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Investigation
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MEMORANDUM TO: P. Lee Smith
Deputy Assistant Secretary
for Policy and Negotiations

FROM: James Maeder
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
performing the duties of Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Biodiesel from Argentina

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I. SUMMARY

The Department of Commerce (Commerce) determines that biodiesel from Argentina is being, or is likely to be, sold in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). Commerce also determines that critical circumstances exist, in part, for certain Argentine exporters and producers of biodiesel. The petitioner in this investigation is the National Biodiesel Board Fair Trade Coalition, which is an *ad hoc* association comprised of domestic producers of biodiesel, as well as one trade association.[1] The two mandatory respondents in this investigation are: LDC Argentina S.A. (LDC) and Vicentin S.A.I.C. (Vicentin) and affiliated companies (collectively, the Vicentin Group).[2] The period of investigation (POI) is January 1, 2016, through December 31, 2016. We analyzed the comments submitted by the interested parties in this investigation. As a result of this analysis, and based on our findings at verification, we made changes to the preliminary margin calculations for the respondents in this investigation. We recommend that you approve

[1] *See, e.g.*, Biodiesel from Argentina and Indonesia; Antidumping and Countervailing Duty Petitions, dated March 23, 2017.

[2] In the *Preliminary Determination*, Commerce determined that Vicentin Group comprised of Vicentin, Renova S.A. (Renova), Oleaginosa Moreno Hermanos S.A. (OMHSA), Molinos Agro S.A. (Molinos), Patagonia Energia S.A. (Patagonia), VFG Inversiones y Actividades Especiales S.A., Vicentin S.A.I.C. Sucursal Uy, Trading Company X, and Molinos Overseas Commodities S.A. *See Biodiesel from Argentina: Preliminary Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, in Part*, 82 FR 50391 (October 31, 2017) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM) at "Affiliation and Collapsing." Commerce has made no changes to the preliminary decision to collapse these entities in this final determination.

the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of issues in this investigation for which we received comments from interested parties.

Comment 1: Whether it is Appropriate to Adjust Normal Value for the Renewable Identification Number Value
Comment 2: Whether the Determination to Disregard Home Market Prices Due to Particular Market Situation Contradicts Commerce Precedent
Comment 3: Whether the Particular Market Situation Permits Disregarding Raw Material Costs
Comment 4: Whether the Particular Market Situation Adjustment for Soybean Export Tax Results in Double Counting
Comment 5: Whether to Adjust the Constructed Value Profit Calculation
Comment 6: Whether Commerce's Use of its Inflation Methodology Should be Determined on a Country-Wide or Company-Specific Basis
Comment 7: Whether it is Appropriate to Index Costs for Inflation if Commerce Finds a Particular Market Situation
Comment 8: Whether to Deduct Export Taxes from Gross Unit Prices
Comment 9: Whether to Apply Adverse Facts Available to Certain Unreported LDC Expenses
Comment 10: Whether to Apply Facts Available to LDC's Unreported U.S. Sales
Comment 11: Treatment of Vicentin Group's EPA-Related Soybean Expenses
Comment 12: Whether to Apply Adverse Facts Available to Molinos's Export Expenses
Comment 13: Whether to Adjust Patagonia's Costs for the Change in Biodiesel Finished Goods Inventories
Comment 14: Whether to Reduce Patagonia's Byproduct Offset by Commissions Paid on the Sales of the Byproduct
Comment 15: Whether to Adjust Vicentin's Reported Costs for an Unreconcilable Cost Difference
Comment 16: Whether Elements of the Renova Transfer Price to Actual Processing Cost Comparison are on an Inconsistent Basis and Require Adjustment

II. BACKGROUND

On October 31, 2017, Commerce published the *Preliminary Determination* in the LTFV investigation of biodiesel from Argentina.[3] Commerce conducted the cost and sales verifications in Buenos Aires, Argentina, and Kansas City, Missouri, between October 30, 2017, through November 17, 2017.[4] On December 19, 2017, the petitioner and both respondents filed case

[3] *See Preliminary Determination*.
[4] *See* Memorandum, "Verification of the Sales Responses of LDC Argentina S.A. in the Antidumping Duty Investigation of Biodiesel from Argentina," dated November 29, 2017; *see also* 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 (Vicentin Group Sales Verification Report); 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 Sales Verification Report) at 12-13.

briefs.[5] The petitioner and both respondents filed rebuttal briefs on January 3, 2018.[6] On January 17, 2018, Commerce held a public hearing for this investigation.

III. SCOPE OF THE INVESTIGATION

The product covered by this investigation is biodiesel from Argentina. Commerce did not receive any scope comments subsequent to the *Preliminary Determination* and, therefore, the scope has not been updated since the *Preliminary Determination*. For a complete description of the scope of this investigation, *see* Appendix I of the accompanying *Federal Register* notice.

IV. FINAL AFFIRMATIVE DETERMINATION OF CRITICAL CIRCUMSTANCES, IN PART

Commerce preliminarily determined that critical circumstances existed for LDC and all other producers or exporters, but not for the Vicentin Group.[7] For this final determination, Commerce has evaluated the shipping data placed on the record subsequent to the *Preliminary Determination* to determine whether critical circumstances exist.[8] Specifically, we evaluated whether imports were massive by comparing shipments made between April 2017 through October 2017 (the month of the publication of the *Preliminary Determination*) with shipments between September 2016 through June 2016.[9] Based on this examination, Commerce continues to find the critical circumstances existed for LDC and all other producers or exporters but did not exist for the Vicentin Group.[10] Accordingly, Commerce has made no changes to the critical circumstances determination made in the *Preliminary Determination*.

V. CHANGES SINCE THE PRELIMINARY DETERMINATION

Based on our review and analysis of the comments reviewed from parties, minor corrections presented at verifications and various errors identified, we made certain changes to the margin calculations for both respondents. Specifically, we made the following changes:

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[5] *See* Petitioner Letter, "Biodiesel from Argentina: Petitioner's Case Brief," dated December 19, 2017 (Petitioner Case Brief); *see also* LDC Letter, "Biodiesel from Argentina: Case Brief," dated December 19, 2017 (LDC Case Brief); Vicentin Group Letter, "Vicentin Group's AD Case Brief; Biodiesel from Argentina," dated December 19, 2017 (Vicentin Group Case Brief).

[6] *See* Petitioner Letter, "Biodiesel from Argentina: Petitioner's Rebuttal Brief," dated January 3, 2018 (Petitioner Rebuttal Brief); *see also* LDC Letter, "Biodiesel from Argentina: Rebuttal Brief," dated January 3, 2018 (LDC Rebuttal Brief); Vicentin Group Letter, "Vicentin Group's AD Rebuttal Brief," dated January 3, 2018 (Vicentin Group Rebuttal Brief).

[7] *See Preliminary Determination*, 82 FR at 50391-50392; *see also* PDM at 4-7.

[8] At the time of the *Preliminary Determination*, we did not have complete information regarding all other producers and exporters of biodiesel in Argentina for purposes of conducting a "massive imports" analysis. *See* PDM at 7. Commerce's final critical circumstances calculations for all other producers and exporters, however, are based on an analysis of the full base and comparison periods. *See* Memorandum, "Antidumping Duty Investigation of Biodiesel from Argentina: Calculation Memorandum for the Final Critical Circumstances Determination," dated concurrently with this memorandum.

[9] *See* Memorandum, "Antidumping Duty Investigation of Biodiesel from Argentina: Calculation Memorandum for the Final Critical Circumstances Determination," dated concurrently with this memorandum.

[10] *Id*.

A. Vicentin Group

1. Updated the sales and cost databases
2. Removed all expenses related to the certification and generation of renewable identification numbers (RINs)
3. Revised the treatment of export taxes
4. Revised the treatment of Molinos's export expenses based on adverse facts available (AFA)
5. Revised certain cost-related expenses
6. Revised the constructed value (CV) profit rate

B. LDC

1. Updated the sales and cost databases
2. Removed all expenses related to the certification and generation of RINs
3. Revised the treatment of export taxes
4. Added lines for the two unreported constructed export price (CEP) sales based on AFA
5. Revised the CV profit rate

VI. USE OF FACTS OTHERWISE AVAILABLE AND ADVERSE INFERENCES

Sections 776(a)(1) and (2) of the Act provide that Commerce shall, subject to section 782(d) of the Act, apply "facts otherwise available" if necessary information is not on the record or an interested party or any other person: (A) withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by Commerce, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act.[11]

Section 776(b) of the Act further provides that Commerce may use an adverse inference in selecting from among the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information. Further, section 776(b)(2) states that an adverse inference may include reliance on information derived from the petition, the final determination from the investigation, a previous administrative review, or other information placed on the record. When selecting an AFA rate from among the possible sources of information, Commerce's practice is to ensure that the rate is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rue to induce respondents to provide Commerce with complete and accurate information in a timely manner."[12] Commerce's

[11] Under the Trade Preferences Extension Act of 2015, numerous amendments to the Antidumping Duty (AD) and Countervailing Duty (CVD) law were made, including amendments to sections 776(b) and 776(c) of the Act and the addition of section 776(d) of the Act, as summarized below. *See Trade Preferences Extension Act of 2015*, Pub. L. No. 114-27, 129 Stat. 362, dated June 29, 2015 (TPEA); *see also Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793 (August 6, 2015).

[12] *See, e.g.*, *Drill Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 76 FR 1971 (January 11, 2011); *see also Notice of Final*

practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[13]

Section 776(c) of the Act provides that, when Commerce relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal.[14] Secondary information is "information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise."[15] It is Commerce's practice to consider information to be corroborated if it has probative value.[16] In analyzing whether information have probative value, it is Commerce's practice to examine the reliability and relevance of the information to be used.[17] However, the SAA emphasizes that Commerce need not prove that the selected facts available are the best alternative information.[18]

Finally, under the new section 776(d) of the Act, Commerce may use any dumping margin from any segment of a proceeding under an antidumping order when applying an adverse inference, including the highest of such margins.

For the reasons explained below, Commerce determines that application of facts otherwise available, with an adverse inference, are appropriate, pursuant to section 776(b) of the Act, in determining the value assigned to certain expenses incurred by the Vicentin Group and certain unreported sales made by LDC during the POI.

A. Application of Facts Otherwise Available to Molinos's Export Expenses

On October 20, 2017 (*i.e.*, 12 days prior to verification of Molinos),[19] Commerce issued an outline to the Vicentin Group, identifying all areas it intended to review and verify, including movement expenses.[20] Commerce's letter outlined clear instructions as to the extent and depth of this exercise, and its expectations regarding the process and preparedness of the respondent.[21] Specifically, the letter indicated that the respondent be prepared to provide a calculation worksheet explaining the computation of each reviewed expense and that the calculation be

Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan, 63 FR 8909, 8932 (February 23, 1998).

[13] *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. I (1994) (SAA), at 870.

[14] *See* 19 CFR 351.308(d).

[15] *See, e.g.*, SAA at 870.

[16] *See, e.g.*, SAA at 870.

[17] *See, e.g.*, SAA at 869.

[18] *See* SAA at 869-70.

[19] *See* Vicentin Group Letter, "Molinos Agro: Verification Exhibits; Biodiesel from Argentina, (A-357-820)," dated November 7, 2017, at 2.

[20] *See* Commerce Letter, "Antidumping Duty Investigation of Biodiesel from Argentina: Sales Verification Outline for Vicentin S.A.I.C.," dated October 20, 2017 (Vicentin Group Verification Outline) at 12-13.

[21] *Id*.

supported by source documents.[22] Moreover, the verification outline provides the respondent an opportunity to submit minor corrections at the outset of verification.[23]

As further discussed at Comment 12, while verifying Molinos's reported export expenses, Commerce officials found, and Molinos officials confirmed, that discrepancies exist in approximately half of the export expense entries, resulting in incorrect calculations for the entirety of the reported export expenses. Some of the discrepancies appeared to be caused by misallocation of expenses.[24] Regarding the remaining discrepancies, company officials speculated that they were likely caused by typographical errors.[25] Because these errors suggest that certain export expenses may have been assigned to the incorrect vessel and, therefore, potentially impact all of Molinos's vessel-specific export expense calculations, Commerce officials were unable to verify the accuracy of any of the reported export expense values included in the sales database and, as such, cannot rely on any of the reported export expense values for purposes of this final determination.

Despite Commerce's detailed and specific instructions in the verification outline, including documentation required to complete the verification process successfully and an opportunity to submit any minor corrections at the outset of verification, Molinos did not prepare the reconciliation or corrections to this information prior to or during the verification. As a result, Molinos failed to provide Commerce officials with the necessary information to be able to verify the reported export expenses and, as such, Commerce was unable to verify any of the reported export expense values applied in the U.S. sales database.

Accordingly, we find that information was provided, but Commerce was unable to verify it within the meaning of section 776(a)(2)(D) of the Act. Specifically, Commerce could not tie the export expenses and their calculations to the accounting system and underlying invoices. As such, this justifies reliance on facts otherwise available under section 776(a)(2)(D) of the Act.

B. Application of Facts Otherwise Available to LDC's Unreported CEP Sales

Just as in the case of the Vicentin Group, Commerce issued an outline to LDC prior to verification, identifying all areas it intended to review and verify, including a reconciliation of the reported sales quantities and values.[26] This outline was issued to LDC on November 6, 2017, nine days before verification began on November 15, 2017.[27] Commerce's letter outlined clear instructions as to the extent and depth of this exercise, and its expectations regarding the process and preparedness of the respondent.[28] Specifically, the letter indicated that the respondent be prepared to provide a detailed reconciliation of the reported sales quantities and values submitted

[22] *Id.*
[23] *Id.* at 6.
[24] *See* Vicentin Group Sales Verification Report at 46.
[25] *Id.*
[26] *See* Commerce Letter, "Antidumping Duty Investigation of Biodiesel from Argentina: Constructed Export Price Sales Verification Outline for LDC Argentina S.A.," dated November 6, 2017 (LDC CEP Verification Outline) at 9.
[27] *Id.*
[28] *Id.*

in the U.S. sales database and the company's accounting and financial records.[29] Moreover, the verification outline provides the respondent an opportunity to submit minor corrections at the outset of verification.[30]

While verifying LDC's CEP sales, LDC officials discovered discrepancies in the sales information, which ultimately revealed that LDC had excluded two sales of subject merchandise that had been incorrectly recorded in its accounting system.[31] Company officials believed that the errors arose from incorrectly entered transaction information associated with sales of subject merchandise that should have been reported as CEP sales.[32]

Despite Commerce's detailed and specific instructions in the verification outline, including documentation required to complete the verification process successfully and an opportunity to submit any minor corrections at the outset of verification, LDC did not prepare the reconciliation or corrections to this information prior to or during the verification. As a result, LDC failed to provide Commerce officials with all of its CEP sales of subject merchandise.

Accordingly, we find that LDC withheld information (*i.e.*, two sales of subject merchandise) that was requested of it by Commerce within the meaning of sections 776(a)(2)(A) and (B) of the Act. Specifically, as LDC failed to report these two CEP sales, the sales information in LDC's accounting systems does not match with the sales quantities and values reported in the U.S. sales database. As a result of this failure, we are applying facts otherwise available under sections 776(a)(2)(A) and (B) of the Act.

C. Application of Facts Otherwise Available, with Adverse Inferences

In *Nippon Steel*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) clarified that the "best of its ability" standard of section 776(b) of the Act means to put forth maximum effort to provide full and complete answers to all inquiries.[33] We note that the information in question is the type of information that large international companies such as Molinos and LDC should reasonably be able to provide. Commerce's initial questionnaire explains that the responses must be fully verifiable and may affect the consideration accorded to the information.[34] Commerce's verification outline clearly detailed how to prepare for this process and what the verifiers expected to review.[35] Moreover, as noted above, Commerce afforded Molinos and LDC opportunities to correct for any minor errors at the outset of each respective verification. At no time did Molinos or LDC indicate that they had difficulties complying with Commerce's requests, in accordance with section 782(c) of the Act. We find that Molinos and LDC would have been able to provide this information if it had made the appropriate effort when it received Commerce's verification outline. Molinos and LDC's failure to provide accurate and verifiable export expense information and CEP sales information, respectively, demonstrates that the

[29] *Id.*
[30] *Id.* at 6.
[31] *See* LDC CEP Sales Verification Report at 12-13.
[32] *Id.*
[33] *See Nippon Steel Corp. v. United States*, 337 F. 3d 1373, 1382 (Fed. Cir. 2003) (*Nippon Steel*).
[34] *See, e.g.*, Commerce Letters, "Biodiesel from Argentina: Antidumping Duty Investigation Sections B-E Questionnaire," dated May 16, 2017, at G-8.
[35] *See* Vicentin Group Verification Outline at 9-10; *see also* LDC CEP Verification Outline at 9.

companies failed to cooperate to the best of their ability. Therefore, and pursuant to section 776(b) of the Act, we find that the application of adverse inferences is appropriate in selecting from among the facts available to determine the value assigned for Molinos's export expenses and for LDC's unreported CEP sales.

D. Selection and Corroboration of AFA Rates

Because Molinos and LDC failed to act to the best of their abilities in this investigation, in accordance with section 776(b) of the Act, we made adverse inferences in selecting from among the facts available with respect to our valuation of Molinos's export expenses and LDC's unreported CEP sales. Commerce has relied on information placed on the record by the Vicentin Group and LDC as the basis for sources of the applying facts otherwise available with adverse inferences, as established by section 776(b)(2)(D) of the Act. Specifically, for the reasons discussed at Comment 10, regarding Molinos's export expenses, Commerce relied on the highest calculated value of export expenses reported by Molinos as AFA. As detailed at Comment 12, regarding LDC's unreported CEP sales, Commerce relied on information reported for the similarly sized CEP sale with the highest dumping margin as AFA. Accordingly, as this information is not derived from secondary sources, as defined under 776(c)(1) of the Act, it is not necessary for Commerce to corroborate the information.

VII. DISCUSSION OF THE ISSUES

Comment 1: Whether it is Appropriate to Adjust Normal Value for the Renewable Identification Number Value

LDC's Case Brief

- Commerce's circumstance of sale (COS) adjustment for RINs is inappropriate.[36]
- Under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410, COS adjustments are applied to normal value (NV) for actual selling expenses incurred; in this case, however, Commerce adjusted NV based on both RIN-associated expenses (*e.g.*, U.S. Environmental Protection Agency (EPA) certification expenses) and estimated RIN values.[37] In prior cases, Commerce has declined to make COS adjustments based on value instead of expenses incurred.[38]
- A COS adjustment based on RIN values is hypothetical and unfair. The biodiesel under investigation is identical in both the Argentine and U.S. markets; hypothetical RIN values are based on a distinct RIN market (*i.e.*, the market for separated/unassigned RINs), rather than biodiesel, which is outside the control of LDC.[39] Separated RINs are not the product under investigation. There is no quantifiable value in biodiesel for potential RINs.[40]

[36] *See* LDC Case Brief at 6.
[37] *Id.* at 6, 7-9.
[38] *Id.* at 8 (citing *Final Determination of Sales at Less Than Fair Value; Cyanuric Acid and its Chlorinated Derivatives from Japan used in the Swimming Pool Trade*, 49 FR 7424 (February 29, 1984)).
[39] *Id.* at 6, 9-12.
[40] *Id.* at 10.

- The COS adjustment is inequitable because RIN generation is a U.S. government requirement. RIN values are not discussed during sales negotiations or recorded as separate incomes.[41] It is unfair for Commerce to penalize a company for complying with U.S. government regulations, especially since LDC has no control over effects of its compliance with the EPA standards.[42]
- LDC does not object to adjustments based on RIN-associated expenses actually incurred.[43]

Vicentin Group's Case Brief

- Any COS adjustment is limited to expenses incurred by the foreign exporter that are directly related to the sales under consideration. The statutory and regulatory guidance indicates that a COS adjustment can only include expenses incurred by a foreign exporter that are directly related to the sales under consideration. Both Commerce and the Court of International Trade have rejected arguments to apply a COS adjustment when such criteria have not been satisfied.[44]
- The U.S. revenue sales value received by the U.S. customer for a RIN is not an expense incurred by the Vicentin Group that is directly related to its sales. RINs can only be generated by U.S. producers or U.S importers. Furthermore, the sale of RINs is considered revenue to U.S. biodiesel producers/importers.[45] Therefore, the criteria for a COS adjustment for RIN values have not been satisfied.
- Under U.S. law, NV refers to the value of the merchandise under consideration when sold for consumption in the foreign market. The value of the merchandise in the United States is expressly excluded from the statute as a basis for NV.[46] Because a RIN is a revenue item, it cannot be considered an expense.[47] The COS provision cannot be used to circumvent specific statutory and regulatory limitations on adjustments.[48]
- A CV that includes a RIN value, based on the value of a separated RIN, does not reflect NV as defined by the statute; rather, it is an inflated U.S. value.[49] Comparing an overstated constructed U.S. value with U.S. price is not a fair comparison and does not measure dumping.[50]
- Because Commerce has already deducted the cost of complying with the EPA mandate from the Vicentin Group's U.S. sales prices, Commerce's COS adjustment double counts the cost of complying with the EPA mandate.[51]

[41] *Id.* at 6, 12-13.
[42] *Id.* at 12-13 (citing *Waterman Steamship Corporation v. United States*, 26 Cust. Ct. 114 (1951)).
[43] *Id.* at 9.
[44] *See* Vicentin Group Case Brief at 11-12.
[45] *Id.* at 16.
[46] *Id.* at 18.
[47] *Id.* at 19.
[48] *Id.* at 20.
[49] *Id.* at 21-22.
[50] *Id.* at 20, 22.
[51] *Id.* at 22-23.

Petitioner's Rebuttal Brief

- The record contains overwhelming evidence that RIN values are embedded in prices of biodiesel sold by the respondents in the United States, but not in comparison markets, so Commerce should continue to make a COS adjustment for RIN values to balance the comparison between U.S. price and NV.[52]
- The respondents deny having incurred any revenue from RIN values associated with U.S. biodiesel sales because RINs are generated after importation, but it is not necessary to "generate" RINs for RIN values to be included in sales prices. The creation of RINs is distinct from the generation/registration of RINs and occurs throughout the production of EPA-qualified biodiesel. The respondents adhere to rigorous EPA compliance/certification procedures, and the resulting RIN eligibility adds value to their biodiesel. Such RIN values are embedded in the price of imported biodiesel and non-RIN-eligible biodiesel has minimal value in the U.S. market. Whether or not the value of RINs is detached and separately traded after importation is not relevant to Commerce's AD analysis.[53]
- Failing to adjust for RIN values would ignore a quantifiable imbalance between U.S. price and NV. Without the COS adjustment for the full RIN value, it is impossible to achieve the basic purpose of the statute: an apples-to-apples comparison of U.S. price with NV.[54] Commerce has flexibility to achieve a fair, apples-to-apples comparison, and the COS adjustment for RIN values is necessitated by the statutory fair comparison requirement and the directive to calculate AD margins as accurately as possible.[55]
- The Act requires Commerce to base CV on the value of imported merchandise. Commerce correctly calculated NV to reflect the RIN-inclusive value of biodiesel imported into the United States.[56]
- Commerce's interpretation of its own regulation is entitled to substantial deference under the *Auer* deference doctrine.[57]
- The Vicentin Group's argument that Commerce erred by accounting for EPA-related expenses as a direct selling expense offset and as a COS adjustment for RIN value is without merit.[58] Unlike the direct selling expenses associated with EPA certifications, RINs are credit instruments attached to biodiesel imports. RINs are discreet elements of value embedded in U.S. sales prices, so they should be separately accounted for using a COS adjustment. The inspection/certification expenses are qualitatively and quantitatively different from the RIN values.[59]
- The RIN values embedded in biodiesel sales prices are determined by the U.S. RIN market, as systematically recorded in the publication Commerce used to make its preliminary COS adjustment. Therefore, they are not hypothetical.[60]

[52] *See* Petitioner Rebuttal Brief at 4-5.
[53] *Id.* at 5-8.
[54] *Id.* at 9-10.
[55] *Id.* at 12.
[56] *Id.* at 14.
[57] *Id.* at 14-15.
[58] *Id.* at 15.
[59] *Id.* at 16.
[60] *Id.* at 17-18.

- Even though RIN values arise from a U.S. government program, they are a verifiable element of value that increases the U.S. sale prices of biodiesel which must be accounted for when comparing such prices to NV.[61]
- Alternatively, Commerce is authorized to achieve a fair comparison by making a downward adjustment to U.S. price. Price adjustments are not limited to expenses. The regulations broadly define "price adjustment" to include any element of value that may affect the net outlay of funds by the purchaser. RIN values are reflected in the respondents' U.S. customers' net outlay.[62]

Commerce's Position:
Commerce continues to find that it is appropriate to apply an adjustment to NV (in this case, CV) to ensure a balanced comparison between NV and the respondents' U.S. sales prices, which include the values of both biodiesel and embedded RIN eligibility.

In the *Preliminary Determination*, we recognized that, during the POI, Argentina did not have a regulatory system that produced tradeable credits comparable to RINs, which are attached to certain biofuel products, such as biodiesel, sold in the U.S. market.[63] Specifically, we determined that the value of RINs embedded in the value of subject merchandise sold on the United States market creates an imbalance between NV and U.S. price because there is no comparable value added to sales of biodiesel in Argentina. Therefore, in order to compare NV with U.S. price accurately and fairly, as mandated by the Act, we made a COS adjustment to correct the RIN imbalance by adding the value of the RIN to NV for all of the respondents' sales.[64] However, for purposes of this final determination, Commerce determined that it is more appropriate to make the adjustment as a price adjustment under 19 CFR 351.401(c), as discussed in greater detail below.

Section 773(a) of the Act calls for a "fair comparison" between EP or CEP and NV. The SAA further recognizes that "{t}o 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."[65] As recognized by the courts, the statute generally "seek{s} to produce a fair 'apples-to-apples' comparison between foreign market value and United States price."[66] "{T}o achieve that end, the statutes and Commerce Department 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."[67] Sections 772(a) and 773(a)(1)(B)(i) of the Act further state that, in determining EP or NV, Commerce begins with the price at which the subject merchandise or foreign like product is first sold (*i.e.*, the basic "starting price").

[61] *Id.* at 18.
[62] *Id.* at 20-21.
[63] *See* Petitioner PMS Allegation at Exhibit 11 (indicating that RINs are generated with regard to, *inter alia*, ethanol and biodiesel).
[64] Neither the respondents nor their U.S. affiliates detached and traded the RINs separately.
[65] *See* SAA at 820.
[66] *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995).
[67] *Id.*

After reviewing the comments submitted by interested parties, Commerce determined that the necessary adjustment, as required by the Act, is best made as a price adjustment under 19 CFR 351.401(c). Specifically, 19 CFR 351.401(c) provides, in relevant part, that: "In 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 § 351.102(b), that are reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable)." Section 351.102(b)(38) of Commerce's regulations defines "price adjustment" 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 § 351.401(c)), that is reflected in the purchaser's net outlay." In its recent amendment to this provision, Commerce clarified:

> With respect to the proposed changes to 19 CFR 351.102(b)(38) in the Proposed Rule, these modifications were not intended to foreclose other types of price adjustments, such as billing adjustments and post-sale decreases to home market prices or increases to U.S. prices. Nonetheless, in light of a party's comment, the Department is modifying 19 CFR 351.102(b)(38) to refine the definition of price adjustment and to clarify that a price adjustment is not just limited to discounts or rebates, but encompasses other adjustments as well.[68]

In the context of this investigation, as detailed in the *Preliminary Determination*, the price paid by a U.S. customer for biodiesel with a RIN still attached has two components: a biodiesel component and a RIN component. Commerce noted, for example, that a respondent had stated before the ITC that "if a given RIN has a value of $0.75, it would add $0.75 to a gallon biodiesel. . . . {In this example,} in which the RIN value is $0.75 per gallon, *{U.S.} 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.*"[69] Thus, the gross or starting prices reported to Commerce for U.S. sales of biodiesel are reflective of an upward adjustment for RIN values, which must be accounted for in the margin of dumping between U.S. prices and NV. In order to account for this upward adjustment, an offsetting addition to NV is appropriate under 19 CFR 351.401(c) to match the adjustment already embedded in the U.S. price. Furthermore, by not affecting the U.S. sales denominator, an addition to NV results in a dumping margin based on a denominator that is proportional to entered value, which is inclusive of the RIN markup.

Because Commerce is now making the adjustment as a price adjustment under 19 CFR 351.401(c), rather than a COS adjustment, several comments regarding the limitations of 19 CFR 351.410 are now moot. Nevertheless, we are addressing the following comments from interested parties that appear relevant to any RIN adjustment to NV, regardless of the regulatory reference. LDC asserts that the RIN values used in Commerce's COS adjustment are hypothetical and, therefore, "unfair."[70] However, the record shows that the RIN values Commerce added to NV

[68] *See Modification of Regulations Regarding Price Adjustments in Antidumping Duty Proceedings, Final Rule*, 81 FR 15641, 15644 (March 24, 2016).
[69] *See* PDM at 29.
[70] *See* LDC Case Brief at 6, 10.

are actual values.[71] As noted by the petitioner, the relied-upon values are actual, market-driven RIN values, which were recorded and published by a reliable source.[72] These published values pertain to specific sales and, as admitted by the respondents themselves, are reflected in the price of all Argentine biodiesel sales to the U.S. customers.[73] LDC also argues that RIN values are not discussed during sales negotiations or recorded as separate incomes and, furthermore, that it is unfair to penalize a company for complying with government regulations. In response, we agree with the petitioner that, although the specific RIN value may not be discussed during sales negotiations or recorded separately, the respondents adhere to rigorous EPA compliance/certification procedures, and the resulting RIN eligibility adds value to the price paid by the customer if the RIN is not detached and sold separately before the customer purchases the biodiesel. The customer is fully aware of the value RIN eligibility adds to the biodiesel, and such RIN values are embedded in the price of imported biodiesel, as discussed above and in the *Preliminary Determination.* We further conclude that, in making the requisite adjustment, we are not unfairly penalizing the companies for compliance; rather, we are ensuring a balanced comparison between NV and the respondents' U.S. sales prices, which include the values of both biodiesel and embedded RIN eligibility.

The Vicentin Group argues that a CV that includes a RIN value, based on the value of a separated RIN, does not reflect NV as defined by the statute. In essence, the Vicentin Group argues that CV is intended to be an estimate of the home market sales value, rather than an estimate of the U.S. sales value. This argument mischaracterizes the purpose of an adjustment to NV, whether based on home market sales values or CV. The purpose of the adjustment is not to add something Commerce somehow deems missing from home market sales or costs into CV. Instead, as discussed above, the purpose is to make sure that both sides of the comparison (*i.e.*, the U.S. and home markets) are on an equal basis in terms of adjustments (*i.e.*, to make sure that we can conduct an "apples-to-apples" comparison), thereby isolating the margin of dumping. Similar to adjustments for differences in movement expenses and credit expenses, the adjustment for RIN value is meant to net out differences in prices attributable to something other than the price of the subject merchandise. The CV itself is based on the respondents' own home market experience, relying on respondents' own cost information and an estimate of home market selling expenses and profit.

Finally, the Vicentin Group asserts that, because Commerce deducted the cost of complying with EPA mandates (*i.e.*, manufacturing RIN-eligible biodiesel) from U.S. sales prices and also made the COS adjustment discussed above, the *Preliminary Determination* "double counted" the cost of complying with EPA mandates.[74] For purposes of this final determination, Commerce has

[71] *See* PDM at 30; *see also* Petitioner Letter, "Petitioner's Particular Market Situation Allegation Regarding Respondent's Home and Third Country Market Sales and Cost of Production," dated August 2, 2017 (Petitioner PMS Allegation), at Exhibit 14.
[72] *See* Petitioner Rebuttal Brief at 16. Although the source of the RIN values, as provided by the petitioner, is protected as business proprietary information, no party has disputed the publication's reliability.
[73] *See* Memorandum, "Verification of the Sales Responses of LDC Argentina S.A. in the Antidumping Duty Investigation of Biodiesel from Argentina," dated November 29, 2017, at 9 (stating that "everyone is aware of RIN prices in the United States" and that RIN values are likely considered when the customer proposes a flat price for biodiesel); *see also* Vicentin Group Sales Verification Report at 26 (noting that "non-RIN-eligible biodiesel has minimal value in the U.S. market.").
[74] *See* Vicentin Group Case Brief at 22-23.

reconsidered its treatment of RIN-associated expenses as U.S. selling expenses. Given that we are making an upward adjustment to NV for RIN-eligible biodiesel based on the full value of the RINs, continuing to deduct reported U.S. selling expenses specifically associated with EPA compliance and RIN registration from U.S. price would create an imbalance between NV and U.S price. Accordingly, Commerce has revised its calculations and is no longer making an adjustment to U.S. price for U.S. selling expenses related to EPA compliance and RIN registration.

Comment 2: Whether the Determination to Disregard Home Market Prices Due to Particular Market Situation Contradicts Commerce Precedent

Vicentin Group's Case Brief

- The quantity of the Vicentin Group's home market sales passes Commerce's viability test, and there were sufficient above-cost home market sales to serve as the preferred basis for NV. Patagonia's home market prices must be used in the final dumping calculations.[75]
- The fact that the Government of Argentina (GOA) sets biodiesel prices in Argentina does not necessarily mean that a particular market situation (PMS) exists.[76] The relevant factor is the effect of government control on pricing, not the mere existence of government intervention.[77]
- The GOA's monthly biodiesel prices are calculated based on the price of soybean oil published by the Ministry of Agriculture. Therefore, the primary factor used to determine domestic biodiesel prices is competitive, published prices that were not manipulated by the government.[78]
- The quotas assigned by the GOA are based on projected rates of consumption by domestic oil companies and may be adjusted based on oil companies' needs.[79]
- The underlying goal of the GOA's regulation of the biodiesel market is to promote the domestic production and use of biodiesel. Setting high or uncompetitive prices would only counteract that goal.[80]

Petitioner's Rebuttal Brief

- Commerce's determination that the existence of a PMS renders respondents' home market sales prices outside the ordinary course of trade is consistent with the statute and record facts. In accordance with the SAA, a PMS may render comparison market sales outside the "ordinary course of trade" where there is government control over price such that the home market prices cannot be considered to be competitively set.[81]
- The respondents concede that the GOA controls 100 percent of their biodiesel sales prices and production volumes.[82]

[75] *Id.* at 24.
[76] *Id.*
[77] *Id.* at 25.
[78] *Id.* at 26.
[79] *Id.* at 27.
[80] *Id.* at 28.
[81] *See* Petitioner Rebuttal Brief at 23-24.
[82] *Id.* at 24.

- Commerce's proper rejection of the respondents' home market sales from its analysis was based on the respondent' own discussion of the Argentine domestic biodiesel market, as well as other record evidence indicating that the GOA's control over the market has an extensive and direct effect on biodiesel prices that distorts virtually all sales of biodiesel in the home market.[83]
- The respondents fail to overcome overwhelming record evidence demonstrating the GOA's extensive control over the Argentine biodiesel market. The Vicentin Group's assertions that biodiesel prices in Argentina are market-driven are unsubstantiated.[84]
- The price of soybean oil is not competitively set in Argentina; rather, it is set by the GOA's Ministry of Agriculture. The record also indicates that the costs of soybeans for soybean oil producers are intentionally lowered through an export tax regime.[85]
- There are no data to support the respondents' claims that labor and other biodiesel production costs are competitively set. Even if such evidence were on the record, it would not negate the GOA's absolute control over the biodiesel sales market, rendering home market sales outside the ordinary course of trade.[86]
- According to Commerce's verification reports, exceptions to the GOA's quotas are rare. Once the quotas are issued, producers and purchasers are bound by them, regardless of supply and demand forces.[87]
- Contrary to the Vicentin Group's arguments, the facts of this investigation are different from the facts in Commerce's 2003 determination regarding an alleged PMS in the *Wheat from Canada* proceeding.[88]
- Argentine biodiesel sales prices and production volumes are arbitrarily based on the GOA's assessment of companies' production capacities and levels of integration. Furthermore, during the POI, the GOA arbitrarily increased prices by 38 percent.
- The regulated market in Argentina restricts competition. For example, several of the respondents are banned from selling biodiesel domestically, and producers that are awarded domestic sales quotas lack autonomy to select their own customers in the domestic market.[89]
- The significant level of GOA control compels a finding of a PMS that renders home market biodiesel prices unreliable. Given the GOA's restraints over the respondents' ability to make domestic sales, the PMS also skews any viability analysis. Accordingly, Commerce must disregard both home market and third country sales and continue to calculate NV based on CV.[90]

[83] *Id.* at 25.
[84] *Id.* at 26.
[85] *Id.*
[86] *Id.* at 27.
[87] *Id.*
[88] *Id.* at 28 (citing *Notice of Final Determinations of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat from Canada*, 68 FR 52741 (September 5, 2003) (*Wheat from Canada*), and accompanying IDM (Wheat from Canada IDM)).
[89] *Id.* at 30-31.
[90] *Id.* at 32-33.

Commerce's Position:
Commerce continues to find that it is appropriate to rely on CV, rather than home market sales prices, for purposes of establishing NV because a PMS exists with regard to the domestic biodiesel market in Argentina.

As discussed in the *Preliminary Determination*, section 773(a)(1)(B)(i) of the Act defines NV 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 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 TPEA added the concept of "particular market situation" to the definition of the term "ordinary course of trade."

The statute does not define "particular market situation," but the SAA explains that such a situation may exist for sales "where there is government control over pricing to such an extent that home market prices cannot be considered competitively set."[91] Additionally, in *Salmon from Chile*, which pre-dated the TPEA, the Department determined that a PMS existed because "home market sales were incidental to the Chilean salmon industry, which is export oriented."[92] In *Pasta from Italy*, the Department determined that a PMS existed because the respondent had a single third country sale "which prevents a proper comparison."[93] More recently, in *OCTG from Korea*, the Department determined that a PMS existed in Korea which distorted OCTG COP.[94]

As detailed in the *Preliminary Determination*, the record of this investigation clearly indicates that domestic biodiesel sales prices are established by the government and are not based on competitive market conditions.[95] After consideration of the record and interested party arguments, we continue to find that the Argentine biodiesel market is controlled to such an extent that the home market prices cannot be considered to be competitively set and, therefore, are outside the ordinary course of trade.[96] Specifically, the price and quantity of *all* domestic biodiesel sales in Argentina are set by the government and assigned to producers based on non-market factors, such as the production capacity and integration level of individual biodiesel producers.[97] It is undisputed and verified that producers that do not meet the government's

[91] *See* SAA at 822.
[92] *See Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon from Chile*, 63 FR 31411 (June 9, 1998) (*Salmon from Chile*).
[93] *See Notice of Final Results of the Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy*, 72 FR 7011 (February 14, 2007) (*Pasta from Italy*), and accompanying IDM (Pasta from Italy IDM).
[94] *See Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2014-2015*, 82 FR 18105 (April 17, 2017) (*OCTG from Korea*), and accompanying IDM (OCTG from Korea IDM) at Comment 3.
[95] *See* PDM at 21-23.
[96] *Id.* at 21.
[97] *Id.* (citing Vicentin Group Letter, "Vicentin's Section A Part 2 Questionnaire Response," June 2, 2017, at 19 (stating "Under this regulated market, the Ministry of Energy assigns prices and quotas to selected companies based on the capacity and the integration of those companies. These pries and quotas depend on the following: higher prices for biodiesel processors of up to 25,000 tons/year (small), lower prices for processors of up to 50,000

requirements are prohibited from selling biodiesel domestically, and those producers that are permitted to sell are assigned specific quotas and have no discretion to modify the prices mandated by the GOA.[98] Accordingly, the record evidence firmly establishes that the government's interventions had a direct effect on biodiesel prices in Argentina during the POI.

Relying on *Frozen Shrimp from Thailand*, the Vicentin Group notes that the mere existence of government intervention in Argentina's biodiesel market does not *per se* create a PMS and argues that Commerce must examine "the effect of government control on pricing, not the existence of government intervention nor the process for setting prices."[99] In that review, Commerce rejected an argument that a PMS existed for frozen shrimp in Thailand because of a government program applied to prices of raw shrimp. Commerce concluded that the involvement of the Government of Thailand in the market was not itself sufficient to demonstrate that a PMS existed and that the allegation failed to demonstrate that the government's actions had a direct effect on frozen shrimp. Here, by contrast, the direct effect on biodiesel prices is evident from the record: the GOA mandates non-negotiable prices for biodiesel in Argentina.

Although the Vicentin Group has identified several additional factors used by the GOA to calculate the price of biodiesel (*e.g.*, soybean oil prices and labor prices),[100] there is no evidence that these factors are based on competitive market prices. Accordingly, the circumstances of this investigation are different from those in *Wheat from Canada*,[101] where Commerce found that a PMS did not exist in regard to home market prices because such prices reflected market conditions.[102] Unlike the Canadian wheat prices at issue in that case, which were calculated based on, *inter alia*, Minneapolis Grain Exchange prices and prices *negotiated* between the Government of Canada and Canadian wheat consumers,[103] Argentine biodiesel prices are mandated by the GOA without any negotiation with Argentine biodiesel producers or other private sector parties and based on, *inter alia*, soybean oil prices published by the GOA itself, rather than market-based soybean oil prices.[104] As such, we continue to find that the GOA's involvement in Argentina's domestic biodiesel market is pervasive.[105] Furthermore, as discussed in greater detail at Issue 3, the soybean oil prices themselves arguably are distorted due to Argentina's export tax regime, which results in low soybean prices. Moreover, contrary to the Vicentin Group's assertion, we find it appropriate to examine the extent and impact of

tons/year (medium), and even lower prices for processors of more than 50,000 tons/year that are not integrated companies.")).

[98] *See* PDM at 22; *see also* Vicentin Group Sales Verification Report at 12.

[99] *See* Vicentin Group Case Brief at 24-25 (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) (*Frozen Shrimp from Thailand*), accompanying IDM at Comment 3.

[100] *See, e.g.*, Vicentin Group Case Brief at 26.

[101] *See* Wheat from Canada IDM at Comment 1.

[102] *Id*.

[103] *Id*.

[104] The Vicentin Group notes, and Commerce acknowledges, that the GOA occasionally revises domestic biodiesel quotas based higher-than-anticipated demand from Argentine biodiesel consumers. *See* Vicentin Group Case Brief at 27; *see also* Vicentin Group Sales Verification Report at 24. The crucial fact, however, is that the biodiesel *prices* are not changed or negotiated, regardless of supply and/or demand. *See* Vicentin Group Sales Verification Report at 24.

[105] *See* PDM at 21.

government involvement with respect to the biodiesel market, irrespective of the goal of such government involvement.

The Vicentin Group suggests that the value of the biodiesel prices set by the GOA (*i.e.*, whether the prices are high or low) is relevant to Commerce's analysis of whether the prices are competitively set.[106] Profitability, or a lack thereof, is not a necessary factor in Commerce's PMS analysis. As stated in the *Preliminary Determination*, "any pre-determined level of profitability is also contrary to competitive pricing behavior."[107] The crucial fact in Commerce's home market PMS determination is that the GOA mandates non-negotiable prices for biodiesel in Argentina. Accordingly, there is no room for competition in the market, and the Vicentin Group's home market sales are outside the ordinary course of trade. Accordingly, despite the Vicentin Group's contention that Commerce must rely on Patagonia's home market sales for purposes of this final determination, it would be inappropriate to base dumping margin calculations on any sales values from Argentina's domestic biodiesel market.

Finally, Commerce notes that the Vicentin Group's arguments regarding market viability were addressed in the *Preliminary Determination*.[108] As discussed in the *Preliminary Determination*, where there are home market sales, Commerce normally evaluates whether a sufficient volume of sales of the foreign like product exists in the home market to serve as a viable basis for calculating NV (*i.e.*, the aggregate volume of home market sales of the foreign like product is equal to or greater than five percent of the aggregate volume of U.S. sales), in accordance with section 773(a)(1)(C) of the Act. When sales in the home market are not viable, section 773(a)(1)(B)(ii) of the Act provides that sales to a third-country market may be utilized if: (1) the prices in such market are representative; (2) the aggregate quantity of the foreign like product sold by the producer or exporter in the third-country market is five percent or more of the aggregate quantity of the subject merchandise sold in or to the United States; and (3) Commerce does not determine that a PMS prevents a proper comparison with the U.S. price.

For this investigation, we continue to find that the GOA's strict quota and pricing system for biodiesel in Argentina renders the viability test, as established under section 773(a)(1)(C) of the Act, unreliable.[109] As a result of the home market PMS finding, described above, Commerce must disregard all home market sales because they "fall within the regulated price and quota system put in place by the government."[110] Therefore, we determine that all home market sales are outside the ordinary course of trade, regardless of whether the quantity of the Vicentin Group's home markets would pass the viability test, and, as such, continue to rely on CV as the basis for NV in this final determination.

[106] *See* Vicentin Group Case Brief at 28.
[107] *See* PDM at 22.
[108] *Id.* at 18, 20.
[109] *Id.* at 18.
[110] *Id.* at 22.

Comment 3: Whether the Particular Market Situation Permits Disregarding Raw Material Costs

Vicentin Group's Case Brief

- The Vicentin Group's reported soybean costs reasonably reflect costs associated with producing biodiesel in Argentina.[111] The Vicentin Group's costs are not different from the soybean costs incurred by other Argentine biodiesel producers.[112] In contrast, adjustments made to the respondents' hot-rolled coil prices in *OCTG from Korea* were made because other Korean consumers were paying higher prices for steel.[113]
- The statute defines the "ordinary course of trade" as the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to the merchandise of the same class or kind.[114] The GOA's soybean export taxes have been in place for a reasonable time (*i.e.*, since 2002).[115] Therefore, it is part of the ordinary course of trade.[116]
- There is no positive evidence demonstrating that the export tax is the actual cause of lower soybean prices in Argentina; rather, there is evidence implying that the taxes result in cheaper domestic soybeans.[117] Additionally, record evidence demonstrates that the GOA's export tax on soybeans does not have a material impact on domestic soybean prices (*i.e.*, that elimination of the export tax would result in only a 1.2 to 1.6 percent price increase).[118] Continuing to find sufficient evidence to demonstrate distorted soybean costs in Argentina will result in an extremely low standard for PMS.[119]
- The World Trade Organization (WTO) will strike down Commerce's decision to replace the Vicentin Group's own soybean costs with an international value.[120] The WTO Appellate Body ruled against a similar adjustment in *European Union – Anti-dumping Measures on Biodiesel from Argentina*, as evaluated under Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement.[121]

Petitioner's Rebuttal Brief

- Contrary to the Vicentin Group's arguments, in finding a PMS with respect to cost, Commerce is not required to: (1) find that respondents benefited from distorted input costs to the exclusion of other producers; or (2) make a conclusive causation finding.[122]
- Costs associated with the respondents' soybean purchases are outside the ordinary course of trade.[123]

[111] *See* Vicentin Group Case Brief at 30.
[112] *Id.* at 31.
[113] *Id.* (citing OCTG from Korea IDM at Comment 3).
[114] *Id.* at 32.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 33-34.
[118] *Id.* at 33.
[119] *Id.* at 35.
[120] *Id.* at 33-35.
[121] *Id.* at 34-35.
[122] *See* Petitioner Rebuttal Brief at 33.
[123] *Id.* at 34.

- The Act broadly authorizes Commerce to disregard costs of production that do not represent costs in the ordinary course of trade; the Act does not mandate that the respondents' costs must differ from other producers' costs, as suggested by the Vicentin Group.[124] The respondents' narrow interpretation of the statute would preclude Commerce from finding a PMS in cases of industry- or country-wide input cost distortion.[125]
- The respondents misrepresent the factual basis underlying Commerce's PMS determination in the *OCTG from Korea* proceeding. In *OCTG from Korea*, Commerce corrected domestic hot-rolled coil prices; other Korean producers' costs associated with hot-rolled coil purchased from third-country suppliers were unaffected. In both *OCTG from Korea* and this investigation, the relevant input prices are distorted country-wide.[126]
- The respondents' arguments regarding "reasonable time" are "absurd." Such a narrow reading of the Act would perpetuate, rather than correct, distortions.[127]
- The record clearly establishes that Argentine soybean prices are aberrationally lower than world market prices. Accordingly, Commerce must continue to find a PMS such that the costs of materials in Argentina do not reflect the costs of production in the ordinary course of trade.[128]
- A finding of causation is not required for PMS but is, nonetheless, satisfied.[129]
- The respondents incorrectly read a causation element into the PMS provisions of the Act.[130] The Act merely requires that a PMS determination be based on a finding that the cost of materials does not accurately reflect the cost of production in the ordinary course of trade.[131]
- It is clear that the Argentine soybean market is distorted based on comparisons of market-based soybean prices to the respondents' reported soybean costs. Argentine soybean prices were more than 33 percent lower than world soybean prices.[132]
- Commerce's determination in the parallel CVD investigation corroborate a finding that the export tax leads to distorted soybean prices.[133]
- Assuming, *arguendo*, that the statute imposes a causation requirement, U.S. Trade Representative and WTO publications confirm that the GOA's export tax regime depresses domestic soybean prices to below-market levels.[134]
- WTO jurisprudence does not control Commerce's determinations in this investigation, as WTO rulings are not controlling U.S. law. The Federal Circuit has ruled that international agreements do not supersede domestic law.[135]

[124] *Id.*
[125] *Id.*
[126] *Id.* at 34-35.
[127] *Id.* at 35-36.
[128] *Id.* at 37.
[129] *Id.* at 38.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.* at 39.
[134] *Id.* at 39-40.
[135] *Id.* at 41-42.

Commerce's Position:
Commerce continues to find that a PMS exists with regard to domestic soybean prices in Argentina, because such prices are outside the ordinary course of trade. Accordingly, Commerce is continuing to disregard the raw material prices associated with soybeans purchased in Argentina and, alternatively, to rely on market-determined soybean prices to calculate CV as NV.

As discussed in the *Preliminary Determination*, pursuant to section 771(15) of the Act, the Department 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 TPEA added the concept of "particular market situation" to the definition of the term "ordinary course of trade." The TPEA also added language to section 773(e) of the Act which states 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."

The Vicentin Group suggests that, in order to satisfy the statutory elements of a PMS, Commerce must make an explicit determination that the GOA's export tax regime is the direct cause of distorted soybean prices in Argentina.[136] The Act, however, stipulates no such causal requirement. We agree with the petitioner that the language of the Act "is straightforward and simply requires that a PMS decision be based on a finding that 'the cost of materials…{does} not accurately reflect the cost of production in the ordinary course of trade.'"[137] As detailed in the *Preliminary Determination*, reliable evidence demonstrates that Argentina's export tax regime impedes external trade and competitive pricing for soybeans.[138] For example, multiple publications on the record indicate that the GOA's export tax on soybeans was designed to generate a low-cost surplus of soybeans for domestic use, thereby artificially depressing prices.[139] Government intervention in pricing, such that the prices can no longer be considered competitively set, is one of the indicators of a PMS specifically cited in the SAA.[140] Accordingly, the GOA's intervention in soybean pricing through the export tax regime renders prices paid by respondent biodiesel producers for soybean inputs outside the ordinary course of trade.

Furthermore, the export tax regime is not an ordinary revenue measure; rather the record demonstrates that it is unique to soybeans, as soybeans were the only commodity subject to an export tax during the POI.[141] Based on a simple comparison of the price of soybeans in

[136] *See* Vicentin Group Case Brief at 33-35.
[137] *See* Petitioner Rebuttal Brief at 38 (citing section 773(e) of the Act).
[138] *See* PDM at 23 (citing Petitioner PMS Allegation at 38-40). Specific evidence includes, *inter alia*, reports published by the World Bank and the Organization for Economic Co-operation and Development. *See, e.g.*, Petitioner PMS Allegation at Exhibits 20 and 21.
[139] *See* PDM at 23 (referring to U.S. Department of Agriculture and U.S. Trade Representative publications); *see also* Petitioner PMS Allegation at 40 and Exhibits 24 and 25.
[140] *See* SAA at 822.
[141] *See* Petitioner PMS Allegation at Exhibit 25, page 4 (stating that, in December 2015, the GOA "eliminated export

Argentina to the price of soybeans in the global commodity market, it is also apparent that Argentine soybean prices are distorted.[142] Information placed on the record by the petitioner demonstrates that soybean prices in Argentina were nearly 40 percent lower than soybean prices in the world market during the POI.[143] Based on a totality of the circumstances analysis, the record evidence supports Commerce's conclusion that Argentina's export tax regime prevents competitive pricing and contributes to such low domestic soybean prices.[144]

Citing Commerce's PMS analysis in *OCTG from Korea*, the Vicentin Group suggests that, because all Argentine biodiesel producers pay comparable prices for soybean inputs, such prices are within the ordinary course of trade and should be used to calculate CV.[145] In essence, the Vicentin Group is arguing that Commerce cannot find a market-wide PMS and, instead, must focus on a respondent's specific sales and transactions. However, Commerce's conclusions in *OCTG from Korea* are consistent with this final determination. In *OCTG from Korea*, based on a totality of the circumstances analysis, we also found a PMS with regard to prices for an input material (*i.e.*, hot-rolled coil) purchased in certain markets that were determined to be distorted. Specifically, Commerce adjusted prices for hot-rolled coil purchased domestically or from the People's Republic of China, as appropriate in that case. Thus, although Commerce made adjustments to the respondents' specific input purchase transactions to address the PMS, the PMS finding in *OCTG from Korea* was also made on a market-wide basis.

Commerce acknowledges that, in certain contexts, an ordinary course of trade analysis may involve a comparison of specific sales and transactions to the general market.[146] However, we do not believe such a comparison is always appropriate within the context of a PMS analysis. 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. Furthermore, in 2015, the TPEA specifically modified the meaning of "ordinary course of trade," as defined by the Act, to include any situation in which Commerce finds that a PMS prevents proper comparison between the markets.[147] As noted above, the SAA specifically refers to government action, such as the soybean export tax regime in Argentina, as an example of the type of distortion that would contribute to a PMS.[148] Consistent with Commerce's interpretation of "ordinary course of trade" in other situations (*e.g.*, rejecting sales prices as outside the ordinary course of trade when below cost and rejecting prices when transactions are between affiliated parties), the Act focuses on whether prices and costs are distorted and seeks to achieve an

taxes on all crop commodities (corn went from 20 percent to zero), except for the soybean complex").
[142] *See* PDM at 23; *see also* Petitioner PMS Allegation, at 45 and Exhibit 37-B.
[143] *See* Petitioner PMS Allegation at 45 and 37-B.
[144] The Vicentin Group cites a set of studies speculating that removal of Argentina's export tax regime would result in a soybean price increase between 1.2 and 1.6 percent. *See* Vicentin Group Case Brief at 23. Upon further consideration of these studies, Commerce finds the comparison of *actual* Argentine soybean prices to global soybean commodity prices to be a more accurate illustration of the disparity between soybean prices in Argentina and soybean prices in the world market than the predictions contained in the Vicentin Group's studies.
[145] *See* Vicentin Group Case Brief at 30-31.
[146] *See*, *e.g.*, SAA at paragraph 834; *see also* Pasta from Italy IDM at Comment 1 (explaining, several years before the TPEA, that Commerce historically focuses its PMS analysis on the behavior of a specific respondent, but also expressly noting that an analysis of general market conditions "may be appropriate in some instances").
[147] *See* section 771(15)(C) of the Act.
[148] *See* SAA at 822.

accurate assessment of NV; it does not center on the uniqueness or specificity of circumstances. As discussed above, the record clearly indicates that prices in the Argentine soybean market, as a whole, are distorted. Therefore, it is reasonable to find that such prices are outside the ordinary course of trade.

The Vicentin Group argues that Argentina's soybean export tax regime has been in place for a "reasonable period of time" (*i.e.*, since 2002) and, therefore, are part of the ordinary course of trade in Argentina.[149] Commerce acknowledges that the Act defines "ordinary course of trade" as "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to the merchandise of the same class or kind."[150] However, we disagree that the language "reasonable period of time" precludes a PMS finding where the distortion at issue has occurred over several years. Accordingly, the fact that Argentina's soybean export tax regime has been in place since 2002 does not render its effects on Argentina's domestic soybean prices within the ordinary course of trade.[151] The Act requires Commerce to make a fair comparison between non-distorted NV and U.S. prices.[152] Excepting long-standing regimes or practices with distortive effects on NV, such as Argentina's soybean export tax regime, would undermine the "fair comparison" required by the Act, as the calculated NV would remain distorted.

Finally, as stated in prior determinations, WTO decisions do not supersede U.S. law.[153] The Federal Circuit has found that "WTO decisions are 'not binding on the United States.'"[154] Furthermore, the SAA states: "WTO dispute settlement panels will not have any power to change U.S. law or order such a change. Only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it."[155] The Federal Circuit has echoed this principle, stating that if there are inconsistencies, "it is strictly a matter for Congress" to resolve.[156] Therefore, the Vicentin Group's arguments regarding the WTO decision issued in *European Union – Anti-dumping Measures on Biodiesel from Argentina* are not relevant to Commerce's final determination in this investigation.

Comment 4: Whether the Particular Market Situation Adjustment for Soybean Export Tax Results in Double Counting

LDC's Case Brief

- The PMS for soybean prices, resulting from export taxes, was countervailed in the concurrent CVD investigation of biodiesel from Argentina.[157]

[149] *See* Vicentin Group Case Brief at 32.
[150] *See* section 771(15) of the Act.
[151] *See* Vicentin Group Case Brief at 32.
[152] *See* section 773(a) of the Act.
[153] *See, e.g.*, *Large Residential Washers from the Republic of Korea: Final Results of the Antidumping Duty Administrative Review; 2014-2015*, 81 FR 62715 (September 12, 2016), and accompanying IDM (Washing Machines from Korea IDM) at Comment 5.
[154] *See* Petitioner Rebuttal Brief at 41 (citing *Corus Staal BV v. Dept. of Commerce*, 395 F.3d 1343, 1348-49 (Fed. Cir. 2005)).
[155] *See* SAA at 659.
[156] *See Corus Staal BV*, 395 F.3d at 1348-49.
[157] *See* LDC Case Brief at 14.

- Adjusting the companies' costs to account for low domestic soybean prices, while also countervailing the low domestic soybean prices, results in an impermissible double remedy.[158]
- Commerce should not adjust for domestic soybean prices where those prices have already been countervailed in the corresponding CVD investigation.[159]

Vicentin Group's Case Brief

- In the *Preliminary Determination*, Commerce addressed a novel situation in which subsidy allegations in the concurrent CVD case (*i.e.*, soybeans purchased for less than adequate remuneration (LTAR)) were based on the same factual circumstances as PMS allegations in this proceeding (*i.e.*, low cost soybeans in a distorted home market).[160] The law permits remedying the situation in either the AD or CVD proceeding, but it does not permit imposing duties twice to address the same issue through both antidumping and countervailing duties.[161] Doing so would result in double counting.[162]
- The petitioner and the evidence in both proceedings are the same.[163]
- Due to an accelerated timetable for both the AD and CVD investigations, the CVD briefing schedule closed before the AD preliminary determination was issued. As a result, Commerce was not able to consider fully the complex interplay between the parallel cases.[164]
- Because a significant CVD rate has already been calculated and imposed to address the provision of soybeans for LTAR, Commerce cannot penalize the Vicentin Group a second time for the same alleged unfairness.[165]
- Commerce should not impose an AD margin that double counts pricing already addressed through the CVD margin.[166] The statute does not require this result; rather, PMS provisions give Commerce the discretion to avoid such situations: Commerce "may use another calculation methodology under this subtitle or any other calculation methodology." Commerce is not required to make any adjustment.[167] The PMS provisions require "fair comparison," so Commerce should eliminate the double counting.[168]
- Alternatively, Commerce should use third country sales as NV to avoid double counting because the PMS provision expressly allows "another calculation method under this subtitle."[169]

[158] *Id.*
[159] *Id.* at 16.
[160] *See* Vicentin Group Case Brief at 38-39.
[161] *Id.*
[162] *Id.*
[163] *Id.* at 38.
[164] *Id.* at 39.
[165] *Id.* at 40-41.
[166] *Id.* at 42.
[167] *Id.* at 43.
[168] *Id.*
[169] *Id.* at 44-45.

- Commerce could also limit the adjustment in this AD proceeding to any amount not already offset by the CVD margin.[170]
- The statute and the SAA focus on ensuring a fair comparison between NV and U.S. prices.[171] Therefore, Commerce should seek to eliminate duplication or double counting. Commerce should utilize its inherent discretion to achieve a fair, apples-to-apples comparison and avoid double counting in this investigation.[172]
- In other proceedings, Commerce has refused to subtract antidumping duties from U.S. price in order to avoid double counting.[173] Similarly, Commerce has consistently refused to subtract countervailing duties associated with domestic subsidies from U.S. price, and it is clear that any CVD imposed in non-market economy cases must not double count an AD margin already imposed.[174] Accordingly, the principle that Commerce must avoid double counting is long-standing Commerce policy.
- Having imposed a countervailing duty to address the low cost of soybeans, Commerce should not adjust the AD margin to reflect the same low cost of soybeans. A CVD cannot be appropriate where it represents the fully amount of the subsidy and where antidumping duties, calculated on the basis of the same subsidization, are imposed concurrently.[175]

Petitioner's Rebuttal Brief

- Without the PMS adjustment to soybean costs, soybean costs would remain distorted and prevent Commerce from calculating accurate antidumping duty margins.[176]
- AD and CVD margins are derived differently and intended to address distinct forms of trade distortions.[177] Commerce's adjustment to the respondents' costs is consistent with adjustments made for major inputs under section 773(f)(3) of the Act.[178]
- The CVD rate and subsidy analysis were not factored into Commerce's AD determinations.[179] The GOA's depression of domestic soybean prices was found to be countervailable under a separate provision of the Act.[180] If Commerce failed to also correct distorted soybean costs in this proceeding, it would be prevented from calculating reliable production costs and, thus, accurate AD margins.[181]

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[170] *Id.* at 45.
[171] *Id.* at 47.
[172] *Id.*
[173] *Id.* at 50-51 (citing, *e.g.*, *Certain Hot-Rolled Lead and Bismuth Carbon Steel from the United Kingdom; Final Results of Antidumping Duty Administrative Review*, 60 FR 44009, 44010 (August 24, 1995); *Color Television Receivers From the Republic of Korea; Final Results of Administrative Review of Antidumping Duty order*, 51 FR 50333, 50337 (September 27, 1993)*; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom*, 58 FR 39729, 39727 (July 26, 1993)).
[174] *Id.* at 51-52.
[175] *Id.* at 56-57 (citing Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (March 11, 2011)).
[176] *See* Petitioner Rebuttal Brief at 43.
[177] *Id.*
[178] *Id.* at 43-44.
[179] *Id.* at 44.
[180] *Id.*
[181] *Id.*

- The statute and agency practice compel use of a PMS adjustment to correct for distortions in AD calculations, and Commerce properly exercised its discretion to make such an adjustment in this case.[182]
- Unlike section 772(c)(1)(C) of the Act, which expressly prohibits double counting of countervailing duties to offset export subsidies, there is no provision in the Act suggesting that Commerce must decline to correct for input cost distortions using the same benchmarks used in a parallel CVD case.[183] If Congress had intended to incorporate a double remedy adjustment in the PMS provisions, it would have explicitly done so.[184]
- The precedent cited by the respondents regarding the alleged prevention of double counting is fundamentally distinct from the PMS correction to distorted soybean costs and not relevant to this case.[185]
- Contrary to the Vicentin Group's arguments, the PMS adjustment to soybean costs was necessary to avoid an unfair comparison between U.S. price and NV and, thus, calculate dumping margins as accurately as possible.[186]
- In accordance with *TPEA*, which eliminated the requirement that a PMS exist in the third country to disregard third-country prices, Commerce appropriately rejected the use of third-country sales prices.[187]
- WTO jurisprudence does not control Commerce's determinations in this investigation.[188]

Commerce's Position:

Commerce continues to find that it is appropriate to make a PMS adjustment to soybean prices to correct for distortions that are caused by Argentina's export tax regime and render soybean prices outside the ordinary course of trade. In particular, we find that such an adjustment is necessary to calculate an accurate AD margin, as prescribed by the statute, for purposes of this investigation. Commerce notes that AD and CVD investigations are conducted in accordance with two separate subtitles of the Act and, as we have stated in prior proceedings, with entirely independent administrative records.[189] As such, although Commerce's AD and CVD investigations of biodiesel were conducted concurrently, they are two entirely separate proceedings. The Act, as it specifically pertains to AD proceedings, requires Commerce to determine NV based on the rules in section 773 of the act in order to achieve a fair comparison with EP or CEP. In particular, section 773(e) of the Act, which was added to the statute through the TPEA, explains that "if a particular market situation exists such that the cost of materials and

[182] *Id.* at 45.
[183] *Id.*
[184] *Id.* at 46.
[185] *Id.*
[186] *Id.* at 46-47.
[187] *Id.*
[188] *Id.* at 48-49.
[189] *See, e.g., Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Affirmative Countervailing Duty Determination*, 82 FR 23188 (May 22, 2017), and accompanying IDM at Comment 5 (stating: "{T}he margins and subsidy rates calculated for {the respondent} in prior AD and CVD proceedings, as well as the analysis conducted on the separate record of the concurrent AD proceeding, are not directly pertinent to this CVD investigation because, pursuant to 19 CFR 351.104(a)(1), the Department maintains an independent administrative record for each proceeding and limits its analysis in each case to the information on the corresponding official record."); *see also* 19 CFR 351.104(a)(1).

fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, {Commerce} may use another calculation methodology under this subtitle or any other calculation methodology." In other words, where a PMS exists such that the price of certain input materials does not accurately reflect the cost of manufacture, it is within Commerce's discretion to use another calculation methodology to calculate an NV that reflects production costs in the ordinary course of trade. Therefore, in the present case, where the price of domestic soybeans does not accurately reflect the cost of manufacture, as discussed in Comment 3, it is within Commerce's discretion to adjust CV to achieve an accurate measure of NV and, thereby ensuring a fair and proper comparison to U.S. price.

As discussed in Comments 2 and 3, substantial record evidence indicates that, during the POI, a PMS affected both the available home market sales values (*i.e.*, domestic sales made by Patagonia) and the respondents' costs of manufacture.[190] Although there is no apparent means for Commerce to correct for the sales distortion, aside from relying on CV as NV, we have the statutory authority to adjust CV to address the distortions to soybean prices, which do not reflect the cost of manufacture in the ordinary course of trade.[191] As a result, we are able to use a non-distorted CV, which accurately reflects cost of manufacture, as NV.

LDC and the Vicentin Group allege that adjusting CV based on a PMS finding regarding soybean prices amounts to a double remedy in this proceeding.[192] As an initial matter, neither party points to a statutory directive in the Act that curtails Commerce's authority to adjust CV based on a PMS that, by means of certain government interventions, renders production costs outside the ordinary course of trade merely because it was determined in a separate administrative proceeding that a government has provided a countervailable subsidy. Furthermore, there is no indication that Congress intended to curtail Commerce's authority under section 773(e) of the Act. We note that the Act contains provisions directing Commerce to address potential double remedies in certain limited situations. For example, the Act provides that Commerce shall offset export subsidies by adjusting EP or CEP in the amount of any CVD imposed on the subject merchandise. The Act also provides that Commerce shall, in certain circumstances, adjust antidumping duties by domestic countervailable subsidies in non-market economy (NME) proceedings.[193] Regarding the latter example, in particular, we note that, in 2012, Congress responded to the Federal Circuit's opinion in *GPX Int'l Tire Corp. v. United States* by creating the possibility of an offset in NME AD proceedings to avoid possible double remedies arising from companion CVD cases.[194] Only three years later, however, Congress did not even mention the possibility of a double remedy or a correction for a double remedy when it passed the TPEA, which explicitly granted Commerce's authority to address a PMS in the context of CV. Consistent with prior rulings by the Federal Circuit, the TPEA's silence on this matter suggests that Congress intended Commerce's AD and CVD determinations to apply independently as the results of separate proceedings without regard to potential double

[190] For a discussion of these issues, *see* Comment 2 (pertaining to the PMS regarding home market sales) and Comment 3 (pertaining to cost distortions), *supra*.
[191] *See* section 773(e) of the Act.
[192] *See* LDC Case Brief at 14; *see also* Vicentin Group Case Brief at 38-39.
[193] *See* section 777A(f) of the Act.
[194] *See* H.R. 4105 (signed 2012); *see also GPX Int'l Tire Corp v. United States*, 666 F.3d 732 (Fed. Cir. 2011) (*GPX III*).

remedies.[195] At minimum, Congress's silence cannot be interpreted as curtailing Commerce's authority to ensure a proper comparison between NV and U.S. price. Moreover, despite allegations of a double remedy, we note that the Federal Circuit has explained that "the extent to which the statute may prohibit double counting is unclear."[196]

Finally, as noted by the Vicentin Group,[197] this is a "novel" issue arising from a new statutory provision and, as such, Commerce has minimal experience in its application. Broadly precluding an adjustment to correct a distorted NV when there is overlap between a countervailed subsidy and the cause of a market distortion, as suggested by the respondents, would severely limit the application of the PMS provisions, as recently revised by the TPEA, in situations where companion AD and CVD proceedings exist. Commerce must gain further experience with the application of the new provisions before imposing such significant limitations on the newly granted authority.

Comment 5: Whether to Adjust the Constructed Value Profit Calculation

Petitioner's Case Brief

- The CV profit calculation should be revised because it does not account for Energy Absolute Public Company Limited's (Energy Absolute) two separate business activities. Energy Absolute's separate financial statements show that the company engages in two distinct business activities – biodiesel production and investment management. The investment management segment is devoted exclusively to the management of Energy Absolute's subsidiaries and generates revenues through the collection of dividends. However, in calculating CV profit, Commerce did not include the dividend income and erroneously allocated all of Energy Absolute's financial and administrative costs to the biodiesel segment and none to the investment management segment.[198]
- Although Commerce's established practice is to exclude investment income from the calculation of CV profit, the record shows that Energy Absolute's dividend income was used to repay loans, provide funds for collateral deposits, and purchase property and equipment. As such, there are administrative and financial costs associated with Energy Absolute's dividend income. Therefore, Commerce must include Energy Absolute's dividend income in the calculation of CV profit, thereby allocating administrative and financial expenses to the activity.[199]

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[195] *See Turtle Island Restoration Network v. Evans*, 284 F.3d 1282, 1296 (Fed. Cir. 2002) (stating "when Congress omits from a statute a provision found in similar statutes, the omission is typically thought deliberate); *see also Int'l Trading Co. v. United States*, 110 F. Supp. 2d 977, 988 (Ct. Int'l Trade 2000) (citing *Floral Trade Council v. United States*, 41 F. Supp. 2d 319, 329 (Ct. Int'l Trade 1999) (stating: "Where Congress has included specific language in one section of a statute but has omitted it from another, related section of the same Act, it is generally presumed that Congress intended the omission.")).

[196] *See GPX III*, 666 F.3d at 737. The Court of International Trade (CIT) cited the risk of "double counting" in its ruling against the imposition of countervailing duties in NMEs. The Federal Circuit expressly noted its doubts about a statutory requirement to avoid "double counting" and, instead, upheld the CIT's decision in GPX on the alternative principle of "legislative ratification" (*i.e.*, Congress had never overruled prior determinations by Commerce not to apply countervailing duties in NMEs, despite having the opportunity to do so).

[197] *See* Vicentin Group Case Brief at 38-39.

[198] *See* Petitioner Case Brief at 4-8.

[199] *Id.* at 6-7.

- The CV profit calculation should be revised because it fails to reflect an accurate financial expense amount for Energy Absolute. Commerce's practice is to calculate financial expenses based on the highest level of consolidated financial statements.[200] Therefore, in accordance with this practice, Commerce should revise Energy Absolute's profit calculation, which is based on the company's separate financial statements, to incorporate financial expenses based on the company's consolidated financial statements. When adjusted to reflect consolidated financial expenses, Energy Absolute's net result is a loss, which renders Energy Absolute's financial statements unusable for the CV profit calculation.[201] Therefore, Commerce should conclude that Verbio Biofuel and Technology's (Verbio) financial statements are the only useable financial statements for CV the profit calculation.[202]
- The CV profit calculation should be revised because it contains a clerical error concerning the treatment of Energy Absolute's net currency exchange gains and losses. Commerce treated Energy Absolute's net currency exchange gains and losses as a loss, rather than a gain, in the CV profit calculation. Commerce should correct this clerical error.[203]

Vicentin Group's Rebuttal Brief

- Commerce should continue to exclude Energy Absolute's dividend income, since, as the petitioner admits, it is Commerce's long-established practice to exclude investment activities.[204]
- Energy Absolute's dividend income should not be included since, contrary to the petitioner's assertions, it is not related to the current operations of the company, but rather reflects the company's investment in solar and wind power plant projects.[205]
- There is no record evidence to suggest that Energy Absolute incurred financial and administrative expenses relative to its dividend income; therefore, Commerce should continue to assign the full amount of administrative and financial expenses to biodiesel in the calculation of CV profit.
- The petitioner's suggestion to mix and match the results from Energy Absolute's separate and consolidated financial statements, both of which show a positive profit, is self-serving and creates an artificial loss where none exists.[206]

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[200] *Id.* at 9 (citing, *e.g.*, *Certain Steel Concrete Reinforcing Bars from Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part*, 71 FR 65082 (November 7, 2006), and accompanying IDM at Comment 6; *Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Oil Country Tubular Goods from Mexico*, 70 FR 60492 (October 18, 2005)).
[201] *Id.* at 11 (citing, *e.g.*, *Magnesium Metal from the Russia Federation: Final Results of Antidumping Duty Administrative Review*, 76 FR 56396 (September 13, 2011), and accompanying IDM (Magnesium from Russia IDM)).
[202] *Id.* at 8-12.
[203] *Id.* at 4-13.
[204] *See* Vicentin Group Rebuttal Brief at 2-3 (citing *Stainless Steel Wire Rod from the Republic of Korea; Final Results of Antidumping Duty Administrative Review*, 69 FR 19153 (April 12, 2004), and accompanying IDM (SS Wire Rod from Korea IDM).
[205] *Id.* at 3.
[206] *Id.* at 4-5.

- While it is Commerce's practice to calculate financial expenses using consolidated financial statements because of the fungibility of money, the methodology bears no logical relationship to CV profit.[207]

LDC's Rebuttal Brief

- Commerce should reject the petitioner's contradictory requests to restate the CV profit calculation to either include dividend income or to incorporate consolidated financial expenses.[208]
- Consistent with its normal practice, Commerce should continue to exclude dividend income from the numerator of the CV profit calculation.[209]
- Commerce should continue to rely on Energy Absolute's separate financial statements for calculating financial expenses, since the subsidiaries included in the consolidated financial statements are not involved in biodiesel operations. However, if Commerce decides to use Energy Absolute's consolidated financial statements, Commerce should disregard the petitioner's request to include dividend income in the numerator of the CV profit ratio.[210]

Commerce's Position:

In the *Preliminary Determination*, we calculated CV profit under section 773(e)(2)(B)(iii) of the Act, *i.e.*, based on any other reasonable method, using a simple average of the net results from two surrogate financial statements that were placed on the record of this investigation – Verbio and Energy Absolute.[211] For the final determination, we have reviewed our CV profit calculation in light of the comments received, and, as a result, we have made certain adjustments to our calculation. Specifically, for the reasons discussed below, we no longer relied on the Energy Absolute financial statements and, instead, only relied on the Verbio financial statements.

First, we have adjusted Energy Absolute's net results from its separate financial statements to reflect financial expenses based on the company's consolidated financial statements. It is Commerce's long-standing practice to calculate a respondent's financial expenses using the highest level of consolidated financial statements that include the respondent's results.[212] This methodology recognizes the fungible nature of invested capital resources (*i.e.*, debt and equity) within a consolidated group of companies.[213] It also recognizes that the controlling entity within a consolidated group has the ultimate power to determine the capital structure and financial costs of each member within the group.[214] Contrary to the respondents' arguments, we find that this rationale holds true whether relying on a respondent's own financial statements or on the

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[207] *Id*.
[208] *See* LDC Rebuttal Brief at 1-3.
[209] *Id.* at 2 (citing *Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review*, 75 FR 6627 (February 10, 2010)).
[210] *Id.* at 2-3.
[211] *See* PDM at 27.
[212] *See*, *e.g.*, *Frozen Warmwater Shrimp from India* and accompanying IDM at Comment 7; *Notice of Final Determination of Sales at Less than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Mexico*, 67 FR 55800 (August 30, 2002), and accompanying IDM (SS Wire Rod from Mexico IDM) at Comments 8.
[213] *See* SS Wire Rod from Mexico IDM at Comment 8.
[214] *Id*.

publicly-available financial statements of a surrogate. Nevertheless, we point out that Commerce does not require, nor reasonably expect, interested parties to submit both separate and consolidated results where surrogate financial statements are requested.[215] Rather, in calculating surrogate ratios, Commerce merely considers the merits of the financial statements that interested parties have found to be publicly available and were placed on the record of the proceeding. In the instant case, the record includes both the separate and consolidated financial statements for Energy Absolute.[216]

Therefore, because the additional surrogate information is on the record in this case and the use of such information conforms with Commerce's practice of calculating financial expenses at the highest level of consolidation, we have relied on Energy Absolute's consolidated financial statements to calculate the financial expense ratio used for determining the company's net results. In a final note regarding financial expenses, we agree with the petitioner that the net foreign exchange gain from Energy Absolute's separate financial statements was mistakenly treated as a loss in our CV profit calculation. However, we find that this issue is now moot, since we are relying on the consolidated, rather than the separate, financial statements for the calculation of Energy Absolute's financial expenses.

Regarding the petitioner's argument that dividend income should be included in the calculation of Energy Absolute's net profit, we disagree. The petitioner acknowledges that Commerce has a long-established and consistent practice of excluding investment-related activities from calculation of COP and CV.[217] Notwithstanding this practice, the petitioner argues that an exception should be made in the instant case, based on its assertions that the dividend income earned from Energy Absolute's investment management business segment reflects payments for services rendered to subsidiaries and was used in activities that benefit the company's operations as a whole. According to the petitioner, Commerce erred in excluding the dividend income (*i.e.*, not treating it as a line of business) and, thereby, allocating all expenses to Energy Absolute's biodiesel production segment and none to its investment management segment.

We find the petitioner's arguments unpersuasive. First, we have found no evidence from Energy Absolute's financial statements to support that the company operates an investment management business. Rather, the company itself is engaged in biodiesel production and holds interest in subsidiaries engaged in generating electricity from renewable energy.[218] The dividend income at question merely represents a distribution of the earnings from these subsidiaries and is not evidence of an entirely distinct and discrete line of business.[219] Nor do we agree that the

[215] *See, e.g.*, Commerce Letter, "Submission of New Factual Information for the Calculation of CV Profit and Selling Expenses," dated September 1, 2017 (requesting only that interested parties submit surrogate financial statements that are complete, *i.e.*, include the auditor's letter and all financial statement footnotes, and include a full English translation).
[216] *See* Petitioner Letter, "Biodiesel from Argentina and Indonesia: Petitioner's Submission of Factual Information Concerning CV Profit and Selling Expenses," dated September 18, 2017 (Petitioner CV Profit Submission), at Exhibit 4-B.
[217] *See, e.g.*, SS Wire Rod from Korea IDM at Comment 8.
[218] *See, e.g.*, Petitioner CV Profit Submission at Exhibit 4-B (pages 27, 33, 49, and 156 of the Annual Report (describing the nature of Energy Absolute's business as biodiesel-related production activities and renewable energy production activities (via subsidiaries)).
[219] *See, e.g.*, Petitioner CV Profit Submission at 72 (describing the dividend policies of the company's subsidiaries).

dividend income is payment for management services rendered to Energy Absolute's subsidiaries. A review of the company's notes to the financial statements shows that Energy Absolute collected management fees, rental fees, and interest income from its subsidiaries that were in addition to the dividend income it received.[220]

Finally, based on a review of Energy Absolute's cash flow statement, the petitioner surmises that the dividend income was used to support the operations of the company as a whole, and as such, these activities would have generated expenses that were included in the CV profit calculation, and, therefore, the associated revenue (*i.e.*, the dividends) should likewise be included. This argument also fails. As we discussed above, we have found no evidence from Energy Absolute's financial statements to support that the company operates an investment management business. The dividend income at question merely represents a distribution of the earnings from subsidiaries. How Energy Absolute may have chosen to spend the dividend income it received does not transform the nature of a dividend, *i.e.*, it is the distribution of a company's profits to its investors. Hence, we do not find there is a compelling reason to depart from Commerce's normal practice of excluding from the calculation of COP and CV all income and expenses related to investment activities.

For the final determination, we have recalculated Energy Absolute's net results using a financial expense ratio that is based on the company's consolidated financial statements. As a result of this change, we derived a net loss for Energy Absolute. Because it is Commerce's practice to exclude companies with non-profitable net results from the calculation of CV profit, we excluded Energy Absolute's results from our calculation.[221] Therefore, for the final determination, we have relied solely on Verbio's financial statements to calculate the CV profit ratio.

Comment 6: Whether Commerce's Use of its Inflation Methodology Should be Determined on a Country-Wide or Company-Specific Basis

Vicentin Group's Case Brief

- Commerce's 25 percent annual threshold for the country-wide application of its inflation methodology is not in accordance with section 773(f) of the Act, which requires the use of a respondent's normal books and records if such books and records are in accordance with generally accepted accounting principles (GAAP) and are a reasonable reflection of a company's costs.[222]
- The Vicentin Group's normal books and records, which were not restated for inflation, are in accordance with Argentine GAAP, which does not require the restatement of financial statements for inflationary effects unless the cumulative inflation rate is equal to, or greater than, 100 percent over a three-year period.[223]

[220] *See* Petitioner CV Profit Submission at 199.
[221] *See*, *e.g.*, Magnesium from Russia IDM at Comment 1.B; *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Review*, 74 FR 11349 (March 17, 2009), and accompanying IDM at Comment 1.
[222] *See* Vicentin Group Case Brief at 57-58.
[223] *Id.* at 59.

- Commerce has not provided an analysis to demonstrate that the Vicentin Group's normal books and records do not reasonably reflect costs associated with producing biodiesel, but, rather, arbitrarily presumed that the annualized rate of inflation renders the Vicentin Group's costs unusable.[224]
- The WTO has repeatedly held that investigation authorities are required to make an actual determination based on positive evidence, not merely a presumption based on general information, that a company's books are distortive.[225]

Petitioner's Rebuttal Brief

- Commerce normally adheres to a company's GAAP-based normal books and records; however, if such records unreasonably distort or misstate costs, Commerce's established practice is to reject the use of home country GAAP as a basis for calculating the cost of production.[226]
- Because inflation increased more than 25 percent during the POI, the use of the Vicentin Group's GAAP-based financial statements, which have not been restated for inflation under Argentine GAAP's benchmark for restatement (*i.e.*, 100 percent cumulative increase over three years), would distort costs in Commerce's antidumping analysis.[227]
- Commerce's indexing of the Vicentin Group's costs to remedy the distortion caused by inflation is no different from the adjustments that Commerce frequently makes to respondents' reported costs to ensure the data are valued correctly.[228]
- Commerce is not required to make a formal analysis and determination but, rather, must only be satisfied "that the GAAP treatment at issue distorts the reported costs" in order to depart from the company's normal books and records.[229]
- A review of the Vicentin Group's average quarterly costs, unadjusted for inflation, demonstrates that Argentine GAAP's treatment of inflation significantly distorts costs and, in turn, the NVs that are based on those costs. Therefore, to minimize the distortive impact of high inflation, Commerce should apply its high inflation methodology.[230]

Commerce's Position:

We continue to apply our high inflation methodology in the final determination. To determine whether to apply the high inflation methodology, Commerce's long-standing practice is to use a 25 percent per annum inflation rate as the benchmark for assessing the impact of inflation on an economy.[231] The term "high inflation" is used to refer to a high rate of increase in price levels.

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[224] *Id.* at 60.
[225] *Id.* at 58 (citing *European Union – Anti-dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R, 6 October 2016, Para. 7.2).
[226] *See* Petitioner Rebuttal Brief at 50 (citing *Purified Carboxymethylcellulose from Finland, Notice of Final Results of Antidumping Duty Administrative Review*, 72 FR 70568 (December 12, 2007) (*CMC from Finland*)).
[227] *Id.* at 51-52.
[228] *Id.* at 52 (citing, *e.g.*, *Certain Oil Country Tubular Goods from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2014-2015*, 81 FR 71074 (October 14, 2016), unchanged in *OCTG from Korea*).
[229] *Id.* at 53 (citing *CMC from Finland*).
[230] *Id.* at 53-54.
[231] *See, e.g.*, *Silicomanganese from Brazil: Final Results of Antidumping Duty Administrative Review*, 69 FR 13813 (March 24, 2004) (*Silicomanganese from Brazil*), and accompanying IDM (Silicomanganese from Brazil IDM) at Comment 4; *Final Determination of Sales at Less Than Fair Value: Cut-to-Length Carbon Steel Plate Products from Indonesia*, 64 FR 73164, 73170 (December 29, 1999) (*CTL Plate from Indonesia*).

When an economy is experiencing high inflation, the value of the country's currency is rapidly deteriorating, resulting in each local currency unit having substantially less real value over time, while price levels in that currency increase at a high rate. A greater nominal amount of the currency is required to purchase a product at a later point in time than was needed at an earlier point in time. Minor price fluctuations are normal and do not normally have a significant effect on our margin calculations. However, large increases in prices during the POI can lead to distorted results. Thus, in countries experiencing high inflation, the nominal value of production costs increases over time, even where such costs, expressed in real terms, remains constant. In other words, even if real costs remain constant, because of the decline in the currency's value, the cost of the inputs used to produce the product under investigation would be expressed at a lower nominal value at the beginning of the POI than at the end of the POI. Similarly, the price to home market customers purchasing the same domestic like product will be expressed at a lower nominal value at the beginning of the POI than at the end of the POI. Recognizing that it would be distortive to use nominal values to calculate POI average period costs in high inflation cases, Commerce has developed a clear and predictable cost calculation methodology to be followed in cases where the annual rate of inflation exceeds the established threshold of 25 percent. As such, Commerce's high inflation methodology is used to mitigate the distortions that are logically created when prices rise over 25 percent within a single period. In the instant case, Commerce found that Argentina experienced an annualized rate of inflation that exceeded 25 percent during the POI, which triggered the use of Commerce's high inflation methodology.[232]

The Vicentin Group argues that section 773(f) of the Act requires Commerce to accept a company's GAAP-based normal books and records unless those books and records do not reasonably reflect the actual cost of producing the merchandise. Citing both the statute and the WTO, the Vicentin Group concludes that Commerce's high inflation determination must be specific to the Vicentin Group's GAAP-based books and records and not to the Argentine economy in general. We disagree that a company-specific analysis is required for each separate respondent operating in a high inflation economy before Commerce may apply its high inflation methodology. The statute does not contemplate, nor does Commerce's past practice mandate, a company-specific analysis with regard to the distortive impact of inflation on the books and records of companies functioning in high inflation economies.[233] Rather, in practice, we have consistently and predictably focused on the country's annualized rate of inflation over the relevant reporting period in determining whether high-inflation exists and whether our high inflation methodology should be applied.[234] We also do not find that the Vicentin Group's citation to the WTO Appellate Body determination in *European Union – Anti-dumping Measures on Biodiesel from Argentina* is a compelling reason to depart from our methodology, as that WTO decision concerned Argentina's export tax system and not high inflation.[235] Furthermore, as noted above in Comment 3, WTO reports do not supersede U.S. law and, as such, are not

[232] *See* Memorandum, "Biodiesel from Argentina Antidumping Duty Investigation: LDC Argentina S.A.," dated May 25, 2017 (High Inflation Memo).
[233] *See*, *e.g.*, Silicomanganese from Brazil IDM at Comment 4; *CTL Plate from Indonesia* (relying on the country's inflation rate to establish whether to use the high inflation methodology).
[234] *Id.*
[235] *See European Union – Anti-dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R, 6 October 2016, Para. 7.2

directly relevant to Commerce's final determination in this investigation.[236] Thus, consistent Commerce's past practice, we conducted our inflation analysis in this case using Argentina's annualized rate of inflation during the POI and found a change in excess of 25 percent.[237] Therefore, we continue to find that it is appropriate to apply our high inflation methodology.

Comment 7: Whether it is Appropriate to Index Costs for Inflation if Commerce Finds a Particular Market Situation

Vicentin Group's Case Brief

- The purpose of indexing is to prevent distortions that may occur when comparing home market prices to period-average costs (cost test) or when comparing U.S. prices to period-average constructed values (margin calculation).[238]
- Commerce's PMS determinations in the current case make indexing inapplicable since Commerce is not using the Vicentin Group's home market (*i.e.*, no cost test) and Commerce is not using either period-average costs or indexed period-average costs to calculate CV since soybean costs, the largest component of biodiesel costs, were set to world market prices.[239]
- Because soybean costs have been set to world market prices whether the Vicentin Group's costs "reasonably reflect" the actual cost of production does not apply. Thus, there is no legal or policy justification for applying inflationary indexing to the Vicentin Group's reported costs.
- Commerce's PMS soybean adjustment, which grossed up soybean costs to world-market (non-inflationary) prices, effectively eliminated the distortions caused by inflation on the largest component of biodiesel costs. Thus, Commerce double-counted the effects of inflation on the Vicentin Group's soybean costs by unnecessarily indexing the Vicentin Group's reported soybean costs and then applying the PMS soybean adjustment to the indexed (increased) costs, rather than applying the adjustment to the unindexed costs.[240]
- Commerce overstated the PMS soybean adjustment by comparing non-inflationary world market soybean prices to the Vicentin Group's unindexed soybean prices.[241]

Petitioner's Rebuttal Brief

- Commerce's decision to index the Vicentin Group's soybean costs does not exaggerate the impact of the PMS soybean adjustment. Rather, it was necessary for Commerce to first neutralize the effects of inflation on the Vicentin Group's costs by indexing the monthly soybean costs to a constant currency (non-inflationary) basis and then Commerce was able to apply the PMS soybean adjustment which raised the Vicentin Group's non-inflationary soybean costs to the non-inflationary world market prices.[242]

[236] *See* Washing Machines from Korea IDM at Comment 5.
[237] *See* High Inflation Memo at 1.
[238] *See* Vicentin Group Case Brief at 60-62.
[239] *Id.*
[240] *Id.* at 62-63.
[241] *Id.* at 63-65.
[242] *See* Petitioner Rebuttal Brief at 54-56.

- Commerce must also continue to index the Vicentin Group's costs to neutralize the impact of inflation on costs that are unaffected by Commerce's PMS soybean adjustment, such as direct labor.[243]

Commerce's Position:
For the final determination, as discussed above under Comment 6, we continued to apply Commerce's high inflation methodology, which includes the use of indexing, in the calculation of the respondents' costs. Contrary to the Vicentin Group's arguments, we do not find that it is distortive or unnecessary to index the Vicentin Group's costs when also applying the PMS soybean adjustment. To explain our reasoning, it is beneficial to commence with an outline of Commerce's high inflation methodology for calculating cost of production (COP) and CV. We note that in countries experiencing high inflation, as discussed above under Comment 6, the nominal value of production costs increases over time, even where such costs, expressed in real terms, remain constant. Where Commerce determines inflation to have a distortive effect on our analysis, we generally make our price-to-price, price-to-CV, and price-to-COP comparisons over shorter periods of time during which inflation will have a less distortive effect. For example, when inflation exceeds 25 percent per year, to mitigate the impact of such inflation, we limit our averaging of comparison market sales to sales within the same month as the U.S. sale to which they will be compared.[244] In investigations, this means we weight average prices on a monthly basis. For COP and CV, we generally compute a monthly cost that is based on the weighted average of all monthly costs as indexed for inflation over the POI. Therefore, in the standard high inflation questionnaire, Commerce directs the respondent to report current monthly costs.[245] This means that for direct materials, such as soybeans in the instant case, the respondent is required to value consumption at replacement cost, whereby the monthly consumption quantities are multiplied by the respondent's respective average monthly raw material purchase prices, rather than at historical cost. Conversion costs are valued at the historical amounts incurred during the month of production as normally recorded in the respondent's books.

Although Commerce requests monthly costs from respondents where there is high inflation, Commerce still adheres to its long-standing practice of calculating annual average costs which smooths out the normal cost fluctuations that occur during an accounting period.[246] However, with high inflation, the monthly costs reported by the respondent essentially reflect a different currency for each month of the period. To neutralize the impact of inflation on the calculation of the annual average costs, Commerce restates the respondent's reported costs in a constant currency basis (usually the end of the period) using monthly inflation indices and then calculates the period average COPs and CVs.[247] The period-wide weighted-average COPs and CVs are then restated (*i.e.*, deflated) in the currency values of each month during the period. Thus,

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[243] *Id.* at 53
[244] *See, e.g., Notice of Preliminary Results of Antidumping Administrative Review: Certain Welded Carbon Steel Pipe and Tube from Turkey*, 69 FR 18049 (April 6, 2004), unchanged in *Antidumping Administrative Review: Certain Welded Carbon Steel Pipe and Tube from Turkey*, 69 FR 48843 (August 11, 2004).
[245] *See* Commerce Letters, "Biodiesel from Argentina: Antidumping Duty Investigation Updated Section D Questionnaire," dated May 31, 2017 at 1-2.
[246] *See, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada*, 71 FR 3822 (January 24, 2006), and accompanying IDM at Comment 5.
[247] *See, e.g.,* Silicomanganese from Brazil IDM at Comment 4; *CTL Plate from Indonesia*.

Commerce's indexing methodology does not increase the actual costs reported by the respondent; rather, it is a necessary step that allows Commerce to calculate the weighted-average period COPs and CVs using monthly data that are stated in different currency levels.[248]

The Vicentin Group argues that applying the PMS soybean adjustment to the costs which have been indexed to the end of the period essentially accounts for inflation twice. However, in making this assertion, the Vicentin Group overlooks the fact that our normal high inflation methodology avoids this potential problem with the de-indexing step of Commerce's calculations. As explained above, Commerce inflates the reported POI monthly costs to a constant currency so that the POI-wide weighted-average costs can be calculated.[249] However, once the weighted-average costs have been calculated at a common purchasing power, the weighted-average costs are deflated (or de-indexed) to the purchasing power for each month in which a cost is needed for matching purposes. It is the de-indexed weighted-average monthly costs, which represent the purchasing power of the months in which the products were produced, that are compared to the U.S. sales prices reported for the corresponding months.

Regardless, we note that applying the PMS soybean adjustment to the indexed weighted-average costs produces the same outcome as applying the PMS soybean adjustment to the de-indexed weighted-average costs stated in each month's currency level. For example, assume the monthly soybean consumption costs have been indexed to a constant currency and an annual weighted-average soybean cost of $12 per bean has been calculated. Further, assume the adjustment factor, which has not yet been applied, is 10 percent, while the inflation indices for two sample months during the calendar year period, February and December, are 100 and 120, respectively. The annual weighted-average soybean cost deflated to February prices is $10 per bean ($12 * 100/120). If the adjustment is applied to the deflated February figure, the adjusted February soybean cost is $11 ($10 * 1.10), which agrees with the result under Commerce's methodology, *i.e.*, applying the adjustment to the inflated figure and then deflating the adjusted figure to February prices ($12 * 1.10 * 100/120 = $11).

We also disagree with the Vicentin Group that the calculation of the PMS soybean adjustment is based on a distorted comparison of non-inflationary world prices to inflationary Argentine prices. While the computation of the Vicentin Group's POI average soybean price commences with the Vicentin Group's actual POI monthly soybean purchases in Argentine pesos, these average monthly purchase prices are then exchanged into a stable non-inflationary currency, U.S. dollars, using the respective monthly peso to dollar exchange rates.[250] The PMS soybean adjustment is then based on the difference between the average world market price in U.S. dollars and the average Vicentin Group price, also in U.S. dollars. Thus, we disagree with the Vicentin Group's argument that the Vicentin Group soybean prices used in the calculation were unadjusted for inflation. Further, since the PMS soybean adjustment was calculated using period average prices, we find it appropriate likewise to apply the adjustment to the Vicentin Group's period-average soybean costs. Hence, contrary to the Vicentin Group's assertions, it was necessary to use Commerce's indexing methodology when applying the PMS soybean adjustment and applying this indexing methodology did not double count the PMS adjustments.

[248] *Id.*
[249] *Id.*
[250] *See* Petitioner PMS Allegation at Exhibit 37-A.

Finally, although we do not find that the underlying methodology used for comparing the soybean prices needs revision, we have discovered an error in the calculation of the PMS soybean adjustment percentage. Specifically, we found that the original calculation improperly used the world market soybean price, rather than the Vicentin Group's soybean price, as the denominator of the ratio.[251] To be mathematically correct, the denominator used to calculate a ratio must be on the same basis as the per-unit cost to which the ratio is being applied (*i.e.*, the Vicentin Group's soybean costs). Therefore, for the final determination, we have not adjusted the methodology used in the *Preliminary Determination* for applying the PMS soybean adjustment. However, we have revised the PMS soybean adjustment itself to correct for a mathematical error.[252]

Comment 8: Whether to Deduct Export Taxes from Gross Unit Prices

Petitioner's Case Brief

- Section 772(c) of the Act instructs that U.S. prices "shall be…reduced by…the amount, if included in such price, of any export tax…imposed by the exporting country on the exportation of the subject merchandise to the United States…"[253]
- Commerce's preliminary treatment of the respondents' export taxes should be corrected to be consistent with Commerce precedent and the statute by deducting the respondents' reported export tax expenses from their U.S. gross unit prices.[254]
- Commerce has two options for making this adjustment, either deducting directly from U.S. gross unit price or treating the export taxes as an additional movement expense.[255]

Vicentin Group's Rebuttal Brief

- Commerce should refuse to make the change to the treatment of export taxes as proposed by the petitioner.[256]
- The plain language of section 772(c) of the Act indicates that Commerce will reduce U.S. price based upon export taxes only if the export tax is included in such price, but the statute does not mandate a deduction of export taxes from U.S. price in all cases.[257]
- Commerce must determine whether the export tax is, or is not, included in the price paid by the U.S. customer.[258]

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[251] *Id.*; *see also* Vicentin Group Final Cost Memo at 2.
[252] *See* Vicentin Group Final Cost Memo at 2, 4.
[253] *See* Petitioner Case Brief at 14.
[254] *Id.* (citing, *e.g.*, *Diamond Sawblades and Parts Thereof from the Republic of Korea*, 70 FR 77135 at 77139 (December 29, 2005), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 FR 29310 (May 22, 2006)).
[255] *Id.* at 14-15.
[256] *See* Vicentin Group Rebuttal Brief at 6.
[257] *Id*.
[258] *Id.* at 6 (citing to *Silicon Metal from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 FR 54563 (September 5, 2012) (*Silicon Metal from China*) and accompanying IDM (Silicon Metal from China IDM) at Issue 1).

- Under Commerce's practice, taxes are included in the reported price if the exporter's customary business records show that the tax was either separately added to the customer's price or when not separately stated, if the export tax was, in fact, included in the price charged to the customer.[259]
- The Federal Circuit has held that there is no need to conduct a pass-through analysis to determine whether a customer ultimately absorbs the costs of a tax in instances where commercial facts (*e.g.*, accounting records) are available on the record.[260]
- Record evidence indicates that the export taxes are paid by the Vicentin Group and are not present on the commercial invoice. As such, it would be inappropriate to deduct the Vicentin Group's export taxes from U.S. price because the taxes are not paid by the customer or passed on to the customer.
- The petitioner's argument that the export taxes can be treated like a movement expense as an alternative to directly deducting them from the U.S. gross unit price can be dismissed because, ultimately, section 772(c)(2)(B) of the Act indicates that the antidumping duty margin should be calculated on a tax-neutral basis. As Commerce's treatment of the export tax in the *Preliminary Determination* correctly calculated the margin on a tax-neutral basis, there is no need to make any adjustment to the Vicentin Group's U.S. prices, either directly as taxes or through their treatment as movement expenses.[261]

Commerce's Position:
For purposes of this final determination, Commerce revised its calculations to treat reported export taxes as a deduction from U.S. price, rather than an addition to NV.

In the *Preliminary Determination*, Commerce treated export taxes as direct selling expenses; as direct selling expenses are added to NV rather than deducted from U.S. prices, the reported export taxes were accounted for in the calculation of NV. As an initial matter, section 772(c)(2)(B) of the Act establishes that export and constructed export prices shall be reduced by the following:

> {T}he amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States, other than an export tax, duty, or other charge described in section 771(6)(C).[262]

Thus, a plain reading of the statute indicates that a deduction should be made from U.S. prices for any export tax (other than those related to offsetting CVD subsidies) imposed by the exporting county on the exportation of the subject merchandise, which are already included in such prices. In this case, the record is clear that the respondents must pay an export tax on the

[259] *Id.* (citing to *Daewoo Electronics Co. v. Int'l Union of Electronic, Electrical, Technical, Salaried & Machine Workers*, 6 F.3d 1511, 1516-17 (Fed. Cir. 1993) (*Daewoo Electronics*)).
[260] *Id.* at 8 (citing *Daewoo Electronics*).
[261] *Id.* at 9.
[262] Section 771(6)(C) of the Act refers to "export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the countervailable subsidy received."

declared value of the biodiesel upon exportation from Argentina, and that such export tax is unrelated to CVD subsidies. No party disputes these facts.[263]

The Vicentin Group contends that the phrase within the statute, "if included in such price," requires that Commerce determine whether the export tax is included or not in the price paid by the U.S. customer. To support this argument, the Vicentin Group cites to *Silicon Metal from China* and *Daewoo Electronics*. However, *Silicon Metal from China* is unavailing because that case is specific to Commerce's policy regarding export taxes in non-market economies at the time of the decision and, thus, is not relevant to this market economy proceeding.[264]

Notwithstanding the inapplicability of *Silicon Metal from China* to the instant case, *Silicon Metal from China* references an applicable Federal Circuit decision, which discusses the statutory requirement for export tax deductions:

> Significantly, the statute requires export taxes to be deducted from the {U.S. price} 'if {the export tax is} included in such price.' Because the plain language of the statute does not require all export taxes to be deducted from the {U.S. price}, but requires deduction of only those that are included in the price of the merchandise, the statute clearly contemplates a situation where the export tax is not included in the price of the merchandise…We agree with the interpretation proposed by Commerce in its Remand Determination. In a market economy, Commerce can presume that any tax imposed on the merchandise to be exported will be included in the {U.S. price} of that merchandise…[265]

The "presumption" referred to by the Federal Circuit is that in a market economy, such as Argentina, "a product subject to a government-imposed export tax can be expected to actually incur the tax liability and to incorporate the tax amount into its cost and pricing structure;"[266] *i.e.*, in a market economy, an additional cost to the producer or exporter, such as an export tax, will be passed on to the customer. Therefore, the Federal Circuit has affirmed Commerce's interpretation of the plain language of the statute to presume that any export taxes are included in the U.S. price when exported from a market economy. As a result of this presumption, the statute requires that the export taxes must be deducted from U.S. price.

The Vicentin Group argues that evidence on the record indicates that it, rather than its U.S. customers, paid the relevant export tax; and, therefore, the value of the export taxes should not be deducted from U.S. price. Commerce does not dispute that the Vicentin Group exporters, or LDC for that matter, paid the export tax, but this fact does not diminish the presumption that a market economy exporter would have passed this tax onto its customers in the U.S. price. In other words, it is immaterial that the Vicentin Group did not directly and separately bill its customers for the export tax because a market economy exporter would be expected to pass that

[263] *See*, *e.g.*, Vicentin Group Sales Verification Report at 15, 37; OMHSA Verification Exhibits at Exhibit VE-OMH-1.
[264] *See* Silicon Metal from China IDM at Issue 1.
[265] *See Magnesium Corp. of America v. United States*, 166 F.3d 1364, 1370-71 (Fed. Cir. 1999) (*Magnesium Corp.*).
[266] *See Magnesium Corp. of America v. United States*, 949 F.Supp. 870, 872 (CIT 1996) (affirmed by the Federal Circuit in *Magnesium Corp.*).

expense on to the U.S. customer in some form in order to recoup that expense. Contrary to the Vicentin Group's assertions, *Daewoo Electronics* does not mandate explicit evidence that U.S. customers were charged for the export tax in order to deduct that tax from U.S. price and, therefore, is moot. In fact, the Federal Circuit stated that "{t}he reality is that…these taxes can only be recouped in their entirety from purchasers."[267] By concluding that the U.S. price reported by the Vicentin Group and LDC included the export tax, thus satisfying the statutory requirement, Commerce has updated the margin calculation to deduct export taxes from U.S. price instead of adding them to NV.

Comment 9: Whether to Apply Adverse Facts Available to Certain Unreported LDC Expenses

Commerce notes that the comments related to this issue rely heavily on proprietary information that cannot be discussed herein. The following is a public summarization of those comments, as well as Commerce's position. For the full presentation of all the comments and Commerce's position, including proprietary information, *see* LDC's Final Analysis Memorandum.[268]

Petitioner's Case Brief

- During verification, Commerce determined that LDC did not report certain expenses.
- LDC's withholding of this information until verification is problematic because it: (1) deprived the petitioner an opportunity to develop the record of this investigation; and (2) impeded Commerce from calculating accurate preliminary dumping margins.[269]
- LDC did not put forth the maximum effort to provide full and complete responses.[270]
- On the basis that LDC did not fully cooperate with Commerce's investigation on this issue, Commerce should assign a value for these unreported expenses based on AFA, as established under section 776(b) of the Act.[271]
- For the application of AFA, Commerce should assign LDC the highest reported per-unit expense reported in the field "DBROK3U," which includes stowage fees as well as certain EPA-related expenses, to substitute for these unreported expenses as this is a reasonable substitute.[272]

LDC's Rebuttal Brief

- The petitioner incorrectly claims that LDC Claypool withheld information until verification; LDC did not withhold any information and, as such, Commerce should reject the claims and proposal to apply AFA to value these expenses.[273]

[267] *See Daewoo Electronics*, 6 F.3d at 1517.
[268] *See* Memorandum to the File "LDC Argentina S.A. Final Determination Analysis," dated concurrently with this memorandum (LDC Final Analysis Memorandum).
[269] *See* Petitioner Case Brief at 16-18.
[270] *Id.* at 18-19.
[271] *Id*.
[272] *Id.* at 19. *See also* LDC Letter, "Biodiesel from Argentina: Response to Sections B and C Supplemental Questionnaire," dated August 18, 2017, at 26 (indicating which expenses were reported in the field DBROK3U).
[273] *See* LDC Rebuttal Brief at 3.

- LDC explains why these expenses were not reported, with this explanation verified by Commerce.[274]
- The petitioner's proposed AFA value (*i.e.*, highest value reported for DBROK3U) to substitute for the expenses in question is not a reasonable substitute because the values reported in that field would result in an overstatement of the unreported expenses.[275]
- If Commerce determines that it is appropriate to apply AFA to these expenses, LDC proposes what it considers to be a reasonable substitute.[276]

Commerce's Position:
Commerce finds that this issue is moot. As discussed in Comment 1, we determined that, because NV has been adjusted for the value of RINs, the inclusion of any expenses related to the generation of RINs would result in double counting. As the present unreported expenses can be considered related, in some capacity, to the generation of RINs, Commerce finds that it would not be appropriate to include these expenses in the margin calculation. Accordingly, Commerce determines that it is not necessary to make a determination related to either the application of AFA on these unreported expenses or any resulting AFA rate selection.

Comment 10: Whether to Apply Facts Available to LDC's Unreported U.S. Sales

Petitioner's Case Brief
- During the CEP verification, Commerce determined that LDC failed to report two small CEP sales during the POI.[277] Regardless of whether the sales were small in volume, they cannot be ignored for the final determination.
- Commerce must calculate the final dumping margin and potential uncollected antidumping duties (PUDD) with these sales by relying on section 776(a) of the Act.[278]
- Commerce should select the sale that most closely matches the missing sales and impute the data associated with that sale to the two missing CEP sales; selection of sales other than the identified sale will not incentivize LDC to report its sales information accurately in the future.[279]
- As established in the SAA and *Nippon Steel*, where facts available determinations are made, Commerce should ensure the party does not obtain a more favorable result by failing to report the information; the proposed imputation of sales data achieves this objective.[280]

LDC's Rebuttal Brief
- The petitioner recognizes that LDC Claypool inadvertently did not report two sales and that Commerce found these sales' quantities and values to be very minor yet,

[274] *Id.* at 3-4.
[275] *Id.* at 4.
[276] *Id.* at 5.
[277] *See* Petitioner's Case Brief at 21.
[278] *Id.*
[279] *Id.*
[280] *Id.* at 22 (citing to SAA at 870; *Nippon Steel*, 337 F.3d at 1381).

nonetheless, requests that Commerce calculate LDC's margin and PUDD by including these two missing sales.[281]

- Commerce has previously excluded sales where said omitted sales would have no or little effect on the margin and, as such, Commerce should decline the petitioner's request to include these missing sales.[282]
- At verification, LDC demonstrated how the error resulting in the excluded sales occurred and why it was only detected at verification; this was detailed in Commerce's verification report.[283]
- In *Bicycles from China*, which had similar facts, Commerce excluded unreported sales because it determined they were non-subject merchandise and any inclusion in the margin calculation would have little to no effect on the margin.[284]
- Because the petitioner's proposed addition of imputed two records for the missing sales has no effect on the margin, Commerce should follow its past practice and decline to include imputed sales data for these missing sales in the margin calculation.

Commerce's Position:
Commerce finds that LDC did not cooperate to the best of its ability when it failed to correctly report all of its CEP sales and, as a result, Commerce has relied on AFA when assigning a value to the unreported sales.

Prior to verification, Commerce issued a verification outline identifying all areas it intended to review and verify, including a reconciliation of the reported sales quantities and values.[285] This outline was issued to LDC on November 6, 2017, nine days before verification began on November 15, 2017.[286] Commerce's letter outlined clear instructions as to the extent and depth of this exercise, and its expectations regarding the process and preparedness of the respondent.[287] Specifically, the letter indicated that the respondent should be prepared to provide a detailed reconciliation of the reported sales quantities and values submitted in the U.S. sales database and the company's accounting and financial records.[288] Moreover, the verification outline provides the respondent an opportunity to submit minor corrections at the outset of verification.[289] LDC did not present any minor corrections relating to the two sales in question, and it was only during the course of verification that they were discovered to have been excluded. In the CEP verification report, Commerce noted that:

> {C}ompany officials discovered two additional CEP sales that were not included in LDC's U.S. sales database. Specifically, while reconciling USBROKU and USDUTYU expenses, LDC Claypool determined that two sales of

[281] *See* LDC's Rebuttal Brief at 6.
[282] *Id.*
[283] *Id.* at 6-7 (citing the LDC CEP Sales Verification Report at 12-13).
[284] *Id.* at 7 (citing *Notice of Final Determination of Sales at Less Than Fair Value; Bicycles from the People's Republic of China*, 61 FR 19026, 19041 (April 30, 1996) (*Bicycles from China*)).
[285] *See* LDC CEP Verification Outline at 9.
[286] *Id.*
[287] *Id.*
[288] *Id.*
[289] *Id.* at 6.

> biodiesel…were inadvertently excluded from the U.S. sales database. Company officials speculated {as to why} the error occurred…indicating {the unreported sales} were associated with CEP sales. The Department notes that…the missing CEP sales {resulted in minor}…difference{s} between the reported quantity and value and the actual quantity and value…[290]

LDC contends that these sales are minor in nature and, citing *Bicycles from China*, argues that Commerce should exclude these two unreported sales from the final determination on this basis. We disagree. Although Commerce determined in *Bicycles from China* that the application of AFA was not warranted and that the sales could therefore be excluded because they were minor, Commerce has an obligation to consider the facts as they relate to these two sales when determining what treatment is warranted.

As noted above in the "Use of Facts Otherwise Available and Adverse Inferences," LDC had an obligation to ensure that its questionnaire responses were submitted correctly and accurately. Unlike in *Bicycles from China*, where the respondent did not report the sales because it believed that they were not subject merchandise, LDC simply failed to report to Commerce sales of merchandise that are undisputedly within the scope of this investigation.[291] Moreover, as discussed above, we provided LDC with ample opportunity, both in its questionnaire responses and at the beginning of verification, to report certain corrections. Despite Commerce's detailed and specific instructions in the verification outline, including a discussion of the documentation required to complete successfully the required reconciliation of quantity and value data and the opportunity to submit any minor corrections discovered while preparing for such a reconciliation at the outset of verification, LDC did not prepare the reconciliation or identify the errors in the reported sales information prior to verification. As a result, we find that LDC withheld information requested by Commerce by failing to provide said information by the deadline for submission and, therefore, we find that the facts in this proceeding indicate that it is appropriate to rely on facts otherwise available, in accordance with sections 776(a)(2)(A) and (B) of the Act.

Additionally, with respect to arguments that Commerce should exclude the sales because they have negligible to no effect on the margin, we note that, beyond proprietary information indicating their approximate size, there is no other information on the record concerning these sales. As such, Commerce has no reasonable method with which to determine whether these sales would have had an impact on the margin. Further, the fact that a sale or sales may not have an impact on the margin does not automatically indicate that said sale(s) should be excluded from the margin calculation. Ultimately, Commerce is charged with the responsibility of calculating the most accurate dumping margin possible and the only way in which we can do that is if the respondent fully cooperates to provide the necessary information.

As noted, LDC had multiple opportunities throughout the course of this investigation, including an opportunity at the outset of verification, to correct any errors in its calculations. Notwithstanding these opportunities, LDC made no attempts to update the U.S. sales database with all of the CEP sales make during the POI. Moreover, LDC made no indication to Commerce that, under section 782(c), it was unable to submit the CEP sales in question in the

[290] *See* LDC CEP Sales Verification Report at 12-13.
[291] *See Bicycles from China*, 61 FR at 19041.

form or manner requested. On this basis, we find that LDC did not cooperate to the best of its ability with respect to the missing CEP sales and, pursuant to section 776(b)(1), we have determined that the application of adverse inference when selecting among facts otherwise available is appropriate. As part of this application of AFA, Commerce has found that, regardless of their alleged impact on the margin program, it is not appropriate to exclude these sales. Specifically, to conclude that LDC failed to cooperate to the best of its ability but then exclude these sales wholesale because of their alleged minimal impact on the margin would be contrary to Commerce's standard practice of employing adverse inferences to ensure that a party does not obtain a more favorable result by failing to cooperate, as laid out in the SAA and *Nippon Steel*.[292]

The petitioner contends that Commerce should rely on a similarly-sized CEP sale with the highest PUDD as a proxy for the two missing sales. Commerce agrees and has relied on a two-step process to select the proxy values to be used in the margin program for the missing sales. First, we calculated the sale-specific margins for all sales and identified the similarly-sized CEP sale with the highest dumping margin. Using the values and information reported for this selected sale, we generated two new sales in the database to represent the missing sales. Then, we identified the similarly-sized CEP sale with the highest quantity and assigned that quantity to the two new sales. Accordingly, based on the application of AFA, Commerce has relied on record information for similarly-sized sales to calculate the highest possible PUDD for the missing sales.[293]

Comment 11: Treatment of Vicentin Group's EPA-Related Soybean Expenses

Petitioner's Case Brief

- The Vicentin Group acknowledged that it pays a premium on related EPA-certified soybeans that must be used to ensure biodiesel destined for the United States is in compliance with the EPA's Renewable Fuel Standard (RFS) program, while recognizing that it does not pay these same premiums on biodiesel destined to other markets.[294]
- Because these soybean premiums are paid only on biodiesel destined for the United States, the Vicentin Group's RIN-related EPA compliance expenses on soybeans used in the *Preliminary Determination* should be recalculated, allocating the expenses over only U.S. sales rather than all sales, to ensure an accurate dumping margin is calculated.[295]

Vicentin Group's Rebuttal Brief

- Commerce should reject the petitioner's argument that the premiums paid on EPA-compliance soybeans should be recalculated to allocate the expenses over only U.S. sales rather than all sales, as was done in the *Preliminary Determination*.[296]

[292] *See* SAA at 870; *see also* Nippon Steel, 337 F.3d at 1381.
[293] For more information on the similarly-sized sales and other proprietary information related to the AFA calculation, *see* LDC's Final Analysis Memorandum
[294] *See* Petitioner Case Brief at 24.
[295] *Id.* at 23-25.
[296] *See* Vicentin Group Rebuttal Brief at 9.

- Section 772(d)(1)(B) of the Act defines direct selling expenses as "expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties."[297]
- The fees incurred are charged for paperwork required to certify that the soybeans meet the EPA's standards under the RFS program. These fees are either included in the invoice for the soybeans or included in a separate invoice and are properly recorded as a cost of production in the Vicentin Group's accounting records (*i.e.*, treated as a raw material-related expense).[298]
- Because the premiums paid for EPA-compliant soybeans are paid on initial raw materials, these premiums do not constitute a direct selling expense as defined by the statute; to characterize a raw material input expense as a direct selling expense, therefore, directly contradicts the statute.[299]
- On the basis that these premiums cannot be considered directly related to, or result from, U.S. sales, the method of how to allocate the fees is never reached.
- Should Commerce continue to treat these expenses are direct selling expenses and agree to allocate the expenses just to U.S. sales, the premiums should be divided by total quantity shipped by the Vicentin Group rather than by the quantity sold, thus ensuring all sales produced by each company in the group are captured.[300]

Commerce's Position:
As discussed in Comment 1, for purposes of this final determination, Commerce has determined that, because NV has been adjusted for the value of RINs, the inclusion of any expenses related to the generation of RINs would result in double counting. Therefore, this issue is moot. Because the premiums paid for EPA-compliant soybeans can be considered related, in some capacity, to the generation of RINs, Commerce finds that it is not appropriate to include these expenses in the margin calculation. Accordingly, Commerce has determined that this issue is moot and, as a result, Commerce has not undertaken any analysis related to the comments regarding the treatment of the reported EPA compliance-related soybean premiums paid when purchasing soybeans.

Comment 12: Whether to Apply Adverse Facts Available to Molinos's Export Expenses

Petitioner's Case Brief

- During verification, Commerce was unable to verify approximately half of Molinos's reported U.S. sales export expenses (*i.e.*, brokerage and handling, stowage, inspection and survey fees). These expenses were incorrectly reported and, therefore, could not be verified.[301]
- The Vicentin Group had multiple opportunities to report the correct Molinos export expenses but, by failing to do so, impeded Commerce's ability to calculate an accurate

[297] *Id*.
[298] *Id.* at 10.
[299] *Id*.
[300] *Id.* at 11.
[301] *See* Petitioner Case Brief at 26.

dumping margin and, ultimately, did not cooperate to the best of its ability, pursuant to section 776(b) of the Act.[302]

- On the basis that Molinos did not cooperate to the best of its ability, Commerce should apply AFA to determine Molinos's export expenses, assigning the highest reported export expense in Molinos's U.S. sales database to all U.S. sales.[303]

Vicentin Group's Rebuttal Brief

- Commerce should not restate Molinos's misreported export expenses; these discrepancies were typographical errors resulting in the misallocation of some expenses which have no effect on the overall accuracy of the database.[304]
- Commerce verified the underlying invoices and reviewed the accounting system; because the sales database relied on information from the accounting records, these reported values properly tied to individual vessel codes.[305]
- Because Commerce verified the invoices and accounting system, there is no basis for applying AFA to these expenses and, thus, no adjustment should be made to Molinos's export expenses in the final determination.[306]

Commerce's Position:

Commerce finds that the Vicentin Group did not cooperate to the best of its ability when it failed to correctly report or reconcile accounting records for Molinos's vessel-specific export expense calculations and, as a result, Commerce has relied on AFA when assigning a value for these unverifiable expenses. As noted in the verification report:

> {W}hile attempting to reconcile these costs, the Department noted discrepancies between the invoice values and recorded payments for approximately half of the relevant entries, causing export expenses for certain vessels to be incorrectly calculated. Several of these discrepancies appear to be the result of misallocating expenses across multiple sales delivered to the same vessel. Molinos was not able to resolve the remaining issues, stating that the anomalies were likely typographical errors…They noted that vessel-specific shipment costs, which are identified by vessel number, are manually entered each month and that mistakes may be made in the process of assigning an expense to a particular vessel number because allocating such expenses on a per-vessel basis is not significant for purposes of accounting.[307]

The Vicentin Group contends that the typographical errors were immaterial, because these expenses were calculated on a vessel-specific basis and, as such, any misallocations between shipments on a specific vessel are still captured in the vessel-specific expense. Commerce points out that there are two distinct sets of discrepancies addressed in the report: (1) misallocations; and (2) unresolved issues that officials explained as likely being typographical errors. Regarding

[302] *Id.* (citing to *Nippon Steel*, 337 F.3d at 1382).
[303] *Id.* at 26-27.
[304] *See* Vicentin Group Rebuttal Brief at 11-12.
[305] *Id.* at 12.
[306] *Id*.
[307] *See* Vicentin Group Sales Verification Report at 46.

the misallocated expenses (*i.e.*, sale-specific expenses incurred in relation to one sale but incorrectly allocated to a different sale that was shipped on the same vessel), Commerce agrees that, because the expenses were calculated on a vessel-specific rather than a sale-specific basis, a misallocation between sales shipped on the same vessel may be immaterial. However, the misallocations were only one part of the discrepancies. Commerce was unable to resolve the remainder of the discrepancies, and the Molinos officials' explanation that the remaining anomalies were "likely" typographical in nature does not address Commerce's need for reliable, verifiable information. Moreover, as acknowledged by the Molinos officials, it is possible that these errors resulted in expenses from one vessel improperly being assigned to another (*i.e.*, that these errors cut across vessels). As such, Commerce could not confirm that any of the vessel-specific costs were correct. Therefore, while intra-vessel misallocations may not have any effect on the vessel-specific values, the other anomalies, which may include expenses assigned to the improper vessel, are not as easily resolved and have the potential to affect the accuracy of the vessel-specific values. As a result, Commerce cannot find that any of the vessel-specific values reported as export expenses are reliable.

We disagree with the Vicentin Group's contention that the export expenses are properly reported on a vessel-specific basis because Commerce verified the underlying invoices and accounting systems and verified that the export expenses were derived from the accounting system. As noted above, Commerce was unable to verify a connection between the underlying invoices and the accounting records for approximately half of the expenses that were reviewed during verification. Commerce notes that the intention of verification is to ensure that the information provided is accurate and reliable.[308] With expenses such as these, we will review the originating information (*e.g.*, invoices), accounting records, and any other relevant documentation presented by the respondent (*e.g.*, receipts or bank statements) in an attempt to connect the originating information with the information provided in the questionnaire responses. In this instance, Commerce and the Vicentin Group officials were unable to verify that the accounting entries accurately reflected the underlying invoices. Consequently, because the accounting entries used as the basis for the export expense calculations were unverifiable, Commerce also finds that Molinos's export expenses were unverifiable. As a result, Commerce has determined that, in accordance with section 776(a)(2)(D) of the Act, the Molinos export expenses should be subject to the use of facts otherwise available.

As discussed in the "Use of Facts Otherwise Available and Adverse Inferences" section above, as well as in the petitioner's case brief, the Vicentin Group and Molinos had multiple opportunities throughout the course of this investigation, including an opportunity at the outset of verification, to correct any errors in their calculations. Notwithstanding these opportunities, no corrections were offered to remedy the discrepancies that were discovered during verification. Moreover, the Vicentin Group made no indication to Commerce that, under section 782(c) of the Act, it was unable to submit the export expenses in question in the requested form or manner requested. On this basis, we find that the Vicentin Group did not cooperate to the best of its ability with respect to Molinos's export expenses and, pursuant to section 776(b)(1) of the Act, we will apply an adverse inference when selecting among facts otherwise available to value Molinos's export expenses.

[308] *See, e.g.*, Vicentin Group Verification Outline at 9.

The petitioner contends that the AFA value that Commerce should apply is the highest calculated value of export expenses reported by Molinos; no other interested party suggested an alternate possible value. Commerce finds that assigning the highest Molinos export expense value to all export expenses for Molinos is reasonable, in that this ensures that the Vicentin Group does not receive a more favorable outcome than it would had it fully cooperated with the investigation. Accordingly, Commerce has updated the final margin calculations to reflect this AFA value for Molinos's export expenses.

Comment 13: Whether to Adjust Patagonia's Costs for the Change in Biodiesel Finished Goods Inventories

Petitioner's Case Brief

- Commerce should adjust Patagonia's reported costs to include the change in biodiesel finished goods inventories (*i.e.*, the total pool of costs allocated to products should be based on the total cost of manufacturing rather than the total cost of goods sold).[309]

Vicentin Group did not comment on this issue.

Commerce's Position:
We find that it is appropriate to adjust Patagonia's reported costs to include the change in biodiesel finished goods inventories. At verification, Commerce found that the total pool of costs that Patagonia allocated to the POI biodiesel production quantities represented the costs associated with the quantity of products sold, rather than the costs associated with the quantity of products manufactured.[310] Consequently, we find that an adjustment is necessary to allocate the total cost of manufacturing, rather than the total cost of sales, to the quantities of biodiesel produced (the total cost of sales plus ending biodiesel inventory less beginning biodiesel inventory equals total cost of manufacturing). Therefore, for the final determination, we increased Patagonia's total reported costs to include the net change in the beginning and ending biodiesel inventories.[311]

Comment 14: Whether to Reduce Patagonia's Byproduct Offset by Commissions Paid on the Sales of the Byproduct

Petitioner's Case Brief

- If Commerce continues to grant Patagonia an offset for glycerin byproducts, Commerce should likewise include all associated glycerin byproduct expenses in the reported costs consistent with agency practice.[312]

[309] *See* Petitioner Case Brief at 27.
[310] *See* Memorandum, "Verification of the Cost Response of Vicentin S.A.I.C. in the Antidumping Duty Investigation of Biodiesel from Argentina," dated November 29, 2017 (Vicentin Group Cost Report), at 2.
[311] *See* Vicentin Group Final Cost Memo at 2 and Attachment 18.
[312] *See* Petitioner Case Brief at 28 (citing, *e.g.*, *Silicomanganese from Brazil*; *Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 FR 20335 (April 19, 2010) (*OCTG from China*)).

Vicentin Group's Case Brief

- Commerce should not increase Patagonia's reported variable overhead costs to include the glycerin sales commissions since these commissions were reported to Commerce as indirect selling expenses.[313]
- If Commerce finds it appropriate to include the glycerin sales commissions as a variable overhead expense, these commissions should be removed from Patagonia's indirect selling expense calculation.[314]

Petitioner's Rebuttal Brief

- Including Patagonia's glycerin sales commissions as a variable overhead expense would not result in a double-counting of these expenses since the commissions were reported as a home market indirect selling expense and Patagonia's home market sales information was not used for the calculation of NV due to Commerce's PMS determination.[315]

Vicentin Group did not provide further comment on this issue in its rebuttal brief.

Commerce's Position:

We have adjusted Patagonia's reported costs to include the glycerin sales commissions for the final determination. In reporting to Commerce, Patagonia reduced the variable overhead costs from its normal books and records to exclude the commissions related to glycerin sales.[316] Further, because glycerin is a byproduct generated during the production of biodiesel, Patagonia also offset its reported biodiesel production costs by the sales value of the glycerin byproducts sold.[317] Because the sales commissions associated with the glycerin sales reduce the net sales value of the glycerin byproducts, we find it reasonable that these selling expenses should likewise reduce the net value of the byproduct offset granted. While the petitioner's citations to *Silicomanganese from Brazil* and *OCTG from China* do not speak directly to the treatment of byproduct selling expenses, they do demonstrate that Commerce includes in the reported costs all further manufacturing expenses incurred prior to the sale of a byproduct.[318] Thus, we find these cases support the proposition that all expenses directly associated with extracting value from the byproducts that are unintentionally generated during the production of a main product, such as the sales commissions specifically identified as related to glycerin byproducts, should be included in the reported costs, *i.e.*, they should reduce the offset granted.

Therefore, for the final determination, we have included the glycerin sales commissions in Patagonia's reported costs. Further, the Vicentin Group's double-counting issue is moot, as the glycerin sales commissions were reported as a selling expense in Patagonia's home market sales database and, due to Commerce's PMS determination, Patagonia's home market data are not being used as the basis for NV. Therefore, it is unnecessary to remove the glycerin sales commissions from Patagonia's reported home market indirect selling expense rate calculation, as the rate is not being used in Commerce's antidumping analysis.

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[313] *See* Vicentin Group Case Brief at 65.
[314] *Id*.
[315] *See* Petitioner Rebuttal Brief at 56-57.
[316] *See* Vicentin Group Cost Report at 2.
[317] *Id*.
[318] *See* Silicomanganese from Brazil IDM at Comment 6.

Comment 15: Whether to Adjust Vicentin's Reported Costs for an Unreconcilable Cost Difference

Petitioner's Case Brief

- Commerce should adjust Vicentin's reported costs to include the unreconcilable cost difference discovered during the verification of the company's overall cost reconciliation.[319]

The Vicentin Group did not comment on this issue.

Commerce's Position:
Based on the overall cost reconciliation, the total cost of producing biodiesel from Vicentin's financial accounting system was greater than the total production costs reported to Commerce.[320] Therefore, we have adjusted Vicentin's reported costs to account for the unreconcilable cost difference discovered during our verification of Vicentin's overall cost reconciliation.

Comment 16: Whether Elements of the Renova Transfer Price to Actual Processing Cost Comparison are on an Inconsistent Basis and Require Adjustment

Vicentin Group's Case Brief

- Commerce's comparison of the transfer prices charged and the actual costs incurred for Renova's biodiesel toll-processing services improperly includes some elements on an inflation-indexed basis and some elements on a non-indexed basis. The comparison and the resulting Renova biodiesel processing cost adjustment should be revised so that all elements of the calculation are on the same basis.

Petitioner's Rebuttal Brief

- The record demonstrates that Commerce's analysis was performed on a consistent basis and needs no further adjustment. Specifically, Renova's total cost was fully inflated since it included Commerce's inflation adjustments for depreciation and general and administrative (G&A) expenses, while Renova's transfer price was likewise fully inflated, because it included an additional margin that is periodically reviewed and adjusted by the tolling entities in order to account for changes in market conditions, which, according to the petitioner, should factor in the impact of inflation.[321]

Commerce's Position:
For purposes of the final determination, Commerce revised its comparison, so that all elements of the calculation were on the same basis. During the POI, Renova toll-processed soybean oil into biodiesel for Vicentin, Molinos, and OMHSA, and in reporting to Commerce, Vicentin, Molinos, and OMHSA reported the cost of these services at the transfer prices paid to Renova. However, because Vicentin, Molinos, OMHSA, and Renova have been collapsed and treated as a single entity for purposes of this investigation, all transactions between them should be reported

[319] *See* Petitioner Case Brief at 28-29.
[320] *See* Vicentin Group Cost Report at 2.
[321] *See* Petitioner Rebuttal Brief at 57-60.

at the actual costs incurred and not at the transfer prices paid. Therefore, in the *Preliminary Determination*, we compared the transfer prices charged by Renova (and reported by the collapsed affiliates to Commerce) to Renova's actual cost of the biodiesel processing services performed to determine if an adjustment to the transfer prices reported was warranted.[322] Based on this analysis, we found that the transfer prices charged by Renova did not fully recover the total costs it incurred. Accordingly, we adjusted the transfer prices reported by Vicentin, Molinos, and OMHSA by the percentage difference between Renova's transfer prices and actual costs.[323]

For the final determination, we have reviewed our analysis of the Renova transactions from the *Preliminary Determination* and found that, while we included Renova's depreciation and G&A expenses on an inflation-adjusted basis, all other costs associated with Renova's biodiesel processing were based on the nominal values from Renova's normal books and records.[324] Furthermore, the transfer prices used in the analysis were likewise based on the nominal values recorded by Renova in its books each month.[325] Although the petitioner suggests that the additional two dollar denominated fees that are a part of the total transfer price charged by Renova accounts for the impact of inflation on the total transfer price, we disagree. While Renova's additional fee is invoiced in a stable currency (*i.e.*, U.S. dollars), the total monthly transfer prices charged (including the additional fees) were recorded in Renova's books each month in Argentine pesos.[326] The transfer prices used in Commerce's comparison were, in turn, compiled from Renova's monthly peso-denominated records.[327] Therefore, Commerce's preliminary analysis reflected the peso-denominated transfer prices in the purchasing power of the respective month, rather than in an inflation-adjusted constant currency. Hence, we agree with the Vicentin Group that in the *Preliminary Determination*, the components of the Renova analysis were not treated consistently with regard to inflation. Therefore, for the final determination, we have converted all elements of the Renova analysis to the same basis and then applied the revised biodiesel processing percentage difference to the transfer prices reported by Vicentin, Molinos, and OMHSA.[328]

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[322] *See* Memorandum, "Less Than Fair Value Investigation of Biodiesel from Argentina: Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination – Vicentin S.A.I.C.," dated October 19, 2017, at Attachment 10.
[323] *Id*.
[324] *Id*.
[325] *Id*.
[326] *See*, *e.g.*, OMHSA Letter, "Response of OMHSA to the Department's Supplemental Section D Questionnaire; Biodiesel from Argentina," dated September 6, 2017, at 3 (describing that Renova's additional fee is calculated in U.S. dollars per metric ton of soybean oil processed); Vicentin Group Cost Report at Renova Cost Verification Exhibit (REN CVE) 6 (examining the general ledger accounts related to the peso-denominated transfer prices charged).
[327] *See* Vicentin Group Cost Report at 35-36 and REN CVE 6.
[328] *See* Vicentin Group Final Cost Memo at Attachment 10.

VIII. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination in the investigation and the final weighted-average dumping margins in the *Federal Register*.

☒	☐
Agree	Disagree

2/20/2018

X

Signed by: PRENTISS SMITH

P. Lee Smith
Deputy Assistant Secretary
for Policy and Negotiations