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Wilmar Trading PTE Ltd., et al. v. United States
Consol. Court No. 18-00121; Slip Op. 22-64 (CIT June 9, 2022)
Biodiesel from Indonesia

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

I. SUMMARY

The U.S. Department of Commerce (Commerce) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (the Court).[1] These final remand results concern the final determination issued in the less-than-fair-value investigation on biodiesel from Indonesia.[2] The petitioner is the National Biodiesel Board Fair Trade Coalition. The respondents selected for individual examination were Wilmar Trading PTE Ltd. (Wilmar) and PT Musim Mas (Musim Mas).[3]

II. BACKGROUND

On June 9, 2022, the Court remanded certain aspects of the *Final Determination* to Commerce for further consideration. First, the Court held that Commerce failed to establish the legal basis empowering it to adjust normal value to account for the value of renewable identification numbers (RINs) for Wilmar.[4] Second, the Court held that Commerce's finding of

[1] *See Wilmar Trading PTE Ltd., et al. v. United States*, Consol. Court No. 18-00121, Slip Op. 22-64 (CIT June 9, 2022) (*Remand Order*).
[2] *See Biodiesel from Indonesia: Final Determination of Sales at Less Than Fair Value*, 83 FR 8835 (March 1, 2018) (*Final Determination*), and accompanying Issues and Decision Memorandum (IDM); s*ee also Biodiesel from Argentina and Indonesia: Antidumping Duty Orders*, 83 FR 18278 (April 26, 2018).
[3] *See Biodiesel from Indonesia: Preliminary Affirmative Determination of Sales at Less Than Fair Value,* 82 FR 50379 (October 31, 2017) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM), unchanged in *Final Determination*.
[4] *See Remand Order* at 24-25.

the existence of one or more particular market situations (PMS) with respect to Wilmar's non-Public Service Option (PSO) home market sales was not supported by substantial evidence.[5] Finally, the Court reserved decision on Musim Mas' challenges to Commerce's use of adverse facts available until the results of redetermination are before the Court.[6]

On August 16, 2022, Commerce issued Draft Remand Results addressing these issues.[7] On August 23, 2022, Wilmar and the petitioner submitted comments.[8] All comments are addressed below in the "Comments on Draft Remand Results" section.

Pursuant to the Court's *Remand Order*, Commerce addressed the issues described above and has: (1) clarified and explained the legal authority empowering it to make a RIN adjustment to export price, as opposed to normal value; and (2) explained why it is reasonable to find that one or more PMS existed with respect to Wilmar's non-PSO sales. For the purposes of these final results of redetermination, we have made certain changes to our calculations; however, after accounting for such changes, the rate upon remand for Wilmar remains identical to the rate in the *Final Determination*.[9]

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[5] *Id.* at 18-21.
[6] *Id*. at 25.
[7] *See* Draft Results of Redetermination, *Wilmar Trading PTE Ltd., et al. v. United States*, Consol. Court No. 18-00121, Slip Op. 22-64 (CIT June 9, 2022), dated August 16, 2022 (Draft Remand Results).
[8] *See* Wilmar's Letter, "Biodiesel from Indonesia – Comments on Draft Results of Redetermination Pursuant to Court Remand," dated August 23, 2022 (Wilmar's Brief); *see also* Petitioner's Letter, "Biodiesel from Indonesia: Petitioners' Comments on Draft Remand Results," dated August 23, 2022 (Petitioner's Brief).
[9] *See* Memorandum, "Antidumping Duty Investigation of Biodiesel from Indonesia; Draft Remand Analysis – Wilmar Trading PTE Ltd.," dated August 16, 2022 (Wilmar Remand Analysis Memorandum).

III. 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) of the Act 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 sections 772(c) and (d) of the Act, as appropriate. Likewise, section 773(a)(1)(B)(1) of the Act 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.

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 351.102(b)(38) as "a change in the price charged for subject merchandise or the foreign like

[10] *See Antidumping Duties; Countervailing Duties*, 61 FR 7308, 7329 (February 27, 1996) (*1996 Proposed Rule*) ("{Commerce} 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; Final Rule*, 62 FR 27296, 27300 (May 19, 1997) (*Preamble*) ("{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.*, 62 FR 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 Modification*).

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: "{i}n 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) of the Act. The courts have recognized that the Act 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} regulations call for adjustments 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 Wilmar, as reflected in its U.S. sales database, included values for both biodiesel and RINs.[14] Commerce explained RINs in the *Preliminary Determination* as follows:

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[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 (CIT 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 {of the Act}. To achieve such a fair comparison, section 773 {of the Act} provides for the selection and adjustment of normal value to avoid or adjust for differences between sales which affect price comparability").

[13] *See Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995).

[14] *See Preliminary Determination* PDM at 28; *see also* Wilmar's Letter, "Biodiesel from Indonesia: Supplemental Sections B-C Questionnaire Response," dated August 18, 2017 (Wilmar's Supplemental BCQR), at 18.

> {i}n 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 to the EPA RINs 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, 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 Indonesia, 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 existed in the Indonesian biodiesel market, and, therefore, determined that it was appropriate to base normal value for Wilmar 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

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[15] *See Preliminary Determination* PDM at 27 (internal footnotes omitted).
[16] *Id.* at 28.
[17] *Id.* at 16-17.
[18] *Id.* at 27-28.
[19] *See Final Determination* IDM at 6.

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 relied principally upon information submitted by Wilmar.[21]

C. Remand Order

In the *Remand Order*, the Court held that Commerce failed to "establish the necessary legal authority for applying a price adjustment to normal value when the factual basis for its adjustment concerned U.S. price. It is worth noting that the statutory path for an adjustment to export price (U.S. price) appears to be clear."[22] The Court discussed its decision in *Vicentin I,* litigation involving the biodiesel from Argentina investigation, in which the Court addressed circumstances analogous to those present in this case.[23] The Court stated that "{o}n remand, after *Vicentin I*, Commerce modified its determination and 'accounted for RINs by decreasing export and constructed export price,' a determination that was sustained by the Court because Commerce had supported with substantial evidence its authority to adjust export price for RIN values."[24]

The Court stated that, in the event that Commerce "chooses to make an alternative adjustment (such as an adjustment to U.S. price), its determination must be supported by substantial evidence and in accordance with law."[25]

D. Analysis

In the *Remand Order*, the Court stated that the statutory path for making a RIN adjustment to U.S. price rather than normal value appears to be clear.[26] As the Court noted,

[20] *Id*.
[21] *See Preliminary Determination* PDM at 27-28.
[22] *See Remand Order* at 25.
[23] *Id.* at 23-26 (citing *Vicentin S.A.I.C. v. United States*, 404 F. Supp. 3d 1332 (CIT 2019) (*Vicentin I*)).
[24] *Id.* at 24 (citing *Vicentin S.A.I.C. v. United States*, 466 F. Supp. 3d 1227, 1230 (CIT 2020) (*Vicentin II*)).
[25] *Id*. at 25.
[26] *Id.*

following the decision in *Vicentin I*, which involved circumstances analogous to this case, Commerce modified its determination in the biodiesel from Argentina case and accounted for RINs by decreasing export and constructed export price, as opposed to making a price adjustment to normal value.[27] This decision was sustained by the Court in *Vicentin II*, and was recently affirmed by the U.S. Court of Appeals for the Federal Circuit (CAFC or Federal Circuit).[28] In these final results of redetermination, and in light of the decisions of the Court and the CAFC, Commerce is now revising its analysis in this proceeding as follows, which is consistent with the courts' opinions.

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.[29] Accordingly, 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 an intangible embedded value in U.S. price, which may have caused some unintended confusion. Although the invoice does not segregate 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

[27] *Id.* at 24.
[28] *See Vicentin S.A.I.C. v. United States*, 42 F.4th 1372 (Fed. Cir. 2022) (*Vicentin CAFC*).
[29] As noted above, the Court sustained this approach because Commerce supported with substantial evidence its authority to adjust export price for RIN values. *See Vicentin II*, 446 F. Supp. 3d at 1230, *aff'd Vicentin CAFC*, 42 F.4th 1372.

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* 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.[30]

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:

[30] *See 1996 Proposed Rule*, 61 FR at 7329; *see also Preamble*, 62 FR at 27300; and *2016 Modification*, 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, Commerce 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.").

> {t}he {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.[31]

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 U.S. International Trade Commission (ITC), B99 (a biodiesel blend containing 99.0 to 99.9 percent biodiesel) sold in the United States for $2.27 per gallon in 2016 on average with RINs included,[32] and for $1.01 per gallon when sold without RINs.[33] Thus, the respondents, and all other sellers of biodiesel, adjust their prices upwards when selling biodiesel that is RIN-eligible.

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}."[34] 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.[35]

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 Indonesian

[31] *See* Petitioner's Letter, "Biodiesel from Indonesia: Petitioner's Particular Market Situation Allegation Regarding Respondents' Home Market Sales and Costs of Production," dated July 25, 2017 (PMS Allegation), at Exhibit 9 (Congressional Research Report: Analysis of Renewable Identification Numbers (RINs) in the Renewable Fuel Standard (RFS) at 1).
[32] *Id.* at Exhibit 4 (ITC Preliminary Report, at Table V-4 (price per gallon weight-averaged by quantity in gallons).
[33] *Id.* at Exhibit 4 at Table V-5 (price per gallon weight-averaged by quantity in gallons)).
[34] *See* PMS Allegation at Exhibit 4 (ITC Preliminary Report at 24).
[35] *Id.* (ITC Preliminary Report at 26).

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*, Wilmar described the price adjustment as follows: "{if} the RIN value is $0.75 per gallon, industry participants generally assume that a gallon of RINless B100 should be $0.75 per gallon less expensive than a gallon of B100 with K1 RINs attached."[36]

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.[37]

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 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 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."[38] PUDD is typically divided by the

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[36] *See Final Determination* IDM at 7; *see also* Wilmar's Letter, "Biodiesel from Indonesia: Supplemental Section A Questionnaire Response 2017," dated August 11, 2017, at 21.
[37] *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 results of redetermination. We note that the terms "fair comparison" and "apples-to-apples comparison" are sometimes used interchangeably to describe the overall statutory scheme.
[38] *See Torrington Co. v. United States,* 44 F.3d 1572, 1578 (Fed. Cir. 1995) (*Torrington*).

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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. Using the values in this example, in the *Final Determination*, Commerce calculated PUDD as follows, *i.e.*, adjusting normal value by adding the RIN value:

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.

Using these same values, but instead deducting the RIN value from U.S. price, the calculation for PUDD would be as follows:

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, in this example the PUDD is $2 million. The *ad valorem* rate will change dramatically, however, depending on the denominator by which the PUDD is divided. If the unadjusted U.S. price is used ($2 / gallon), the *ad valorem* rate will be 100 percent.[39] If the adjusted U.S. price is used ($2 - $1 = $1), the *ad valorem* rate will be 200 percent.[40] If the latter rate of 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

[39] $2 million / ($2 x 1 million gallons) = 100%.
[40] $2 million / ($1 x 1 million gallons) = 200%.

value seen by U.S. 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 results of redetermination, although Commerce is deducting the RIN value from U.S. price to calculate the PUDD, Commerce is using the unadjusted U.S. sales price in the denominator to determine the *ad valorem* cash deposit rates. This results in *ad valorem* cash deposit rates of 92.52 percent for Wilmar and 92.52 percent (all others), the same rates determined in the *Final Determination*.[41]

2. Authority to Disregard Wilmar's Non-PSO Sales

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 {EP} or {CEP.}" Pursuant to sections 771(15) and 773(a)(1)(C)(iii) of the Act, Commerce shall find sale prices 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." Moreover, the SAA provides that a PMS might exist "where there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set."[42]

[41] *See* Wilmar Remand Analysis Memorandum and the revised calculation.
[42] *See* SAA at 822.

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B. Background on Non-PSO Sales

In the *Final Determination*, Commerce found that, through the PSO, "the government's interventions have had a direct effect on biodiesel prices and production in Indonesia during the {period of investigation (POI)}" that justified finding the existence of a sales-based PMS with respect to PSO and non-PSO sales in the home market.[43] Commerce found that "it is clear that neither component of PSO pricing is subject to negotiation, regardless of supply and/or demand. Both components of the biodiesel price are set by the {Government of Indonesia (GOI)}."[44]

Additionally, in the *Final Determination*, we found non-PSO sales to be outside the ordinary course of trade. In particular, we noted that the GOI-mandated PSO sales comprised the vast majority of Indonesian biodiesel consumption, which is a clear indication that all Indonesian biodiesel prices are distorted due to the PMS.[45] Moreover, we found that the prices of non-PSO sales were also based on the distorted price of domestic Crude Palm Oil (CPO) and that the price of CPO comprises the vast majority of the cost to produce biodiesel in Indonesia.[46] Based on this analysis, we found that non-PSO sales also were outside the ordinary course of trade.[47]

C. Remand Order

In the *Remand Order*, the Court sustained Commerce's determination that PSO sales were outside the ordinary course of trade.[48] However, the Court held that Commerce's determination that Wilmar's non-PSO sales were not made in the ordinary course of trade, and that they, therefore, could not serve as a basis for normal value, was not supported by substantial

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[43] *See Final Determination* IDM at 13.
[44] *Id*. The components are the Petrodiesel Price and the Biodiesel Subsidy Fund (BSF) Payment.
[45] *Id.* at 15.
[46] *Id.*
[47] *Id.*
[48] *See Remand Order* at 16.

evidence.[49] The Court concluded that Commerce failed to cite to record evidence of a price effect on non-PSO sales resulting from PSO sales, and had, instead, merely made a claim and stated it as a fact.[50] The Court also held that there was substantial evidence to support the finding that the cost of CPO, the main input in biodiesel, was distorted by a PMS created by the GOI's export taxes and levies.[51] While the Court held that it was not necessarily unreasonable for Commerce to find that this cost-based PMS contributed to its finding that Wilmar's non-PSO sales were not competitively set, it determined that Commerce had failed to show how the price paid for biodiesel for non-PSO sales was affected by the distorted cost of CPO or that the non-PSO prices were not determined by the market.[52] The Court instructed Commerce to either support with substantial evidence a finding that one or more PMS existed with respect to Wilmar's non-PSO sales or use the price paid for these sales in its normal value determination.[53]

D. Analysis

The Court sustained Commerce's decision to exclude Wilmar's PSO sales from its normal value determination because both the BSF Payment and the Petrodiesel Price used to compensate biodiesel producers in the PSO were determined by the GOI and the payments made for petrodiesel were not competitively set.[54]

Based on the facts on the record, Commerce continues to find that the GOI's pervasive regulation of the domestic biodiesel market amounts to a PMS that renders all of Wilmar's non-PSO home market sale prices outside the ordinary course of trade. The Court has affirmed Commerce's finding that the GOI does not establish PSO prices based on a "market price" for

[49] *Id.* at 26.
[50] *Id.* at 20.
[51] *Id*.
[52] *Id.* at 20-21.
[53] *Id.* at 21.
[54] *Id.* at 18.

biodiesel. Rather, the GOI establishes the PSO prices paid to Indonesian biodiesel producers on a quarterly basis,[55] based on a reference price for petrodiesel and the product cost of petrodiesel in Indonesia.[56] The GOI's Fund Management Agency (FMA) makes an additional payment to biodiesel producers under the BSF. The record demonstrates that the GOI's export tax on CPO is the source of funds for the GOI's BSF payments to biodiesel producers.[57] The GOI has stated that:

> export taxes on primary commodities can be used to reduce the domestic price of primary products in order to guarantee supply of intermediate inputs at below world market prices for domestic processing industries. In this way, export taxes provide an incentive for the development of domestic manufacturing or processing industries with higher value-added exports.[58]

Thus, the funding mechanism and the configuration of the BSF payments suggest that the GOI's intent is to ensure the existence and growth of the biodiesel industry as a whole.[59] As the Court noted in its *Remand Order*:

> in *Wilmar CVD*, the Court upheld Commerce's determination regarding attribution – *i.e.*, that the Fund provided grants that were tied (*i.e.*, attributed) to all sales of biodiesel by Wilmar . . . not just those made in the Indonesian market. The basis for this determination, which the Court found reasonable, was Commerce's finding that the purpose of the Fund was to subsidize biodiesel *as a product*, whether sold domestically or exported. In other words, the benefit of the Fund Payments applied to *all* of Wilmar's domestic sales, irrespective of whether they were {PSO} or {non-PSO} sales because the grants were paid to the company, and although they were paid on account of the {PSO} sales, the result was that all sales, {PSO} and {non-PSO} benefitted. [60]

[55] Presidential Regulation No. 61/2015 establishes how the GOI determines the price of PSO sales. The price for biodiesel is based on the reference price for petrodiesel as determined by the Directorate General for Oil and Gas (DGOG) on a quarterly basis. The DGOG relies on the price for petrodiesel reported in the Means of Platts Singapore and the production cost of petrodiesel in Indonesia. *See* PMS Allegation at Exhibit 1.
[56] *Id.*; *see also Preliminary Determination* PDM at 21.
[57] *See* PMS Allegation at Exhibit 1.
[58] *Id.* at Exhibit 15.
[59] *Id.* at Exhibit 1. The GOI's Biofuel Mandatory Use Regulation (B20) of 2013 requires the purchasing companies to include 20 percent biodiesel in their petroleum-based fuels.
[60] *See Remand Order* at 19 (citing *Wilmar Trading Pte Ltd. v. United States*, 466 F. Supp. 3d 1334 (CIT 2020) (*Wilmar CVD*)) (internal citations omitted) (emphasis in original).

Thus, it is reasonable to conclude that the GOI's BSF payments affect the price of all sales (*i.e.*, PSO and non-PSO sales) made by Indonesian biodiesel producers, including Wilmar.

Moreover, the record of the underlying investigation shows that the GOI mandates producer-specific minimum sale quantity requirements for PSO sales, specifying, for each six-month period, the minimum quantity of biodiesel that producers must sell to PSO-customers.[61] As a result of these quantity requirements, PSO sales comprise the vast majority of Indonesian biodiesel consumption at the country-wide level.[62] All PSO sales, including those made by Wilmar, are made to [ ].[63] Thus, in addition to making distortive BSF payments to Indonesian biodiesel producers which directly affect the price of all biodiesel sold in Indonesia, through the PSO program, the GOI substantially redirects the supply of biodiesel available from non-PSO to PSO consumers. This means that non-PSO prices are not competitively set because the part of the market comprised of non-PSO sales does not include the [ ] biodiesel customers ([ ]) in Indonesia or the vast majority of available biodiesel. Further, the combination of the effect of the export tax on CPO – the main input used in Indonesian biodiesel – and subsequently on biodiesel, and the fact that the domestic market is almost exclusively constituted of PSO sales to [ ],[64] means the GOI interventions have resulted in a distorted market that impacts all domestic biodiesel sales.

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[61] *See* Wilmar's Supplemental BCQR at 5 and Exhibit S-6.

[62] *See* Petitioner's Letter "Biodiesel from Argentina and Indonesia; Antidumping and Countervailing Duty Petitions," dated March 23, 2017 (Petition) at Exhibit GEN-31 at 6.

[63] [ ]. *See* PMS Allegation at Exhibit 1.

[64] As we stated in the Preliminary Analysis Memorandum, and the Court notes on page 20 of its opinion, biodiesel procured by the PSO totaled 2,132,289 metric tons (MT) for the period November 2015 through October 2016, whereas the estimated total consumption of biodiesel in Indonesia was projected at 1,958,225 MT for 2016. This indicates that the PSO sales comprised the vast majority of Indonesian biodiesel sales. *See* Memorandum, "Wilmar Trading PTE Ltd. Preliminary Determination Analysis," dated October 19, 2017 (Preliminary Analysis Memorandum), at 2.

The Act uses the term "particular market situation," which indicates that such situation exists in a market and, consequently, Commerce may reasonably analyze the Indonesian biodiesel market as a whole. By definition, a PMS analysis is concerned with distortions in the overall market, rather than distortions on particular sales or transactions of a particular company.[65] Companies like Wilmar and its non-PSO customers do not operate in a vacuum, but, rather, make sales and purchases of biodiesel in a market. If that particular market is distorted as a whole, it would be illogical to conclude that a small portion of Wilmar's sales in that market (*i.e.*, its non-PSO sales) are somehow insulated from the market distortions. The Act does not mandate that Commerce conduct an additional, granular, transaction-specific price evaluation within a market where "a particular *market* situation" exists.

In the *Remand Order*, the Court held that there was substantial evidence to support the finding that the cost of CPO, the main input in biodiesel, was distorted by a PMS created by the GOI's export taxes and levies.[66] Absent the PMS with respect to CPO prices in Indonesia, the cost of all sales of biodiesel would likely have been significantly higher. For instance, Wilmar's weighted-average cost for biodiesel sold in the home market would likely have increased by [ ] percent.[67] This distortion affects the costs of PSO sales and non-PSO sales alike. It would

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[65] *See Final Determination* IDM at comment 3; *see also 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) (*Biodiesel from Argentina*), and accompanying IDM, at Comment 3.

[66] *See Remand Order* at 20.

[67] *See, e.g.*, *NEXTEEL Co. v. United States*, 28 F.4th 1226, 1234 (Fed. Cir. 2022) (*NEXTEEL*) (stating, "Nothing in the statute requires Commerce to quantify the distortion precisely. Still, a quantitative comparison showing a difference between costs incurred and costs in the ordinary course of trade could be substantial evidence supporting the existence of a particular market situation."). In the instant case, Commerce is able to quantify the difference between the costs actually incurred by Wilmar and what its costs would have been in the ordinary course of trade. *See* Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination - Wilmar Trading Pte. Ltd.," dated October 19, 2017 (Preliminary Cost Analysis Memorandum), at Attachment 6, unchanged in the *Final Determination*.

be illogical to conclude that Wilmar's non-PSO sales are immune to distorted CPO costs that affect all production of biodiesel in Indonesia.

The record of this investigation contains sufficient evidence to demonstrate that the biodiesel market in Indonesia as a whole is distorted, and that two particular market situations (*i.e.*, one stemming from the GOI's PSO program and another related to the distorted price of CPO) exist such that prices of all biodiesel sales in that market are outside the ordinary course of trade. Therefore, Commerce continues to find that the GOI exercises control over the supply of biodiesel, as well as "control over pricing to such an extent that home market prices cannot be considered to be competitively set."[68] In addition, Commerce finds that the existence of a cost-based PMS, which affects the entire Indonesian biodiesel market, is further indication that the Indonesian market, including Wilmar's non-PSO sales, is not a suitable source for normal value. On this basis, we continue to find that all prices in the home market, including non-PSO sales, are significantly distorted and that such non-PSO sales are not an appropriate basis for normal value.

IV. COMMENTS RECEIVED ON DRAFT REMAND RESULTS

On August 16, 2022, Commerce released the Draft Remand Results and invited parties to comment.[69] On August 23, 2022, Wilmar and the petitioner submitted comments on the Draft Remand Results.[70] These comments are addressed below.

[68] *See* SAA at 822.
[69] *See* Draft Remand Results.
[70] *See* Wilmar's Brief; and Petitioner's Brief.

1. Lawfulness of U.S. Price adjustment for RINs

Wilmar's Comments:

- In the Draft Remand Results, Commerce deducted the RIN values from export price, based on the mistaken premise that U.S. sales prices inclusive of RIN values "do{} not reflect the true 'starting price.'"[71] In so doing, Commerce disregarded its finding in the *Final Determination* that RIN values constitute an integral part of the purchase price of biodiesel sold by Wilmar to its U.S. customers, rather than a separate adjustment to that price.[72]
- Section 772(a) of the Act requires Commerce to use "the price at which the subject merchandise is first sold" as the export price.[73] Pursuant to 19 CFR 351.401(c), Commerce may adjust that price to account for "price adjustments," which constitute "a change in the price charged for subject merchandise . . . , such as a discount, rebate, or other adjustment . . . that is reflected in the purchaser's net outlay."[74] Commerce failed to reconcile these legal authorities with its prior findings and substantial record evidence.
- Commerce arbitrarily and capriciously[75] posits that such prices inclusive of RIN values have "already been 'adjusted' upwards to include the RIN value," despite conceding elsewhere that "the RIN value is not a separate line item on the invoice" and is "not separately negotiated between" the buyer and the seller.[76]

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[71] *See* Wilmar's Brief at 3 (citing Draft Remand Results at 7).
[72] *Id*. at 3.
[73] *Id.*
[74] *Id.* at 4 (citing 19 CFR 351.102(b)(38)).
[75] *Id.* at 5 (citing *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024 (D.C. Cir. 2018) (*ANR Storage*); and *Honeywell Int'l Inc. v. Mexichem Amanco Holding S.A. De C.V.*, 865 F.3d 1348, 1354 (Fed. Cir. 2017) (*Honeywell*)).
[76] *Id.* (citing Draft Remand Results at 7).

- Commerce has no legal basis to adjust export price by RIN values to account for regulatory differences in markets. Commerce has not identified any source of statutory or regulatory authority that would permit its inflation of the dumping margin by the value of RINs based on the existence of different regulatory regimes for biodiesel in the United States and Indonesia.[77]

Petitioner's Comments:

- In its Draft Remand Results, Commerce reasonably made an adjustment for RIN values as a deduction to U.S. price, rather than as an addition to normal value. Commerce's determination on remand is responsive to the Court's *Remand Order*, is in accordance with law, and is supported by substantial evidence.[78]
- 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. Moreover, the invoice price is a price for biodiesel which has already been 'adjusted' upwards to include the RIN value. Therefore, Commerce must deduct the RIN value from the invoice price to isolate a U.S. starting price for biodiesel.[79] This is consistent with the ITC's determination that the price of biodiesel is a function of the product itself as well as any attached RIN.[80]
- With similar facts, in *Vicentin CAFC*, the Federal Circuit affirmed Commerce's deduction of RIN values from the Argentine respondent's export price as a "price

[77] *Id*.
[78] *See* Petitioner's Brief at 3.
[79] *Id.* at 4 (citing Draft Remand Results at 7).
[80] *Id.* (citing Draft Remand Results at 9).

adjustment" under 19 CFR 351.401(c) to arrive at the appropriate starting price under section 772(a) of the Act.[81]

Commerce's Position: Commerce continues to conclude for these final remand results of redetermination that an adjustment to U.S. price is necessary to account for RIN values and derive the starting price of biodiesel under sections 772(a) and (b) of the Act and 19 CFR 351.401(c). In doing so, 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 explained in the Draft Remand Results (adopted in our final analysis, above) how the adjustment for the RIN value constitutes a price adjustment under 19 CFR 351.401(c). In particular, we explained 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."[82] As such, consistent with the *Final Determination*, in these final remand results, we continue to find that RIN values constitute part of the purchase price of biodiesel sold with RINs by Wilmar to its U.S. customers. The fact that the RIN value is not a separate line item on the invoice and is not separately negotiated between the buyer and the seller[83] does not obviate the fact that RIN values constitute part of the purchase price of biodiesel sold with RINs by Wilmar as RIN-eligible biodiesel sold to the United States. As stated in the Draft Remand Results, Wilmar and its U.S. customers recognize that the price

[81] *Id*. at 5 (citing *Vicentin CAFC)*.
[82] *See* Draft Remand Results at 8-9.
[83] *See* Wilmar's Brief at 5 (citing Draft Remand Results at 7).

paid for RIN-eligible biodiesel covers two commodities: biodiesel, bundled with a RIN.[84] Although the invoice does not segregate 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. 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, as required by section 772 of the Act.[85]

Moreover, we explained 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, we explained that sections 772(a) and (b) of the Act 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 19 CFR 351.102(b), that are reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable)."[86] Further, under virtually identical facts, the Federal Circuit upheld our interpretation of these provisions in *Vicentin CAFC*.

We disagree with Wilmar that Commerce's finding that the invoice prices include the RIN value is arbitrary or capricious, given that the RIN value is not a separate line item on the invoice and is not separately negotiated between the buyer and the seller.[87] To the contrary, in *Vicentin CAFC*, the Federal Circuit affirmed Commerce's deduction of RIN values from the

[84] *See* Draft Remand Results at 9.
[85] *See* sections 772(a) and (b) of the Act.
[86] *See* Draft Remand Results at 10 (repeated in the analysis section above).
[87] *See* Wilmar's Brief at 5 (citing *ANR Storage* and *Honeywell*).

Argentine respondent's export price as a price adjustment under 19 CFR 351.401(c) to arrive at the appropriate starting price under section 772(a) of the Act.[88] Similar to the facts in this case, the Court there observed that the "invoice price does not reflect the 'price at which the *subject merchandise* is first sold,' as required by {section 772(a) of the Act}" 'because {the invoice price} includes a RIN value.'"[89] Thus, "subtracting the value of the RINs to isolate the price paid for biodiesel alone effects the overall statutory scheme for the less-than-fair-value comparison, which 'seeks to produce a fair apples-to-apples comparison between' the normal value and export price."[90] Moreover, the Federal Circuit also saw "no requirement that the buyer and seller expressly state or negotiate an adjusted price."[91] The Federal Circuit upheld Commerce's deduction of RIN values from export price as a price adjustment under 19 CFR 351.401(c) and 351.102(b)(38) under similar facts, and held that, given "the similarities between RINs and rebates, the non-limiting language of the regulation, and the fact that Commerce's calculation effects the overall statutory scheme, the regulation unambiguously permits Commerce to subtract the RINs values."[92]

2. Whether Commerce Should Revise How it Calculated PUDD

Petitioner's Comments:

- In its calculation of PUDD in the Draft Remand Results, Commerce departed from its standard practice of dividing PUDD by the total value of sales using net U.S. price and instead used the unadjusted U.S. sales price in the denominator to determine the *ad valorem* cash deposit rates.[93]

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[88] *See Vicentin CAFC*, 42 F.4th at 1378-79.
[89] *Id.*, 42 F.4th at 1378 (emphasis in original).
[90] *Id.*
[91] *Id.*, 42 F.4th at 1379.
[92] *Id.*
[93] *See* Petitioner's Brief at 6-7, n. 17.

- CBP, however, permits importers to declare separately the value of imported merchandise attributable to subject merchandise, such that the *ad valorem* rate applies only to that amount.[94] Consequently, an importer may declare a specific value associated with the subject merchandise. 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 the total PUDD if an importer follows CBP's guidance and separately reports the entered value of the subject merchandise, exclusive of RIN value.[95]
- Accordingly, 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.[96]

Wilmar did not comment on this issue.

Commerce's Position: As explained in the Draft Remand Results, we find it appropriate to use the net U.S. price inclusive of the value of RINs when computing the cash deposit rate for Wilmar, because this method ensures that CBP will not over collect cash deposits of antidumping duties.[97] There is no evidence on this administrative record indicating that importers have been segregating RIN values in self-reporting the entered value of biodiesel from Indonesia; to the contrary, all evidence on this record indicates that they are not doing so. Given these facts, we believe the revised denominator used in the Draft Remand Results is currently the best method to avoid overcollection.

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[94] *Id.* (citing CBP Document, "Clarification – Correct Use of the AD/CVD Special Value Fields, Multiple Entry Line and Set (June 5, 2018), CSMS #18-000379".)
[95] *Id.*
[96] *Id.*
[97] *See* Draft Remand Results at 11.

We acknowledge the petitioner's point that producers and exporters may, in the future, change the way that they reflect RIN values on their invoices. In the event of an administrative review, if evidence of such a change is presented, Commerce will consider that evidence, along with any comments regarding the calculation of cash deposits in this proceeding (or the concurrent countervailing duty (CVD) proceeding), and determine whether a different methodology for computing cash deposits is appropriate.

3. Wilmar's Non-PSO Sales as the Basis for Normal Value

Wilmar's Comments:

- Commerce concluded that the GOI's: (1) "pervasive regulation of the domestic biodiesel market amounts to a PMS that renders all of Wilmar's non-PSO home market sale prices outside the ordinary course of trade";[98] and (2) "{Biodiesel Subsidy Fund} payments affect the price of all sales (*i.e.*, PSO and non-PSO sales) made by Indonesian biodiesel producers, including Wilmar."[99]
- In advancing these reasons, Commerce misapplied the operative legal standard and fails to identify evidence in the record that substantiates its conclusions. As a matter of law, the GOI's mere involvement in the Indonesia biodiesel market does not satisfy the threshold for finding that a PMS existed with respect to Wilmar's non-PSO sales.[100]
- The SAA explains that a PMS may exist "where there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set."[101] Commerce has interpreted the phrase "to such an extent" to mean that the relevant factor in determining whether a PMS exists is "the effect of

[98] *See* Wilmar's Brief at 6 (citing Draft Remand Results at 14).
[99] *Id*. (citing Draft Remand Results at 15).
[100] *Id*. at 7.
[101] *Id*. (citing SAA, H.R. Doc. No. 103-116, at 822).

government control on pricing, not the existence of government intervention."[102] Thus, Commerce predicates its conclusion on the application of the wrong legal standard.

- Commerce also erroneously concluded that, if a PMS existed with respect to PSO sales, it must also have existed with respect to non-PSO sales. However, Commerce provides no factual basis for this *ipse dixit* statement;[103] instead, it has merely made a claim and stated it as a fact.[104]
- The record points to precisely the opposite conclusion regarding the non-PSO sales. In the underlying investigation, Wilmar presented evidence demonstrating that there was no pattern or correlation between the value of its PSO and non-PSO sales.[105] Moreover, Commerce's calculation of the difference between Wilmar's average PSO and non-PSO prices demonstrates that there is no correlation between Wilmar's PSO and non-PSO prices.[106] Thus, Commerce has no factual basis to conclude that all of Wilmar's non-PSO home market sales are outside the ordinary course of trade.[107]
- Lacking record evidence, Commerce turned to economic theories of supply and demand, concluding that: (1) the "substantial redirection of the supply of biodiesel available from non-PSO to PSO consumers further distorts prices for non-PSO sales in the home market such that they cannot be considered to have been 'competitively set;'"[108] and (2) it is "illogical to conclude that a small portion of Wilmar's sales in {the

[102] *Id*. (citing *Certain Frozen Warmwater Shrimp from Thailand: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination*, 76 FR 40881 (July 12, 2011) (*Shrimp from Thailand*), accompanying IDM, at Comment 3).
[103] *Id*. (citing *Icon Health & Fitness, Inc. v. Strava, Inc*., 849 F.3d 1034, 1048 (Fed. Cir. 2017) (providing that, under the substantial evidence standard of review, unsubstantiated assertions do not equate to evidence)).
[104] *Id*. (citing *Remand Order* at 10).
[105] *Id*. (citing Wilmar Letter, "Biodiesel from Indonesia - Response to Petitioner's Particular Market Situation Allegation," dated August 17, 2017 (Wilmar's PMS Rebuttal Submission), at 8 and Exhibit. 2 (Aug. 17, 2017).
[106] *Id*. at 8 (citing Preliminary Analysis Memorandum at 2.
[107] *Id*.
[108] *Id*. (citing Draft Remand Results at 16).

Indonesian} market (*i.e.*, its non-PSO sales) are somehow insulated from the market distortions."[109] Commerce also reiterated the supposed "effect of the export tax on CPO" in support of its conclusion.[110]

- Commerce cited no evidence demonstrating that, in fact, "non-{PSO} sales {were} affected by the distorted cost of CPO or that the non-{PSO} price was not determined by the market."[111] Commerce may not rest on mere speculation as to how an economic theory might work in certain circumstances when, as here, the record tells a different story.[112]

- Commerce also made a series of unsupported findings as to the supply of biodiesel to non-PSO consumers. Commerce found that "the supply of biodiesel available to non-PSO consumers in Indonesia is determined not by the market, but rather by the GOI."[113] In the very same paragraph, however, Commerce acknowledges that the GOI "mandates producer-specific minimum sale quantity requirements for PSO sales."[114] The GOI does not place any similar limitations on how much biodiesel producers may sell outside of the PSO, thereby allowing producers to make non-PSO sales consistent with market demand.[115]

- Commerce defended its decision by relying on the existence of the export tax and export levy on CPO, reasoning that it would be illogical to conclude that Wilmar's non-PSO sales are immune to distorted CPO costs that affect all sales of biodiesel in

[109] *Id*. (citing Draft Remand Results at 17).
[110] *Id*. (citing Draft Remand Results at 16).
[111] *Id*. (citing *Remand Order* at 11).
[112] *Id*. at 9 (citing *OSI Pharms., LLC v. Apotex Inc.*, 939 F.3d 1375, 1382 (Fed. Cir. 2019) ("Mere speculation is not substantial evidence" sufficient to support an agency finding).
[113] *Id*. (citing Draft Remand Results at 16).
[114] *Id*. (citing Draft Remand Results at 15).
[115] *Id*. (citing Wilmar's PMS Rebuttal Submission at 7 and Exhibit 2).

Indonesia.[116] However, Commerce unlawfully relied on mere speculation in place of the substantial evidence needed to support a finding of fact. Commerce found that it is "likely" that the export tax and export levy on CPO might have certain effects, but points to no evidence in the record that confirms its speculation. Accordingly, there could not logically be a clear nexus between any effects of the export tax and export levy on CPO and the sales prices of PSO and non-PSO sales.[117] In the final remand results, Commerce should rely on Wilmar's non-PSO sales as the basis for normal value.[118]

Petitioner's Comments:

- Commerce correctly observed that the Act "uses the term 'particular market situation,' which indicates that such situation exists in a market and, consequently, Commerce may reasonably analyze the Indonesian biodiesel market as a whole."[119] This is consistent with the SAA, which makes clear that the existence of a PMS is a qualitative determination that can be rendered based on market conditions—as summarized by the Federal Circuit, "some circumstance."[120]
- The Court's finding that substantial evidence supports the finding that the CPO was distorted by the PMS created by Indonesia's export taxes and levies confirms that all of Wilmar's biodiesel sales were affected by the distorted cost of CPO and that the non-PSO biodiesel sales price was influenced by non-market forces. As Commerce correctly notes, the "Act does not mandate that Commerce conduct an additional, granular,

[116] *Id*. (citing Draft Remand Results at 17).
[117] *Id*. at 10 (citing Preliminary Analysis Memorandum at 2).
[118] *Id*.
[119] *See* Petitioner's Brief at 8 (citing Draft Remand Results at 16).
[120] *Id*. (citing *NEXTEEL*, 28 F.4th at 1234).

transaction-specific price evaluation within a market where 'a particular market situation' exists."[121] Again, the Federal Circuit agrees, explaining that "{n}othing in the statute requires Commerce to quantify the distortion {from a PMS} precisely."[122]

- Although not required by statute, Commerce calculated that Wilmar's weighted-average cost for biodiesel would likely have increased by [ ] percent."[123] Commerce's calculation reflects "Wilmar's POI weighted-average CPO value" compared to "the adjusted POI World Market Price of CPO," adjusted by the "percentage that CPO comprises of Wilmar's total biodiesel cost of manufacture."[124] This calculation demonstrates that the cost-based PMS in Indonesia affects PSO sales and non-PSO sales alike because the distortion in input costs is country-wide and not specific to PSO or non-PSO sales in the domestic market.
- Commerce's determination that all sales, including non-PSO sales, are distorted by the price-based PMS in Indonesia is supported by substantial record evidence. PSO sales are the overwhelming majority of all biodiesel sales in Indonesia and, thus, affect prices in the entire market by setting market conditions. The GOI's export tax significantly distorts the cost of CPO (*i.e.*, the main raw material in biodiesel production) in the Indonesian market, which necessarily distorts the price of biodiesel produced in the Indonesian market and sold to all customers. Finally, the GOI provides subsidy payments to biodiesel producers for all PSO sales (*i.e.*, the vast majority of all sales),

[121] *Id*. (citing Draft Remand Results at 17).
[122] *Id*. (citing *NEXTEEL*, 28 F.4th at 1234).
[123] *Id*. at 15(citing Draft Remand Results at 17).
[124] *Id*. at 12 (citing Preliminary Cost Analysis Memorandum at 12, Attachment 1, unchanged in the *Final Determination*).

which benefit the production and sale of all biodiesel in Indonesia, including non-PSO sales.[125]

- The GOI specifies, for each six-month period, the minimum quantity of biodiesel that producers must sell to the PSO-customers. As a result of these quantity requirements, PSO sales comprise the vast majority of the Indonesian biodiesel consumption at the country-wide level[126] and [ ] percent of Wilmar's home market sales.[127] As such, Commerce correctly found that, through the PSO program, the GOI dramatically limits the supply of domestically produced biodiesel available to all other Indonesian consumers of biodiesel. This includes the home market customers that purchased Wilmar's non-PSO sales.[128]
- This substantial redirection of the supply of biodiesel available from non-PSO to PSO consumers further distorts prices for non-PSO sales in the home market such that they cannot be considered to have been 'competitively set.[129] As with the PSO sales, this fits squarely within one of the specific examples of a PMS specified in the SAA.[130] Commerce's analysis is supported by the GOI's own recognition that the PSO program at issue here established market conditions.[131]
- Commerce's distortion analysis is also confirmed by the fact that non-PSO biodiesel sales prices are [ ] as the world-market price for CPO, a raw material input in biodiesel production. In its preliminary analysis memorandum,

[125] *Id*. at 13.
[126] *Id*. at 10 (citing Draft Remand Results at 15).
[127] *Id*. (citing *Remand Order* at 20 n. 16).
[128] *Id*. at 10 – 11 (citing Draft Remand Results at 16).
[129] *Id*. at 11 (citing Draft Remand Results at 16).
[130] *Id*. (citing SAA at 822 ("{A} 'particular market situation' . . . might exist . . . where there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set.").
[131] *Id*.

Commerce noted that Wilmar's average price per metric ton for non-PSO sales was [ ], "whereas the world market price of CPO was $681.06 {} per metric ton."[132] Thus, the average price for non-PSO biodiesel sales was [ ] to the world market price for a mere input, CPO. Thus, because the non-PSO sales comprise an incidental portion of all home market sales and prices for non-PSO biodiesel are [ ] the market price of CPO inputs, Commerce reasonably found non-PSO sales also to be outside the ordinary course of trade, in accordance with section 773(a) of the Act.[133]

- Finally, Commerce reasonably emphasized that BSF payments benefitted the production of all biodiesel, not just biodiesel sold under the PSO.[134] As Commerce explains, the GOI provides the BSF payments to account for the difference between petrodiesel and biodiesel prices in Indonesia. The "GOI's export tax on CPO is the source of funds for the GOI's BSF payments to biodiesel producers" and is part of the GOI's stated policy of using "export taxes on primary commodities {that} can be used to reduce the domestic price of primary products in order to guarantee supply of intermediate inputs at below world market prices for domestic processing industries."[135] Thus, the "funding mechanism and the configuration of the BSF payments suggest that the GOI's intent is to ensure the existence and growth of the biodiesel industry as a whole."[136]

Commerce's Position: We continue to find that find that the biodiesel market in Indonesia as a whole is distorted, and that two particular market situations (*i.e.*, one stemming from the GOI's PSO program and another related to the distorted price of CPO) exist such that prices of

[132] *Id*. (citing Preliminary Analysis Memorandum at 3).
[133] *Id*. at 12 (citing Draft Remand Results at 16-17).
[134] *Id*. (citing Draft Remand Results at 14-15).
[135] *Id*. (citing Draft Remand Results at 14-15).
[136] *Id*. (citing Draft Remand Results at 15).

all biodiesel sales in that market are outside the ordinary course of trade. Therefore, we continue to find that the GOI exercises control over the supply of biodiesel, as well as control over pricing to such an extent that home market prices cannot be considered to be competitively set.[137] In addition, we continue to find that the existence of a cost-based PMS, which affects the entire Indonesian biodiesel market, is further indication that the Indonesian market, including Wilmar's non-PSO sales, is not a suitable source for normal value. On this basis, we continue to find that all prices in the home market, including those for non-PSO sales, are significantly distorted such that non-PSO sales do not form an appropriate basis for normal value.

As we stated in the Draft Remand Results, the Act uses the term "particular market situation" to cover situations which exist in a particular market; consequently, it is reasonable to analyze the Indonesian biodiesel market as whole under this provision.[138] Indeed, a PMS analysis is concerned with distortions in the overall market, rather than distortions on particular sales or transactions of a particular company.[139] Such an analysis is consistent with the SAA, which makes clear that the existence of a PMS is a qualitative determination that can be rendered based on market conditions, as well as with holdings by the Federal Circuit, which focus on distortions related to the absence of normal market forces.[140]

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[137] *See* SAA at 822.
[138] *See* Draft Remand Results at 16.
[139] *Id*. at 16-17; *see also, e.g.*, *Biodiesel from Argentina* IDM at Comment 3 ("A PMS analysis is, by definition, concerned with distortions in the overall 'market,' rather than distortions in particular sales or transactions in relation to the general market."), *aff'd sub nom Vicentin II*.
[140] *See NEXTEEL*, 28 F.4th at 1234 (describing the examples of a PMS in the SAA simply as "situations in which some circumstance distorts costs so that they are not set based on normal market forces or do not move with the rest of the market."); *see also* SAA at 822 ("{A} 'particular market situation' . . . might exist . . . where there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set. It also may be the case that a particular market situation could arise from differing patterns of demand in the United States and in the foreign market. For example, if significant price changes are closely correlated with holidays which occur at different times of the year in the two markets, the prices in the foreign market may not be suitable for comparison to prices to the United States.").

In the *Remand Order*, the Court held that Commerce's finding that a sales-based PMS rendered Wilmar's PSO unusable as a basis for normal value is supported by substantial evidence and otherwise in accordance with law.[141] This Court acknowledged that the PSO program aimed to promote the production of all Indonesian biodiesel.[142]

We continue to find that the BSF payments benefitted the production of all biodiesel sales, not just PSO sales.[143] Because the GOI's export tax on CPO is the source of funds for the GOI's BSF payments to biodiesel producers and is intended to reduce the domestic price of CPO to below world market prices,[144] the funding mechanism and the configuration of the BSF payments suggest that the GOI's intent is to ensure the existence and growth of the biodiesel industry as a whole.[145] This determination is supported by the Court's recognition that the BSF payments "provided grants that were tied (*i.e.*, attributed) to all sales of biodiesel by Wilmar…not just those made in the Indonesian market" and that "the purpose of the {BSF} was to subsidize biodiesel as a product, whether sold domestically or exported."[146] Based on these facts, and as acknowledged by the Court, the GOI actively promoted the production of all Indonesian biodiesel during the POI.

As noted in the "Analysis" section, above, the GOI mandates producer-specific minimum sales quantities for PSO sales, specifying the minimum quantity of biodiesel that producers must sell to [   ] PSO-customers in each six-month period, as well as the price at which the producers must sell that biodiesel. As a result of these requirements, the GOI controls and directs the supply of the vast majority of the Indonesian biodiesel consumption at the country-wide level.

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[141] *See Remand Order* at 16.
[142] *Id.* at 6 (citing *Wilmar CVD,* 466 F. Supp. 3d at 1343).
[143] *See* Draft Remand Results at 14-15.
[144] *See* PMS Allegation at Exhibit 15.
[145] *See* Draft Remand Results at 15.
[146] *See Remand Order* at 19 (citing *Wilmar CVD,* 466 F. Supp. 3d at 1347).

As the Court recognized, PSO sales account for [ ] percent of Wilmar's home market sales.[147] Through the PSO program, the GOI dramatically redirects the supply of domestically-produced biodiesel, distorting the part of the market comprised of non-PSO sales by removing the [ ] biodiesel customers ([ ]) in Indonesia and the vast majority of available biodiesel. It would be unreasonable to consider this substantial redirection of the supply of biodiesel available from non-PSO to PSO consumers in isolation, as Wilmar suggests, given that the market functions as a whole. PSO sales and non-PSO sales exist in a single market, subject to the same market forces, where the GOI mandates the price and volume of the vast majority of the biodiesel sold at the country-wide level every six months through the PSO program.[148]

In the *Remand Order*, although the Court concluded that substantial evidence supports the finding that the cost of CPO – the main input in biodiesel – was distorted by the PMS created by Indonesia's export taxes and levies, the Court held that "Commerce has failed to show just how the price paid for the biodiesel sold in non-Program sales was affected by the distorted cost of {CPO} or that the non-Program price was not determined by the market."[149] While the Act does not require a quantification of a market-wide distortion, we also note that, absent the cost-based PMS with respect to CPO, Wilmar's weighted-average cost of manufacture (COM) for all biodiesel, including that sold in the home market would likely have increased by [ ] percent.[150] To arrive at this increase, we compared the POI world market price of CPO to Wilmar's POI weighted-average CPO value, and then adjusted the CPO portion of Wilmar's

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[147] *See Remand Order* at 20 n. 16.
[148] *See* Wilmar's Supplemental BCQR at 5 and Exhibit S-6; *see also* Petition at Exhibit GEN-31 at 6.
[149] *See Remand Order* at 21.
[150] *See* Preliminary Cost Analysis Memorandum at 12, Attachment 1.

COM by the resulting percentage.[151] This calculation showed that Wilmar's weighted-average COM for biodiesel sold in the home market would increase from $[ ]/MT to $[ ]/MT.[152] For reference, Wilmar's average price for its non-PSO sales was $[ ]/MT.[153]

The link between costs and sales prices is axiomatic. Indeed, the record shows that Wilmar takes into account its manufacturing costs, including raw material costs, when determining the price of its products.[154] As noted above, absent the PMS with respect to CPO costs in Indonesia, Wilmar would face significantly higher manufacturing costs; in order to sell biodiesel in Indonesia in the ordinary course of trade (*i.e.*, at above-cost prices), therefore, it would need to increase its prices to cover those higher manufacturing costs. The cost-based PMS in Indonesia affects PSO sales and non-PSO sales alike because the distortion in input costs is country-wide and not specific to PSO or non-PSO sales in the domestic market.

We disagree with Wilmar that our finding here is based on the mere existence of GOI intervention in *parts* of the biodiesel market in Indonesia. The record of the underlying investigation demonstrates that the GOI intervenes heavily in *all* aspects of the Indonesia biodiesel market.[155] Moreover, Wilmar's reliance on *Shrimp from Thailand* is misplaced. In that case, the Government of Thailand program at issue affected only 2.5 percent of Thailand's production of raw shrimp, the main input for frozen shrimp, and was only in effect for two and a half months during the relevant period under consideration.[156] Conversely, the GOI's

[151] *Id.*
[152] *See* Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination - Wilmar Trading Pte. Ltd.," date February 20, 2018, at attachment 6.
[153] *See* Preliminary Cost Analysis Memorandum at 12, Attachment 1. We note that Wilmar sold identical biodiesel to PSO and non-PSO customers, and, thus, there were no differences in the manufacturing costs by type of home market customer.
[154] *See, e.g.*, Memorandum, "Verification of the Sales Response of Wilmar Trading PTE Ltd. and PT Wilmar Bioenergi Indonesia in the Antidumping Investigation of Biodiesel from Indonesia," dated November 22, 2017 at 6. Wilmar stated that, when negotiating U.S. sales prices, it considers the multiple factors including raw material costs.
[155] *See, e.g.*, *Final determination* IDM at Comments 2 and 3.
[156] *See Shrimp from Thailand* IDM at 14-15.

interventions through the PSO program and its export tax, which distorted the price of CPO, affected all biodiesel sales and production in Indonesia for the entire POI.

Moreover, contrary to Wilmar's arguments, neither the Act nor the SAA mandates that Commerce find a pattern or correlation between the prices of Wilmar's PSO sales price and non-PSO sales price in order to determine that a sales-based and cost-based PMS exist with respect to biodiesel in Indonesia. Nonetheless, we disagree with Wilmar that it provided reliable evidence to show that such a pattern did not exist.[157]

A simple comparison of the average price for Wilmar's PSO and non-PSO sales is insufficient to show that there is a correlation between the two prices; rather, it merely shows that the prices are different. While we recognize that this difference exists (*i.e.*, $[ ]/MT for PSO sales and $[ ]/MT for non-PSO sales), the difference does not prove, in and of itself, that the prices for non-PSO sales were competitively set nor that they were otherwise made in the ordinary course of trade. As noted above, because the COM for the products sold outside of the PSO process was impacted significantly due to the government's intervention in the CPO market, and because Wilmar considered that COM when setting its prices, we find it is reasonable to conclude that the biodiesel market in Indonesia as a whole is distorted, and that all biodiesel sales in that market are outside the ordinary course of trade (*i.e.*, unusable as a basis for normal value).

We also disagree with Wilmar's contention that Commerce made a series of unsupported findings as to the supply of biodiesel to non-PSO consumers. In the Draft Remand Results, we

[157] Wilmar provided no explanation of the methodology it used to determine the quantities or values of the PSO sales and non-PSO sales proffered as such evidence, nor did it tie the data to its home market sales database. Moreover, Wilmar did not specify whether the PSO price it used in the comparison included the BSF payment from the GOI, nor did it provide the source of the exchange rates or the applicable exchange rates that it relied upon to calculate the prices used in the chart. *See* Wilmar's PMS Rebuttal Submission at 7 and Exhibit 2.

found that the supply of biodiesel available to non-PSO consumers in Indonesia is determined not by the market, but rather by the GOI, which "mandates producer-specific minimum sale quantity requirements for PSO sales."[158] While the GOI does not place any limitations on how much biodiesel producers may sell outside of the PSO program, the fact remains that, during the POI, the mandatory minimum quantity requirements set by the GOI for PSO sales directed the vast majority of Indonesian biodiesel production at the country-wide level to [ ] companies. Indeed, PSO sales comprised [ ] percent of Wilmar's home market sales during the POI.[159] The GOI does not have to place any formal limitations on how much biodiesel producers may sell outside of the PSO. The GOI's intervention means that non-PSO prices are not competitively set because the portion of the market comprised of non-PSO sales does not include the [ ] biodiesel customers ([ ]) in Indonesia or the vast majority of available biodiesel. Further, the combination of the effect of the export tax on CPO – the main input used in Indonesian biodiesel – and subsequently on biodiesel, and the fact that the domestic market is almost exclusively constituted of PSO sales to [ ][160] means the GOI interventions have resulted in a distorted market that impacts all domestic biodiesel sales.

V. FINAL RESULTS OF REDETERMINATION

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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[158] *See* Draft Remand Results at 15.
[159] *See* Wilmar Trading PTE Ltd. Preliminary Determination Analysis, dated October 17, 2017 at 3.
[160] As noted in the "Analysis" section above, biodiesel procured by the PSO totaled 2,132,289 MT for the period November 2015 through October 2016, whereas the estimated total consumption of biodiesel in Indonesia was projected at 1,958,225 MT for 2016. This indicates that the PSO sales comprised the vast majority of Indonesian biodiesel sales. *See* Preliminary Analysis Memorandum at 2.

find that the PMS that existed in Indonesia affected the entire biodiesel market in Indonesia, including Wilmar's non-PSO sales. For these final results of redetermination, we have made certain changes to our calculations; however, after accounting for such changes, the rate upon remand for Wilmar remains identical to the rate in the *Final Determination*,[161] as does the rate applied to Musim Mas.[162]

Producer/Exporter	**Weighted-Average Dumping Margin (percent)[163]**
Wilmar Trading PTE Ltd.	92.52
PT Musim Mas	276.65
All Others	92.52

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Lisa W. Wang
Assistant Secretary
  for Enforcement and Compliance

[161] *See* Wilmar Remand Analysis Memorandum.
[162] *See* Memorandum, "Antidumping Duty Investigation of Biodiesel from Indonesia; Draft Remand Analysis – PT Musim Mas Rate," dated August 16, 2022.
[163] There were no export subsidies that were countervailed in the concurrent CVD investigation.