIN values. Thus, if the *ad valorem* cash deposit rate is calculated on the basis of $1 per gallon (the RIN-exclusive value), but that rate is applied to shipments entering at $2 per gallon (the RIN-inclusive value), CBP will collect $4 million in PUDD instead of $2 million. Therefore, for these final remand results, Commerce is using the unadjusted U.S. sales price to determine the *ad valorem* cash deposit rates, which are 60.44 percent (LDC), 86.23 percent (Vicentin), and 74.63 percent (all others), the same rates determined in the *Final Determination*.[60]

2. PMS Adjustment for Distorted Soybean Prices

A. Legal Framework

Section 773(a)(1)(B)(i) of the Act defines normal value as "the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price." Pursuant to section 771(15) of the Act, Commerce shall find "sales and transactions" to be "outside the ordinary course of trade" in situations in which it "determines that the particular market situation prevents a proper comparison with the export price or constructed export price." Section 504 of the Trade Preferences Extension Act of 2015 (TPEA) added the concept of "particular market situation" to the definition of the term "ordinary course of trade" in section 771(15) of the Act, as well as to section 773(e) of the Act pertaining to constructed value.[61] Section 773(e) of the Act directs that constructed value is the sum of the costs of materials and

[60] *See* LDC Analysis Memo and Vicentin Analysis Memo for the revised calculations.
[61] Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, 129 Stat. 362 (2015) (TPEA).

fabrication employed in producing the subject merchandise, plus amounts for general and administrative expenses, interest, profit, selling expenses, and U.S. packing costs.

Pursuant to section 504 of the TPEA, section 773(e) of the Act also provides that "if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology."

B. Background on PMS Adjustment for Distorted Soybean Prices

In the *Preliminary Determination*, as upheld in the *Final Determination*, Commerce found that a PMS existed due to the extensive regulatory control of the Government of Argentina (GOA) over its biodiesel market, thus causing Commerce to rely on constructed value as normal value.[62] Additionally, Commerce determined separately that a PMS exists with regard to the price of soybeans, a constituent element of the cost of production of biodiesel in Argentina, because of the GOA's 30 percent export tax on soybeans.[63] Commerce's determination rested on three findings: (1) numerous studies indicated 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.[64] As a result, Commerce did not rely on the soybean prices paid by the respondents as part

[62] *See* Preliminary Determination PDM at 21-23; *see also* Final Determination IDM at 16-18.
[63] *See* Preliminary Determination PDM at 23-24; *see also* Final Determination IDM at 21-23.
[64] *See* Final Determination IDM at 21-23.

of the cost of production calculation, finding that such prices "did not accurately reflect the cost of production in the ordinary course of trade."[65] Instead, Commerce relied on market-determined prices.[66]

In response to arguments that Commerce's PMS determination with respect to the export tax on soybeans results in an impermissible "double remedy" because of Commerce's affirmative subsidy determination with respect to the export tax in the companion CVD investigation,[67] Commerce explained that there is no statutory directive to avoid a PMS adjustment in circumstances where the underlying behavior also forms the basis of a countervailable subsidy.[68] Commerce also explained that the Act contains provisions directing Commerce to address potential double remedies across AD and CVD proceedings in certain limited situations, but that Congress had included no such language in the TPEA, despite the fact that the TPEA was enacted only three years after Congress addressed a double remedy issue in enacting new legislation in response to the Federal Circuit's decision in *GPX Int'l Tire Corp v. United States*.[69] Therefore, Commerce reasoned the TPEA's silence on the matter was intentional and that Congress intended for Commerce to conduct and apply the results of AD and CVD proceedings independently of one another, unless otherwise directed under the statute.[70]

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[65] *Id*.
[66] *Id*.
[67] *See* CVD Final Determination.
[68] *Id.* at 26-28.
[69] *Id.* at 27 (discussing section 772(c)(1)(C) of the Act pertaining to export subsidy offsets to export price or constructed export price; section 777A(f)(1) of the Act pertaining to adjustment of AD duties for CVD duties in nonmarket economy countries; Application of Countervailing Duty Provisions to Nonmarket Countries, Pub L. No. 112-99, 126 265 (2012) (adding section 777A(f)(1) of the Act); *GPX Int'l Tire Corp. v. United States*, 666 F.3d 732 (Fed. Cir. 2011) (*GPX CAFC*); and TPEA).
[70] *Id.* at 27-28.

C. Remand Order

In the *Remand Order*, the Court found lawful Commerce's resort to an alternative methodology pursuant to section 773(e) of the Act because of a PMS with respect to the GOA's export tax on soybeans.[71] In particular, the Court "decline{d} to read any restriction on the broad authority" that section 773(e) of the Act grants to Commerce in determining the methodology to calculate constructed value where a PMS exists.[72]

With respect to the respondents' argument that the imposition of both a PMS adjustment and CVD duties resulted in an impermissible double remedy, the Court found that Commerce's PMS determination was not "precluded as a matter of law."[73] Specifically, the Court held that it could not conclude "that Commerce's determination to resort to market-determined prices for soybeans based on the existence of a PMS is contrary to law on the ground that allowing for such an adjustment would constitute a double remedy."[74] The Court rejected the respondents' argument that the "fair comparison" language of section 773(a) of the Act includes a commitment to avoid double counting.[75] The Court concluded that the fair comparison language in the Act and similar language in the Statement of Administrative Action (SAA) referred only to the necessity to avoid double-counting adjustments within a single proceeding.[76] Further, the Court found that the Act's "silence on whether to account for remedies imposed in CVD proceedings when adjusting for a PMS stands in stark contrast with other situations in which

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[71] *See Remand Order* at 16-20.
[72] *Id.* at 19.
[73] *Id.* at 21.
[74] *Id.* at 20.
[75] *Id.* at 21-23.
[76] *Id.* (citing SAA, H.R. Doc. 103-316, vol. 1 (1994) at 821 and 828).

Congress expressly directed Commerce to avoid potential double remedies."[77] Finally, the Court noted Commerce's argument regarding the TPEA being enacted relatively soon after the *GPX* litigation, concluding that the omission of double remedy language in the TPEA "further illustrates the lack of a statutory proscription on the type of adjustment Commerce made here."[78]

The Court further upheld Commerce's finding based on substantial evidence that a PMS existed because of the GOA's export tax on soybeans, holding that "the argument that the record lacks evidence from which Commerce could reasonably conclude that Argentine soybean prices have been distorted fails."[79] However, the Court held that "Commerce has not explained why its CVD investigation and the resulting CVDs have not remedied the distortion{,}" and that "{u}nless and until Commerce explains why its CVD investigation does not remedy the distortion found {in the Argentine soybean market}, its determination that a PMS warrants rejection of Argentine soybean prices is unsupported by substantial evidence."[80]

Specifically, the Court found that "{a}lthough the record evidence indicates that the GOA's export tax regime likely distorted the costs of domestic soybeans, it is unclear why the trade effects of such distortion were not already remedied by the imposition of CVDs."[81] According to the Court, "{a}lthough the statute contains no prohibition on imposing CVDs and ADDs in relation to the same conduct, Commerce has failed to explain, on the current record, why its rejection of Argentine soybean costs—part of its chosen methodology—is reasonable given that Commerce seems to have remedied the export tax regime in the CVD

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[77] *Id.* at 23-25 (discussing section 772(c)(1)(C) of the Act; section 777A(f)(1) of the Act; Application of Countervailing Duty Provisions to Nonmarket Countries, Pub L. No. 112-99, 126 265 (2012); *GPX CAFC*, 666 F.3d 7320; and TPEA).
[78] *Id.* at 25.
[79] *Id.* at 25-28.
[80] *Id.* at 25.
[81] *Id.* at 28 (citing *CVD Final Determination* IDM at 13).

determination."[82] The Court also explained that the Act's use of the word "may" in section 773(e) as well as the substantial evidence standard requires Commerce to explain the reasonableness of its determination, and that "{g}iven that the subsidies distorting the Argentine soybean market seemingly were remedied in the CVD determination, it is not clear why Commerce should disregard the remedy."[83] Further, the Court recognized that "{i}t may be that because the ADD and CVD investigations are distinct proceedings, the remedy provided in the CVD case did not adequately ameliorate the PMS that served as the basis for Commerce's adjustment in this case{;}" however, the Court found that "Commerce has not explained…why the fact that these are separate proceedings renders the remedy in the CVD proceeding ineffectual with respect to the PMS found here."[84]

The Court also found that the Government's explanations before the Court "{did} not address the fact that Commerce's CVD remedy appears to address the same government policy{,}" and that "implicit in {the Government's} argument is that the PMS has a trade affect that needs to be remedied{,}" but missing is an explanation "why the CVD remedy is not sufficient to remedy the PMS."[85] The Court added: "Another way of looking at the problem is to consider that the trade effect of the CVDs imposed will cure the distortion in the Argentine market."[86] Finally, the Court noted that "Commerce may have a reason to believe that the CVDs do not cure the distortion in the Argentine market for the purposes of the ADD investigation{,}" and that "{i}f Commerce has such a reason, it must explain it."[87] Therefore, the Court remanded the issue for further explanation or consideration.[88]

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[82] *Id.*
[83] *Id.* at 29.
[84] *Id.*
[85] *Id.* at 29-30.
[86] *Id.* at 30.
[87] *Id.*
[88] *Id.* at 30-31.

D. Analysis

In the *Remand Order*, the Court affirmed Commerce's finding that a PMS existed because of the GOA's export tax regime on soybeans, but instructed Commerce to explain the reasonableness of its determination to make a corresponding PMS adjustment, particularly whether the underlying GOA policy which caused the PMS had been remedied in the companion CVD investigation. Further, as explained above, the Court recognized that the application of a PMS adjustment and CVD duties simultaneously for the same government policy is permissible under the Act. As noted above, section 773(e) of the Act, as amended by the TPEA, provides that "if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority *may* use another calculation methodology under this subtitle or any other calculation methodology" (emphasis added). The *Remand Order* directs Commerce to consider whether its exercise of the grant of discretion under this provision of the statute is reasonable in light of the companion CVD determination. In particular, the Court ordered Commerce to explain why it is reasonable to make the PMS adjustment under these particular circumstances, based on the record evidence.

For purposes of these final remand results, Commerce explains that it is reasonable to address the same government policy by applying a PMS adjustment in calculating AD duties in an AD proceeding and countervailing the subsidy program in a companion CVD proceeding. As an initial matter, we recognize that both the PMS adjustment and the CVD finding concerning the provision of soybeans for LTAR are intended to address a government policy which results

in distortions to raw material soybean costs for the biodiesel producers. However, as explained below, the CVD duties at issue are not intended to – and, on this record, have not been demonstrated to – provide the same remedy for any deviation of U.S. price from fair value that may arise from distorted raw material costs which are separately remedied by the PMS adjustment and corresponding AD remedy. Rather, Commerce remedies that issue by requiring the collection of AD duties equal to the difference between the U.S. price and the "fair," or "normal," value as defined by the statute.

Accordingly, we continue to find it reasonable to exercise our discretion under the statute not to make any adjustment to our PMS determination as a result of our findings in the companion CVD proceeding.

(i) The AD Remedy, Including the PMS Adjustment, Imposes Duties in an Amount Equal to the Amount by which Normal Value (or "Fair Value") Exceeds the Export Price (or the Constructed Export Price) for Argentine Biodiesel in the United States[89]

As discussed in the *Final Determination*, the AD and CVD laws are separate regimes that provide separate remedies for distinct unfair trade practices.[90] Simply put, the concern of the AD law is price discrimination, *i.e.*, foreign products sold in the United States at prices below fair value, or normal value. Section 773(e)(1) specifies that constructed value (the basis of normal value in this investigation) shall be, *inter alia*, an amount equal to the cost of materials and fabrication "in the ordinary course of trade." Further, section 773(e) of the Act provides that "if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of

[89] Section 731 of the Act ("Antidumping Duties Imposed") (establishing the two fundamental premises for the imposition of AD duties: injury to a U.S. industry, and U.S. sales prices below normal or fair value).
[90] *See* Final Determination IDM at 26-28.

trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology."

As Commerce determined, and as the Court upheld, the GOA's soybean export tax constitutes a PMS which renders the cost of soybeans used by Argentine biodiesel exporters outside the ordinary course of trade.[91] Therefore, Commerce determined that it was necessary to use another calculation methodology, *i.e.*, to rely on world market prices for soybeans which had not been distorted by the GOA's export tax, in determining the cost of soybeans. Without such an adjustment, or by continuing to rely on the Argentine exporters' reported costs of soybeans, which were determined to be outside the ordinary course of trade, Commerce would understate the fair value of biodiesel and mask the true extent of dumping or generate unrepresentative results.[92] In other words, the PMS adjustment is necessary to 1) ensure that fair value is determined free of distortion or otherwise unaffected by costs outside the ordinary course of trade as envisaged by section 773(e) of the Act, and, by doing so, 2) ensure that duties are imposed in an amount equal to the amount by which normal value (or "fair value") exceeds the export price (or the constructed export price) for Argentine biodiesel in the United States, consistent with section 731 of the Act.

As demonstrated further below, with two statutory exceptions, AD duties are calculated in the same manner regardless of whether there is a parallel CVD proceeding.

(ii) The CVD Remedy Imposes Duties in an Amount Equal to the Subsidy, Rather than the Effects of the Subsidy, and Does Not Remedy Sales at Less Than Fair Value

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[91] *See* Final Determination IDM at 21-23; *Remand Order* at 25-28.

[92] *See* SAA at 834 ("{T}he Administration intends that Commerce will interpret section 771(15) {identifying specific types of transactions 'outside the ordinary course of trade'} in a manner which will avoid basing normal value on sales which are extraordinary for the market in question, particularly when the use of such sales would lead to irrational or unrepresentative results.")

In contrast to the AD law, the concern of the CVD law is the subsidization of the foreign producer or exporter, which, depending on the very complex interaction of broader industry and market forces as well as individual company circumstances, may or may not result in sales of subject merchandise to the United States at prices that are "unfair" or lower than they otherwise would be. Countervailable subsidies may in fact lead to an array of market distortions and ultimately injurious trade effects, as discussed below. Unlike the AD law, the CVD law never requires a demonstration that countervailed subsidies result in lower or "unfair" U.S. prices. The calculation of a countervailable subsidy rate never takes into account the extent to which U.S. sales prices differ from what might be considered fair value.

The CVD law is not designed to remedy unfairly low-priced U.S. sales. Section 701 of the Act provides that, if Commerce determines that "a country…is providing…a countervailable subsidy" with respect to the production or exportation of merchandise imported into the United States, "then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, *equal to the amount of the net countervailable subsidy*" (emphasis added). Section 771(6) of the Act defines the term "net countervailable subsidy" as the full amount of the subsidy, potentially reduced only by three specified offsets not at issue in this proceeding. Significantly, although there are varying types of "countervailable subsidies" with various potential effects on prices, section 771(5)(C) of the Act explicitly states that Commerce "is not required to consider the effect of the subsidy in determining whether a subsidy exists{.}"

As a general matter, there is no *a priori* reason to assume that a countervailable subsidy results in lower U.S. prices and thus no reason to assume that a subsidy contributes to the differential between U.S. prices and normal value. Likewise, the CVD remedy imposed to countervail a subsidy is not intended to address the differential between the U.S. price and

normal value. There are frequently situations in which a countervailable subsidy has no effect on U.S. prices but nevertheless distorts the market for subject merchandise and poses a risk of injury to the U.S. industry, which Commerce must remedy through the imposition of CVDs in addition to the imposition of AD duties. For example, a subsidy might result in increased foreign production and shipment volumes to the United States, or it might lower U.S. prices, a combination of the two, or neither (*i.e.*, the subsidized foreign producers retain the proceeds for future capacity expansions). Different types of subsidies may have a greater or lesser impact on production and sales than others. Different companies might react to the receipt of the same kind of subsidy in different ways, or a given subsidy might have a different impact in different markets depending on the supply and demand conditions in that industry. Increased production and exports may tend to result in export prices over time that are lower than they would have been otherwise, but there will not necessarily be a reduction in price in absolute terms, and any reduction will be not be automatic or necessarily in amounts commensurate with the value of the subsidy.

The subsidy might simply render a mismanaged and heavily indebted producer once again solvent, allowing the company to recover from its past mistakes and to continue injuring its U.S. competition with no additional effect on price. Additionally, even where the subsidized producers in question supply a substantial share of the world market, such that the additional production will likely drive down prices in that market, this will take time and will not occur if other producers in the market reduce production. In sum, market forces determine prices; the relationship of domestic subsidies to export prices is therefore "speculative." Thus, identifying and measuring the effects of a subsidy, such that Commerce can reasonably estimate the extent to which the subsidy (and, correspondingly, the CVD duty imposed in the full amount of the

subsidy) has impacted the dumping margin, is a complex task and one only required by the statute in limited circumstances that do not apply here (*i.e.*, export subsidies pursuant to section 772(c)(1)(C) of the Act, and NMEs pursuant to section 777A(f) of the Act).[93]

For example, in this case, home market prices and sales volumes for biodiesel are fixed.[94] Thus, any increase in production and sales of biodiesel caused by the subsidization of soybeans may have a disproportionate effect on Argentina's export markets. This will not necessarily result in a reduction of biodiesel export prices, but may simply take the form of a sudden and sharp increase in shipments to the United States. In fact, shipments of biodiesel from Argentina jumped from 47 million gallons in 2014 to 442 million gallons in 2016 (the POI).[95] The trade effects of the subsidized soybeans may thus have simply taken the form of increased shipments rather than an additional reduction in U.S. price beyond the exporters' decision to sell at less than normal value.

Thus, there are numerous possible market distortions and "trade effects" from countervailable subsidization that may place U.S. industries at risk of injury besides the reduced U.S. prices measured by the dumping margin. Correspondingly, the CVD duty remedy imposed to countervail a subsidy is not intended to address the differential between the U.S. price and normal value. These examples demonstrate that fact, and the statute as it is designed shows no presumption otherwise. In fact, the statute shows that such a presumption should be made in very limited circumstances, which again do not apply in this case.

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[93] Moreover, pursuant to section 777A(f) of the Act, Commerce only provides an offset if, *inter alia*, the subsidy has been demonstrated to have reduced the average price of imports of subject merchandise during the period of investigation or review and Commerce can reasonably estimate the extent to which the subsidy has increased the dumping margin. There is no automatic adjustment that is made to account for the potential overlap in AD and CVD duties. Therefore, section 777A(f) is inconsistent with a hypothetical assumption that domestic subsidies automatically affect export price, such that an adjustment to the AD calculation is generally warranted (*e.g.*, when a PMS remedy is applied), or that, where an adjustment is warranted, a 100 percent pass-through should be assumed.
[94] *See Final Determination* IDM at Comment 2.
[95] *See* Initiation Checklist, dated April 12, 2017, at 2.

(iii) Neither the Statute nor the Record Would Support a Downward Adjustment of the AD Remedy to Account for a Putative Overlap with the CVD Remedy

As stated above, the statute only requires Commerce to consider the overlap of AD and CVD remedies in two narrow circumstances that do not apply here (*i.e.*, export subsidies pursuant to section 772(c)(1)(C) of the Act, and NMEs pursuant to section 777A(f) of the Act). Based on the foregoing, we believe that it is a reasonable exercise of our discretion not to reverse or alter the PMS adjustment due to the concurrent application of CVDs. Indeed, such an exercise would be inherently speculative. The express language of section 777A(f) of the Act requiring Commerce to conduct such a complex analysis in the non-market economy context further supports the reasonableness of Commerce's determination not to conduct such an analysis in this instance, in the absence of any similar statutory directive to do so – particularly where, as discussed below, the revised PMS language in section 773(e) of the Act was enacted only three years after section 777A(f) of the Act.

Furthermore, the respondents have not submitted any information (or cited any information on the record) that would allow Commerce to determine whether they consider the costs of soybeans in determining biodiesel prices for shipments to the United States (*i.e.*, information to establish a so-called "pass-through rate"). Any effort by Commerce to determine the extent to which dumping has already been remedied by the CVD order would therefore risk arbitrarily lowering the trade remedy protection available to the domestic industry under the Act, without evidentiary support.

(iv) Congressional Silence on "Double Remedy" in Section 773(e) of the Act Further Supports the Reasonableness of Commerce's Determination

Had Congress intended for Commerce to take into account a potential double remedy on the basis of certain assumptions, it would have expressly stated so in the new PMS provision of

section 773(e) of the Act enacted by the TPEA, as it did under sections 772(c)(1)(C) and 777A(f) of the Act.[96] We note that the concept of a "particular market situation" had existed in the statute prior to the TPEA revisions. In particular, section 773(a)(1)(B)(ii)(III) of the Act (2012) provided that Commerce may disregard third country sales as the basis for normal value if it determines that "the particular market situation in such other country prevents a proper comparison with the export price or constructed exporter price." Section 773(a)(1)(C)(iii) of the Act (2012) also provided that Commerce may disregard home market sales as the basis for normal value if it determines that "the particular market situation in the exporting country does not permit a proper comparison with the export price or constructed export price." The SAA, in explaining these provisions, provided that a PMS may exist "where there is government control over pricing to such an extent that home market prices cannot be considered competitively set."[97] Therefore, in enacting the TPEA and adding the PMS concept to section 773(e) of the Act, Congress presumably was aware of the SAA's consideration of a PMS based on government control or intervention, and presumably was aware that a PMS remedy might involve the replacement of reported costs with values unaffected by subsidizing behavior.

Congress also was aware of the circumstances which led to the enactment of section 777A(f) of the Act only three years earlier, the legislative history of which expressly addressed the *GPX CAFC* decision on double remedies in companion AD and CVD proceedings. The history of Congressional acts preceding this case therefore stands in stark contrast to the history preceding the *GPX* litigation, and provides a significant distinction between the two proceedings.

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[96] *See Ad Hoc Committee v. United States*, 13 F.3d 398, 401-03 (Fed. Cir. 1993) ("In the circumstances of this case, we believe that had Congress intended to deduct home-market transportation costs from {fair market value}, it would have made that intent clear.").
[97] *See* SAA at 822.

The Federal Circuit concluded in *GPX CAFC* that Congress had effectively "ratified" Commerce's prior interpretation that the CVD law was not applicable to NME countries by failing to "overturn" that prior interpretation through numerous legislative amendments.[98] By contrast, in this case, as the Court notes,[99] the TPEA was enacted only three years after the passage of the *GPX* legislation (section 777A(f) of the Act, discussed above).[100] It is implausible that Congress had not contemplated the potential double-remedy risk inherent in the TPEA, coming so soon after the Court and Federal Circuit decisions in which double-remedy risk was the primary topic, and the passage of the *GPX* legislation in which Congress sought very specifically to overrule the Federal Circuit's decision ("Congress clearly sought to overrule our decision in *GPX*….{D}uring the floor debate, our decision in *GPX* was referenced by name and discussed at length."[101]). Therefore, Congress' silence on this matter in the TPEA indicates that Congress did not believe Commerce should attempt to measure or alleviate any double remedy through the discretion delegated to Commerce under the 773(e) of the Act. As the Court recognized, the Act's "silence on whether to account for remedies imposed in CVD proceedings when adjusting for a PMS stands in stark contrast with other situations in which Congress expressly directed Commerce to avoid potential double remedies."[102]

In light of this history, Commerce continues to find it reasonable not to make any adjustments to its PMS determination.

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[98] *GPX CAFC*, 666 F.3d at 745 ("We thus find that in amending and reenacting the trade laws in 1988 and 1994, Congress adopted the position that countervailing duty law does not apply to NME countries. Although Commerce has wide discretion in administering countervailing duty and antidumping law, it cannot exercise this discretion contrary to congressional intent. We affirm the holding of the Trade Court that countervailing duties cannot be applied to goods from NME countries.")
[99] *See Remand Order* at 24-25.
[100] *See* Application of Countervailing Duty Provisions to Non-Market Economy Countries, Pub. L. No. 112-99, 126 Stat. 265 (2012).
[101] *See GPX International Tire Corporation v. United States*, 678 F. 3d 1308, 1311 (CAFC 2012).
[102] *See Remand Order* at 23-25.

(v) The CVD Remedy has Not Eliminated the Injury Addressed by the AD Remedy Under Subtitle B

Above, Commerce has explained that the AD and CVD remedies address two separate types of unfair trade effects, each resulting in a distinct type of distortion in the marketplace. Commerce has also explained that there is no reason to assume that there is overlap between the two types of distortion, and thus in the instant case, Commerce is not actually imposing two remedies for the same distortion. The GOA's intervention results in distortions remedied through Subtitle A and distinct distortions remedied through Subtitle B. We have also explained that we do not believe Congress intends for Commerce to attempt to estimate the extent to which there might be such overlap or to make an adjustment based on such an estimate, and therefore it is reasonable not to make such an adjustment.

III. COMMENTS RECEIVED ON DRAFT REMAND RESULTS

Issue 1: Lawfulness of the U.S. Price Adjustment for RINs

Petitioner's Comments

- The Court did not take issue with Commerce's finding that, in the absence of an adjustment, there is an imbalance in the comparison between U.S. price and normal value. Instead, the Court indicated that "there may be two sources of statutory authority upon which Commerce might have relied to adjust normal value to account for the value of RINs."[103]
- To support its conclusion that RINs have discernible value for making a price adjustment, the Draft Remand Results highlight record evidence establishing that U.S. sales prices reflect the value of both biodiesel and RINs.[104] However, additional testimony from the

[103] *Remand Order* at 9-12.
[104] Draft Remand Results at 12-13 (repeated in the analysis section above).

same ITC proceeding cited by Commerce provides further evidence of how RIN values are an element of the total U.S. price for biodiesel. Specifically, in remarks on behalf of both Argentine and Indonesian biodiesel producers, Mr. Edmund Sim stated: "What is in the price? The price includes the liquid. It includes the RIN . . . . No matter how many ways you slice it, it's all built into the product."[105] If Commerce should depart from its draft redetermination, Commerce should adjust normal value using the statutory circumstance of sale adjustment to achieve a fair comparison between U.S. price and constructed value.

LDC's Comments

- The statute does not permit a hypothetical value to be subtracted from export price or constructed export price as a price adjustment under sections 772(a) and (b) of the Act and 19 CFR 351.401(c).
- The deduction from U.S. price is unsupported by substantial evidence because the RINs value attached to RINs-eligible biodiesel is a compliance value that varies depending on the purchaser's needs. The market values used in Commerce's estimate of RINs value are for detached spot market sales of RINs. The record does not support that the buyer and seller negotiated prices for the imported biodiesel on the basis of these values.
- Although Commerce must use a "price net of price adjustments," there is no price other than that negotiated between the buyer and seller for the biodiesel. That price is already a "price net of price adjustments."

[105] PMS Allegation at Exhibit 17.

- A price adjustment is demonstrated by an actual change in the price. Here, however, there is only one price in the sale; it is never changed or adjusted. There is no price that then increases once the RINs are attached; there is simply one price.
- The provisions for export price and constructed export price both refer to the "price at which the subject merchandise is <u>first sold (or agreed to be sold)</u>" (emphasis added). The adjusted U.S. price is a price invented by Commerce, which deducts a RINs-value invented by Commerce from the "first sold" or "agreed to be sold" price, which is not permitted by the statute.
- If a buyer is seeking to satisfy its RVO through contracts of biodiesel purchases with attached RINs, then the attached RINs certainly have a "compliance value" for the purchaser. If, on the other hand, the buyer already has the RINs that it needs at the time of purchasing the biodiesel from LDC, it may attach no or little "compliance value" to the RINs attached to the biodiesel. There is no evidence or reason to believe that the value of a RIN is the same for all purchasers or that it is the same as the sport market detached-RIN price. In its redetermination, Commerce has still not established that the detached-RINs spot prices equate to the attached-RINs value in the biodiesel contracts at issue. Moreover, in antidumping proceedings, hypothetical values are not a permitted basis of adjustments.
- LDC Argentina continues to suggest that if Commerce finds it necessary to account for attached-RINs value in the U.S. price of biodiesel sales in order to have a proper comparison with constructed value, then it should deduct the actual expenses related to RINs from U.S. prices.

Vicentin's Comments

- Commerce provides no citation to a subsection within section "772(a)" of the Act that gives Commerce the authority to make the downward adjustment for the RIN revenue to export price. This lack of clarity is important because the statute very specifically limits the types of upward and downward price adjustments that are permitted. Since Commerce is reducing the export price by the revenue of the RIN, the universe of permitted adjustments is narrowed even further to those in section 772(c)(2).
- In *Dongguan Sunrise Furniture*, Commerce refused to make an upward adjustment to U.S. price to account for freight revenue as requested by the respondent.[106] The court found that it was reasonable for Commerce to read the list of upward adjustments in section 772(c)(1) as an exclusive list that does not include freight revenue. Similarly, "income" is not a movement cost, charge, or expense that can be adjusted for under 772(c)(2).
- Specifically, Commerce cites to 19 CFR 351.401(c) as granting it the authority to make such an adjustment. However, to read into that provision the authority to make a RIN income adjustment to U.S. price would frustrate the purpose and plain meaning of the statute. It is well established that the courts will not grant agency deference to regulations which are contrary to the statutory intent.[107]
- Commerce makes an assumption that the value of the RIN was "included" in the selling price of the biodiesel sold to its customers. *Vis-à-vis* Vicentin, the evidentiary record more than proves that Commerce's assumption is not correct.

[106] *See Dongguan Sunrise Furniture v. United States*, 865 F. Supp. 2d 1216, 1248-49 (CIT 2012).
[107] *Muwwakkil v. Office of Personnel Management*, 18 F.3d 921, 925 (CAFC 1994) (refusing to grant deference to regulations contrary to statutory intent); *Oshkosh Truck Corp. v. United States*, 123 F.3d 1477, 1481 (CAFC 1997) (refusing to grant deference where agency regulation was at odds with the statutory language).

- Early in the investigation, Vicentin explicitly informed Commerce:

> Vicentin has no information about the RINs because Vicentin is not the entity that generates the RINs. Nor is Vicentin the entity that sells the RIN. Rather, RINs are generated by the Vicentin's U.S. customers – the entity that undertakes blending required under the law. In the ordinary course of business, RINs are generated by Vicentin's U.S. customer after the biodiesel clears U.S. Customs. It is Vicentin's U.S. customer that then sells the RIN. {B}ecause Vicentin sells all of its subject merchandise to the United States on an FOB Argentina basis, Vicentin has no documentation to support any information on RINs that may or may not be utilized by its unaffiliated U.S. customers.[108]

- Additional information on the record demonstrates that it is impossible to tie individual RIN sales in the United States to particular imports of biodiesel.
- An adjustment for RIN *value* is not permitted by the Act. The RIN value is created after importation and can only be detached by Vicentin's unaffiliated U.S. customers. Section 772(e) of the Act only allows an adjustment for value added after importation where the subject merchandise is imported by a person affiliated with the exporter or producer. Any RIN adjustment must therefore be limited to the direct expenses incurred by Vicentin in ensuring RIN-eligible biodiesel, a permissible deduction pursuant to section 772(c).
- Commerce's calculation worksheet fails to account for temporal issues addressed in the margin calculation (*e.g.*, calculation adjustments addressing inflation, the Cohen's D analysis regarding price difference over time, etc.) and fails to provide or fully explain the methodology used in establishing the margin, as required by section 19 USC 1677f(i)(2).

[108] *See* Vicentin's Letter, "Rebuttal Comments on Petitioner's Proposed Model Match," dated May 12, 2017, (Vicentin Rebuttal Model Match Comments) at 2-3 (emphasis added).

Commerce's Position: Commerce continues to conclude for these Final Remand Results that RIN values are properly accounted for as an adjustment necessary to derive the starting price of biodiesel under sections 772(a) and (b) of the Act and 19 CFR 351.401(c). While Commerce does not deny that there may be other possible means of accounting for RIN values under the Act, such as the petitioner's suggestion to consider the RIN values as a type of circumstances of sale adjustment, we have adhered to the Court's order by clarifying that the adjustment is properly made pursuant to sections 772(a) and (b) of the Act and 19 CFR 351.401(c).

We do not agree with LDC that the adjustment constitutes a "hypothetical" value. As explained in the analysis section above, there is ample evidence on the record that RIN values are measurable and easily discernible. We note, above, for example, that the Congressional Research Service views RINs as a type of "commodity," and we have also explained that RIN values are traded and published on a daily basis, a fact that was corroborated during the verification of LDC's U.S. affiliate. The fact that the price of biodiesel is adjusted upwards to account for the (non-hypothetical) price of the RINs is also supported by the evidence Commerce cites above from the ITC report (which compares prices for RIN-eligible and non-RIN eligible biodiesel), statements by LDC's U.S. affiliate at verification ("the price of B99 is comprised of the cost of biodiesel . . . *plus a RIN value*"), statements by LDC and Vicentin officials in Buenos Aires, also at verification, and statements of various parties before the ITC, all of which was described in detail in the Draft Remand Results and which is repeated above.

For essentially the same reasons, we also disagree with LDC that we have failed to demonstrate that the RIN values are connected "at all" to the individual transaction values in the sales databases developed on the record. As described above, the record includes ample evidence that sales of biodiesel in the United States include two components, a biodiesel price

and a RIN price, and the value of the RIN price is easily discernible and published. The record indicates no exceptions to this conclusion for biodiesel with a RIN attached. LDC posits a hypothetical example in which a U.S. customer is uninterested in the RIN and simply wants to purchase only the biodiesel. LDC suggests that under this scenario, the transaction price would not include a RIN value even if the product purchased still had a RIN attached. This scenario, however, is implausible and unreasonable. A seller would not reduce its price simply because one customer values the product differently than another. Rather the seller would sell to a buyer who is willing to pay the market price. It would be unreasonable to assume that the seller would ever accept a lower price than what the market offers. If the market price for a ton of a particular commodity product is $500, but a specific buyer considers it worth only $400, the dealer will not reduce the price to match that buyer's individual valuation. The dealer will instead sell the product to someone who is willing to pay the market value of $500. While spot prices, like other prices, might be in constant flux as supply and demand and expectations change, they nevertheless reflect what one must pay at that given moment to obtain that commodity. The spot prices for RINs on the record of this investigation are market prices and, as such, indicate what buyers must pay for the RIN attached to biodiesel, and there is no basis to believe a seller would accept anything less than that amount.

Moreover, as noted above, RINs are tradeable and, in fact, trade on a daily basis. Thus, even if a particular buyer does not need the RIN to satisfy its own obligations under the RFS, it can sell the RIN to somebody else who does. Thus, regardless of whether the buyer needs the RIN for its own account, it is still buying something that has a certain, measurable market value. It is, therefore, hard to conceive of any buyer that would consider the RIN to have no value.

In so far as LDC might be arguing that there are different spot prices that might be assigned to particular RIN sales, there is no indication of that possibility on the record.[109] The record indicates there are daily spot prices for RINs. Commerce relied on the spot prices reported by LDC for all CEP sales,[110] and the spot prices reported by the petitioner for all other U.S. sales.[111] As indicated above, Commerce noted in the investigation that the RIN values submitted by the petitioner were nearly identical to those used by LDC to estimate RIN values for its CEP sales. The record also indicates there is only one market for trading RINs, which is regulated by the Environmental Protection Agency: the EPA Moderated Transaction System.[112]

Commerce explained in the Draft Remand Results (repeated in the analysis section above) how the adjustment for the RIN value constitutes a price adjustment under 19 CFR 351.401(c). Contrary to LDC's claims that there is only one price, which is never changed or adjusted after RINs attach, Commerce has explained above that the record indicates that "when a foreign producer/exporter sells RIN-eligible biodiesel to the United States, it is selling two commodities: biodiesel, bundled with a RIN. If a party were to sell biodiesel without a RIN – whether because the biodiesel was not eligible for a RIN, the RIN was already detached and sold separately, or any other reason – the seller's price would reflect solely the value of the biodiesel, and accordingly would be significantly less than biodiesel sold with a RIN."[113] It is therefore necessary to remove the RIN value to determine the price at which the subject merchandise (*i.e.*, biodiesel without a RIN) "is first sold (or agreed to be sold) in the United States." We then cite

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[109] Commerce acknowledges that there are different RINs for different types of renewable fuels, but only one set of prices for the D4 RINS that attach to biodiesel.
[110] *See* LDC's Section B and C Questionnaire Response, dated August 18, 2017, (LDC SBCQR) at 15 and Exhibit Supp. C1.
[111] *See* PMS Allegation at Exhibit 14.
[112] *Id.* at Exhibit 13 (a Congressional Research Service report).
[113] *Infra* at 11.

the ITC Preliminary Report, transcripts from the ITC hearing, and statements made by both mandatory respondents during verification to corroborate this conclusion.

Vicentin incorrectly claims that Commerce provides no citation to a subsection within section 772 of the Act for the authority to make the downward RIN adjustment to U.S. price. Commerce, however, clearly cites to subsections (a) and (b) of section 772 of the Act for this authority in multiple instances.[114] Vicentin's confusion appears to be based on its assertion that section 772(a) of the Act is the same as section 19 USC 1677a.[115] It is not. Section 772(a) of the Act is the equivalent of section 19 USC 1677a(a). Thus, most of Vicentin's brief concerning this issue – its arguments admonishing Commerce's failure to identify a subsection of section 772 of the Act, its speculation that Commerce must have meant subsection (c) (which Commerce does not mention anywhere in the Draft Remand Results), its arguments as to why subsection (c) is inapplicable – appear to be predicated on a mistake. We have specifically cited subsections (a) and (b) of section 772, *i.e.*, 19 USC 1677a(a) and (b), as the basis for our adjustment.

Likewise, Vicentin's arguments regarding 19 CFR 351.401(c) appear to be based on the same mistaken comparison of the Act and the United States Code. Vicentin argues that a regulation cannot contravene statutory intent. We do not disagree. Commerce explains in detail above how 19 CFR 351.401(c) is derived from sections 772(a) and (b) and 773(a)(1)(B)(i) of the Act. In particular, Commerce explains that "sections 772(a) and (b), provide that in determining export price or constructed export price, Commerce begins with the price at which the subject merchandise is "first sold" in the United States. Pursuant to these provisions, 19 CFR 351.401(c)

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[114] *See, e.g.,* Draft Remand Results at 10 ("Commerce clarifies that the legal basis for making a RIN adjustment to U.S. price are sections 772(a) and (b) of the Act (pertaining to export price and constructed export price, respectively) and 19 CFR 351.401(c).") (repeated in the analysis section above).

[115] "The Department only generally cites 'section 772(a)' (which is section 19 U.S.C. § 1677a of the statute), and provides no citation as to which subsection within section 1677a that gives the Department the authority to make the downward adjustment for the RIN revenue to export price." *See* Vicentin Comments at 4-9.

provides that '{i}n calculating export price, constructed export price, and normal value (where normal value is based on price), the Secretary normally will use a price that is net of price adjustments, as defined in section 351.102(b), that are reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable).'"[116]

Similar to LDC, Vicentin makes a number of arguments concerning the lack of a negotiation or sale between Vicentin and its U.S. customers pertaining explicitly to RINs and the inability to tie specific RIN values to specific U.S. sales, claiming that RIN values are not included in biodiesel sales from Argentina. As noted in the Draft Remand Results (and again in the analysis section above), however, there is ample evidence on the record demonstrating that the price of a gallon of RIN-eligible biodiesel in the United States includes the price of a RIN. In addition, besides possibly self-serving statements made by the respondents early on in the proceeding, such as those noted by Vicentin in its case brief,[117] the record includes several statements by both respondents at verification indicating the significance of RINs to the sales transactions. Commerce discussed these statements in detail in the Draft Remand Results (repeated above), as well as relevant language from the ITC Preliminary Report. For example, LDC's U.S. affiliate stated: "the price of B99 is comprised of the cost of biodiesel, plus the cost of petrodiesel, *plus a RIN value*, less expenses incurred by the blender. Although RIN values are implicitly factored in the price of biodiesel, they are not explicitly linked to or included as a line item in overall biodiesel pricing."[118] For its part, Vicentin admitted at verification: "{A}lthough RIN eligibility is not expressly discussed while negotiating biodiesel sales contracts, the company is informally aware that all U.S. sales must be accompanied by the certifications

[116] *See* Draft Remand Results at 10 (repeated in the analysis section above).
[117] *See* Vicentin Comments at 11-12 (quoting Vicentin Rebuttal Model Match Comments).
[118] *See* LDC CEP Verification Report at 8; *see also* Draft Remand Results at 12 (repeated in the analysis section above).

necessary to establish that the biodiesel is 'RIN eligible.' . . . Vicentin knows to only sell RIN-eligible biodiesel to U.S. {customers} because non-RIN-eligible biodiesel has minimal value in the U.S. market."[119]

Vicentin next appears to suggest that RINs can only be accounted for under section 772(e) of the Act, which applies to further processing of subject merchandise in the United States by an affiliate of the respondent. Vicentin argues that 772(e) of the Act only allows an adjustment for value added after importation where the subject merchandise is imported by a person affiliated with the exporter or producer. Any RIN adjustment, it continues, must therefore be limited to the direct expenses incurred by Vicentin in ensuring RIN-eligible biodiesel, a permissible deduction pursuant to section 772(c) of the Act. As explained above, Commerce is relying on sections 772(a) and (b) of the Act, not sections 772(e) or (c). Commerce does not believe, furthermore, that section 772(e) of the Act is relevant, as the RIN value is not the result of further processing after importation, but is the result of LDC and Vicentin producing RIN-eligible biodiesel in Argentina.

Vicentin and LDC both suggest that Commerce deduct the expenses they incurred in ensuring RIN-eligibility as a direct selling expense, rather than making an adjustment for the RIN value itself. The expenses, however, are a small fraction of the RIN value and making an adjustment for them would not allow Commerce to isolate the sales price of the biodiesel.[120] As detailed above, the invoice price includes the price of biodiesel plus the RIN price, not the RIN-related expenses. Moreover, while making an expense adjustment may be reasonable when it is

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[119] Draft Remand Results at 13 (repeated in the analysis section above).
[120] Compare the values LDC reported for field RINVALU (the RIN values LDC reported for CEP sales in USD per MT) with the values it reported for field DBROK4U (EPA compliance expenses in USD per MT). *See* LDC SBCQR at 15, 18 and Exhibit Supp. C1.

the only measurable value on the record, in this case, as discussed above, the RIN values are easily discernible, traded, published, and documented on the record.

Finally, Vicentin faults Commerce for failing to account for "temporal issues addressed in the margin calculation (*e.g.*, calculation adjustments addressing inflation, the Cohen's *d* analysis regarding price difference over time, etc.) and fails to provide or fully explain the methodology used in establishing the margin, as required by the statute at 19 U.S.C. § 1677f(i)(2)." Vicentin does not elaborate on what exactly the issues are with the calculations released, does not ask for any specific changes to be made in these final remand results, nor did Vicentin request additional calculation disclosure materials from Commerce after the issuance of the Draft Remand Results. It is unclear what Vicentin means when it argues that changing the RIN adjustment, from an addition to normal value to a deduction to U.S. price, would affect "temporal" aspects of the calculations.[121] Commerce chose to perform the revisions to the calculations pursuant to this remand in an Excel worksheet and provided the revisions in this manner because that method seemed most transparent. In doing so, Commerce downloaded a database created by the SAS program used in the investigation (which all parties had ample opportunity to comment on during the investigation), removed the upward RIN adjustment from normal value, deducted the same RIN value from U.S. price, recalculated PUDD, and then divided PUDD by a revised sales denominator (inclusive of RIN) in order to determine the cash deposit rates. The data, including variable names, is *exactly* the same as the data used by Commerce in its final determination in the investigation (and nearly identical to what was used in its preliminary determination), which was disclosed to Vicentin and all other interested parties. Just like in the final determination, the revised margin calculation relies on the "average-

[121] Vicentin Comments at 14-15.

to-average" margin calculation method (the "standard" methodology), and the data already reflects the inflation adjustment made by Commerce in the preliminary and final determinations. Vicentin fails to detail with any precision what it might consider to be a calculation error or to explain how the calculations should be revised.

Issue 2: Determination of the Cash Deposit Rate

Petitioner's Comments

- Insofar as Commerce has calculated a lower cash deposit rate by using a gross U.S. price (*i.e.*, a larger denominator that decreases the resulting rate), CBP will actually collect less than total PUDD if an importer follows CBP's guidance and separately reports the entered value of the biodiesel, exclusive of RIN value. Thus, Commerce should not depart from its established method for calculating cash deposit rates and should instead use net U.S. price in the denominator so that the full amount of PUDD will be collected upon assessment.

Vicentin's Comments

- Commerce's description of the denominator used in its revised calculation is not only confusing and incomplete, it is impossible to evaluate based on the limited data provided in the remand worksheet.

Commerce Position: Commerce made a change to the sales denominator used in the calculation of the cash deposit rates in order to avoid over collecting deposits "at the border," as explained in the Draft Remand Results.[122] Essentially, despite the petitioner's claims to the contrary, Commerce expects Customs and Border Protection (CBP) to be aware only of the total invoice value for shipments of subject merchandise to the United States. Commerce has no evidence that

[122] Draft Remand Results at 16 (repeated in the analysis section above).

CBP would be aware of the individual biodiesel prices and RIN prices combined in the invoice value. While the petitioner suggests an alternative method of addressing this same potential problem (allowing importers to self-report separate biodiesel and RIN values in special value fields in CBP's "Automated Commercial Environment"), such a case-specific system is not in place at this time, and there is no information on the record indicating importers have been segregating RIN values in self-reporting the entered value of biodiesel from Argentina. Thus, Commerce believes the revised denominator used in the Draft Remand Results is currently the best method to avoid overcollection. Commerce notes that the commingling of biodiesel and RIN prices in entered value has been an implicit issue in this case since the initiation of the investigations and could have been raised by the petitioner at a much earlier date (*e.g.*, during the investigation). In the event of an administrative review, Commerce will consider any comments to implement a more accurate cash deposit and assessment system for this order (or the concurrent CVD order), including possible instructions to CBP and importers regarding the proper determination of entered value.[123]

Issue 3: Reasonableness of the PMS Adjustment

Petitioner's Comments

- The Court did not disturb Commerce's finding that a particular market situation in Argentina distorts the respondents' soybean input costs. Commerce should, therefore, reject any comments on the Draft Remand Results pertaining to the factual basis for finding a PMS.

[123] With one very small exception (a shipment of approximately one gallon of biodiesel), there have been no shipments of subject merchandise under either the AD or CVD order since the imposition of cash deposits pursuant to the preliminary determination. *See* Memorandum, "CBP Data Queries under the AD and CVD Biodiesel Orders," dated January 6, 2020.

- Commerce's Draft Remand Results appropriately focuses on the nature of an antidumping remedy – that is, to address the unfair pricing that arises when U.S. prices are below fair value (*i.e.*, normal value).[124] In this context, Commerce properly explains the need to establish a normal value that reflects costs of production that are in the ordinary course of trade.
- Commerce also correctly observes that the CVD law is not intended to address unfair pricing and acknowledges that subsidies do not necessarily result in dumped export prices. The CVD statute explicitly narrows Commerce's inquiry to whether a subsidy exists while the AD statute directs Commerce to compare U.S. prices to normal value that is based on prices and costs in the ordinary course of trade in assessing whether an exporter is dumping.
- Commerce identifies examples of how subsidies may be distortive without necessarily leading to lower or dumped U.S. prices, but such examples and related discussion are unnecessary to comply with the *Remand Order*. Commerce should simply address the lack of record evidence on whether or to what extent the subsidy found in the CVD investigation actually and verifiably resulted in lower U.S. prices. The absence of such evidence is adequate to establish the reasonableness of making a PMS adjustment.
- There is no statutory or factual presumption that a subsidy results in lower or dumped export prices that warrants or compels Commerce to account for countervailing duties when calculating dumping margins. Section 772(c)(1)(C) of the Act, which instructs Commerce to reduce (f) dumping margins by the amount of export subsidies, is not relevant here. Section 777A(f)(1) permits Commerce to adjust a dumping margin in the

[124] Draft Remand Results at 23-24.

NME context only if the record establishes that domestic subsidies actually "pass through" in the form of lower U.S. prices. Thus, the Act does not "presume" that subsidies pass through in the form of lower U.S. prices.

- In contrast to sections 772(c)(1)(C) and 777A(f)(1), Commerce's discretion under the PMS provision does not at all relate to the existence of subsidies. In fact, the legislative history underlying the PMS provision confirms that Commerce may make a PMS adjustment to address subsidized inputs. Specifically, Representative Patrick Meehan stated: Commerce shall "be empowered to be able to disregard prices or costs of inputs that foreign producers purchase if . . . Commerce has reason to believe or suspects that *the inputs in question have been subsidized* or dumped."[125]
- Senator Sherrod Brown specifically mentioned products "that Korea now dumps in the United States—*illegally* subsidized," as a target of TPEA Title V, which includes the PMS amendment.[126]
- The respondents have presented no evidence that establishes that domestic production subsidies resulted in lower U.S. prices. Rather, heretofore, respondents have relied upon a general presumption of "double remedies."
- In the absence of any evidence offered by respondents linking subsidies to lower U.S. prices, it is eminently reasonable for Commerce to make a PMS adjustment to ensure that its dumping calculations reflect costs that are incurred in the ordinary course of trade.

LDC's Comments

[125] 161 Congressional Record H4666 (June 25, 2015) (*House Record*) (emphasis added) (*n.b.*: Commerce believes the correct citation is 161 Congressional Record H4690 (June 25, 2015)).
[126] 161 Congressional Record S2900-S2901 (May 14, 2015) (*Senate Record*) (emphasis added).

- The Court ordered Commerce to explain how the countervailing duty it imposed did not remedy the soybean price distortion, given that the CVD and PMS findings both address the same government program.[127] In response, Commerce merely reiterates the Court's conclusion that the statute contains no prohibition on imposing CVDs and ADDs in relation to the same conduct.
- The redetermination does not assess whether the PMS distortion is factually remedied by the CVD determination. The redetermination only discusses legal differences between the CVD and AD statutes and hypothetical applications of those laws, which no one disputes.
- Commerce simply asserts that the CVD remedy has not eliminated the injury addressed by the AD remedy under Subtitle B. This assertion, however, is based upon Commerce's legal conclusion that the "the GOA's intervention results in distortions remedied through Subtitle A and distinct distortions remedied through Subtitle B." Commerce does not in fact compare or analyze the particular, factual distortions at issue. This is evident by its statement that it "do{es} not believe Congress intends for Commerce to attempt to estimate the extent to which there might be such overlap." The Court has asked for a case-specific analysis, which Commerce has not provided.

Vicentin Comments

- Commerce's Draft Remand Results "never explain{} why its CVD determination remedied the distortion" and is thus unsupported by substantial evidence.[128]

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[127] *Remand Order* at 31.
[128] Vicentin Comments at 16.

- Commerce says AD and CVD investigations concern different types of conduct, and the statute does not require Commerce to avoid any double counting. The Court's concern in this instance, however, is not with the law but, rather, with the facts of the case. The Court's evident concern is that the CVD determination on its face appears to remedy precisely the same conduct – an export tax that produces an allegedly artificially low price for soybeans – that Commerce "remedied" by increasing the artificially low prices by the PMS adjustment. The Court's requirement is that, at a minimum, Commerce "consider" whether or not "the trade effect of the CVDs imposed" is sufficient to "cure" the distortion in the Argentine soybean market, in whole or in part.
- Commerce never explains why it is impossible or "risky" to attempt to determine the precise trade effects of the countervailed subsidy, as the Court requires it to do.
- Commerce is willing to assume the RIN value was fully passed on to U.S. price, despite conflicting evidence, but finds that it would be arbitrary to make the "same assumption" in the case of soybean prices. If Commerce effectively assumes pass-through in one situation, there is no reason why it cannot do so in the other. There is no factual basis on which to refuse to adhere to the Court's order.

Commerce's Position: Both LDC and Vicentin claim Commerce failed to explain how the CVD remedy imposed did not remedy the same distortive behavior addressed by the PMS adjustment. To the contrary, we explain in detail that the two separate remedies address separate issues, and that both remedies must be presumed necessary to address fully the range of distortive effects brought about by countervailable subsidies and unfairly low U.S. prices. This is consistent with the Court's order, which does not seem necessarily to take issue with two remedies addressing the same "behavior," but, instead, asks Commerce to explain why the

distortive "trade effects" created by the PMS were not already remedied by the CVD order. As discussed above, the answer is essentially that there is a distinction between the behavior of the GOA, and the trade effects created by such behavior.

We also agree with the petitioner that there is no evidence on the record, and that respondents have not attempted to point to any evidence on the record, indicating that the countervailable subsidy at issue has resulted in lower U.S. prices, and further agree that there is no reason to assume that the distortive effects of the subsidies are the same or even overlap with the distortive effects created by the respondents' prices at less-than-fair-value. Therefore, there is likewise no evidence indicating that the CVD remedy has addressed the same distortive trade effects as the AD remedy.

Moreover, we agree with the petitioner that there is no general *presumption* embedded in the statutory scheme that the distortive effects of the subsidies are the same or even overlap with the distortive effects created by the respondents' unfair prices. The petitioner claims that a presumption that the effects of subsidies pass-through to U.S. prices is limited to export subsidies, and that the presumption in that context is reflected in the directive of section 772(c)(1)(C) of the Act to account for export subsidies in the determination of antidumping margins. While Commerce agrees that section 772(c)(1)(C) of the Act incorporates such a presumption within the limited context of export subsidies, Commerce emphasizes that this presumption of pass-through does not demonstrate a conclusion that other types of subsidies *typically* lead to lower U.S. prices. There is no dispute that the subsidy at issue in this case is not an export subsidy.

Commerce also agrees with the petitioner that section 777A(f)(1) of the Act provides for an offset only under certain, limited circumstances. Thus, section 777A(f)(1) of the Act also

cannot be read as establishing a presumption that subsidies, as a rule, lead to lower U.S. prices. Moreover, Commerce re-emphasizes that if Congress had intended for Commerce to follow a similar type of analysis in making PMS adjustments, as provided for in section 777A(f)(1), it would have done so; this conclusion is especially clear given the proximity in time of the TPEA amendment to the section 777A(f)(1) amendment.

Commerce agrees that the legislative history behind the TPEA amendment supports the conclusion that Congress did not believe there was a risk that a PMS cost adjustment would duplicate any remedy already implemented through the imposition of countervailing duties. As the petitioner notes, Representative Patrick Meehan stated: Commerce shall "be empowered to be able to disregard prices or costs of inputs that foreign producers purchase if …Commerce has reason to believe or suspects that the inputs in question have been subsidized or dumped."[129] Also, Senator Sherrod Brown specifically mentioned products "that Korea now dumps in the United States—illegally subsidized," as a target of the TPEA.[130]

Given that the TPEA does not include any language similar to section 777A(f)(1) of the Act, Commerce does not believe it has any authority, far less an obligation, to conduct the type of in-depth factual analysis both LDC and Vicentin claim is necessary. Moreover, the Court's order also does not call for such analysis. Rather, the Court requires Commerce to explain how, based on the record before it, it is reasonable to apply the PMS adjustment given that Commerce has already applied the CVD remedy. Commerce has explained above, repeatedly, that AD and CVD remedies are intended to address different issues, which may in fact stem from a common instance of government behavior or conduct. The fact that this explanation has general applicability across AD and CVD investigations does not mean that the explanation fails to

[129] *House Record* at H4690.
[130] *Senate Record* at S2900.

address the particular situation of this case; far from it, the explanation details precisely why the application of the PMS remedy is reasonable in this case (as well as others). Nevertheless, Commerce has also referred to the lack of any evidence on the record (of this particular case) indicating that the subsidy at issue might have led to unfair U.S. prices, thus resulting in an overlap between the distortive effects of countervailable subsidization and the distortive effects of the respondents dumping biodiesel in the United States at unfair prices. Tellingly, in their comments on the Draft Remand Results, LDC and Vicentin *still* do not attempt to connect their argument to any facts on the record.

Finally, Vicentin argues there is an inconsistency between Commerce's determination that RINs affect U.S. prices and Commerce's simultaneous determination that it is unable to determine whether subsidies affect U.S. prices. There are significant differences between the two issues, however. Commerce has an obligation under the Act to isolate the price of subject merchandise and conduct an apples-to-apples comparison between U.S. prices and normal value. As explained above, the opposite is true with regard to determining the effects of subsidies on U.S. prices, which is an obligation specifically rejected by section 771(5)(C) of the Act, and which Congress did not expressly include as a requirement within the context of the TPEA. Moreover, also as explained above, the RIN values are easily discernible, published values and the record clearly demonstrates that they are attributable to biodiesel sales in the United States. The determination of whether and to what extent subsidies might affect U.S. prices is speculative, not required by the Act, and risks diluting the remedy to which the petitioning industry is entitled, a result contrary to the intent of Congress in enacting the Act and its amendments.

Issue 4: Commerce's Discretion to Make a PMS Adjustment

Petitioner's Comments

- Commerce suggests that it reasonably exercised its discretion to adjust for the PMS in part due to the significance of the distortion in soybean costs. Commerce explains that it reasonably exercises its discretion in adjusting for a PMS where "a problem is grievous enough to warrant departing from reliance on a company's actual costs of production."[131] In so doing, Commerce is unnecessarily articulating a new and inappropriate standard for making a PMS adjustment.
- Neither the cost-based PMS provision at section 773(e) of the Act, nor its legislative history, make any reference to the extent to which a respondent's costs are distorted. Commerce should stand by its existing practice that it will exercise its discretion to adjust for a PMS if the distortion in costs is "*quantifiable*".[132]
- Commerce should note that the discretion afforded it under the statute is not to ignore distorted costs when establishing normal value, but rather to permit Commerce not to adjust for a PMS when the factual record does not provide a reliable, quantifiable basis to do so. The record in this case provides clear, quantifiable evidence, including benchmark world market prices, that Argentine soybean prices are distorted. Faced with such evidence, it would have been an abuse of discretion to refuse to adjust for the PMS, regardless of the magnitude of the distortion.

Commerce Position: We agree with the petitioner that we unnecessarily articulated a restriction on our PMS authority in the Draft Remand Results. Commerce believes it has adequately explained why its application of the PMS adjustment in this investigation constitutes a

[131] Draft Remand Results at 33.
[132] *See Certain Oil Country Tubular Goods from the Republic of Korea*, 84 FR 24085 (May 24, 2019) (*Korean OCTG*) and accompanying IDM at Comment 1-C.

reasonable exercise of its authority, given the discretion afforded to Commerce by Congress's use of the word "may" in section 773(e) of the Act. Thus, because Commerce has explained why its use of its discretion was reasonable in this case, it is not necessary to speculate in what situations it might exercise its discretion not to remedy a demonstrated PMS. Nevertheless, Commerce notes the petitioner is correct that one such situation can be found in *Korean OCTGs*, in which Commerce found that the record of that case contained inadequate data to make adjustments for certain PMS findings.[133] Therefore, Commerce has deleted this discussion (section D(vi) of the Draft Remand Results) from this final analysis.

Issue 5: The Disposition of the Changed Circumstances Reviews

Petitioner's Comments

- Given the fact that the changed circumstances review is still pending, the implications of a speculative final determination on this remand redetermination need not be addressed here. Should Commerce issue final results of the changed circumstances reviews while this remand proceeding is still before the Court, the petitioner will address the implications of the changed circumstances review at that time.

LDC's Comments

- Rather than advise the court of potential mootness, Commerce should issue its final determination in the CCR. If it does not, there is a danger that the Court's consideration of the issues in this appeal will be clouded by potential outcomes in the CCR or vice-versa.

[133] *Korean OCTG* IDM at Comment 1-C.

- Both in the CCR and in the remand determination, Commerce should seek to make fair determinations based on the law; it should not seek to obtain a specific outcome by balancing its determinations between the CCR and remand determination.

Commerce Position: On December 16, 2019, Commerce reopened the record of the CCRs for new information and comments concerning changes made by the GOA to Argentina's export tax regime. Commerce is still considering the information and comments received and thus has not yet issued final CCRs. Thus, Commerce is deleting the discussion of "mootness" (section E of the Draft Remand Results) and is not addressing the comments of interested parties on the issue of "mootness" from this final analysis.

IV. FINAL REMAND RESULTS

Commerce has clarified the issues from the *Final Determination* described above and in accordance with the Court's order. Based on this analysis, Commerce has (1) clarified and explained the legal authority empowering it to make a RIN adjustment, and has made such an adjustment to export price pursuant to section 772(a) and (c) of the Act; and (2) explained why, on this record, the CVD remedy imposed does not remedy the distortion found in the AD case and why, therefore, it is reasonable to apply a PMS adjustment. For the purpose of these final remand results, we have made certain changes to our calculations; however, after accounting for such changes, the rates upon remand for both LDC and Vicentin remain identical to the rates in the *Final Determination*.[134]

[134] *See* LDC Analysis Memo; *see also* Vicentin Analysis Memo.

1/31/2020

X

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
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for Enforcement and Compliance