A-357-820
Remand Redetermination
Slip Op. 20-91 CIT 18-00111
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Vicentin S.A.I.C. et al. v. United States
Consol. Court No. 18-00111; Slip Op. 20-91 (CIT July 1, 2020)

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. 20-91 (CIT July 1, 2020) (*Second Remand Order*). This final remand redetermination concerns *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.[3] First, the Court found that Commerce failed to explain clearly the legal basis empowering it to adjust normal value to account for the value of renewable

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[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).
[3] *See Vicentin S.A.I.C. et al. v. United States*, Consol. Court No. 18-00111, Slip Op. 19-120 (CIT September 10, 2019) (*First Remand Order*).

identification numbers (RINs) for both respondents.[4] 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.[5] 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 (LTAR) in the companion countervailing duty (CVD) investigation did not remedy the distortion.[6] The Court remanded Commerce's determination on both issues for further consideration or explanation.[7]

Pursuant to the Court's *Remand Order*, Commerce clarified the issues from the *Final Determination* described above.[8] Based on this analysis, Commerce: (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;[9] and (2) explained why Commerce's PMS finding and subsidy determination in the companion CVD investigation do not result in an impermissible "double-remedy" based on the record evidence.[10] After accounting for such changes, the rates upon remand for both LDC and Vicentin remained identical to the rates in the *Final Determination*.[11]

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[4] *See First Remand Order* at 8-15, 30.
[5] *Id.* at 15-30.
[6] *Id.* at 25-30; *see also Biodiesel from the Republic of Argentina: Final Affirmative Countervailing Duty Determination*, 82 FR 53477 (November 16, 2017), and accompanying IDM; and *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*).
[7] *See First Remand Order* at 30-31.
[8] *See* "Final Results of Redetermination Pursuant to Court Remand, Consol. Court No. 18-00111; Slip Op. 19-120," dated January 31, 2020 (First Remand Redetermination).
[9] *Id.* at 8-16 and 31-43.
[10] *Id.* at 16-31 and 44-53.
[11] *Id.* at 54.

On July 1, 2020, the Court issued the *Second Remand Order*. The Court found it not unreasonable for Commerce to make a RIN adjustment to export price pursuant to 19 CFR 351.401(c) and 19 CFR 351.102(b)(38),[12] and that the margin calculation methodology used in the First Remand Redetermination was otherwise reasonable.[13] The Court also found, however, that "Commerce has not explained how any distortion created by the PMS in this case has not already been remedied by the concurrent CVD case, and therefore its resort to international market prices for soybeans, without adjustment for the CVD remedy, is unreasonable."[14]

On October 19, 2020, Commerce issued a Draft Remand Redetermination addressing the Court's concerns.[15] Pursuant to the Court's order, Commerce examined the record and determined that substantial evidence indicates that the domestic subsidy at issue did not reduce U.S. prices during the POI. In addition, Commerce reiterated its position, under respectful protest, that such "pass-through" analysis is not required by the Act in this context, explained that there is no presumption stemming from Commerce precedent, legislative history, or statutory design that subsidies pass through to U.S. prices (and, thus, that there is no burden on Commerce to demonstrate otherwise in order to render its determinations "reasonable"), and explained that such analysis may actually risk lowering the trade remedy protection afforded to the domestic industry to a level below that to which it is entitled. On October 26, 2020, we received comments on the Draft Remand Redetermination from the NBB and LDC.[16] Commerce responds to all comments below following the Final Analysis section.

[12] *See Second Remand Order* at 18.
[13] *Id.*
[14] *Id.* at 32.
[15] *See* "Draft Results of Redetermination Pursuant to Court Remand, Consol. Court No. 18-00111; Slip Op. 19-120," dated October 19, 2020 (Draft Remand Redetermination).
[16] *See* NBB's Letter, "Biodiesel from Argentina: Petitioners' Comments on Draft Remand Redetermination," dated October 26, 2020 (NBB Comments); *see also* LDC's Letter, "Biodiesel from Argentina (Antidumping): Comments on Second Draft Remand Redetermination," dated October 26, 2020 (LDC Comments).

II. FINAL ANALYSIS

Double Remedy

A. Background

Section 773(a)(1)(B)(i) of the Tariff Act of 1930 (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.[17] Section 773(e) of the Act directs that constructed value is the sum of the costs of materials and 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."

[17] *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, 129 Stat. 362 (2015) (TPEA).

In the *Preliminary Determination*, as upheld in the *Final Determination*, Commerce determined 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 Government of Argentina's (GOA's) 30 percent export tax on soybeans.[18] As a result, Commerce did not rely on the soybean prices paid by the respondents as part of the cost of production calculation, finding that such prices "did not accurately reflect the cost of production in the ordinary course of trade."[19] Instead, Commerce relied on market-determined prices.[20]

In the *First Remand Order*, 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 LTAR in the companion CVD investigation did not remedy the distortion.[21]

In the First Remand Redetermination, Commerce explained why the PMS finding and subsidy determination in the companion CVD investigation do not result in an impermissible "double-remedy" based on the record evidence.[22] Commerce first explained that the AD and CVD laws are separate regimes that provide separate remedies for distinct unfair trade practices. In particular, the AD law imposes duties in an amount equal to the amount by which normal value (or "fair value") exceeds the export price or constructed export price for Argentine biodiesel in the United States. On the other hand, the CVD law 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. Commerce explained that, unlike the AD law, the CVD law is not designed to remedy

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[18] *See Preliminary Determination* PDM at 23-24; *see also Final Determination* IDM at 21-23.
[19] *See Final Determination* IDM at 21-23.
[20] *Id*.
[21] *See First Remand Order* at 25-30.
[22] *See* First Remand Redetermination at 16-31 and 44-53.

unfairly low-priced U.S. sales. Therefore, the CVD remedy imposed to countervail a subsidy is not intended to address the differential between the U.S. price and normal value.[23]

Commerce then explained why 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. Commerce explained that 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 non-market economies pursuant to section 777A(f) of the Act). Commerce reasoned that attempting to reverse or alter the PMS adjustment due to the concurrent application of CVDs would be inherently speculative. Additionally, Commerce explained that the respondents did not submit any information (or cite 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"). Therefore, 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.[24]

Lastly, Commerce reiterated that Congressional silence on "double remedy" concerns in promulgating section 773(e) of the Act in the TPEA, three years after the litigation involving double remedies in non-market economy (NME) proceedings, supported the reasonableness of Commerce's determination not to make any double remedy adjustment.[25]

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[23] *Id.* at 22-27 and 44-53.
[24] *Id.* at 28 and 44-53.
[25] *Id.* at 28-31 and 44-53.

In the *Second Remand Order*, the Court held that "Commerce has not explained how any distortion created by the PMS in this case has not already been remedied by the concurrent CVD case, and therefore its resort to international market prices for soybeans, without adjustment for the CVD remedy, is unreasonable."[26]

The Court recognized that the statute does not mandate offsetting CVDs from a concurrent CVD case where Commerce determines normal value using an alternative method pursuant to section 773(e) of the Act, but that "the lack of statutory directive does not render Commerce's alternative methodology reasonable."[27] The Court held that Commerce's explanation in the First Remand Redetermination failed to address the problem raised by the Court, "namely, whether its calculation of normal value (*i.e.*, using international market prices for soybeans) remedies subsidies that have already been remedied by the concurrent CVD case."[28] According to the Court:

> Commerce's use of an alternative methodology for constructed value, using market prices for soybeans, may remedy the effects of domestic subsidization already remedied by the concurrent CVD case, such that Commerce must either account for the increase in the weighted average dumping margin resulting from the countervailing duties or explain why doing so is unnecessary. Commerce's alternative calculation methodology corrects for a distortion in home market prices caused by a domestic subsidy that has potentially already been accounted for in the concurrent CVD case.[29]

The Court expanded on its concern through a discussion of the statutory treatment of export subsidies and concurrent remedies in the NME context. In the former context, the Court concluded that:

> {The statutory} treatment of export subsidies illustrates that export subsidies affect only one side of the {less than fair value (LTFV)} equation such that the price differential between normal value and U.S. Price is presumed to be the

[26] *See Second Remand Order* at 32.
[27] *Id.* at 31.
[28] *Id.* at 31-32.
[29] *Id.* at 33 (internal citations omitted).

> result of the subsidy. Conversely, domestic subsidies are presumed to impact both sides of the LTFV equation, such that any price differential between normal value and U.S. Price is presumed to result from something other than the subsidy.[30]

In the latter context, the Court finds that:

> {A} domestic subsidy that would normally affect both sides of the LTFV is remedied when Commerce determines normal value because the statute requires that normal value be determined through surrogate values. Because the NME surrogate value provisions effectively remedy the domestic subsidy in an {antidumping duty (ADD)} case (by increasing the normal value side of the LTFV equation), Congress provided a statutory provision to avoid double remedy where there is a concurrent CVD case. Here, Commerce's adoption of an international market price for soybeans when calculating constructed value negates the assumed even-handedness of a domestic subsidy and remedies the domestic subsidy in the same way that the surrogate values remedy a domestic subsidy in an NME situation.[31]

In light of these findings, the Court held that "Commerce has not explained why the dumping margin is not improperly increased when there is an unadjusted remedy imposed for a PMS that has already been addressed by the imposition of CVDs on the same merchandise, nor has it explained why it cannot adjust the remedy for the PMS to account for the already imposed CVDs."[32] Therefore, the Court remanded Commerce's determination for further explanation or reconsideration.[33]

B. The Provision of Soybeans for LTAR Does Not Affect U.S. Prices for Argentine Biodiesel

At the outset, and as discussed below, Commerce respectfully disagrees with the Court that there exists any sort of "presumption" that domestic subsidies typically reduce U.S. prices such that it is incumbent upon Commerce to demonstrate otherwise. That said, to comply with

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[30] *Id.* at 33-34 (citing *Notice of Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium from France*, 69 FR 46501, 46506 (August 3, 2004) (*LEU from France*).
[31] *Id.* at 34-35 (citing 19 USC 1677f-1(f)(1)(C)).
[32] *Id.* at 35-36.
[33] *Id.* at 29 and 36.

the Court's remand order, under respectful protest,[34] we have performed an analysis below to further explain – in the Court's words – "why the dumping margin is not improperly increased when there is an unadjusted remedy imposed for a PMS that has already been addressed by the imposition of CVDs on the same merchandise{.}"[35]

As the Court explains, the potential for a double remedy stems from the possible uneven effects of a subsidy on U.S. prices and normal value (here determined by the use of "constructed value"). If the subsidy's effect on the LTFV equation is limited to lowering U.S. price (as would be the case if the subsidy's influence on normal value is removed through the use of a surrogate value or, as is the case here, through the use of a world market value) some portion of the differential determined by the LTFV equation is the result of the subsidy. If, however, the subsidy affects neither U.S. price nor normal value, the even-handedness of the subsidy's effects is maintained and no portion of the LTFV differential can be attributed to the subsidy.

The key finding in this context (*i.e.*, when normal value is unaffected by the subsidy), therefore, is whether the subsidy has affected U.S. prices. In other words, Commerce must determine whether the subsidy has "passed through" to U.S. prices. In administering 19 USC 1677f-1(f)(1) (*i.e.*, section 777A(f)(1) of the Act), the only section of the Act requiring and delineating a pass-through analysis, Commerce has required the producer or exporter under examination to demonstrate: a "subsidies-to-cost link," *e.g.*, the subsidy's effect on cost of manufacture; and, a "cost-to-price link," *e.g.*, the producer's or exporter's prices changed as a result of changes in cost of manufacture.[36] Commerce also asks whether countervailable

[34] *See Viraj Group Ltd. v. United States*, 343 F.3d 1371, 1376-77 (Fed. Cir. 2003).
[35] *See Second Remand Order* at 35-36.
[36] *See, e.g.*, *Antidumping Duty Investigation of Common Alloy Aluminum Sheet from the People's Republic of China: Affirmative Final Determination of Sales at Less-Than-Fair Value*, 83 FR 57421 (November 15, 2018), and accompanying IDM at 5-6*; see also Certain Hardwood Plywood Products from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair*

subsidies have been demonstrated to have reduced the average price of imports during the period under examination.

In the instant case, the record demonstrates that there is no cost-to-price link and that the subsidy has not otherwise "reduced the average price of imports of the class or kind of merchandise" during the period of investigation (POI) (in the words of 777A(f)(1)(B) of the Act). First, the record demonstrates overwhelmingly that the respondents price their U.S. sales by reference to U.S. market prices, either for conventional "petro-diesel" or soybean oil. For example, LDC explained at verification that "{f}or sales to U.S. customers, LDC Claypool {LDC's U.S. affiliate} signed contracts with the customers, agreeing to provide B99 biodiesel that was *generally priced based on New York Mercantile Exchange (NYMEX) heating oil* futures prices plus some specified premium. . . ."[37] Also, [

][38] "{Commerce} asked LDC Claypool when prices are set based on NYMEX heating oil futures rather than CBOT soybean oil futures. Company officials stated that *U.S. companies typically prefer NYMEX heating oil prices*, since biodiesel is regarded as fuel and heating oil reflects fuel prices, whereas Argentine transactions typically rely on CBOT soybean oil prices as they generally regard biodiesel less as fuel and more similar to a soybean product."[39] Likewise,

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Value, Preliminary Affirmative Determination of Critical Circumstances, in Part, 82 FR 28629 (June 23, 2017), and accompanying PDM at 42-43 (finding the mandatory respondents failed to establish a cost-to-price link), and *Forged Steel Fittings from the People's Republic of China: Affirmative Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination and Extension of Provisional Measures*, 83 FR 22948 (May 17, 2018), and accompanying PDM at 30-31 (finding the mandatory respondents failed to establish either subsidy-to-cost link or a cost-to-price link).

[37] *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 (LDC CEP Verification Report) at 6 (emphasis added).

[38] *See* Memorandum, "Verification of the Sale Responses of LDC Argentina S.A. in the Antidumping Duty Investigation of Biodiesel from Argentina," dated November 29, 2017 (LDC Verification Report) at 9.

[39] *See* LDC CEP Verification Report at 17 (emphasis added).

at Vicentin, "Officials explained that the company may sell biodiesel at a flat price or based on a Chicago Board of Trade (CBOT) futures price, plus or minus a premium."[40] [

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Other information submitted by both respondents confirms the narrative of the verification reports. For example, a U.S. sales "trace" reviewed during the Argentine portion of the LDC verification indicates: "[ ]"[42] Likewise, a U.S. sales trace provided by Vicentin as part of a questionnaire response indicates: [ ][43]

The *ITC Preliminary Report* provides a description of the industry in general that confirms the explanation provided by the respondents.[44] The report finds that: "Biodiesel has traditionally been marketed primarily as an additive or alternative to petroleum-based diesel fuel, and, as a result, biodiesel prices have been influenced by the price of petroleum-based diesel fuel, adjusted for government incentives supporting renewable fuels, *rather than biomass based diesel production costs*."

The *ITC Preliminary Report* also demonstrates a lack of correspondence between the subsidy at issue and Argentine prices through price data collected for 2016 through 2019. According to the report, Argentine biodiesel was on average $3.19/gallon in 2014, dropped to

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[40] *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 25.
[41] *Id.* at 27 (emphasis added).
[42] *See* LDC Verification Report at Exhibit 8; *see also* LDC CEP Verification Report at Exhibits 7 and 8 (using nearly identical language to establish contract prices).
[43] *See* Vicentin June 2, 2017 Section A Questionnaire Response at Exhibit A-VIC-13.
[44] *See Biodiesel from Argentina and Indonesia, Investigation Nos. 701-TA-571-572 and 731-TA-1347-1348 (Preliminary)*, U.S. ITC Publication 4690 (May 2017) (*ITC Preliminary Report*) at VI-7 (placed on the record of the investigation by Petitioner's August 2, 2017 PMS Allegation at Exhibit 9) (emphasis added).

$2.66/gallon in 2015, and rose to $2.99/gallon in 2016.[45] During the same period, however, the export tax on Argentine soybeans fell from 35 percent to 30 percent.[46] If the presumptions underlying the double remedy theory were true, Argentine prices to the United States should have risen during this period. Notably, the pattern followed by Argentine prices (dropping from 2014 to 2015 before rebounding in 2016), is the same pattern followed by prices for other imports (*e.g.*, imports of biodiesel from Canada and Indonesia) during this three-year period. Information published by the U.S. Department of Agriculture and the U.S. Census Bureau demonstrate a similar pattern, indicating a correlation between U.S., Argentine, and Indonesian prices in the United States during each quarter from 2014 through 2016.[47] Thus, pricing information demonstrates Argentine prices for U.S. shipments correspond to the overall U.S. market, and not to the cost of soybeans in Argentina.

As the record demonstrates LDC and Vicentin price their U.S. shipments in a manner designed to compete with (or undercut) U.S. prices for petro-diesel and biodiesel, and not based on the domestic subsidy, Commerce concludes there is no significant link between the subsidy and U.S. prices. Therefore, as both sides of the LTFV equation in this instance are unaffected by the export tax on soybeans, the differential between U.S. prices and normal value (*i.e.*, the dumping margin) is not partially the result of the subsidy, and thus the PMS adjustment to fair value does not remedy the subsidy.

[45] *See ITC Preliminary Report* at Tables C-1 and IV-2.
[46] *See, e.g.*, Petitioner's Letter, "Antidumping and Countervailing Duty Petitions on Behalf of The National Biodiesel Board Fair Trade Coalition," dated March 23, 2017 (Petition) at Volume II, Exhibit GEN-30, page 4.
[47] *See* Petition at Volume II, Exhibit GEN-28.

C. A Pass-Through Analysis Is Based on Presumptions Not Contained in the Act Nor Supported by Legislative History, Is an Evidentiary Burden that Should Not Be Placed on Commerce, and Risks Undermining the Relief to which Domestic Parties Are Entitled Under Subtitle B of the Act

As the Court has noted on multiple occasions in this proceeding, the statute does not require Commerce to make a double remedy adjustment in this context.[48] Instead, the Court has required Commerce to demonstrate the lack of a double remedy (or to make an adjustment to avoid the double remedy) based on a holding that Commerce's determinations must be reasonable given the factual record and based on substantial evidence.[49] Whether it is reasonable for Commerce to proceed with the PMS adjustment without undertaking the type of analysis above depends, however, on whether certain assumptions about "pass-through" are valid—in particular, whether it is so clear that domestic subsidies typically reduce U.S. prices such that it is incumbent upon Commerce to demonstrate otherwise, and, if so, whether the extent of the reduction can be determined accurately, such that an appropriate adjustment can be made. In the *Second Remand Order*, such presumptions are drawn by the Court from statements Commerce made over 15 years ago in an administrative review, *LEU from France*, and are inferred by the Court from sections 772(c)(1)(C) and 777A(f) of the Act.

The issue before Commerce in *LEU from France* was whether all countervailing duties should be subtracted from U.S. prices because they were "United States import duties," within the meaning of section 772(c)(2)(A) of the Act. Commerce refused to deduct the countervailing duties from U.S. price because they were not "United States import duties" within the meaning of that section of the statute. Commerce reached that conclusion after considering several

[48] *See, e.g.*, *Second Remand Order* at 31 ("Commerce and Defendant correctly observe that the statute does not mandate offsetting CVDs from a concurrent CVD case where Commerce uses constructed value or an alternative under 19 U.S.C. § 1677b(e).")
[49] *Id.*

different aspects of the issue, including the legislative history of section 772(c)(2)(A) of the Act, the meaning of the term "United States import duties" within the context of the current Act as well as its 1921 predecessor, the meaning of the phrase "any costs, charges, or expenses" of importation, the logic and context of the 1979 amendments to the Act requiring an adjustment for export subsidies (*i.e.*, section 772(c)(1)(C) of the Act discussed above), Commerce practice and relevant court decisions, and the practice of U.S. Customs.[50] Commerce also considered the "assumption" that domestic subsidies do not "affect dumping margins, because they lower prices in both the U.S. market and the domestic market of the exporting country equally."[51] Commerce, however, did not make a determination that all domestic subsidies are presumptively fully passed through to export prices or that the effect of subsidies on export prices can be determined with any degree of certainty. To the contrary, Commerce focused on the significance of such assumptions in understanding past practice. For example, Commerce notes its understanding that such assumptions underlie Congress' passage of the 1979 amendments to the Act. Thus, it would be incorrect to treat any statement in *LEU from France* as a formal finding by Commerce regarding the assumptions considered therein pursuant to the larger conclusion not to deduct countervailing duties from U.S. price. Moreover, insofar as *LEU from France* stands for a finding regarding the pass-through effect of subsidies on U.S. prices, such reasoning was superseded by Commerce's extensive refutation of such presumptions five years later in the *GPX* litigation, and by Congress' enactment of section 777A(f) of the Act, which, as discussed below, does not codify a presumption that domestic subsidies affect U.S. export prices, but rather calls for an empirical analysis of the question within a particular context.

[50] *See LEU from France*, 69 FR at 46506-08.
[51] *Id.* at 46506.

While section 772(c)(1)(C) of the Act requires a full adjustment for export subsidy countervailing duties in AD proceedings, the legislative history provides no grounds for concluding that Congress' action was based upon specific and rigid presumptions about the pass-through effect of subsidies on export prices other than a seeming recognition that export subsidies could affect price comparability for dumping purposes (presumably by lowering export prices) whereas domestic subsidies presumably would affect the price (and cost) of the merchandise sold in both markets equally.[52] This recognition does not mean, however, that Congress assumed that 100 percent of export subsidies automatically pass through to U.S. prices or that 100 percent of domestic subsidies automatically pass through to prices (and costs) of products sold in both the home and U.S. markets. In fact, in enacting section 772(c)(1)(C) of the Act, Congress may have recognized the complexity of the issues that would need to be resolved to estimate the specific offset, and thus opted for a full offset for export subsidies to avoid such potential problems.[53]

By comparison, the more recent provisions of section 777A(f) of the Act pertaining to subsidy offsets in NME proceedings are significantly more complex. In particular, pursuant to

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[52] *See* Senate Report on the Trade Agreements Act of 1979, S. Rep. No. 96-249 (1979) at 94 ("The purpose of the amendment regarding additions to {U.S. price} with respect to countervailing duties also being assessed because of an export subsidy is designed to clarify that such adjustment is made only to the extent that the exported merchandise, and not the other production of the foreign manufacturer or producer or other merchandise handled by the seller in the foreign country, benefits from a particular subsidy{}. The princip{le} behind adjustments to the price paid in these instances is to achieve comparability between the price{s}which are being compared. Where the situation is the same. . . {the merchandise in both markets benefits from the subsidy} then no adjustment is appropriate.") Congress added section 772(c)(1)(C) to the statute in the Trade Act of 1979 (1979 Act), Pub. Law 96-39, Title I § 101, 93 Stat. 181 (1979).

[53] Indeed, given the variety of export subsidy programs, certain export subsidies may have a greater or lesser effect upon export prices. For example, the granting government can explicitly condition the receipt of the subsidy upon the export of a specific quantity of merchandise. Alternatively, a government can grant subsidies to exporters by virtue of their status or past performance as exporters generally, but without any condition concerning their future export performance. The first type of subsidy provides a clear incentive to increase exports, whereas the second type does not. Consequently, the second type may have a smaller effect upon export prices. Where the exporter is already a low-price supplier and the terms of the subsidy do not require increased exports, there may be little benefit to the exporter in lowering its price further.

this section, 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. In other words, there is no presumption of pass-through and no automatic adjustment is made to account for the potential overlap in antidumping and countervailing duties. There must be a demonstration, with affirmative evidence, that such an adjustment is warranted and to what extent. *That requirement actually creates a presumption of no pass-through*, which must be rebutted before an offset is made, the opposite of what the Court has done in this case by requiring Commerce to demonstrate no pass-through.

As Commerce has explained at length previously, we do not believe Congress intended for Commerce to attempt to measure or alleviate any double remedy through the discretion delegated to Commerce under section 773(e) of the Act.[54] But beyond that conclusion, there seems to be no basis to find that Congress intended to create a presumption of pass-through and to place a burden on Commerce to rebut that presumption, in contradiction to its design of section 777A(f) of the Act. It is not difficult to imagine why Congress would choose not to place such a burden on Commerce. First, as previously explained in the First Remand Redetermination, there is no reason to assume—even in general—that domestic subsidies automatically reduce U.S. prices.[55] In fact, Commerce has demonstrated above that, in the instant case, the subsidy at issue is not linked to reduced U.S. prices. Second, within the context of 777A(f) of the Act and of the current PMS context under the TPEA, Congress may have simply not wanted to incur the risk that Commerce would "over correct" the possible double remedy by either denying the PMS adjustment altogether or by estimating too large of an

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[54] *See, e.g.*, First Remand Redetermination at 30.
[55] *Id.* at 25-27.

offsetting deduction to the AD cash deposit rate. As Commerce noted previously, such efforts risk arbitrarily lowering the trade remedy protection available to the domestic industry under the Act.[56]

III. COMMENTS FROM INTERESTED PARTIES

Issue 1: A Pass-Through Analysis is Not Required by Statute, Is an Evidentiary Burden Placed on Commerce by the Court Rather than Congress, and Risks Undermining the Relief to Which Domestic Parties Are Entitled by Law

NBB Comments

- Commerce correctly explained that whether the PMS adjustment is reasonable depends upon whether certain assumptions about pass-through are valid—in particular, whether domestic subsidies typically reduce U.S. prices and whether the extent of the reduction can be determined accurately.[57]

- The Draft Remand Results correctly explain that pass-through assumptions are not valid, notwithstanding the Court's citation to *LEU from France* or inferences drawn from 19 USC 1677a(c)(1)(C) and 19 USC 1677f-1(f)(1).[58]

- Even if *LEU from France* stands for a finding that all domestic subsidies are presumptively fully passed through to export prices or that the effect of subsidies on export prices can be determined with any degree of certainty (which it does not), a single determination by Commerce is not evidence of agency practice,[59] and, as Commerce notes, it has been superseded by the "GPX litigation, and by Congress' enactment of {19 USC 1677f-1(f)}, which does not codify a presumption that domestic subsidies affect U.S. export prices."[60]

- While the Court is correct that "Congress provided a statutory provision to avoid a double remedy where there is a concurrent CVD case" in the NME context, Congress did not create a presumption of pass-through in such cases. Rather, as Commerce correctly notes, 19 USC 1677f-1(f) "*actually creates a presumption of no pass-through*, which must be rebutted before an offset is made."[61]

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[56] *Id.* at 28.
[57] *See* NBB Comments at 4.
[58] *Id.* at 4.
[59] *Id.* at 6 ("An action…becomes an 'agency practice' ***when a uniform and established procedure exists*** that would lead a party, in the absence of notification of a change, reasonably to expect adherence to the {particular action} or procedure." *Huvis Corp v. United States*, 525 F. Supp. 2d 1370, 1378-79 (Ct. Int'l Trade 2007) (quoting *Ranchers-Cattlemen Action Legal Found. V. United States*, 74 F. Supp. 2d 1353, 1374 (Ct. Int'l Trade 1999)). (emphasis supplied).)
[60] *Id.* (citing the Draft Remand Redetermination at 14).
[61] *Id.* at 7.

- While the language of 1677f-1(f) is "vague enough to allow Commerce some discretion to allocate evidentiary burdens for establishing the statutory criteria for a double remedy offset," the statutory criteria nevertheless must be satisfied before Commerce can adjust dumping margins to account for countervailable domestic subsidies.[62] As Commerce notes, this is "the opposite of what the Court has done here by requiring Commerce to {affirmatively} demonstrate no pass-through."[63]

- In sum, the Court has created a new evidentiary burden on Commerce that was not imposed or even contemplated by Congress and finds no support in Commerce's past practice—an unreasonable burden that risks arbitrarily lowering the trade remedy protection available to the domestic industry.[64]

Commerce Position: Commerce agrees with the comments of the NBB in support of the Draft Remand Redetermination and has left its analysis unchanged above. In particular, Commerce agrees there is no presumption in the Act or Commerce practice that subsidies pass through to U.S. prices, nor is there a presumption that the effects of subsidies on prices can be measured accurately with any certainty. As noted above, section 777A(f) of the Act (19 USC 1677f-1(f)) actually creates a presumption of no pass-through, which must be rebutted before reducing the amount of the AD cash deposit rate. Despite the fact that there is not even a provision in the Act addressing an AD cash deposit rate adjustment in the current circumstances (a PMS adjustment overlapping a CVD finding), the Court has nevertheless created an additional evidentiary burden on Commerce that does not even exist under the circumstances giving rise to section 777A(f) of the Act. The Court has, in effect, read two additional provisions into the Act that Congress itself chose not to include: (1) that the potential for a double remedy renders a PMS adjustment impermissible when a parallel CVD investigation addresses the same behavior;[65] and (2) that

[62] *Id.* (citing *Wheatland Tube Co. v. United States*, 26 F. Supp. 3d 1372, 1384 (CIT 2014)).
[63] *Id.* at 7-8 (citing Draft Remand Redetermination at 15).
[64] *Id.* at 8.
[65] *See First Remand Order*, 404 F. Supp. 3d at 1340 ("Congress did not reference the potential for a double remedy in {the PMS provision of the TPEA}.")

Commerce must first preclude such a possibility, or must make adjustments to its determinations accordingly, in order to render its AD determinations "reasonable."

Issue 2: Commerce Has Not Explained Why It Is Reasonable to Adjust Constructed Value

LDC Comments

- Commerce incorrectly states that the key question here is whether the subsidy affects export price. The question, however, as framed by the Court, is whether Commerce can reasonably justify adjusting the cost of soybeans in the AD calculation after it has already imposed a countervailing duty to eliminate the alleged benefit for a lower soybean cost.[66]

- No one disputes that the reason for imposing the countervailing duty was to offset the alleged benefit of a lower Argentine soybean input price for the production of biodiesel. The reason for the PMS adjustment in the AD calculating is the same.[67]

- Commerce's explanation deals in generalities about the AD and CVD statutes, and about export subsidies and NME cases. The Court wants to know why both remedies should apply to correct the alleged lower soybean price. Commerce has not provided a clear answer.[68]

Commerce Position: LDC appears to argue that the application of a PMS adjustment addressing the same issue subject to a subsidy determination (in this case, low soybean prices) is *per se* unreasonable. The Court, however, does not make such a ruling. Rather, the Court instructs Commerce to explain "why the dumping margin is not improperly increased when there is an unadjusted remedy imposed for a PMS that has already been addressed by the imposition of CVDs on the same merchandise," or, alternatively, to explain "why it cannot adjust the remedy for the PMS to account for the already imposed CVDs."[69] Thus the Court has directed Commerce to explain the effects of the CVD determination on the AD margin (or lack thereof). The Court illustrates its precise concern when it discusses the potential for subsidies to unevenly

[66] *See* LDC Comments at 5.
[67] *Id.*
[68] *Id.* at 6.
[69] *See Second Remand Order* at 35-36.

"impact both sides of the LTFV equation,"[70] and "the assumed even-handedness of a domestic subsidy" in conventional AD calculation methodologies.[71] Commerce's analysis above follows the Court's analytical framework (*i.e.*, the "pass-through" framework) by demonstrating that the domestic subsidy at issue (soybeans for LTAR) has not affected U.S. prices for biodiesel. Because the subsidy also has not affected the normal value used in the AD dumping calculations, Commerce properly concludes that the dumping margin is not improperly increased through the PMS adjustment. Additionally, Commerce explained that an adjustment to the PMS remedy risks undermining the trade remedy relief to which the domestic industry is entitled.

Issue 3: Commerce Has Not Explained Why It Cannot Adjust the Remedy for the PMS to Account for the Already Imposed CVDs

LDC Comments

- The Court also instructed Commerce to address why it could not adjust the PMS calculation so that it does not double count the countervailing duties it has already imposed for the Argentine soybean prices. Commerce has not addressed this issue in the redetermination.[72]

Commerce Position: The Court did not require Commerce to explain why it cannot adjust the PMS calculation so that it does not double count the countervailing duties already imposed. The Court finds that Commerce did not explain why the PMS adjustment did not improperly increase the dumping margin, "nor" did Commerce explain why it could not make an adjustment to account for any improper adjustment. The implication of the Court's ruling is that *if* Commerce cannot explain why there is no improper increase of the dumping margin, it must *instead* explain why an adjustment is not possible. As explained above, Commerce believes it has demonstrated thoroughly that the PMS adjustment did not result in an improper increase in the AD margin;

[70] *Id.* at 34.
[71] *Id.* at 35.
[72] *See* LDC Comments at 7 (citing *Second Remand Order* at 35-36).

thus, it is not technically necessary to explain why an adjustment cannot be made. Regardless, Commerce has also stated above and in the First Remand Order that an adjustment is both contrary to the language of the statute (which does not include PMS adjustments among the reasons for offsetting CVDs) and risks undermining the relief afforded to the domestic industry by Congress, given the complexity of tying subsidies in a foreign market to export prices to the United States.[73]

Issue 4: Congress' Rationale for Prohibiting Double Remedies in Other Instances is Applicable Here, but Commerce's Emphasis on a "Pass-Through" Analysis Misses the Mark

LDC Comments

- The unreasonableness of the double remedy here is similar to the unreasonableness of a double remedy in the scenarios where Congress has explicitly prohibited a double remedy. In the Second Remand Order, the Court pointed to two scenarios where Congress has instructed Commerce not to "double count" by remedying the same "program" in parallel AD and CVD cases: where the parallel CVD case finds an export subsidy, and where the parallel AD case uses the NME methodology. Underlying both examples is a clear rationale: once a particular benefit has been neutralized through the imposition of a CVD, it is not reasonable to seek to neutralize it again in the AD case.[74]

- Congress has been clear that, in the export subsidy scenario and the NME scenario, any difference between the normal value and export price may be at least partially attributable to the subsidy and, therefore, Commerce must adjust the AD calculation to account for the CVD remedy.[75]

- Whether the subsidy is passed through to prices – either normal value or export prices – is not relevant here because: (1) the normal value calculation is based on cost, not price; and (2) the benefit that Commerce purports to neutralize in the subsidies case relates to the same soybean input cost. Commerce need not determine whether the subsidy affected price; it undeniably affects cost, which is the basis for normal value in this case. There is no need to adjust those same costs again through a PMS adjustment, and it is simply unreasonable to do so.[76]

- Although the NME scenario also relies on costs for its normal value calculation, those costs cannot be affected by an input subsidy because they are taken from a third country.

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[73] *See supra* at 16; *see also* First Remand Redetermination at 51.
[74] *See LDC Comments* at 7-8 (citing *Second Remand Order* at 33-35).
[75] *Id.* at 8.
[76] *Id.* at 9.

> In that case, Commerce is not adjusting for a distortion in the costs for normal value and simultaneously imposing a countervailing duty for low costs as it is here. Even if Commerce countervailed an input subsidy in an NME case, the fact that Commerce neutralized the low costs in the related CVD case would not necessarily lead to the same concerns because the normal value calculation uses third country costs. Thus, any double remedy analysis in the NME scenario necessarily looks to the impact of the input subsidy on the export price.[77]

Commerce Position: LDC's comments on this issue simply restate its previous comments, arguing that a PMS adjustment addressing the same behavior subject to a CVD determination is *per se* unreasonable. As Commerce explains above in response to LDC's comments under Issue 2, the Court's concern is with whether the subsidy has an even-handed effect on the "LTFV equation." Commerce has demonstrated that the effects of the provision of soybeans for LTAR are, in fact, even handed as neither U.S. price nor normal value is affected.

Moreover, LDC is simply wrong when it suggests that Commerce "must adjust" the AD calculation to account for the CVD remedy in the "NME scenario." Section 777A(f) of the Act clearly limits the adjustment to situations where the "countervailable subsidy has been demonstrated to have reduced the average price of imports" and where Commerce "can reasonably estimate the extent to which the countervailed subsidy . . . has increased the weighted average dumping margin."

LDC attempts to dismiss the appropriateness of a pass-through analysis in this instance by noting that the normal value calculation is based on cost, not price, and that "the 'benefit' that Commerce purports to neutralize in the subsidies case relates to the same soybean input cost."[78] The latter observance appears to be once again an attempt to interpret the Court's ruling as a *per se* prohibition on applying a PMS adjustment when the underlying behavior is also subject to a CVD determination. Commerce has explained above why the Court's ruling does not require

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[77] *Id.* at 9-10.
[78] *Id.* at 9.

such an outcome. Regarding the former observance, it is unclear why LDC believes that a cost-based normal value renders a pass-through analysis irrelevant or how it "misses the mark," to use LDC's language. The question addressed by the pass-through analysis is the question posed by the Court: is the LTFV equation in this case affected by the domestic subsidy such that the subsidy inappropriately increases the AD margin? Our answer is no. The cost-based normal value, based on international prices, is unaffected by the domestic subsidy. Likewise, in its pass-through analysis, Commerce has demonstrated that U.S. prices are unaffected by the domestic subsidy. Thus, the LTFV equation is not affected by the domestic subsidy such that the AD margin is inappropriately increased, and the AD margin is not fully or partially the result of the domestic subsidy.

LDC next tries to dismiss the pass-through analysis by attempting to distinguish the "NME scenario" from the circumstances at hand. It does so by arguing that, in the NME scenario, "those costs cannot be affected by an input subsidy because they are taken from a third country."[79] But that is precisely the situation we have here. As the Court states: "Commerce's *adoption of an international market price for soybeans when calculating constructed value* negates the assumed even-handedness of a domestic subsidy and remedies the domestic subsidy in the same way that the surrogate values remedy a domestic subsidy in an NME situation."[80] Pursuant to the Court's illustration of its concern, Commerce demonstrates that the even-handedness of the domestic subsidy is not "negated" in the current case because U.S. prices are unaffected by the subsidy. The Court thus poses the problem in terms of the subsidy's effects on normal value and U.S. prices and Commerce, thus, appropriately analyzes the subsidy's effects on U.S. prices.

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[79] *Id.*
[80] *See Second Remand Order* at 35 (emphasis added).

Finally, Commerce notes that LDC never takes issue with the conclusion that the domestic subsidy does not affect U.S. prices. While LDC argues that the pass-through analysis is misplaced for the reasons discussed above, it does not attempt to deny Commerce's conclusion that Argentine export prices for biodiesel are linked to fuel prices in the United States and not to soybean prices in Argentina or to the export tax rate on soybeans underlying the subsidy at issue.

Issue 5: The Draft Remand Redetermination Demonstrates There Is No Pass-Through of the Soybeans Subsidy in the Form of Lower U.S. Prices

NBB Comments

- The Court believes the potential for a double remedy stems from the possible uneven effects of a subsidy on U.S. prices and normal value (here, constructed value).[81]

- Both respondents admitted at verification, confirmed by their own sales documents, that their U.S. prices are tied to general U.S. market prices and not to their own costs of acquiring soybeans in Argentina, nor to the extent such costs are distorted by the GOA's subsidy on soybeans.[82]

- Findings of the International Trade Commission cited by Commerce corroborate the respondents' statements at verification and their sales records and also demonstrate that import values for Argentine biodiesel lack a correlation with the subsidy at issue.[83]

- In sum, Commerce has cited substantial record evidence demonstrating that the GOA's soybeans for LTAR program had no material impact on U.S. price. Accordingly, Commerce's PMS adjustment to account for the GOA's domestic subsidy on soybeans does not result in a double remedy and is necessary to measure accurately normal value and calculate the respondents' dumping margins.[84]

- To avoid any arguments in the future concerning this type of pass-through analysis, Commerce should include in its introduction a statement putting interested parties on notice that the analysis contained in its remand redetermination is specially in response to the Court's directive and is not a statement of Commerce policy or practice that be relied upon by interested parties or litigants in other proceedings.[85]

[81] *See* NBB Comments at 9.
[82] *Id.* at 10.
[83] *Id.* at 11.
[84] *Id.*
[85] *Id.* at 11-12.

Commerce Position: Commerce agrees with the NBB that we have cited substantial record evidence demonstrating that the GOA's soybeans for LTAR program had no material impact on U.S. prices. Commerce also notes that, as explained above, neither LDC nor any other party has taken issue with this conclusion. Rather, LDC's arguments go to whether such analysis is responsive to the Court's instructions to Commerce.

Commerce also agrees with the NBB that the pass-through analysis performed in this remand redetermination is specifically in response to the Court's directive. Commerce has noted several reasons since the *Final Determination* why this type of analysis should not be undertaken. Congress was aware of the concept of a double remedy when it drafted the relevant section of the TPEA and yet made no provision for any type of adjustment or offset to the AD margin or cash deposit rate as it has done in other contexts giving rise to a possible "double remedy."[86] In addition, attempting to determine the amount by which a subsidy may affect U.S. prices is a complex undertaking and Commerce could easily overestimate the effect if it attempted to do so. Such an overestimate would lead to an overcorrection, and thus to an impairment of the trade relief to which domestic parties are entitled. Although Commerce can only speculate, the possibility of such an overcorrection may, in fact, be why Congress declined to include an instruction to avoid a "double remedy" when it enacted the TPEA. Finally, Commerce does not believe it is clear how often the "presumptions" underlying the double remedy theory (*i.e.*, that subsidies affect prices and, thus, dumping margins, and that the amount

[86] *See, e.g.*, *First Remand Order*, 404 F. Supp. 3d at 1339-40 (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 Stat. 265 (2012) (Section 771A(f) Amendment); *GPX CAFC*, 666 F.3d 732 (Fed. Cir. 2011); and TPEA); *see also* First Remand Redetermination at 50 (discussing statements of Congressmen Meehan and Senator Brown appearing to anticipate exactly this situation; *i.e.*, where a PMS adjustment would be applied to situations involving an "illegally subsidized" input); *see generally* First Remand Redetermination at 28-30 (discussing the enactment of the TPEA closely after the resolution of the GPX litigation and the related action of Congress through the Section 771A(f) Amendment).

of the effect can be adequately quantified) are valid. As Commerce explained in the prior remand redetermination, there is no *a priori* reason to assume that the distortive trade effects of a subsidy are limited to reduced U.S. prices.[87] Thus, Commerce has undertaken the pass-through analysis above under respectful protest.

IV. FINAL REMAND RESULTS

Pursuant to the Court's order, Commerce has examined the record and determined that substantial evidence indicates the domestic subsidy at issue did not reduce U.S. prices during the POI. In addition, Commerce has reiterated its position, under respectful protest, that such "pass-through" analysis is not required by the Act in this context, has explained that there is no presumption stemming from Commerce precedent, legislative history, or statutory design that subsidies pass through to U.S. prices (and, thus, that there is no burden on Commerce to demonstrate otherwise in order to render its determinations "reasonable"), and has explained that such analysis may actually risk lowering the trade remedy protection afforded to the domestic industry to a level below that to which it is entitled.

Dated: November 12, 2020

11/12/2020

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Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

[87] *See* First Remand Redetermination at 25-27.