

II

(Non-legislative acts)

REGULATIONS

COMMISSION IMPLEMENTING REGULATION (EU) 2019/244

of 11 February 2019

imposing a definitive countervailing duty on imports of biodiesel originating in Argentina

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union ⁽¹⁾ ('the basic Regulation'), and in particular Article 15 thereof,

Whereas:

1. PROCEDURE

1.1. Initiation

- (1) On 31 January 2018, the European Commission ('the Commission') initiated an anti-subsidy investigation with regard to imports into the European Union of biodiesel originating in Argentina ('the country concerned') on the basis of Article 10 of Regulation (EU) 2016/1037. It published a Notice of Initiation in the *Official Journal of the European Union* ⁽²⁾ ('the Notice of Initiation').
- (2) The Commission initiated the investigation following a complaint lodged on 18 December 2017 by the European Biodiesel Board ('EBB' or 'the complainant') on behalf of producers. The complainant represents around 70 % of the total Union production of biodiesel. The complaint contained evidence of subsidisation and of resulting threat of injury that was sufficient to justify the initiation of the investigation.
- (3) Prior to the initiation of the anti-subsidy investigation, the Commission notified the Government of Argentina ('GOA') ⁽³⁾ that it had received a properly documented complaint, and invited the GOA for consultations in accordance with Article 10(7) of the basic Regulation. The GOA accepted the offer for consultations, which were held on 24 January 2018. During the consultations as well as subsequent exchanges with the GOA, due note was taken of the comments submitted by the GOA. However, no mutually agreed solution could be reached.
- (4) Following the Notice of Initiation, the Commission received comments regarding the initiation from the Argentinian Chamber of Biofuels (Cámara Argentina de Biocombustibles, 'CARBIO'). In their comments, CARBIO stated that the Argentinian biodiesel industry is not subsidised, and that the imports of Argentinian biodiesel pose no threat of material injury to the Union industry.
- (5) Concerning the evidence of subsidisation at initiation stage, the Commission made the open version of the complaint available and provided its analysis on the evidence available at that stage in the memorandum on sufficiency of evidence, on the basis of which the investigation was initiated.

⁽¹⁾ OJ L 176, 30.6.2016, p. 55.

⁽²⁾ OJ C 34, 31.1.2018, p. 37.

⁽³⁾ The term 'GOA' is used in this Regulation in a broad sense, including all Ministries, Departments, Agencies and Administrations at central, regional or local level.

- (6) Concerning the evidence on threat of injury, CARBIO argued that the complainant failed to provide sufficient evidence concerning the criteria in Article 8(8) of the basic Regulation, in particular the significant rise in imports, the freely disposable capacity in Argentina and the price effect of Argentinian imports. The argumentation of CARBIO was, however, largely based on overly pessimistic estimations of the development of Argentinian exports in 2018, which CARBIO estimated at 480 000 tonnes for the full year 2018 to all countries of the world, without substantiating that low figure which was 70 % below the corresponding figure for 2016 and 2017 ⁽⁴⁾. At such a low level, Argentinian imports would allegedly not pose a threat of injury to the Union industry. The Commission considered the evidence provided in the complaint (based on actual imports until August 2017 and estimations for 2018 based on production figures in the GAIN report ⁽⁵⁾) that indicated much higher estimated level of imports. As regards production capacity, CARBIO confirmed that the production capacity in Argentina indeed significantly exceeds the domestic consumption by more than 3 million tonnes.
- (7) Consequently, those claims were rejected.

1.2. Registration of imports

- (8) On 21 February 2018, the complainant submitted a request for registration of imports of biodiesel originating in Argentina under Article 24(5) of the basic Regulation. On 24 May 2018, the Commission published Implementing Regulation (EU) 2018/756 ('the registration Regulation') ⁽⁶⁾ making imports of biodiesel originating in Argentina subject to registration as of 25 May 2018 onwards.
- (9) Responding to the request for registration, interested parties submitted comments that the Commission addressed in the registration Regulation. The Commission had at its disposal sufficient evidence justifying the need to register imports.
- (10) Under Article 24(5) of the basic Regulation, imports of the product concerned are subject to registration for the purpose of ensuring that should the investigation result in findings leading to the imposition of countervailing duties, those duties can, if the necessary conditions are fulfilled, be levied retroactively on the registered imports in accordance with the applicable legal provisions.
- (11) Following the publication of the registration Regulation, the Commission received comments in this regard from the GOA and CARBIO.
- (12) The comments of the GOA concerned the allegation that the Commission failed to demonstrate sufficient evidence of subsidisation and to demonstrate that injury to the Union industry was caused by massive imports of Argentinian biodiesel in a relatively short period.
- (13) As explained in recitals (5) to (7), the Commission considered that it had sufficient evidence of subsidisation and threat of injury at the time of initiation. In addition, in recital (14) of the registration Regulation, the Commission provided evidence of a massive increase of Argentinian imports of biodiesel in absolute terms and in terms of market share in the period between August 2017 and March 2018, which could show the existence of material injury towards the end of the investigation period. Consequently, those allegations were rejected.

1.3. Investigation period and period considered

- (14) The investigation of subsidisation and injury covered the period from 1 January 2017 to 31 December 2017 ('the investigation period'). The examination of trends relevant for the assessment of injury covered the period from 1 January 2014 to the end of the investigation period ('the period considered').

1.4. Interested parties

- (15) In the Notice of Initiation, interested parties were invited to contact the Commission in order to participate in the investigation. In addition, the Commission specifically informed the complainant, other known Union producers, the known exporting producers and the GOA, the known importers, suppliers and users, traders, as well as associations known to be concerned about the initiation of the investigation and invited them to participate.

⁽⁴⁾ 1 664 145 tonnes for 2016 and 1 650 312 tonnes for 2017.

⁽⁵⁾ United States Department of Agriculture Global Agriculture Information Network (GAIN) report.

⁽⁶⁾ Commission Implementing Regulation (EU) 2018/756 of 23 May 2018 making imports of biodiesel originating in Argentina subject to registration (OJ L 128, 24.5.2018, p. 9).

- (16) Interested parties had an opportunity to comment on the initiation of the investigation and to request a hearing with the Commission and/or the Hearing Officer in trade proceedings.

1.5. Sampling

- (17) In its Notice of Initiation, the Commission stated that it might sample the interested parties in accordance with Article 27 of the basic Regulation.

1.5.1. Sampling of Union producers

- (18) In its Notice of Initiation, the Commission stated that it had provisionally selected a sample of Union producers. The Commission selected the sample on the basis of the highest representative production, which could reasonably be investigated within the time available.
- (19) The provisional sample consisted of three Union producers and represented a broad geographical spread. The sampled Union producers accounted for 19 % of the total production volume of the Union industry. The Commission invited interested parties to comment on the provisional sample.
- (20) The Commission received substantiated comments on the provisional sample from CARBIO, Greenergy Fuels Limited and from the complainant. Recitals (310) to (313) provide a more detailed analysis of those comments.
- (21) As a result, the Commission replaced one of the Union producers in the provisional sample with another. The final sample consisted of three Union producers located in three different Member States. It accounted for over 23 % of Union production.

1.5.2. Sampling of importers

- (22) To decide whether sampling was necessary and, if so, to select a sample, the Commission asked unrelated importers to provide the information specified in the Notice of Initiation.
- (23) Two unrelated importers provided the requested information and agreed to be included in the sample. In view of the low number of unrelated importers, the Commission decided that sampling was not necessary.

1.5.3. Sampling of exporting producers in Argentina

- (24) To decide whether sampling was necessary and, if so, to select a sample, the Commission asked all exporting producers in Argentina to provide the information specified in the Notice of Initiation. In addition, the Commission asked the authorities of Argentina to identify and/or contact other exporting producers, if any, that could be interested in participating in the investigation.
- (25) Nine producers in the country concerned provided the requested information and agreed to be included in the sample. The Commission excluded one company from the sample, as it did not export biodiesel to the Union in the investigation period. The remaining eight companies or groups of companies accounted for 100 % of exports to the Union during the investigation period. In accordance with Article 27(1)(b) of the basic Regulation, the Commission selected the following sample of three groups of exporting producers on the basis of the largest representative volume of exports to the Union which could reasonably be investigated within the time available:
- Group Renova (Molinos Agro SA, Oleaginosa Moreno Hermanos SACIFIYA, Vicentin SAIC), Argentina,
 - Group T6 (Aceitera General Deheza SA, Bunge Argentina SA), Argentina,
 - Louis Dreyfus Commodities ('LDC') Argentina SA, Argentina.
- (26) The sampled groups of exporting producers represented 84 % of the total exports to the Union of the product concerned during the investigation period.
- (27) In accordance with Article 27(2) of the basic Regulation, the Commission consulted all known exporting producers concerned and the GOA on the selection of the sample. The Commission received no comments on the proposed sample.

1.5.4. Individual examination

- (28) No exporting producer, which was not included in the sample, requested individual examination under Article 27(3) of the basic Regulation.

1.6. Questionnaire replies and verification visits

- (29) The Commission sent questionnaires to the GOA, to the three sampled groups of exporting producers, to the three sampled Union producers, and to the two unrelated importers that had come forward.
- (30) The Commission received questionnaire replies from the GOA, all sampled groups of exporting producers, all sampled Union producers but only one of the two cooperating unrelated importers.
- (31) The Commission sought and verified all the information deemed necessary for a determination of subsidy, resulting threat of injury and Union interest. A verification visit took place at the premises of the Argentinian Ministries of Agroindustry, Foreign Affairs, Production and Taxation, during which officials from other relevant ministries also participated. Verification visits also took place at the premises of the Banco de Córdoba, the Banco de la Provincia de Buenos Aires, the Banco de la Ciudad de Buenos Aires, the Banco Central de la República Argentina and the Banco de la Nación Argentina.
- (32) Verification visits under Article 26 of the basic Regulation were carried out at the premises of the EBB and the following companies:

Union producers:

- Masol Iberia Biofuel, S.L.U., El Grao (Castellón) and Barcelona, Spain,
- Saipol, Grand-Couronne, France,
- Verbio Vereinigte BioEnergie AG, Leipzig, Germany;

Sampled exporting producers in Argentina:

- Group Renova:
 - Molinos Agro SA, Buenos Aires,
 - Oleaginosa Moreno Hermanos SACIFlyA, Buenos Aires,
 - Vicentin SAIC, Buenos Aires;
- Group T6:
 - Aceitera General Deheza SA, Buenos Aires,
 - Bunge Argentina SA, Buenos Aires;
- LDC Argentina SA, Buenos Aires.

1.7. Non-imposition of provisional measures and subsequent procedure

- (33) Given that the Commission found it necessary to collect further information on developments after the investigation period, which could further confirm the Commission's preliminary findings and shed more light on the Union interest, the Commission decided not to impose provisional measures in this case.
- (34) On 21 September 2018, by means of an information document describing its preliminary findings, the Commission informed all interested parties that no provisional countervailing duties would be imposed on imports into the Union of biodiesel originating in Argentina. On 8 October 2018, six Member States (France, Spain, Bulgaria, Poland, Portugal and Romania) requested the Commission to impose provisional countervailing measures in this case. By letter of 10 October 2018, the Commission confirmed that the investigation was ongoing and that further facts would be considered (in particular, developments immediately following the investigation period).
- (35) Several interested parties made written submissions on the information document. The parties who so requested were granted an opportunity to be heard, including with the Hearing Officer.
- (36) Following the disclosure of the information document, comments were received from the GOA, CARBIO, all sampled groups of exporting producers, and the EBB.

- (37) The Commission continued seeking and verifying all information it deemed necessary for its definitive findings. The information included in particular, but was not limited to, the additional questionnaire replies received from the EBB and the sampled Union producers concerning the developments after the investigation period, data on biodiesel imports to the Union after the investigation period and data provided by interested parties following the disclosure of the information document.
- (38) On 3 December 2018, the Commission disclosed to all parties the essential facts and considerations on the basis of which it intended to impose a definitive countervailing duty on imports of the product concerned into the Union. All parties were granted a period within which they could make comments on the definitive disclosure.
- (39) Following final disclosure, the EBB, Copa (Committee of Professional Agricultural Organisations), Cogeca (General Confederation of Agricultural Cooperatives in the European Union) and the European Oilseed Alliance welcomed the Commission's intention to impose a definitive countervailing duty on imports of the product concerned into the Union.

2. PRODUCT CONCERNED AND LIKE PRODUCT

2.1. Product concerned

- (40) The product concerned is fatty-acid mono-alkyl esters and/or paraffinic gasoils obtained from synthesis and/or hydro-treatment, of non-fossil origin, commonly known as 'biodiesel', in pure form or as included in a blend, originating in Argentina ('the product concerned').
- (41) The investigation showed that biodiesel produced in Argentina is exclusively soybean methyl ester ('SME') derived from soybean oil, whereas biodiesel produced in the Union is mainly rapeseed methyl ester ('RME') but made also from other feedstock, including waste oils as well as virgin oils.
- (42) SME and RME both belong to the category of fatty-acid methyl esters (FAME). The term 'ester' refers to the transesterification of vegetable oils, namely, the mingling of the oil with alcohol, which produces biodiesel and, as a by-product, glycerine. The term 'methyl' refers to methanol, the most commonly used alcohol in the process.
- (43) SME biodiesel could be used in its pure form but is generally blended before being used in the Union. The reason for blending is that SME in its pure form does not meet the European standard EN 14214 as regards iodine and cetane numbers. The reason for blending SME with RME is that SME has a higher Cold Filter Plugging Point ('CFPP') than RME and is therefore not suitable for use in its pure form during winter months in cold regions of the European Union.
- (44) The blends of biodiesel and mineral diesel are ultimately used in the transport sector as a fuel in diesel powered engines of road vehicles such as cars, trucks and buses, and also in trains. Biodiesel in its pure form or blended with mineral diesels can also be used as a heating fuel in domestic, commercial or industrial boilers and as a fuel for generators to produce electricity. There are trials to introduce biodiesel for air transport, in order to reduce CO₂ emissions by the air industry.
- (45) The product concerned is currently falling within CN codes ex 1516 20 98 (TARIC codes 1516 20 98 21, 1516 20 98 29 and 1516 20 98 30), ex 1518 00 91 (TARIC codes 1518 00 91 21, 1518 00 91 29 and 1518 00 91 30), ex 1518 00 95 (TARIC code 1518 00 95 10), ex 1518 00 99 (TARIC codes 1518 00 99 21, 1518 00 99 29 and 1518 00 99 30), ex 2710 19 43 (TARIC codes 2710 19 43 21, 2710 19 43 29 and 2710 19 43 30), ex 2710 19 46 (TARIC codes 2710 19 46 21, 2710 19 46 29 and 2710 19 46 30), ex 2710 19 47 (TARIC codes 2710 19 47 21, 2710 19 47 29 and 2710 19 47 30), 2710 20 11, 2710 20 15, 2710 20 17, ex 3824 99 92 (TARIC codes 3824 99 92 10, 3824 99 92 12 and 3824 99 92 20), 3826 00 10 and ex 3826 00 90 (TARIC codes 3826 00 90 11, 3826 00 90 19 and 3826 00 90 30).

2.2. Like product

- (46) The investigation showed that the following products have the same basic physical, chemical, and technical characteristics as well as the same basic uses:
- (a) the product concerned;
 - (b) the product produced and sold on the domestic market of Argentina;
 - (c) the product produced and sold in the Union by the Union industry.

- (47) The Commission decided that those products are therefore like products within the meaning of Article 2(c) of the basic Regulation.

2.3. Claims regarding product scope

- (48) The Commission received no claims regarding the product scope.

3. SUBSIDISATION

3.1. Subsidies and subsidy programmes within the scope of the current investigation

- (49) On the basis of the information available, including information contained in the complaint, the Notice of Initiation and the replies to the Commission's questionnaire, the Commission investigated the alleged subsidisation by the GOA through the following subsidy programmes:

- (1) Government's support to the biodiesel industry including through the provision of soybeans for less than adequate remuneration ('LTAR');
- (2) Government's mandated purchase of biodiesel for more than adequate remuneration ('Biodiesel Supply Agreement');
- (3) Provision of loans and export financing on preferential terms and preferential lending by the National Bank of Argentina (Banco de la Nación Argentina, 'BNA');
- (4) Government's revenue forgone or not collected, such as accelerated depreciation for biodiesel producers under the Biofuels Law of 2006, exemption and deferral of the minimum presumed income tax for biodiesel producers under the Biofuels Law of 2006; and
- (5) Provincial and municipal tax exemptions:
 - (a) Provincial tax exemptions provided by the Province of Cordoba;
 - (b) Provincial tax exemptions provided by the Province of Buenos Aires;
 - (c) Province of Santiago del Estero System of Promotion and Industrial Development ('PSPID') — Provincial Law No 6.750;
 - (d) Agreement on municipal taxes between Louis Dreyfus Argentina and the Municipality of General Lagos;
 - (e) Percentage tax rate reduction under the 'Pacto Fiscal' (Decree 14/1994);
 - (f) Real Estate exemption under the Santa Fe Industrial Law: exemption from paying real estate tax under Provincial Law No 8.478/1979 (Article 4) of Industrial Promotion;
 - (g) Provincial tax exemptions provided by the Province of Santa Fe;
 - (h) Article 183.29 Santa Fe Stamp Tax Exemption;
 - (i) Article 127 Santa Fe turnover tax exemption for export sales.

3.2. Government's support to the biodiesel industry including through the provision of soybeans for less than adequate remuneration

3.2.1. The application of the provisions of Article 28(1) of the basic Regulation

- (50) The Commission informed the GOA that it might have to resort to the use of facts available under Article 28(1) of the basic Regulation when examining the existence and the extent of the alleged support granted to the biodiesel industry including through the provision of soybeans for less than adequate remuneration.

- (51) At initiation, the Commission requested the GOA to provide the contact details (names, addresses and email) of all the companies supplying the main input (soybeans) for the production of the product concerned. The GOA did not provide those contact details.
- (52) Following the absence of a reply to that question, a request for additional information was sent to the GOA on 17 April 2018 regarding information in relation to the largest producers/suppliers of soybeans that have provided inputs to the Argentinian producers of biodiesel.
- (53) Given the significant number of companies providing the main input for the product concerned, in the spirit of good cooperation and in order to collect at least some relevant data for the investigation, the Commission limited its request to data from only the ten most important producers/suppliers of soybeans.
- (54) The Commission did not receive full information for most of these producers/suppliers of inputs for the production of the product concerned. In fact the Commission received only information from biodiesel producers who themselves produced soybean oil (not soybeans). No information was received from the ten largest soybean producers, as requested. In the absence of such information, the Commission considered that it had not received crucial information relevant to this aspect of the investigation.
- (55) Furthermore, the Commission requested any available information requested in the preceding recital for those providers of soybeans in the years 2014, 2015, 2016 and the investigation period in which the GOA has no shareholding or is not the largest shareholder. That information was required to assess whether the soybeans supplier and the biodiesel producer were unrelated, related or part of the same entity. The Commission requested evidence that the GOA attempted to contact those suppliers or to indicate to the Commission how such information could be obtained (e.g. through relevant associations). The GOA did not include the information requested, or any evidence of the GOA's attempts to even contact those suppliers.
- (56) The GOA's reply of 15 February 2018 advised that the data requested by the Commission on the soybean growers could be provided by four bodies, two of which being ACSOJA (Asociación de la Cadena de la Soja Argentina) and CARBIO. The Commission services met with both bodies during the verification visit in Argentina but no data on soybean suppliers was received. The other two bodies ⁽⁷⁾ were not inspected given the limited amount of time available. ACSOJA and CARBIO were chosen to be inspected as the two most likely to be able to assist with the investigation.
- (57) During the meeting with ACSOJA, the Commission representatives asked a number of questions on the market situation of soybeans in Argentina, on their supply relationship with the biodiesel producers and on the impact of the export tax on their activity. The ACSOJA representative did not provide any meaningful reply to those questions, and did not provide specific data and evidence useful for the investigation. It was clear that ACSOJA simply represented other representative bodies in the soybean value chain and was unable to answer detailed enquiries, or give the Commission services the information requested in the questionnaire with regard to the production of soybeans.
- (58) Also, ACSOJA committed during the verification visit to sending press releases concerning the export tax on soybeans and its downstream production. The Commission never received such press releases.
- (59) As CARBIO is an association of *biodiesel* producers, it was not able to give the Commission the details on *soybean* producers that were required.
- (60) Consequently, with regard to the alleged government provision of soybeans for less than adequate remuneration, the GOA did not provide the necessary information and evidence as requested by the Commission in its questionnaire, in the letter of 17 April 2018 and during the verification visit.
- (61) The absence of sufficient cooperation did not allow the Commission to collect all the information it considers relevant for its findings in this investigation. More specifically, the Commission could not obtain information and data on the market for soybeans producers, the impact of the government measures (such as the export tax of soybeans) on their behaviour as well as on the supply of soybeans to the biodiesel producers.

⁽⁷⁾ These were AAPRESID (Asociación Argentina de Productores en Siembra Directa) and CIARA (Cámara de la Industria Aceitera de la República Argentina).

- (62) That information included the behaviour and decisions of soybeans producers prior and subsequent to the introduction and the various changes of the export taxes and other similarly restrictive measures, their production strategies and the possibility to switch to alternative crops, the availability and access to arable land, the market features and dynamics with regard to the differentiation between large companies and SMEs, the sales and marketing channels and strategies for their domestic and export markets, the prices and pricing policies in their domestic and export markets, the impact of the international price on their pricing policies, the competition situation domestically and in export markets, their profitability over the years, the impact of possible overcapacity and stockpiling strategies, the imports and exports of their main customers domestically and in export markets including the role of the soybean crushers' industry and the added-value achieved by the crushers' industry as well as the competition situation of the crushers' industry in Argentina and in international markets.
- (63) Furthermore, contrary to what the GOA had asserted in its reply to the questionnaire, during the verification visit the Commission services found that it transpired that the GOA had ownership of one provider of soybeans to the biodiesel industry, namely YPF ⁽⁸⁾. However, as YPF is only one of the hundreds of suppliers of soybeans to the biodiesel industry, the information submitted by this provider, was insufficient to establish the behaviour of the remaining suppliers of soybeans to the biodiesel industry. In particular, YPF does not grow soybeans, but accepts soybeans as payment for its fertiliser and fuel and then sells the soybeans on the Argentinian domestic market. It is therefore not representative of the soybean farmers who supply the biodiesel industry.
- (64) In the absence of information to the contrary received from the GOA, the Commission partially relied on facts available for its findings regarding those aspects of the investigation in accordance with Article 28 of the basic Regulation.
- (65) Following the disclosure of the information document, the GOA disputed again that it did not cooperate fully regarding information requested from soybean farmers and referred to its letter dated 20 July 2018. CARBIO also claimed that the Commission incorrectly stated that the GOA did not cooperate.
- (66) The Commission reiterated that the GOA did not provide contact details for soybean growers and only partial information for soybean oil producers. ACSOJA and CARBIO did not provide the information that the Commission had requested in the questionnaire nor during the meetings held with them. Moreover, during those meetings it became clear that the representative of ACSOJA was not in a position to reply to detailed technical questions and that CARBIO was an association of biodiesel producers and not soybean producers.
- (67) The Commission concluded that, with regard to the alleged GOA's support to the biodiesel industry in particular through various measures including the provision of soybeans for less than adequate remuneration, the GOA did not provide the necessary information and evidence as requested by the Commission in its questionnaire, in the letter of 17 April 2018 and during the verification visit. As a result, the Commission had to rely on facts available concerning that aspect of the investigation.
- (68) In the absence of data provided by the GOA on the sales of soybean growers in Argentina, the Commission relied on the data provided by the sampled exporting producers on the domestic price of soybeans. Furthermore, the Commission relied on publicly available information with regard to the direction or entrustment of the soybean growers by the GOA to sell soybeans domestically for less than adequate remuneration and the GOA's intention to support the biodiesel industry through this and other related measures.
- (69) Following final disclosure, the GOA and CARBIO once again showed their disagreement with the Commission's use of facts available in accordance with Article 28 of the basic Regulation. They claimed that the use of facts available is justified only when an interested party fails to provide 'necessary information', indispensable to reach a specific determination. According to the GOA and CARBIO, the Commission never proved how the information requested was indispensable to reach a specific determination in this case and ignored the fact that the requested information was either unavailable for the GOA or strictly covered by tax secrecy law.

⁽⁸⁾ YPF (Yacimientos Petrolíferos Fiscales) is a vertically integrated Argentinian energy company nationalised in 2012. <https://www.ypf.com/LaCompania/Paginas/Todo-sobre-YPF.aspx>

- (70) The Commission explained extensively in its communication with the GOA the reasons why it needed more detailed information on soybean growers and soybean oil producers. The claim of the GOA and CARBIO that the GOA was not in the position to provide this information was not supported by any evidence proving that this was the case or that the Commission had other reasonable means available to obtain such information. The information requested was of such nature that the Commission could assume that it was either in the possession of the GOA and/or CARBIO or at least that the GOA had the regulatory control over the soybean growers and soybean oil producers to request this information. The Commission also expected better cooperation from soybean growers and soybean oil producers if those were contacted by the GOA directly and/or in close cooperation with the Commission.

3.2.2. Analysis

- (71) The complainant alleged the existence of the GOA's support to the biodiesel industry through various measures. In particular, the complainant claimed that the GOA had implemented a policy of imposing high export taxes and other regulations relating to soybeans and soybean oil, which is the key raw material used for the production of biodiesel in Argentina. In doing so, according to the complainant, the GOA was ensuring that the price of raw materials for the production of biodiesel remained significantly lower than global prices.
- (72) As stated in the Commission's memorandum on sufficiency of evidence ⁽⁹⁾, the Commission considered that the export taxes appeared to be one of the tools devised by the GOA to direct soybean growers and soybean oil producers in assisting the Argentinian biodiesel industry. In this investigation, the Commission has examined the set of measures adopted by the GOA in order to support the Argentinian biodiesel industry artificially.
- (73) In order to establish the existence of a countervailable subsidy, three elements must be present: (a) a financial contribution or income/price support; (b) a benefit; and (c) specificity (Article 3 of the basic Regulation) ⁽¹⁰⁾.
- (74) To come to a conclusion on the first element, the Commission analysed if the set of measures adopted by the GOA lead to a financial contribution in the form of government's provision of soybeans for less than adequate remuneration to the Argentinian biodiesel exporting producers, following Article 3(1)(a) of the basic Regulation, and/or whether the set of measures adopted by the GOA falls under the category of income/price support of the biodiesel industry, following Article 3(1)(b) of the basic Regulation.

3.2.2.1. Financial contribution

- (75) At the outset, the Commission observed that all sampled companies purchased soybeans domestically from either related or unrelated companies to process into soybean oil and then biodiesel. The sampled exporting producers did not purchase soybean oil to further process into biodiesel, as they crushed the soybeans into soybean oil themselves as an intermediate step for the production of biodiesel. Therefore, the analysis in the following sub-sections focuses on whether the GOA provided soybeans (rather than soybean oil) for less than adequate remuneration.
- (76) Article 3(1)(a)(iv), second indent, of the basic Regulation states that a financial contribution exists if a government: 'entrusts or directs a private body to carry out one or more of the type of functions illustrated in points (i), (ii) and (iii) which would normally be vested in the government, and the practice, in no real sense, differs from practise normally followed by governments'. The type of functions described by Article 3(1)(a)(iii) of the basic Regulation occurs where 'a government provides goods or services other than general infrastructure, or purchases goods ...'. Those provisions mirror paragraphs (iii) and (iv) of Article 1.1(a)(1) of the SCM Agreement and should be interpreted and applied in the light of the relevant WTO case law.

⁽⁹⁾ See Memorandum on sufficiency of evidence, 30 January 2018, p. 6.

⁽¹⁰⁾ For a similar analysis, see Commission Implementing Regulation (EU) 2016/387 of 17 March 2016 imposing a definitive countervailing duty on imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron), originating in India (OJ L 73, 18.3.2016, p. 1).

- (77) The WTO panel in US — Export Restraints ruled that the ordinary meanings of the two words ‘entrust’ and ‘direct’ in Article 1.1(a)(1)(iv) of the SCM Agreement require that the action of the government must contain a notion of delegation (in the case of entrustment) or command (in the case of direction) ⁽¹¹⁾. It rejected the US ‘cause-and-effect-argument’ and asked for an explicit and affirmative action of delegation or command ⁽¹²⁾.
- (78) However, in a subsequent case, the Appellate Body held that the replacement of the words ‘entrusts’ and ‘directs’ by ‘delegation’ and ‘command’ is too rigid as a standard ⁽¹³⁾. According to the Appellate Body, ‘entrustment’ occurs where a government gives responsibility to a private body and ‘direction’ refers to situations where the government exercises its authority over a private body ⁽¹⁴⁾.
- (79) In both cases, the government uses a private body as proxy to effectuate the financial contribution, and ‘in most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement’ ⁽¹⁵⁾. At the same time, paragraph (iv) of Article 1.1(a)(1) of the SCM Agreement does not allow Members to impose countervailing measures to products ‘whenever the government is merely exercising its general regulatory powers’ ⁽¹⁶⁾ or where government intervention ‘may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market’ ⁽¹⁷⁾. Rather, entrustment and direction implies ‘a more active role of the government than mere acts of encouragement’ ⁽¹⁸⁾.
- (80) Moreover, the WTO did not consider that ‘leaving discretion to a private body is necessarily at odds with entrusting or directing that private body [...] While there may be cases where the breadth of discretion left to the private body is such that it becomes impossible to properly conclude that that private body has been entrusted or directed (to carry out a particular task), this is a factual/evidentiary matter to be addressed on a case-by-case basis.’ ⁽¹⁹⁾
- (81) In line with those WTO rulings, not all government measures capable of conferring benefits equate to a financial contribution under Article 3 of the basic Regulation and Article 1.1(a) of the SCM Agreement. There must be evidence of a government policy or programme to promote the industry under investigation (in this particular case the biodiesel/biofuels industry), by exercising authority over or giving responsibility to public or private bodies (here the soybean growers) to provide soybeans for less than adequate remuneration to the biodiesel industry.
- (82) In a nutshell, the relevant WTO rulings provide that:
- (i) the determination of whether there is a ‘financial contribution’ under Article 1.1(a)(1) of the SCM Agreement should focus on the *nature* of the government action, rather than on the *effects* or the *results* of the government action ⁽²⁰⁾. In other words, it is well-acknowledged that governments intervene in the market as *regulators* and, when so doing, they cause *effects* on the market and its operators. In this sense, e.g. a government may impose export taxes legitimately in order to generate revenue in case of a very competitive commodity in the international markets. In contrast, there is no such legitimate imposition of export restrictions when it becomes evident that the use of such instrument together with other mechanisms

⁽¹¹⁾ Panel Report of 29 June 2001, DS194 United States — Measures treating export restraints as subsidies, paragraph 8.29.

⁽¹²⁾ Panel Report, DS 194, paragraph 8.44.

⁽¹³⁾ Appellate Body Report of 21 February 2005, DS296 United States — Countervailing duty investigation on Dynamic Random Access Memory (DRAMs) from Korea, paragraphs 110-111.

⁽¹⁴⁾ Appellate Body Report, DS 296, para. 116.

⁽¹⁵⁾ Appellate Body Report, DS 296, para. 116.

⁽¹⁶⁾ Appellate Body Report, DS 296, para. 115.

⁽¹⁷⁾ Appellate Body Report, DS 296, para. 114, agreeing with the Panel Report, DS 194, para. 8.31. on that account.

⁽¹⁸⁾ Appellate Body Report, DS 296, para. 115.

⁽¹⁹⁾ Panel Report, DS 296, paragraph 7.38. This conclusion was not appealed.

⁽²⁰⁾ Panel Report, US — Export Restraints (WT/DS194/R), circulated on 29 June 2001, paras. 8.33-8.34.

to keep commodities domestically and force suppliers to sell below market prices is part of a broader scheme engineered by the government to support a particular industry or set of industries to boost their competitiveness. Thus, the nature of the government action, including its context, object and purpose, is relevant in assessing the 'financial contribution' element;

- (ii) 'entrustment' or 'direction' would involve an explicit and affirmative action addressed to a particular party in relation to a particular task or duty, this being very different from the situation in which a government intervenes in the market in some way, which may or may not have a particular *result* given the factual circumstances and exercise of free choice by the actors in that market. Ultimately, the key question behind the concepts of entrustment or direction is whether the conduct in question, i.e. the financial contribution in the form of provision of goods for less than adequate remuneration, can be attributed to the government or still is the free choice of the private operators in view of market considerations, such as regulatory constraints ⁽²¹⁾;
- (iii) Article 1.1(a)(1)(iv) of the SCM Agreement is, in essence, an anti-circumvention provision and, thus, a finding of entrustment or direction requires that the government gives responsibility to a private body or exercises its authority over a private body in order to effectuate a financial contribution. In most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction ⁽²²⁾. However, governments are likely to have other means at their disposal to exercise authority over a private body some of which may be 'more subtle' than a command or may not involve the same degree of compulsion ⁽²³⁾;
- (iv) there must be 'a demonstrable link' between the government act and the conduct of the private body ⁽²⁴⁾. There is no reason why a case of government entrustment or direction should not be premised on circumstantial evidence (such as implicit and informal acts of delegation or command), provided that such evidence is probative and compelling ⁽²⁵⁾. In this respect, evidence of the government's intention to support the downstream industry (for example, through publicly stated policies or government decisions, or other governmental actions), or the existence of other government measures ensuring a particular result on the market (e.g. an export restraint together with a government measure preventing operators subject to those restraints from stocking their products), may be relevant to determine the existence of a 'financial contribution' under Article 1.1(a)(1)(iv) of the SCM Agreement (in particular as an indirect manner for the government to provide goods, as provided in subparagraph (iii)). In some circumstances, 'guidance' by a government *can* constitute direction ⁽²⁶⁾. The presence of particular *effects* in the market (such as reduction of prices) may also be a factor to be taken into account together with all other available evidence, including the possibility of anticipating those effects in a particular context. Finally, depending on the circumstances, a private body may decide not to carry out a function with which it was so entrusted or directed, despite the possible negative consequences that may follow. This does not show, however, on its own, that the private body was not entrusted or directed ⁽²⁷⁾.

- (83) In line with that case-law, the Commission has reviewed very carefully the nature of the GOA's intervention (whether the GOA's intervention involves the entrustment of or direction to soybean growers?), the nature of the entrusted bodies (are soybean growers private bodies within the meaning of Article 3(1)(a)(iv) of the basic Regulation?), and the action of the entrusted or directed bodies (did the entrusted or directed soybean growers provide soybeans to the Argentinian biodiesel industry for less than adequate remuneration and hence act as a proxy for the GOA?). Moreover, the Commission has verified whether the function carried out would normally be vested in the government (is the provision of soybeans for less than adequate remuneration to soybean oil-producing companies in Argentina a normal government activity?) and whether such function does not, in real sense, differ from the practices normally followed by governments (does the actual provision of soybeans by growers, in real sense, differ from what the government would have done itself?).

⁽²¹⁾ Panel Report, *US — Export Restraints*, paras. 8.29-8.31.

⁽²²⁾ Appellate Body Report, *US — DRAMS (WT/DS296/AB/R)*, circulated 27 June 2005, para. 116.

⁽²³⁾ Appellate Body Report, *US — DRAMS*, para. 115.

⁽²⁴⁾ Appellate Body Report, *US — DRAMS*, para. 112.

⁽²⁵⁾ See Panel Report, *Korea — Commercial Vessels (WT/DS273/R)*, circulated on 7 May 2005, para. 7.373.

⁽²⁶⁾ Appellate Body Report, *US — DRAMS (WT/DS296/AB/R)*, para. 114.

⁽²⁷⁾ Appellate Body Report, *US — DRAMS (WT/DS296/AB/R)*, para. 124.

3.2.2.2. Entrustment or direction of the soybean growers by the Government of Argentina

- (84) In view of the WTO case-law referred to in recitals (77) to (82), the Commission analysed first whether the GOA's support to the Argentinian biodiesel industry is effectively an objective of a government policy and not merely a 'side effect' of the exercise of general regulatory powers. The investigation examined in particular whether the price distortions found were part of the governments' objectives, or whether the lower prices of soybeans were rather an 'inadvertent' by-product of general governmental regulation. In line with the conclusions reached in recital (64), the Commission decided to partially use facts available to determine whether there has been an entrustment or direction of the soybeans growers by the GOA.
- (85) A number of documents show that the GOA explicitly pursued the support and development of the biodiesel industry as a policy objective, in particular by seeking to reduce the domestic price of the input materials (soybeans) and thereby providing a financial contribution to the production of biodiesel.
- (86) This support is achieved through several measures attributable to the GOA (including export taxes on soybeans, subsidies to soybean producers to continue producing and selling domestically to biodiesel producers, counter-measures on producing other grains such as by imposing export quotas, and public statements to encourage soybean producers not to stop their production, but to continue selling domestically) ⁽²⁸⁾. These measures, even though modified on several occasions since their introduction in 1994 ⁽²⁹⁾, have been constantly applied in order to, as stated by the GOA itself in the legislation (see recitals (89) to (100), reduce the domestic price of soybeans in the context of rising world prices and to the benefit of the development of the value added chain in Argentina, which among others, include the biodiesel industry.
- (87) The export taxes on soybeans amount to an important tool used by the GOA to support the biodiesel industry. According to the OECD, in particular through its export tax regime the GOA imposes '*higher rates for raw materials or input producers while lower rates apply for finished products. [...] The price advantage provided to domestic downstream industries can distort and reduce competition in both domestic and foreign markets*' ⁽³⁰⁾. In addition, the International Renewable Energy Agency (IRENA) stated in a report dedicated to Argentina that '*Differential export taxes for biofuels versus other products derived from the same feedstock promoted the export of biofuels, especially biodiesel*' ⁽³¹⁾. The World Bank stated that the GOA levies high export taxes which have the effect of '*lowering the feedstock cost domestically and encouraging exports of biodiesel*' ⁽³²⁾.
- (88) The GOA claimed that none of the publications of the OECD, IRENA and the World Bank referred to an explicit objective of the GOA to support the Argentinian biodiesel industry. However, the GOA did not contradict the correctness of the citations found by the Commission. Contrary to the GOA, the Commission considered that the analyses made in those publications support its finding that the GOA explicitly supports the Argentinian biodiesel industry.
- (89) Argentina has had an export tax in place for soybeans since 1994, fixed at the rate of 3,5 %. As will be illustrated with all the changes of the legislation described in recitals (91) to (100), the measures used to adjust the export tax beyond the initial rate demonstrate the GOA's explicit objective of reducing domestic prices in the context of rising world market prices. During the investigation the GOA claimed that the export tax on soybeans and soybean oil has been in place for revenue raising reasons. Despite multiple requests of the Commission to provide documents supporting this claim, the GOA did not provide any.

⁽²⁸⁾ Statements by the former Minister of Economy, Axel Kicillof, e.g. <http://www.telam.com.ar/notas/201410/82669-kicillof-productores-venta-de-granos.php>, <http://www.lavoz.com.ar/politica/nueva-advertencia-de-kicillof-productores-que-retienen-granos>, <https://www.minutouno.com/notas/341839-kicillof-advirtio-los-sojeros-que-se-apuren-porque-el-precio-va-caer>, accessed on 3 September 2018.

⁽²⁹⁾ Nomenclatura Comun Del Mercosur, Decreto Nacional 2275/1994, Article 7 and Annex VI.

⁽³⁰⁾ The Economic Impact of Export Restrictions on Raw Materials, published in 2010, p. 18, available at: <http://www.oecd.org/publications/the-economic-impact-of-export-restrictions-on-raw-materials-9789264096448-en.htm>, accessed on 13 July 2018.

⁽³¹⁾ Renewable Energy Policy Brief Argentina, June 2015, available at: http://www.iberglobal.com/files/2016/argentina_renewable_energy.pdf, accessed on 13 July 2018, p. 4.

⁽³²⁾ Liquid Biofuels: Background Brief for the World Bank Group Energy Sector Strategy, Background Paper for the World Bank Group Energy sector strategy, March 2010, available at http://siteresources.worldbank.org/EXTESC/Resources/Biofuel_brief_Web_version.pdf, accessed on 13 July 2018, p. 9.

- (90) Furthermore, none of the legislative acts since 2002 related to the export tax adjustments on soybeans, soybean oil or biodiesel give the raising of revenue as a reason for the level of the export tax. Rather, as explained in recitals (91) to (100), those legislative acts state that the purpose of the export tax is to induce soybean suppliers to keep selling domestically at below international prices. Thus, rather than a fiscal revenue measure, the GOA uses export taxes on soybeans as a tool to support the development of the domestic biodiesel industry.
- (91) Following a public emergency declaration ⁽³³⁾, the export tax increased in 2002 from 3,5 % to 13,5 % by Resolution 11/2002 ⁽³⁴⁾. This resolution contained the following statement: *'the effects of any potential substantive change in international prices of agricultural productions shall also be considered'* (emphasis added), showing that this measure was taken to influence the domestic market price of soybeans compared to the world market price.
- (92) The rate was further increased in the same year from 13,5 % to 23,5 % by Resolution 35/2002 ⁽³⁵⁾, which states that *'Law No 22.415 allows the imposition of imports of goods for consumption in order to stabilise domestic prices until they reach convenient levels and maintain a supply that meets the domestic market needs'*. According to the legal text these measures were of a transitory nature and temporary as long as the current general economic conditions persisted. However, these export taxes are still in place, at a similar level as at the time of public emergency, while for other grains the export tax has been set at 0 % ⁽³⁶⁾.
- (93) In 2007, the first large scale biodiesel producers in Argentina started operations. In that year the GOA published two resolutions increasing the export tax on soybeans from 23,5 % to 27,5 % ⁽³⁷⁾ and further up to 35 % ⁽³⁸⁾. Both resolutions stated as reason for the additional export tax that besides an increase in domestic and international demand for these products, the products covered by these resolutions (predominantly soybean related products) are applied for new productive uses, explicitly giving biofuels as an example.
- (94) In addition, Resolution 10/2007 ⁽³⁹⁾ explicitly stated that *'the international prices of grains have increased substantially [...] the creation of additional export duties on a number of the aforementioned goods is deemed convenient'* (emphasis added).
- (95) Resolution 369/2007 ⁽⁴⁰⁾ furthermore explicitly noted that the increase of the export tax is needed for the purpose of *'reducing domestic prices, consolidating the improvements on the distribution of income and stimulating added value'* (emphasis added).
- (96) In 2008, by means of Resolution 125/2008 ⁽⁴¹⁾ the GOA established a formula on the basis of which to calculate a fixed amount of export tax, depending on the level of the official FOB price fixed by the Government (Ministry of Agribusiness) on a daily basis.
- (97) Resolution 125/2008 stated the following policy therein: ***'Cereal grains and oilseeds international prices have significantly increased over the last years, with a high volatility of their inter-annual variation rates. The continuance of such a scenario could have negative effects on the economy as a whole, such as higher domestic prices, lower fairness in the distribution of wealth and growing uncertainty as to investment decisions in the agriculture and livestock industry. The proposed amendment to the scheme of export duties applicable to a key subgroup of cereal grains and oilseeds is an appropriate tool to solve the aforementioned problems.'*** (emphasis added).

⁽³³⁾ Ley 25.561 Declárase la emergencia pública en materia social, económica, administrativa, financiera y cambiaria. Régimen cambiario. Modificaciones a la Ley de Convertibilidad. Reestructuración de las obligaciones afectadas por el régimen de la presente ley. Obligaciones vinculadas al sistema financiero.

⁽³⁴⁾ Ministerio de Economía y Infraestructura, Comercio Exterior, Resolución 11/2002 Fíjase derechos a la exportación para consumo de diversas mercaderías comprendidas en la Nomenclatura Común del Mercosur. Alcances and Ministerio de Economía, Comercio Exterior.

⁽³⁵⁾ Ministerio de Economía y Infraestructura, Comercio Exterior, Resolución 35/2002 Fíjase un derecho a la exportación para consumo de determinadas mercaderías comprendidas en posiciones arancelarias de la Nomenclatura Común del Mercosur.

⁽³⁶⁾ Ministerio de Agroindustria, Decreto 133/2015 Derecho de exportación. Alícuota.

⁽³⁷⁾ Ministerio de Economía y Producción, Nomenclatura Común del Mercosur, Resolución 10/2007 Fíjase un derecho de exportación adicional para mercaderías comprendidas en determinadas posiciones arancelarias.

⁽³⁸⁾ Ministerio de Economía y Producción, Comercio Exterior, Resolución 369/2007 Nomenclatura Común del Mercosur (NCM). Sustituyese en el Anexo XIV del Decreto No 509/2007 y sus modificaciones, el derecho de exportación para determinados productos.

⁽³⁹⁾ Ministerio de Economía y Producción, Nomenclatura comun del Mercosur, Resolución 10/2007, Fíjase un derecho de exportación adicional para mercaderías comprendidas en determinadas posiciones arancelarias, 11.1.2007.

⁽⁴⁰⁾ Ministerio de Economía y Producción, Comercio exterior, Resolución 369/2007, Nomenclatura Común del Mercosur (NCM). Sustituyese en el Anexo XIV del Decreto No 509/2007 y sus modificaciones, el derecho de exportación para determinados productos, 7.11.2007.

⁽⁴¹⁾ Ministerio de Economía y Producción, Nomenclatura Comun del Mercosur, Resolución 125/2008, 10/3/2008, Derechos de exportación. Fórmula de determinación aplicable a determinadas posiciones arancelarias correspondientes a cereales y oleaginosas ('Export duties. Formula for the calculation of the export duties applicable to certain tariff codes for cereal grains and oilseeds').

- (98) Again in 2008, by means of Resolution 64/2008 ⁽⁴²⁾ the GOA modified the formula for the calculation of the export tax and restated explicitly its policy objective: *'The purpose of the scheme of variable export duties is to mitigate the impact on domestic prices of the increase in international prices of grains and oilseeds and their by-products, contributing to improve income distribution.'* (emphasis added).
- (99) In 2012, the GOA published a joint resolution stating that Argentina has been adopting a number of public policies to strengthen the national biodiesel industry, especially upon the enactment of Law No 26.093. The joint resolution further noted that export duties on biodiesel and its blends were consistent with the export duties applied on other by-products in the oilseed sector, considering the differential production costs and maintaining a differential so that the effective rate for biodiesel was lower than that for its main input, **thereby promoting value addition in Argentina and thus helping to boost the development of the biodiesel industry** ⁽⁴³⁾.
- (100) Although at the end of 2015 the newly elected GOA eliminated the export tax on other grain crops, the export tax on soybeans remained high. The decree No 133/2015 ⁽⁴⁴⁾ establishing the elimination of export tax on wheat and adjusting the export tax percentage on soybean to 30 % stated the following policy objective: 'In the case of soybeans and its by-products, the increase in the planted area and the record harvest of the past season **has not prevented the decline of competitiveness and profitability of its entire associated value chain**' (emphasis added). The value chain in this case relates to, among others, the biodiesel industry.
- (101) After disclosure of the information document, the GOA and CARBIO reiterated their claim that any effect on biodiesel production of the export taxes applied to soybeans if such effect exists at all, clearly constitutes at best a side-effect of a revenue collection measure.
- (102) The Commission did not agree with this statement. The decrees, as cited in recitals (91) to (100), cannot be considered just 'mere policy pronouncements'. This legislation repeatedly reflects the GOA's intention to support the biodiesel industry, while, contrary to the GOA's beliefs, the decrees do not state revenue collection as the purpose of the export tax on soybeans. None of the legislation the GOA brought forward in its submission referred to a revenue-raising function for the export tax on soybeans.
- (103) By imposing export taxes on soybeans, the GOA puts Argentinian soybean growers into an economically irrational situation, which induces them to selling their goods domestically for a lower price than they could obtain in the absence of those export taxes. They are therefore deprived of a rational choice and induced to comply with the policy objective behind the export tax.
- (104) This irrational situation was amplified by other export restraints, such as export quotas on agricultural products other than soybeans from 2006 until 2015, discouraging the export of other crops and directing growers toward continuing the production of soybeans (as opposed to other grains), and lowering the domestic price even further. Soybean growers also continued to produce and sell their production locally since stockpiling is not appropriate in relation to this agricultural product and cannot be maintained in the medium to long-term.
- (105) After disclosure of the information document, the GOA claimed that there had been no export quotas on maize and wheat for 10 years. However, the Commission concluded that this statement was factually incorrect. Resolution 543/2008 ⁽⁴⁵⁾ explicitly regulated the determination of maximum export quantities of, among others, wheat and maize. This measure was in force until the end of 2015 ⁽⁴⁶⁾.

⁽⁴²⁾ Ministerio de Economía y Producción, Nomenclatura Común del Mercosur, Resolución Resolución 64/2008, 30/5/2008, Cereales y Oleaginosas. Fijanse para diversas variedades de trigo, maíz, soja y girasol, comprendidas en determinadas posiciones arancelarias de la Nomenclatura Común del Mercosur (N.C.M.), derechos de exportación para distintos precios FOB ('Grains and Oilseeds. Creation of export duties on varieties of wheat, corn, soybean and sunflower included in the tariff codes of the Mercosur Common Nomenclature (NCM) for FOB prices').

⁽⁴³⁾ Ministerio de Economía y Finanzas Públicas, Ministerio de Industria y Ministerio de Planificación Federal, Inversión Pública y Servicios, Comercio Exterior, Resolución Conjunta (Joint Resolution) No 438/2012, 269/2012, 1001/2012 créanse el Registro de Operadores de Soja Autorizados (ROSA) y la 'Unidad Ejecutiva Interdisciplinaria de Monitoreo'. Derógase la Resolución No 109/09.

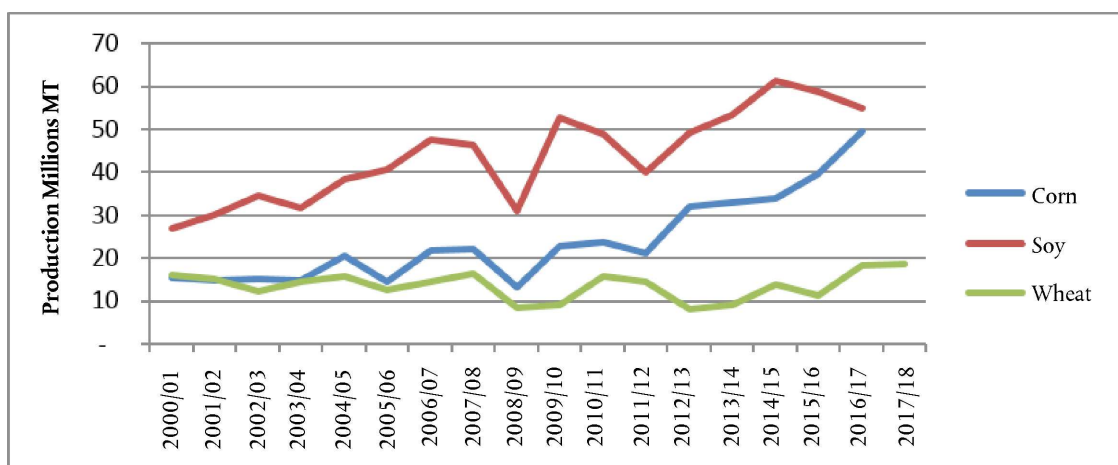
⁽⁴⁴⁾ Ministerio de Agroindustria, Decreto 133/2015 Derecho de exportación. Alicuota.

⁽⁴⁵⁾ Oficina Nacional de Control Comercial Agropecuario, Comercio Exterior, Resolución 543/2008, Establécense los requisitos a que deberán sujetarse los exportadores de granos y/o sus derivados, que soliciten su inscripción en el 'Registro de Declaraciones Juradas de Ventas al Exterior', denominado 'R.O.E. Verde', al que se refiere la Ley No 21.453.

⁽⁴⁶⁾ Ministerio de Agroindustria, Ministerio de Hacienda y finanzas publicas y Ministerio de produccion, Resolución Conjunta 4/2015, 7/2015 y 7/2015, 28.12.2015.

- (106) Furthermore, in 2009 the GOA established a temporary import ban on soybeans, stating that the use of domestic raw materials should be privileged over imported ones thereby adding value to the Argentinian product in the international market, and that the temporary importation of locally produced inputs distorts this objective ⁽⁴⁷⁾. In 2012 the GOA set up the 'Registry for Authorised Soy Operators', removing the import ban ⁽⁴⁸⁾. However, it remained highly cumbersome to import soybeans into Argentina until the further amendments to that registry in 2016 ⁽⁴⁹⁾. The import ban in combination with the export tax on soybean confirms the GOA's policy objective to boost the development of a fully domestic biodiesel industry including local contents in the supply chain. It creates an artificial, government-driven output of soybeans in Argentina for domestic consumption ensuring that local demand for soybeans is satisfied on the basis of local supply oriented towards achieving the stated policy objectives.
- (107) On top of this, a long period of export restraints on other crops has led to significant production increase in soybeans, the so-called 'sojización' ⁽⁵⁰⁾ of Argentinian agriculture. Even after the removal of the export quotas in 2015 ⁽⁵¹⁾ the production of soybeans did not decrease significantly in comparison with the other crops and has remained rather stable, see Graph 1 below:

Graph 1

Argentinian production of soybeans, corn, and wheat per harvesting year

Source: <http://datosestimaciones.magyp.gob.ar/>

- (108) In addition, the GOA published in 2017 a resolution setting out a stimulation regime for soybean farmers ⁽⁵²⁾, as part of the Plan Belgrano ⁽⁵³⁾. The Plan Belgrano was set up in 2016 as an infrastructure and industry developing plan in ten of Argentina's northern provinces, which have historically been less developed compared to the rest of the country. This resolution gave financial incentives to soybean growers in the ten most under-developed provinces within Argentina ⁽⁵⁴⁾ from 1 March until 31 August 2017 and in so doing further directed growers into the production of soybeans and adding to the increased domestic supply of soybeans in favour of the development of the biodiesel industry.
- (109) The Commission considered that, in view of the evidence available, the GOA took a 'more active role than mere acts of encouragement', as required by the Appellate Body ⁽⁵⁵⁾. The measures taken by the GOA restrict the freedom of action of the soybean growers by limiting in practice their business decision at what price to sell their product and where.

⁽⁴⁷⁾ Ministerio de Producción, Resolución 109/2009, Exclúyese del Régimen de Importación Temporal para Perfeccionamiento Industrial a ciertas mercaderías que se clasifican en la posición arancelaria de la Nomenclatura Común del Mercosur.

⁽⁴⁸⁾ Ministerio de Economía y Finanzas Públicas, Ministerio de Industria y Ministerio de Planificación Federal, Inversión Pública y Servicios, Comercio Exterior, Resolución Conjunta (Joint Resolution) No 438/2012, 269/2012, 1001/2012 créanse el Registro de Operadores de Soja Autorizados (ROSA) y la 'Unidad Ejecutiva Interdisciplinaria de Monitoreo'. Derógase la Resolución No 109/09.

⁽⁴⁹⁾ Ministerio de Producción y Ministerio de Hacienda y Finanzas Públicas, Resolución Conjunta 5/2016 y 7/2016, modificación Resolución Conjunta No 438/2012, No 269/2012 y No 1001/2012.

⁽⁵⁰⁾ <https://www.lanacion.com.ar/1492219-sojizacion-de-nuestra-agricultura>

⁽⁵¹⁾ By means of Joined Resolutions 4/2015 and 7/2015.

⁽⁵²⁾ Ministerio de Agroindustria y Administración Federal de Ingresos Públicos, Estimulo Agrícola Plan Belgrano, Resolución General Conjunta 3993-E/2017, 15.2.2017.

⁽⁵³⁾ Jefatura de Gabinete de Ministros, Modifícase la distribución del Presupuesto General de la Administración Nacional — Recursos Humanos — Ejercicio 2016, Decreta 435/2016, 1.3.2016.

⁽⁵⁴⁾ The provinces of Salta, Jujuy, Formosa, Santiago del Estero, Tucuman, Corrientes, Misiones, Catamarca, La Rioja and Chaco.

⁽⁵⁵⁾ Appellate Body Report, DS 296, para. 115.

- (110) They are prevented from maximising their income that they would be able to get in the absence of the export tax on soybeans (e.g. by exporting their production to benefit from higher prices or by increasing domestic prices) as well as other similarly restrictive measures.
- (111) This is further supported by Decree 133/2015 and Decree 640/2016 in which the GOA takes specific measures to help the soybean industry and its associated value chain to reverse the occurred decline in the competitiveness and profitability of its entire associated value chain. Thus, soybean growers are encouraged or directed by the GOA to maintain production to supply the domestic market even if a rational supplier would adapt its output and prices in a situation where exports have been disincentivised.
- (112) Therefore, through those measures the GOA induces the soybean growers to keep the soybeans in Argentina because they cannot sell at better prices which would prevail in Argentina absent those measures.
- (113) In this sense, the input producers are 'entrusted' or 'directed' by the GOA to provide goods to the domestic users of soybeans, i.e. biodiesel producers, for less than adequate remuneration. The soybean growers are given the responsibility to create an artificial, compartmentalised, low-priced domestic market in Argentina.
- (114) In other words, when applying the set of measures described, the GOA knows how the soybean growers will respond to the measures and what consequences will result from them. While the soybean growers may lower their domestic production slightly to respond to the export taxes and other restrictive measures, the evidence shows that production did not stop, nor did it significantly decrease (see Table 1 below and explained further in recital (139)). The Commission concluded that this is a result of the GOA entrusting and directing the soybean growers to continue production and export.
- (115) As explained, in the soybean growing sector the adaptation of the production will remain moderate, which results in lower domestic prices. In this regard, the effects are established on an *ex ante*, not *ex post* basis and are therefore not 'inadvertent'. There is a clear 'demonstrable link' between the policy and the conduct of private bodies involved, which are acting as a proxy for the GOA to carry out its policy of providing soybeans for less than adequate remuneration to the biodiesel industry.
- (116) The GOA itself has acknowledged the success of its set of measures in achieving the stated policy objective of support to the biodiesel industry. In the joint resolution referred to below that the GOA published in 2012, it stated that the public policies adopted included a range of mechanisms to promote the biodiesel industry. It further stated that this explains the successful performance displayed by this productive sector, whose gross margins for its main input during the processing stage exceed 25 % ⁽⁵⁶⁾. These margins seem to have been yielded largely by the differentials between biodiesel, and soybean export duties.
- (117) In conclusion, the Commission found that the GOA had entrusted or directed the soybean growers to carry out its policy to create a compartmentalised domestic market and to provide soybeans to the domestic biodiesel industry for less than adequate remuneration.
- (118) Following the disclosure of the information document, the GOA claimed that the Commission expanded the scope of entrustment or direction, placing an emphasis on the terms inducement and guidance, while the requirements by the WTO imply that the attribution of responsibility must constitute an explicit and affirmative action, be addressed to a particular party and have as its object a particular task or duty. Mere statements of policy by a government cannot constitute an order and the alleged order or entrustment cannot be inadvertent or a mere by-product of governmental regulation.
- (119) The Commission disagreed. As stated in recital (117), in view of the WTO case-law referred to in recital (93), the Commission found substantial evidence to conclude that the GOA has taken explicit and affirmative action to

⁽⁵⁶⁾ Joint Resolution 438/2012, 269/2012 and 1001/2012 of the Ministry of Economy and Public Finance, Ministry of Industry and Ministry of Federal Planning, Public Investment and Services.

entrust or direct the soybean growers to sell their soybeans for less than adequate remuneration to the biodiesel industry. There is 'a demonstrable link' between the government's actions and the conduct of the soybean farmers so that their actions can be attributed to the GOA. The GOA did not substantiate its claim that the evidence found by the Commission could solely be considered as mere statements of policy by the GOA. In particular, the GOA did not dispute the existence of the stated policy objectives, as emanating from those statements; nor did the GOA deny statements celebrating the success of the restrictive measures in achieving the policy goals of supporting the Argentinian biodiesel industry. Therefore, that claim was rejected.

- (120) Furthermore, the GOA claimed that the Commission's conclusion that the existence of different mechanisms within a broader scheme engineered by the GOA to support a particular industry is relevant to determine the nature of the action is manifestly wrong, as export taxes are not included in paragraphs (i) to (iii) of Article 3 of the basic Regulation (or the SCM Agreement) and do not fall under paragraph (iv) of Article 3 of the basic Regulation.
- (121) The sole fact that export taxes as such are not explicitly mentioned in Article 3(1)(a) of the basic Regulation does not exclude them from having the potential nature of a financial contribution and would therefore fall within the definition of a subsidy under the basic Regulation and the SCM Agreement. The Commission provided ample evidence that the export tax on soybeans was used as a tool, together with other instruments, to induce soybean growers to comply with the stated policy objectives in a manner amounting to a countervailable subsidy as specified under Article 3(1)(a) of the basic Regulation. As the GOA did not substantiate the claim of why the export tax on soybeans could not be considered a countervailable subsidy, the Commission rejected the claim.
- (122) Following final disclosure, the GOA did not agree with the Commission's finding in recital (121) that the GOA did not substantiate its claim of why the export tax on soybeans could not be considered a countervailable subsidy.
- (123) Although throughout the investigation the GOA claimed that the imposition of export taxes has an objective of revenue generation, the GOA failed to provide evidence in support of this statement in respect to any of the legislative acts imposing or modifying the level of the export tax on soybeans. In fact, on the basis of the evidence available, the Commission considered that the export taxes are tools among others that the GOA employed to support the development of the biodiesel industry. Therefore, the Commission came to a different conclusion explained in recitals (89) to (90) above and rejected the initial claim of the GOA.
- (124) CARBIO claimed that the Commission ignored the high standard required to prove entrustment or direction. Soybean growers remain free to decide whether to produce, sell and export their soybeans. No element of the export tax on soybeans entrusts or directs soybean producers to take any of these decisions.
- (125) The Commission disagreed that the entrustment or direction standard, as spelled out in recital (82), is not met in this case. Moreover, the claim of CARBIO that soybean growers are free to set the price of soybeans is incorrect. During the verification visit, the GOA explained how the FOB price of soybeans for exports is set by the government. As both the export price and the domestic price of soybeans are far below the world market price, soybean growers are limited in their freedom to set their price. Finally, CARBIO ignores that the export tax is not the only tool devised by the GOA to direct soybean growers. Therefore, this claim was rejected.
- (126) CARBIO also contested the finding of the Commission in recital (112) that soybean growers cannot sell at better prices which would prevail in Argentina absent these measures, referring as support to a study by the Internal Trade Commission stating that the elimination of export tax on soybeans would result in an increase of domestic soybeans prices of only 1,2 % ⁽⁵⁷⁾.

⁽⁵⁷⁾ W. Deese and J. Reeder, *Export Taxes on Agricultural Products: Recent History and Economic Modeling of Soybean Export Taxes in Argentina*, USITC Journal of International Commerce and Economics, 2007.

- (127) However, the Commission noted that according to a study published in the American Journal of Agricultural Economics ⁽⁵⁸⁾, the domestic price of soybeans in the absence of an export tax may be much larger, up to 26,0 %. Furthermore, the study referred to by CARBIO also indicated that the elimination of export tax on soybeans would lead to a decrease in the world market price of soybeans by 18 %. This means that with the theoretical removal of an export tax of 23,5 % the difference between the Argentinian price and the world market price would almost be removed.
- (128) Therefore, the Commission reiterated the conclusion that soybean growers are induced to continue growing and selling soybeans in Argentina without allowing them to sell at better prices, which would prevail in Argentina absent these measures.
- (129) Following final disclosure, the GOA and CARBIO reiterated their claims that:
- there is no set of measures inducing the domestic soybean growers to sell soybeans locally at less than adequate remuneration,
 - soybean growers are free to set the price of their soybeans,
 - no financial contribution occurs through export taxes on soybeans; that any effect of the export taxes applied to soybeans on biodiesel production constitutes, at best, a side effect of a revenue-collection measure,
 - the nature and revenue-collection purpose of the export taxes on soybeans has nothing to do with the alleged entrustment or direction, and
 - no benefit is thereby conferred.
- (130) The GOA and CARBIO further did not agree with the Commission's legal interpretation of the terms 'entrust' and 'direct'. The GOA claimed that the Commission's assessment of the financial contribution strongly resembles the so-called 'effects based approach', which was explicitly and categorically rejected by WTO jurisprudence.
- (131) CARBIO further claimed that the current world market price of soybeans does not reflect what would be the domestic price of soybeans in Argentina in the absence of the export tax.
- (132) As the GOA or CARBIO merely repeated the arguments made previously but failed to substantiate any of these claims, the Commission rejected them.

3.2.2.3. Entrustment or direction of private bodies within the meaning of Article 3(1)(a)(iv) of the basic Regulation

- (133) The Commission then assessed whether the soybean growers in Argentina are private bodies entrusted or directed by the GOA within the meaning of Article 3(1)(a)(iv) of the basic Regulation.
- (134) The sampled Argentinian exporting producers were purchasing all of the soybeans used in the production of biodiesel from domestic sources. These were purchased from private soybean farms, apart from minor volumes of soybeans sourced from the state-owned company YPF.
- (135) Therefore, the Commission considered that, on the basis of the information available, all soybean growers are private bodies which were entrusted by the GOA within the meaning of Article 3(1)(a)(iv) of the basic Regulation to provide soybeans for less than adequate remuneration.

3.2.2.4. Provision of soybeans by soybean growers for less than adequate remuneration

- (136) In the next step, the Commission verified whether the soybean growers actually carried out the Argentinian governmental policy to provide soybeans for less than adequate remuneration. That necessitated a detailed analysis of the market developments in Argentina against an appropriate benchmark. In line with the conclusions reached in recital (64), the Commission decided to partially use facts available to determine whether there had been a provision of soybeans by soybean growers for less than adequate remuneration.

⁽⁵⁸⁾ A. Bouet, C. Estrades, and D. Laborde, Differential Export Taxes along the Oilseeds Value Chain: A Partial Equilibrium Analysis, American Journal of Agricultural Economics, 2014, page 924 <https://academic.oup.com/ajae/article/96/3/924/2737494>

- (137) Through the set of measures described in recitals (84) to (116), the GOA induced the soybean growers to sell locally at lower prices than otherwise (i.e. absent those measures, the soybean growers would have exported the soybeans at the much higher world market price or simply they would have adjusted their supply to the market constraints). In contrast, the soybean growers did not do so because of the GOA's policy to boost the development of the downstream biodiesel industry.
- (138) As demonstrated in Table 1, practically all of the domestic consumption of soybeans is further processed into soybean oil through crushing. The data concerning production, export, import and domestic crushing of soybeans over the years are as follows:

Table 1

Argentinian soybean, soybean oil and biodiesel production

	Soybean production (MT)	Soybean exports (MT)	Soybean imports (MT)	Soybean crushing (MT)	Soybean oil production (MT)	Domestic consumption soybean oil (MT)	Biodiesel production (MT)
2007	47 482 787	11 843 248	2 245 391	36 268 044	6 962 206	474 078	
2008	46 238 890	11 733 588	2 891 771	31 709 219	6 024 101	1 078 022	711 864
2009	30 989 474	4 292 321	823 924	30 285 623	5 772 026	1 348 922	1 179 103
2010	52 676 218	13 616 012	189	36 824 921	7 000 075	2 118 336	1 820 385
2011	48 878 774	10 420 216	12 862	37 339 854	7 113 681	2 996 512	2 429 964
2012	40 100 197	6 158 407	1 428	33 333 313	6 353 359	2 841 121	2 456 578
2013	49 306 202	7 784 236	1 615	34 040 869	6 432 942	2 448 560	1 997 809
2014	53 397 720	7 360 901	2 227	37 936 186	7 096 392	3 184 146	2 584 290
2015	61 446 556	11 509 272	566	40 940 319	7 895 905	2 407 954	1 810 659
2016	58 799 258	8 910 323	853 849	44 482 510	8 670 493	3 137 953	2 659 275
2017	54 971 626	7 369 126	1 897 833	41 824 091	8 065 602	3 264 784	2 871 435

Source: Submission of the GOA, coming from different publicly available Argentinian databases.

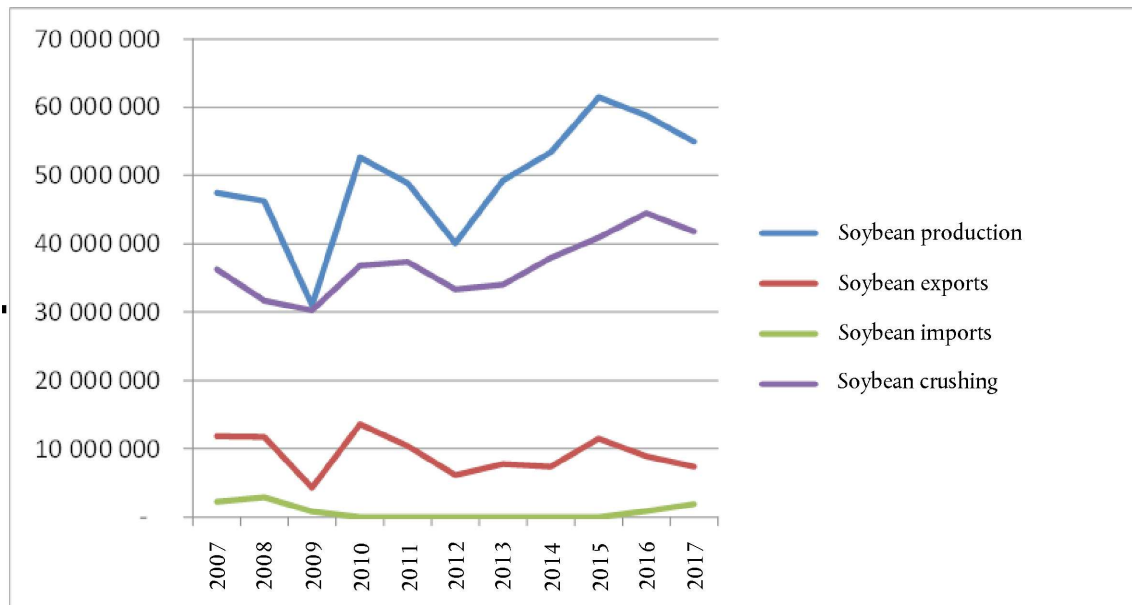
- (139) As can be seen in Table 1, the production of soybeans increased from 26,7 million MT in 2001 to 40,5 million MT in 2006 ⁽⁵⁹⁾. The increase of the export tax on soybeans did not lead to the reduction of soybean production, but to an irrational increase from an economic perspective. Indeed, absent the inducement created by the various measures of the GOA, suppliers subject to export restraints would adapt to the market conditions. However, in this case, rather than reducing their production, the soybean growers also benefit from the policy objective to boost and develop a competitive biodiesel industry which, in turn, required quantities of soybean being made available to biodiesel producers at prices below international prices.

⁽⁵⁹⁾ <http://datosestimaciones.magyp.gob.ar/reportes.php?reporte=Estimaciones>

(140) The trend is shown in Graph 2 below (in MT):

Graph 2

Soybean processing in Argentina



Source: Data provided in the table in recital (138).

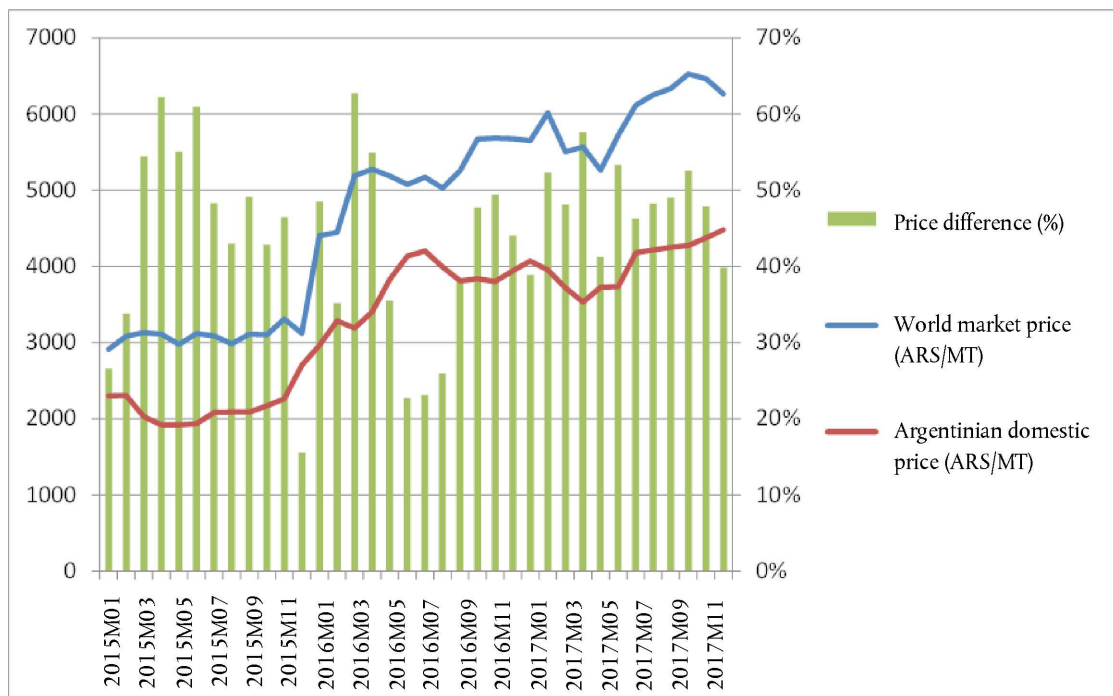
- (141) Table 1 and Graph 2 demonstrate that practically all of the soybean production that was consumed domestically went into crushing and the domestic consumption of the resulting soybean oil was predominantly used for the production of biodiesel.
- (142) Following final disclosure, CARBIO claimed that the Commission was asserting that all soybeans sold domestically were used exclusively for producing biodiesel. The Commission specified that this is not the case. As set out in recital (141), soybeans are sold domestically for crushing into soybean oil and soybean meal. The resulting soybean oil is used to make biodiesel, as there is no significant domestic market for soybean oil in Argentina. Some soybean oil and soybean meal is exported.
- (143) Moreover, exports of soybeans only take place when domestic consumption for both soybean crushing and production of biodiesel is fully satisfied. Table 1 and Graph 2 also show the inexistent or very limited imports of soybeans over the years of application of the export restraints. This is also confirmed by the business model observed with the sampled exporting producers. Indeed, none of them imported soybeans for the production of biodiesel. Rather, they imported the soybeans exclusively for use in their crushing facilities and then exported all of the resulting soybean oil and meal outside Argentina.
- (144) Consequently, the primary objective of the GOA's measures has been achieved: domestically produced soybeans have fully satisfied domestic demand for an input for domestic biodiesel production to the detriment of the soybean producers who would rather optimise their profits and either export all of their produce or sell domestically at higher prices but for the export restraints.
- (145) According to the relevant WTO case-law, as explained in particular at recitals (78), in most cases there should be some form of threat or inducement by the government to the suppliers of inputs to evidence the existence of entrustment and direction. Leaving a margin of discretion does not automatically discard that finding. This case-by-case analysis is evidence-based. In this case, the fact that the exports are rather limited in a highly international commodity market whereby Argentina is one of the leading soybeans world producers is remarkable, especially considering that the price in international markets is significantly higher than the domestic price in Argentina (see Graph 3 in recital (158)).

- (146) The evidence contained in the Argentinian legislation (see recitals (91) to (99)) shows that the GOA's policy objective is to develop and favour the higher added-value downstream industries, including biodiesel. In addition, the GOA clearly stated its objective to shield the downstream industries from the rise of international prices.
- (147) After disclosure of the information document, CARBIO claimed that the Commission failed to provide any evidence for the statement that soybean producers would rather optimise their profits.
- (148) Since the Commission did not receive direct information from the soybean growers, as explained in recitals (61) to (64), the Commission assumed that soybean growers are rational economic operators in a market economy that would optimise their benefits whenever possible. Therefore, it is considered an irrational decision to increase the production of soybeans when prices are decreased because of an increased export tax. The fact that soybean growers continue to supply soybeans despite the various restrictive measures adopted by the GOA is the result of the actions adopted by the GOA to induce soybean growers as entities implementing the stated policy objectives to support the biodiesel industry. Therefore, the claim was rejected.
- (149) The GOA claimed no evidence has been shown that the processing of soybeans in Argentina has been altered in any way as a result of the export taxes on soybeans.
- (150) The Commission disagreed. At the outset, the Commission recalls that the GOA did not assist the Commission in obtaining the necessary information from the soybean growers to better assess their behaviour. Thus, the Commission considered that, on the basis of the information available, the GOA's measures (including the export tax) altered the soybean growers' behaviour to achieve the effects intended by the GOA. As can be seen in Table 1, despite an increase in the export tax on soybeans in 2007, i.e. at the start of large-scale production of biodiesel, the production of soybeans increased significantly. On top of that, the export of soybean oil has been significantly replaced by the export of biodiesel during the same period, showing that the GOA's measures have incentivised a structural change to improve the competitiveness of the biodiesel industry. Consequently, the claim was rejected.
- (151) It is also clear that the countless small soybeans farmers (approximately 64 000), even though not formally prevented by the GOA from exporting their products, are induced by these policies to sell domestically almost all of their production and at lower prices that they would have otherwise achieved in the international markets. There is no evidence on file that the GOA is in any way trying to encourage and/or actively support directly or indirectly an increase of exports and hence a maximisation of profits for the soybeans farmers despite the known difficulties of small farmers to find clients abroad, communicate in a foreign language, and arrange all the burdensome administrative formalities for exports.
- (152) In the absence of other evidence to the contrary on file, and given the lack of sufficient cooperation by the GOA to provide relevant evidence and information in this respect, the Commission concluded that this evidence shows the inducement of soybean growers to sell their production domestically for the benefit of the downstream industries (including the biodiesel producers) rather than maximising their returns, such as by finding other ways such as adapting their production output or even switching to other type of production (e.g. other grains).
- (153) The fact that there is still some degree of discretion for soybean growers to sell abroad at least formally and that very limited exports did take place does not undermine the main conclusion on the existence of their entrustment or direction in line with the WTO case-law in DRAMS ⁽⁶⁰⁾.
- (154) Further, the Commission analysed the impact of the supply of soybeans due to the GOA's measures on the domestic price of soybeans in Argentina, if any.
- (155) The Commission used the average domestic price of soybeans in Argentina which is based on monthly data from Buenos Aires Grain Exchange for Rosario, Bahia Blanca, and Quequen provided by the Ministry of Agribusiness at a country level.

⁽⁶⁰⁾ Panel Report, DS 296, paragraph 7.38. While the Panel Report was appealed, this conclusion in particular, was not appealed.

- (156) The sampled exporting producers did import some soybeans. Although the companies did not use these imports for the production of biodiesel — they were used to make soybean oil which was then exported, the price of these imports could be considered representative, as the soybeans were imported to be crushed and re-exported as soybean oil and their price mirrored the world market price of soybeans.
- (157) The domestic price was compared to the average FOB import price of soybeans by the sampled exporting producers on a monthly basis.
- (158) Graph 3 below shows the price fluctuations over the period considered and the price difference in percentages between the Argentinian domestic price and the world market price.

Graph 3

Argentinian domestic price versus world market price

Source: Bloomberg and the submission of GOA based on publicly available data.

- (159) Graph 3 shows a price difference between the Argentinian domestic price and the world market price which can be explained mainly by the export tax on soybeans. The directing policy of the GOA prevents the soybean growers from realising profits based on world market prices. The soybean growers are effectively deprived of a rational choice to sell on international markets at much higher prices.
- (160) Instead, they are achieving comparable profits on both the domestic and international market, at the expense of reducing domestic prices by the amount of the export tax. Thereby, the GOA suppresses the domestic prices to the benefit of the domestic processing industry.
- (161) The GOA directs by withholding a rational choice from the soybean growers. In addition, as can be observed from the chart, the price difference between domestic prices and international prices has not only remained substantial, but has also shielded the biodiesel industry and all other downstream industries (such as the crushers, mainly integrated with biodiesel producers) from the highest price increases on the international market.
- (162) Consequently, the GOA's set of measures have achieved their pre-defined goal, namely to reduce domestic prices in the context of rising international prices to the benefit of the domestic value added industry, including biodiesel.

- (163) In light of the foregoing, the Commission concluded that the soybean growers in Argentina were entrusted or directed to provide soybeans to the domestic biodiesel industry for less than adequate remuneration.

3.2.2.5. The function which would normally be vested in the government and the practice, which, in no real sense, differs from practices normally followed by governments

- (164) With respect to the 'normally vested' criterion, which had not been further clarified by the Panel ⁽⁶¹⁾ yet, the Commission considered that the provision of raw materials located within a country to national companies is a function which is normally vested in the government. Under general international law, States have sovereignty over their natural resources. While they enjoy large discretion how to organise the exploitation of their natural resources, their sovereignty normally translates into a regulatory governmental power to do so. In this respect, it is irrelevant whether or not a government would habitually engage in this function ⁽⁶²⁾. The Commission therefore found that the provision of soybeans located on Argentinian soil to the Argentinian biodiesel industry is a function which is normally vested in the government.
- (165) Following disclosure of the information document, CARBIO objected to the Commission's decision that a State must be held accountable for the decisions taken by privately owned suppliers of soybeans cultivated within that State. In order to fulfil the 'normally vested' criterion, CARBIO claimed, that all decisions regarding soybeans must be taken for a public purpose. However, as CARBIO stated in its submission, 'a State may elect to take action regarding its natural resources.' This confirms the Commission's stance that such sovereignty normally translates into a regulatory governmental power to organise the exploitation of a state's natural resources. Therefore, it is not necessary that all decisions regarding soybeans must be taken for a public purpose in order to fulfil the 'normally vested' criterion. Otherwise, such entities could be considered as 'public bodies' and attribute their actions to the State, which is not the case under the entrustment or direction scenario. Under this latter case, there is no need that all actions from private bodies can be attributed to the State, but only the specific action examined (i.e. the provision of inputs for less than adequate remuneration). Consequently, the Commission rejected the claim and concluded that the provision of raw materials, such as soybeans, in pursuing objectives of public interests (such as the development of the biodiesel industry) is a function which is normally vested in the government.
- (166) As regards the 'in no real sense differs' criterion, the Commission noted that the language originated in the 1960 report of the Panel on Review Pursuant to Article XVI:5, in which similar language was used in respect of producer-funded levies that were deemed not to differ, in any real sense, from government practices of taxation and subsidisation ⁽⁶³⁾. Against that background, this criterion requires an affirmative finding that the provision of goods by the entrusted private bodies does not, in any real sense, differ from the hypothesis that the government had provided such goods itself. The Commission considers this to be the case. Rather than providing the inputs directly to the biodiesel industry in order to achieve the GOA's public policy objectives of boosting the development of the biodiesel industry, including its export potential, the GOA through a set of measures induces private entities to do so on behalf of the GOA.
- (167) Following final disclosure, the GOA and CARBIO claimed that the Commission failed to provide any evidence showing that decisions taken by privately owned suppliers on the production and sales of soybeans, cultivated on privately owned land in Argentina, reflect a function that is normally vested in the GOA.
- (168) As the Commission set out in recital (164), it considered that the provision of raw materials located within a country to national companies is a function which is normally vested in the government. The GOA or CARBIO did not provide any substantive arguments or evidence rebutting this conclusion and therefore this claim was rejected. The GOA uses soybean growers to achieve a particular policy objective which does not differ to a situation where the GOA itself were the grower of the soybeans directly.

⁽⁶¹⁾ Panel, DS 194, paragraph 8.59.

⁽⁶²⁾ Panel, DS 194, paragraph 8.59 dismissing Canada's argument made in 8.56 to that effect.

⁽⁶³⁾ Panel, Review Pursuant to Article XVI.5, L/1160, adopted 24 May 1960 (BISD 9S/188), para. 12.

3.2.2.6. Conclusion

- (169) Through a set of measures, including export taxes, quantitative restrictions, subsidies to domestic producers, and public policy statements, the GOA induced the domestic soybean growers to sell soybeans locally and 'entrusted' or 'directed' them to provide this raw material in Argentina for less than adequate remuneration. The measures at issue achieved the desired effect to distort the domestic market of soybeans in Argentina and to depress the price to an artificially low level to the advantage of the downstream biodiesel industry. The function to provide soybeans for less than adequate remuneration is normally vested in the government in view of the public objective to support the biodiesel industry and the practice of the soybean growers producing companies to carry it out does not, in any real sense, differ from practices normally followed by governments when pursuing similar policy objectives through other forms of support (such as grants or revenue foregone).
- (170) The Commission thus concluded that the GOA provided an indirect financial contribution within the meaning of Article 3(1)(a)(iv) and (iii) of the basic Regulation, as interpreted and applied in line with the relevant WTO standard under Article 1.1(a)(iv) and (iii) of the SCM Agreement.

3.2.2.7. Price or income support

- (171) The Commission considers that the categories of 'financial contribution'/'income or price support' are not mutually exclusive. In fact, the Appellate Body has confirmed that the 'range of government measures capable of providing subsidies [under 'financial contribution'] is broadened still further by the concept of 'income or price support' in paragraph (2) of Article 1.1(a)' ⁽⁶⁴⁾. This interpretation is also consistent with the object and purpose of the SCM Agreement, which is 'to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures' ⁽⁶⁵⁾.
- (172) Article XVI of the GATT 1994 covers 'any subsidy including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory'.
- (173) The terms 'any form' indicate the broad scope of this category, in the sense that it includes all forms that directly or indirectly provide income or price support. In this sense, the dictionary meaning of 'form' refers to 'one of the different modes in which a thing exists or manifests itself; a species, kind, or variety' also a 'manner, method, way' ⁽⁶⁶⁾. Thus, 'any form' includes any way or manner in which the government provides income or price support to someone.
- (174) 'Support' denotes 'the action of contributing to the success or maintaining the value of something' ⁽⁶⁷⁾. The term 'support' is often used in the context of agriculture, as referring to government support programmes ⁽⁶⁸⁾. In this case, the meaning of 'support' in Article 1.1(a)(2) of the SCM Agreement refers to the action of the government that contributes to the success or maintaining the value of prices or of the income received by someone.
- (175) Finally, the reference 'in the sense of Article XVI of the GATT 1994' implies all forms of income or price support that directly or indirectly increase exports of 'any product' from a WTO Member's territory or reduce imports of this product within its territory. This effect, potential or actual, is explicitly contemplated in Article XVI:1 of the GATT 1994: '... including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory'.

⁽⁶⁴⁾ WT/DS257/AB/R, para. 52.

⁽⁶⁵⁾ Appellate Body Report, *US — Carbon Steel* (DS213), paragraph 73, footnote 65.

⁽⁶⁶⁾ Oxford English Dictionary online, entries I.5.b and I.10.

⁽⁶⁷⁾ Oxford English Dictionary online, entry I.3.b.

⁽⁶⁸⁾ SCM Agreement, Article 15.4 ('... whether there has been an increased burden on government support programmes'); see also Agreement on Agriculture, Article 6 and Annexes II and III ('domestic support').

- (176) In sum, Article 3(1)(b) of the basic Regulation covers government measures of any form that directly or indirectly provide income or price support to someone and that has as an effect, potential or actual ⁽⁶⁹⁾, increasing exports of any product from a WTO Member's territory or reducing imports of this product within its territory. This interpretation is also consistent with the object and purpose of the SCM Agreement that is 'to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures' ⁽⁷⁰⁾.
- (177) In line with this interpretation, in addition to examining whether the set of measures adopted by the GOA could be characterised as 'financial contribution' in the form of provision of goods for less than adequate remuneration, the Commission also analysed whether the GOA's set of measures could also be characterised as income or price support falling under Article 3(1)(b) of the basic Regulation. In so doing, the Commission first examined whether the GOA intends to support the creation and development of the biodiesel industry; second, what kind of measures the GOA adopted to support the biodiesel industry; and third, whether those measures qualified as 'any form of income/price support' in the sense of Article XVI of GATT 1994.
- (178) Following disclosure of the information document, the GOA and CARBIO claimed that the Commission based itself on an inadmissibly broad interpretation of the terms 'any form of income or price support' used in Article 3(1)(b) of the basic Regulation, by arguing that it encompasses 'all forms that directly or indirectly provide income or price support' and 'any way or manner in which the government provides income or price support to someone'.
- (179) The Commission rejected this claim. It made its determination in compliance with the WTO jurisprudence and interpretation of 'income or price support'. As detailed in recitals (186) to (195) below, the Commission did not only look at the effects of the measures taken by the GOA, but also carefully analysed the policy objectives of the measures taken by the GOA as well as their nature and design concluding that the price of biodiesel and soybeans on the Argentinian domestic market '*include direct government intervention in the market with the design to fix the price of a good at a particular level*' ⁽⁷¹⁾. As a result of the policy objectives pursued by the GOA, the domestic biodiesel prices, when compared to the price of the exported biodiesel, are set at an artificially high level, supporting the domestic biodiesel industry (see recitals (189) and (195)). At the same time, the price of soybeans is set at an artificially low level through an export tax on soybeans which also supports the domestic biodiesel industry.
- (180) Following final disclosure, the GOA did not agree with the Commission's interpretation that the categories of 'financial contribution'/'income or price support' are not mutually exclusive, because of the conjunction 'or' in Article 1.1.(a)(2) of the SCM Agreement.
- (181) In recital (171), the Commission explained why it did not consider these categories mutually exclusive. The simple linguistic explanation of the word 'or' in the text of the SCM Agreement did not alter the Commission's reasoning and therefore the claim was rejected.
- (182) The GOA reiterated its claim that the Commission's findings are inappropriately based on an inadmissibly broad interpretation of the terms 'any form of income or price support' as used in Article 1.1.(a)(2) of the SCM Agreement and that in order for the export tax regime to fall within the provisions of Article 1.1.(a)(2), the Commission applies an 'effect-based approach', which is inconsistent with WTO jurisprudence.
- (183) As the GOA did not bring any new supporting evidence to rebut the Commission's conclusions, the Commission rejected the claims.

⁽⁶⁹⁾ 'Potential' effects refer to those effects which naturally follow from the overall architecture, design and structure of the measure, without the need of 'observed' or actual effects on the market.

⁽⁷⁰⁾ Appellate Body Report, *US — Carbon Steel* (DS213), paragraph 73, footnote 65.

⁽⁷¹⁾ Panel Report, *US — GOES* (WT/DS414/R), para. 7.85.

- (184) Following final disclosure, CARBIO also disputed the Commission's findings of income and price support, quoting in their favour another part of the China — GOES Panel Report ⁽⁷²⁾. According to CARBIO, income and price support does not cover situations where 'a movement in prices is an indirect effect of another form of government intervention' ⁽⁷³⁾.
- (185) The Commission considered that CARBIO's reference to the case-law from China — GOES is not relevant in the present case where the conclusions on income/price support are not based on indirect price effects, but on actions attributable to the GOA which are designed, and which have as their objective, price effects that support the biodiesel industry. This claim is therefore rejected.

3.2.2.8. The GOA's intention to support the domestic biodiesel industry

- (186) The legislative acts referred to in recitals (89) to (100) show that the GOA has an explicit policy to support the creation and development of the domestic biodiesel industry. In particular, through Law 26.093 of 12 May 2006 ⁽⁷⁴⁾, the GOA set out a regime to promote the domestic production and use of biofuels, including biodiesel. That law set up an enforcement authority with the role to promote and control sustainable biofuel production and use ⁽⁷⁵⁾. Furthermore, that law provides that the Department of Agriculture, Livestock, Fisheries and Food shall promote crops destined to the production of biofuels that encourage productive diversification of the agricultural sector, the Department of Small and Medium-Sized Enterprises shall promote the acquisition of capital assets by small and medium-sized enterprises destined to biofuel production, and the Department of Science, Technology and Productive Innovation shall promote the research, cooperation and transfer of technology between small and medium-sized enterprises and relevant institutions of the Public National Science, Technology and Innovation System ⁽⁷⁶⁾.
- (187) The GOA has provided explicit support since 2001, when Decree 1396 ⁽⁷⁷⁾ entered into force. That decree set up the Competitiveness Plan for Biodiesel, exempting producers from taxes '*in order to promote the development of biodiesel*' and stating '*that the tax component of liquid fuels and natural gas is a fundamental tool for sending economic signals*' (emphasis added). That Plan was supported by the Undersecretary of Fuels in 2001, who assured the promoters of biodiesel production projects that biodiesel would remain tax-free fuel, and affirmed the role of the GOA by promising the establishment of a stable regulatory framework and by announcing that projects on biodiesel would enjoy the benefits of the industrial promotion regime and credits. He further declared that the development of biodiesel must have agricultural producers as protagonists ⁽⁷⁸⁾.
- (188) The promotion of domestic biodiesel was consolidated by Resolution 1156 in 2004, creating the National Biofuels Programme ⁽⁷⁹⁾ which promoted the technological development of the domestic biodiesel industry by Ministry of Economy and Production ⁽⁸⁰⁾. The GOA explicitly considered the promotion of the domestic biodiesel industry as part of the Argentinian macroeconomic model ⁽⁸¹⁾.

⁽⁷²⁾ Panel Report, China — GOES, recitals 7.85-7.87

⁽⁷³⁾ *Ibid.*

⁽⁷⁴⁾ Régimen de Regulación y Promoción para la Producción y Uso Sustentables de Biocombustibles. Autoridad de aplicación. Funciones. Comisión Nacional Asesora. Habilitación de plantas productoras. Mezclado de Biocombustibles con Combustibles Fósiles. Sujetos beneficiarios del Régimen Promocional. Infracciones y sanciones.

⁽⁷⁵⁾ Article 4 (a) of Law 26.093 from 12.5.2006.

⁽⁷⁶⁾ Article 15(5), (6), and (7) of Law 26.093.

⁽⁷⁷⁾ Decreto 1396/2001, 4.11.2001, Plan de Competitividad para el Combustible Biodiesel. Modificaciones al Impuesto sobre los Combustibles Líquidos y el Gas Natural. Normas Complementarias.

⁽⁷⁸⁾ Statements by the former Undersecretary of Fuels, Cristian Folgar, see <https://www.lanacion.com.ar/326725-el-gobierno-apoyo-los-proyectos-de-biodiesel>, accessed on 4.9.2018.

⁽⁷⁹⁾ Resolution 1156/2004, 10.11.2004, Secretaría de Agricultura, Ganadería, PESCA y Alimentos, BIOCOMBUSTIBLES, Créase el Programa Nacional de Biocombustibles. Principales objetivos. Misiones y funciones.

⁽⁸⁰⁾ See further research: Georges Gérard Flexor, Karina Yoshie Martins Kato and Marina Yesica Recalde, El mercado del biodiésel y las políticas públicas: Comparación de los casos argentino y brasileño, CEPAL review, 2012 (available at https://www.researchgate.net/publication/262960724_El_mercado_del_biodiesel_y_las_politicas_publicas_Comparacion_de_los_casos_Argentino_y_Brasileno_The_biodiesel_market_and_public_policy_Comparison_of_Argentine_and_Brazilian_cases, accessed on 4.9.2018) and Dr Cesar Petrusansky, El Desarrollo del Mercado de Biocombustibles en Argentina, Ejecutivos de Finanzas, 2008 (available at <http://www.iaef.org.ar/files/revista/212/desarrollo.pdf>, accessed on 4.9.2018.).

⁽⁸¹⁾ Secretaría de Política Económica, Ministerio de Economía y Finanzas Públicas, Instrumentos para el Desarrollo Productivo en la Argentina, 2011 (available at https://www.economia.gob.ar/peconomica/basehome/instrumentos_desarrollo_prod_argentina.pdf, accessed on 4.9.2018.).

- (189) The Centro de Economía Internacional stated in 2011 ⁽⁸²⁾ that the development of domestic biodiesel was aimed at maximising the added value of soy, rather than reducing the use of fossil fuels. Reasons for the development of the biodiesel industry given by this research body were, among others, the growing opportunity to supply the needs of external markets and the differentials in terms of export duties, encouraging production with greater added value over that of basic products such as soybeans ⁽⁸³⁾.
- (190) Furthermore, a study conducted by a governmental entity, the National Institute of Agricultural Technology ('Instituto Nacional de Tecnología Agropecuaria', INTA) in 2011 ⁽⁸⁴⁾ concluded that 'it is common to the biodiesel market that it is stimulated by the State for different reasons through different policies', '[i]n other words, it is likely that the market is artificially stimulated and that, without the presence of the State, it loses economic relevance', and that 'the obvious conclusion is that biodiesel does not seem to push the production of soybeans but that the causality goes in the opposite direction'.
- (191) This support has continued until after the investigation period, as in February 2018 the Minister of Energy, the Governor of Santa Fe and CARBIO agreed to set up a joint working group to better design and improve the national strategy for biodiesel ⁽⁸⁵⁾.
- (192) In 2010, the GOA set a blending mandate for the domestic market, requiring the fuel companies in Argentina to purchase biodiesel and blend it with mineral diesel before sale ⁽⁸⁶⁾. This blending mandate was set up together with Biodiesel Supply Agreements between the GOA and biodiesel producers from 2010 until 2015. Those Supply Agreements were established 'because of the importance of the insertion of biofuels into the energy scheme of the country' and it was therefore 'necessary to establish clear guidelines that guarantee efficiently and effectively the achievement of the objectives proposed by the national executive power' ⁽⁸⁷⁾, and further 'taking into account the objectives of the national state to promote the agro industrial activity generating added value to the raw materials produced on national territory' ⁽⁸⁸⁾.
- (193) As discussed in recitals (265) to (267), the GOA did not sign any Biodiesel Supply Agreements after 2015 but continued to allocate quotas and set the price at which the blending companies have to purchase biodiesel. The quota was based upon the expected quantity required by the domestic market to fulfil the blending mandate. The rest of the Argentinian production could only be exported.
- (194) During the investigation period, the price of biodiesel on the domestic market was set on a monthly basis, differentiating for large, large non-integrated, and small and medium companies. The domestic price of biodiesel was based upon the following formula:

Cost of soybean oil (as published by the Ministry of Agriculture) + cost of methanol + cost of labour + other costs + return of capital (being set at 3 %) ⁽⁸⁹⁾.

⁽⁸²⁾ Centro de Economía Internacional (CEI) — Ministry of foreign affairs of Argentina, Los biocombustibles ya forman parte de las agendas global y hemisférica, 2011 (available at <http://www.cei.gob.ar/userfiles/cei%20NOTA%2012.pdf>, accessed on 4.9.2018).

⁽⁸³⁾ This is repeated in Marcelo Regunaga, and Agustín Tejada Rodríguez, La política de Comercio Agrícola de Argentina y el Desarrollo Sustentable, International Centre for Trade and Sustainable Development — ICTSD, 2015, (available at <https://www.ictsd.org/sites/default/files/research/La%20Política%20de%20Comercio%20Agrícola%20de%20Argentina%20y%20el%20Desarrollo%20Sustentable.pdf>, accessed on 4.9.2018), María Marta Di Paola, La producción de biocombustibles en Argentina, Informe ambiental anual — FARN (Fundación ambiente y recursos naturales), 2013, (available at <http://www.farn.org.ar/wp-content/uploads/2014/07/informe2013-1.186-209.pdf>, accessed on 4.9.2018), Evelina Goldstein and Graciela Gutman, Biocombustibles y biotecnología. Contexto internacional, situación en Argentina, CEUR (Urban and regional centre of studies), 2010 (available at <http://www.ceur-conicet.gov.ar/archivos/publicaciones/biocombustibles2.pdf>, accessed on 4.9.2018), and Ricardo Rozemberg and Martina Chidiak, Biocombustibles en la Argentina, Integración y Comercio (Interamerican Development Bank), 2015 (available at <http://www19.iadb.org/intal/icom/data/Biocombustibles%20en%20la%20Argentina.pdf>, accessed on 4.9.2018).

⁽⁸⁴⁾ Jorge A. Hilbert, Rodrigo Sbarra, Martín López Amoros, Producción de biodiesel a partir de aceite de soja — Contexto y Evolución Reciente, Instituto Nacional de Tecnología Agropecuaria — Ministerio de Agricultura, Ganadería y Pesca, 2011, page 124 (available at https://inta.gob.ar/sites/default/files/script-tmp-inta_biodiesel_de_aceite_de_soja_en_argentina.pdf, accessed on 4.9.2018).

⁽⁸⁵⁾ Press article in Clarín on 2.2.2018, Acuerdan crear una mesa de trabajo para potenciar la cadena del biodiésel (available at https://www.clarin.com/rural/acuerdan-crear-mesa-trabajo-potenciar-cadena-biodiesel_0_BJ3nrSflf.html, accessed on 4.9.2018).

⁽⁸⁶⁾ Secretaría de Energía, Ratifícase el Acuerdo de Abastecimiento de Biodiésel para su Mezcla con Combustibles Fósiles en el Territorio Nacional del 20 de enero de 2010. Pautas a cumplir para el abastecimiento de Biodiésel al mercado de combustibles fósiles, Resolución 7/2010 from 4.2.2010.

⁽⁸⁷⁾ Secretaría de Energía, Ratifícase el Acuerdo de Abastecimiento de Biodiésel para su Mezcla con Combustibles Fósiles en el Territorio Nacional del 20 de enero de 2010. Pautas a cumplir para el abastecimiento de Biodiésel al mercado de combustibles fósiles, Resolución 7/2010 from 4.2.2010.

⁽⁸⁸⁾ Secretaría de Energía, Ratifícase la Addenda al Acuerdo de Abastecimiento de Biodiésel para su mezcla con combustibles fósiles en el Territorio Nacional, suscripta el 5 de julio de 2010. Modifícase la Resolución No 7/2010, Resolución 554/2010 from 6.7.2010, repeated in Secretaría de Energía, Resolución 450/2013 from 6.8.2013 and Secretaría de Energía, Acuerdo de Abastecimiento de Biodiésel para su Mezcla con Combustibles Fósiles en el Territorio Nacional. Ratificación, Resolución 660/2015 from 20.8.2015.

⁽⁸⁹⁾ <http://www.energia.gob.ar/contenidos/verpagina.php?idpagina=3818>, accessed on 4.9.2018.

- (195) None of the sampled groups of exporting producers received a quota and supplied the domestic market during the investigation period. However, the average set prices on the domestic market appear to be higher than the average export price, especially for the small, medium, and large non-integrated biodiesel producers. Therefore, by artificially setting the price of domestic biodiesel at an artificially high level, the GOA pursued a policy of providing price support to the small and medium-sized biodiesel industry selling on the domestic market.
- (196) Following the disclosure of the information document, the GOA disputed the finding that the domestic price of biodiesel is set at an artificially high level.
- (197) The Commission disagreed. To assess the domestic price level of biodiesel the Commission used public data provided by the GOA. That public data showed that the domestic price is set by the GOA and thus is not left to market forces. The GOA did not dispute that it sets the domestic biodiesel prices. Furthermore, the public data showed that prices on the domestic market paid by the companies having access to that market (i.e. the small and medium-sized companies) were higher, as a matter of fact, than the export price. The GOA did not dispute that price difference either. Therefore, the Commission concluded that the domestic price of biodiesel is set at an artificially high level. Consequently, that claim was rejected.
- (198) Following the disclosure of the information document, the GOA claimed that the causality connection between the alleged income or price support and a subsequent effect of export increase or import reduction is not positively ascertained and that the largest producers are obstructed to sell domestically.
- (199) The Commission rejected this claim. By regulating the domestic biodiesel market and giving a quota only to the smaller biodiesel companies, the GOA established an industry where the largest producers are obstructed to sell domestically and thus are fully export-oriented, thereby encouraging the export competitiveness of the biodiesel industry. Moreover, Table 2 in recital (209) provides data on the Argentinian production of biodiesel since 2008 (when Argentina started production on a large scale) and the export of biodiesel. Table 2 shows that the income support to the biodiesel industry has had a positive effect on exports due to the fact that this has been created as an export oriented industry and remains so until today.
- (200) As explained in recitals (186) to (191), the GOA had manifestly the intention to support the entire domestic biodiesel industry, irrespective of whether it is domestically and export-oriented. However, none of the sampled exporting producers had any relevant domestic sales during the investigation period. All sampled exporting producers explained that with the supply of small and medium companies who were given quotas by the GOA, the domestic demand was satisfied. The fact that a special price was set for large companies did not alter the fact that none of the large companies sold on the domestic market during the investigation period. As a result, by impeding the biodiesel industry from selling domestically, the GOA propelled the export performance of the Argentinian biodiesel industry.
- (201) Therefore, the Commission concluded that the GOA's intention to support the creation and development of the Argentinian biodiesel industry is manifest.

3.2.2.9. Supporting measures to the biodiesel industry

- (202) As discussed in recitals (186) to (201), the GOA sought to support the biodiesel industry by adopting a set of measures, including the export taxes on soybeans, export quotas on the production of other grains than soybeans, an import ban on soybeans during the period before the investigation period and granting subsidies to the soybean growers in the most under-developed provinces within Argentina. Those measures created an artificial, compartmentalised, low-priced domestic soybean market in Argentina for the benefit of the domestic biodiesel industry. Moreover, with the Biofuels Law of 2006 ⁽⁹⁰⁾ the GOA set up a promotion regime for the production of biodiesel. As also mentioned in recital (191), this support has continued even after the investigation period when the GOA, together with other authorities and operators set up a joint working group to better design and improve the national strategy for biodiesel. Therefore, the Commission concludes on the basis of the information available that in the last decade the GOA has put in place a set of measures in order to create, develop and support the biodiesel industry.

⁽⁹⁰⁾ Law 26.093 of 2006.

3.2.2.10. The set of measures adopted by the GOA qualifies as ‘any form of income/price support’ in the sense of Article XVI of the GATT 1994

- (203) By the set of measures described in recitals (186) to (201), the GOA provides income support to the biodiesel industry. Even if it could be argued that the measures put in place by the GOA on soybean producers do not amount to entrustment or direction, *quod non*, the Commission considers that they would at the very least amount to regulatory conditions which artificially allow biodiesel producers to obtain soybeans at lower prices than those available internationally. A 2012 resolution ⁽⁹¹⁾ of the GOA acknowledged that the biodiesel industry has been making profits reaching up to 25 % in 2012 because of the set of measures adopted by the GOA.
- (204) Moreover, the GOA has put mandatory blending requirements in place so that fuel companies in Argentina have to purchase biodiesel at artificially high prices set by the GOA. As explained in Section 3.3, the Commission does not countervail the Biodiesel Supply Agreements since the exporting producers did not benefit from this measure during the investigation period. However, the fact that the system is in place indicates that the GOA also provides price support to the biodiesel industry.
- (205) The Commission also notes that through the Biofuels Law of 2006 ⁽⁹²⁾ the GOA set up a promotion regime for the production of biodiesel, including the granting of incentives to support the development of this industry.
- (206) All those measures show that the Argentinian biodiesel industry is supported and artificially stimulated. This is even acknowledged by the GOA in one of the publications of the National Institute of Agricultural Technology, stating that ‘it is likely that the market is artificially stimulated and that, without the presence of the state, it loses economic relevance’ ⁽⁹³⁾ and that ‘the differential export tax is a clear incentive to produce biodiesel, and that without state assistance, the biodiesel market for companies that depend on the purchase of oil in the market would not be sustainable as the only sale product’ ⁽⁹⁴⁾.
- (207) Therefore, the Commission concluded that through the set of measures mentioned above the GOA directly or indirectly provides income or price support to the biodiesel industry, thereby contributing to its competitiveness.
- (208) Moreover, as mentioned in recitals (199) and (200), the Argentinian biodiesel industry is a sector that was set up as export-oriented where world market prices prevail.
- (209) As shown in Table 2, the Argentinian biodiesel industry was initially set up as an export-oriented industry, where especially in the first years almost all the production of biodiesel was exported and entered its largest export markets under the Generalised System of Preferences with a zero tariff ⁽⁹⁵⁾.

Table 2

Argentinian production and export of biodiesel (in MT)

Year	Production	Total exports	Exports to the Union	Exports (% of production)
2008	711 864	680 219	n/a	96
2009	1 179 103	1 142 283	n/a	97

⁽⁹¹⁾ Joint Resolution No 438/2012, 269/2012 and 1001/2012 of Ministry of Economy and Public Finance, Ministry of Industry and Ministry of Federal Planning, Public Investment and Services.

⁽⁹²⁾ See Chapter II in Law 26.093 of 2006, available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/115000-119999/116299/norma.htm>

⁽⁹³⁾ Jorge A. Hilbert, Rodrigo Sbarra, Martín López Amoros, Producción de biodiesel a partir de aceite de soja — Contexto y Evolución Reciente, Instituto Nacional de Tecnología Agropecuaria — Ministerio de Agricultura, Ganadería y PESCA, August 2011, page 124 (available at https://inta.gob.ar/sites/default/files/script-tmp-inta_biodiesel_de_aceite_de_soja_en_argentina.pdf, accessed on 4.9.2018).

⁽⁹⁴⁾ Jorge A. Hilbert, Rodrigo Sbarra, Martín López Amoros, Producción de biodiesel a partir de aceite de soja — Contexto y Evolución Reciente, Instituto Nacional de Tecnología Agropecuaria — Ministerio de Agricultura, Ganadería y PESCA, August 2011, page 131 (available at https://inta.gob.ar/sites/default/files/script-tmp-inta_biodiesel_de_aceite_de_soja_en_argentina.pdf, accessed on 4.9.2018).

⁽⁹⁵⁾ Centro de Economía Internacional (CEI) — Ministry of foreign affairs of Argentina, Los biocombustibles ya forman parte de las agendas global y hemisférica, 02.2011 (available at <http://www.cei.gob.ar/userfiles/cei%20NOTA%2012.pdf>, accessed on 4.9.2018).

Year	Production	Total exports	Exports to the Union	Exports (% of production)
2010	1 820 385	1 342 318	n/a	74
2011	2 429 964	1 649 352	n/a	68
2012	2 456 578	1 543 094	1 387 667	63
2013	1 997 809	1 149 259	478 750	58
2014	2 584 290	1 602 695	802 415	62
2015	1 810 659	788 226	6 250	44
2016	2 659 275	1 626 264	0	61
2017	2 871 435 (*)	1 650 119 (*)	638 091	57

Source: Ministry of Energy, GOA and INDEC, GOA — * = estimation.

- (210) Therefore, the support to the domestic biodiesel industry favoured exports of biodiesel whereby the biodiesel producers were able to unfairly compete with biodiesel producers in other countries not benefiting from lower input prices. Lower costs resulted in higher incomes, which could either be transformed into additional profit or used to reduce the price, or both. The Argentinian biodiesel industry remains as having export markets, and in particular the Union market, as its main focus.
- (211) Following final disclosure, the GOA disagreed with the finding of the Commission that a 'set of measures' adopted by the GOA qualifies as 'any form of income or price support' in the sense of Article XIV of the GATT 1994 and Article 1.1(a)(2) of the SCM Agreement, resulting in an increase of exports of biodiesel.
- (212) As the GOA did not provide any further reasoning to support this statement, the Commission rejected this claim.

3.2.2.11. Conclusion

- (213) Therefore, the Commission concluded that through a set of measures, the GOA directly or indirectly provided income/price support to the biodiesel industry resulting in an increase of exports of biodiesel, within the meaning Article 3(1)(b) of the basic Regulation.

3.2.2.12. Benefit

- (214) Having established that the set of measures constitutes a financial contribution by the GOA by means of entrustment or direction of private bodies and/or income/price support, the Commission calculated the amount of subsidisation in terms of the benefit conferred on the recipient, which was found to exist during the investigation period, in accordance with Article 3(2) and Article 5 of the basic Regulation.
- (215) Because most of the GOA's measures aimed at artificially lowering the domestic price of soybeans resulting in higher income for Argentinian biodiesel producers, the Commission examined whether the GOA's support to the biodiesel industry conferred a benefit by reference to the difference between the prices paid by domestic biodiesel producers and a benchmark based on the prevailing market conditions in Argentina for soybeans.
- (216) The Commission assumed that such a difference resulted in higher profits obtained by the Argentinian biodiesel producers and thus at the very least equalled the benefits obtained through the GOA's income/price support. This comparative method also ensured that there was no double counting of other subsidies countervailed in the present investigation and which also provide income/price support to Argentinian biodiesel producers.

- (217) The Commission first calculated the weighted average purchase price of soybeans paid by the sampled Argentinian producers during the investigation period. The weighted average was calculated month-by-month and as delivered from the soybeans growers to the biodiesel plant in Argentina.
- (218) The average purchase price was based on the prices, net of VAT, and quantities indicated in transaction-by-transaction listings of invoices submitted by the companies and verified during the verification visits.
- (219) This average price needed to be compared with an appropriate benchmark. Under Article 6(d) of the basic Regulation the adequacy of remuneration shall be determined in relation to prevailing market conditions for the product in question in the country of provision, i.e. Argentina, including price, quality, availability, marketability, transportation and other conditions of purchase ⁽⁹⁶⁾. This mirrors Article 14(d) of the SCM Agreement and should be interpreted and applied in the light thereof.
- (220) Soybeans are a commodity, and soybeans imported into Argentina are comparable to domestically grown soybeans. The sampled exporting producers imported all of the soybeans on the basis of CIF, having on average the same price level regardless of the origin. The actual import prices delivered on CIF terms to the crushing plants were on the same price level as the world market price, which is quoted as FOB Gulf of Mexico. Purchases of domestically grown soybeans were found to be made on several Incoterms. However, the significant majority of purchases of domestically grown soybeans were also delivered to domestic crushing plants. Imports of soybeans represented a significant volume of the sampled exporting producers' purchases, namely 4,6 %. Those purchases were spread over hundreds of transactions. Although the sampled exporting producers had different suppliers from several neighbouring countries, the import price was found to be on average at the same level, as described in recital (223).
- (221) Therefore, the Commission considered that the actual prices paid by the sampled exporting producers for imported soybeans are considered to reflect undistorted market conditions in Argentina, including the generally applicable delivery charges included in the final price ⁽⁹⁷⁾.
- (222) The fact that those imports by the sampled exporting producers were not used for the production of biodiesel but for producing soybean oil does not alter this conclusion, because during the investigation period the demand for soybeans for producing biodiesel in Argentina was fully covered by the domestic supply of soybeans. At the same time there are no differences in quality between the different soybeans available that would render the imported soybeans not usable for producing biodiesel. Consequently the Commission considered that those purchases constitute an appropriate benchmark.
- (223) On that basis, the Commission used the actual price at which the sampled exporting producers imported soybeans into Argentina, which all came from neighbouring countries, as the closest possible proxy for undistorted Argentinian domestic prices for these products. Indeed, those prices were at the same level as world market prices and were at an average price of 6 043 ARS/MT during the investigation period.
- (224) The Commission then compared the price paid for domestically grown soybeans by the Argentinian producers with the weighted average actual import price for soybeans on a month-by-month basis. These imports were all done under a temporary importation regime and were therefore not subject to import duties and the actual price paid by the sampled exporting producers is considered to be adequate in the prevailing market terms and conditions in Argentina.
- (225) The total amount of the difference represents the 'savings' obtained by the Argentinian producers of biodiesel which purchase soybeans in the Argentinian distorted market compared to the price which they would have paid in the absence of distortions. Ultimately, this total amount represents the benefit conferred on the Argentinian producers by the GOA during the investigation period.

⁽⁹⁶⁾ See WT/DS436/AB/R United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products From India, 8 December 2014, para. 4.244.

⁽⁹⁷⁾ See in that respect the Appellate Body findings in WT/DS436/AB/R United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products From India, 8 December 2014, paras 4.292-4.322.

- (226) In accordance with Article 7(2) of the basic Regulation, the Commission allocated those subsidy amounts over the total turnover of the soybean-based production of the sampled exporting producers during the investigation period as appropriate denominator, because the subsidy granted a benefit to the entire production of soybean-based products and not only to the product concerned or the production destined to exports.
- (227) For the period after the investigation period, the GOA adopted Decree 1343/2016 ⁽⁹⁸⁾ which sets the rate of the export tax on soybeans and soybean oil. The rate will be reduced as from 1 January 2018 until 31 December 2019 every month by 0,5 %. As a result, the export tax for soybeans will be reduced to 18 % at the end of 2019.
- (228) On 3 September 2018 the GOA adopted Decree 793/2018 ⁽⁹⁹⁾, setting the rate of the export tax on soybeans at 18 % from that day on, but implementing an additional export tax of ARS 4 per exported USD, whereby the tax is calculated on the FOB value of the exported soybeans expressed in USD. This shows that the GOA can at any time decide to change the level of the export tax.
- (229) Events after the Commission's decision not to impose provisional measures in September 2018 further confirm that the GOA is entitled to adjust the export tax system regularly. In particular, the 12 % cap on the overall export tax introduced by Decree in September was already increased to 33 % in the law adopting the budget for 2019, and such a cap can remain in place until the end of 2020 ⁽¹⁰⁰⁾.
- (230) The Commission therefore concludes that a benefit will remain to be conferred after the investigation period in accordance with Article 15(1) second sentence of the basic Regulation.
- (231) Following disclosure of the information document, the GOA and CARBIO claimed that the benchmark of imported soybeans does not reflect market conditions in Argentina.
- (232) The GOA's argument that the import price reflects an alternative market benchmark shows an incorrect interpretation of the facts. In fact, the Commission used as a benchmark the import price of soybeans actually paid by the sampled exporting producers. The Commission considered this price an appropriate benchmark for the specific reason that this price reflected the market conditions in Argentina unaffected by the GOA's measures (as verified when comparing those import prices with international prices). The Commission considered the CIF import price adequate, as this reflected the price at the crushing plant, located at the port.
- (233) The Commission acknowledged that the benchmark should respect any comparative advantage of the prevailing country. However, neither the GOA nor CARBIO substantiate or give any evidence to support the allegation that the chosen in-country benchmark does not reflect the market conditions prevailing in Argentina. Consequently, those claims were rejected.
- (234) Following final disclosure, the GOA and CARBIO disagreed that the price paid for imported soybeans constituted an appropriate benchmark since it did not reflect the market conditions in Argentina.
- (235) The Commission explained extensively in recitals (220) and (232) to (233) why it considered the imported soybeans both representative and purchased on the basis of the prevailing market conditions in Argentina. As the GOA or CARBIO did not provide any supporting evidence for their disagreement with this conclusion, the Commission rejected the claim.
- (236) Following the disclosure of the information document, the sampled exporting producers claimed that a benchmark price that is based on the price of the same commodity in a completely different region is unreliable. The Commission noted that the sampled exporting producers only imported soybeans from neighbouring countries. Therefore, that data was the closest proxy to the undistorted price in Argentina absent the GOA's support and the most reliable. Consequently, that claim was rejected.
- (237) Following the disclosure of the information document, CARBIO further claimed that because the export tax on soybeans has been reduced from 30 % to 18 % there is no longer a benefit.

⁽⁹⁸⁾ Decree 1343/2016 of the Ministry of Agroindustry, Derecho de exportación. Alicuota — Modificación, 2.1.2017.

⁽⁹⁹⁾ Decree 793/2018, Poder Ejecutivo Nacional, Derechos de exportación — Modificación, 3.9.2018.

⁽¹⁰⁰⁾ <https://www.minhacienda.gob.ar/onp/presupuestos/2019>, Proyecto de Ley, Artículo 83.

- (238) The Commission noted that CARBIO's understanding of the level of the export tax is incorrect. Decree 793/2018 set the level of the export at 18 % but also implemented an additional export tax of 12 %, with a cap of 4 ARS per USD exported. Effectively, this means that the export tax was set at around 28 %, compared to 30 % during the investigation period.
- (239) The Commission observed that that change took place after the investigation period for subsidisation. Under Article 11(1) of the basic Regulation, information relating to a period subsequent to the investigation period is not, normally, to be taken into account. CARBIO did not provide any compelling reasons why this information should be taken into account.
- (240) Furthermore, CARBIO did not provide any evidence for its claim that any allegation of subsidy or benefit due to the existence of the export tax on soybeans is no longer warranted. The Commission concluded that a slight decrease of around 2 % on the export tax of soybeans did not demonstrate that the subsidies no longer confer any benefit on the exporters involved. The Commission considered that any effect of a further reduction or suppression of the export tax on soybeans should be examined in the context of a review, as opposed to the current investigation.
- (241) CARBIO furthermore claimed that any alleged benefit conferred to the Argentinian producers by the increase in the tax on soybeans would be offset by the increase in the direct export tax on biodiesel and should therefore, following Article 7(1)(b) of the basic Regulation, be deducted from the amount of the total subsidy calculated.
- (242) CARBIO did not provide any justification that the export tax levied on the biodiesel that was exported to the Union was specifically intended to offset the subsidy, as stated in Article 7(1)(b) of the basic Regulation. CARBIO also failed to show how the actual export tax on biodiesel offsets the support conferred by the GOA's measures, including through the export tax on soybeans. Therefore, the Commission rejected that claim.
- (243) CARBIO specifically made further comments regarding the changes to the export tax system after the end of the investigation period, including the increase of export tax on biodiesel, and the changes to the export tax on soybeans. The Commission rejected the assertion that these changes made any difference to the Commission's conclusions.
- (244) Firstly the export tax on biodiesel imposed after the end of the investigation period has had no obvious effect on the amount of the benefit provided to the biodiesel producers based on the provision of soybeans for less than adequate remuneration.
- (245) Secondly there is still an export tax on soybeans, and no evidence has been provided that after the investigation period the price of soybeans in Argentina has increased, thereby theoretically lowering the benefit amount.
- (246) Following final disclosure, the GOA stressed that Article 81 of the Budget Law does not increase to 33 % any 'cap on the overall export tax introduced by Decree 783/2018 in September', as Article 83 established a limit of the export tax rate to 30 % of the taxable value or the official FOB price.
- (247) Even if the export tax was limited to 30 %, the Commission's conclusion that a benefit will remain to be conferred after the investigation period, in accordance with Article 15(1) second sentence of the basic Regulation, still stands.
- (248) Following the disclosure of the information document, the sampled exporting producers submitted comments regarding the calculation of the benefit provided by the supply of soybeans for less than adequate remuneration. These comments were company specific and mainly referred to clerical errors or further claims for adjustment.
- (249) Where a clerical error was found the error was corrected, for example the inclusion of zero-quantity transactions to ensure that the price per kg purchased was correct. However, where a company requested that data that had been verified be changed after their verifications on spot, such a request was denied since the Commission was not in a position to confirm the accuracy of the new unverified data.
- (250) Following final disclosure the two exporting producers who had requested that verified data be changed again made the same claim, and this was again rejected for the same reasons as before.

- (251) At a hearing following the disclosure of the information document, CARBIO claimed that for calculating the benefit the Commission should reject those purchases of soybeans made from related companies for calculating the purchase price in Argentina. The Commission noted that the purchases of soybeans in Argentina made by the exporting producers during the investigation period were made from both related and unrelated suppliers, and the prices were the same. This is a clear indication that the purchases from related suppliers were made at arm's length. The Commission therefore saw no reason not to use these transactions to calculate the benefit to the biodiesel producer, which was calculated on the basis of monthly averages per kilo of soybeans purchased. Consequently, this claim was rejected.

3.2.2.13. Specificity

- (252) The GOA's set of measures were directed to benefit certain industries, including the domestic biodiesel industry. Indeed, even though the distortions on soybeans also benefit downstream products other than biodiesel, the benefit is available only to certain industries in Argentina, being those in the soya value chain. Moreover, even if the GOA's support granted to biodiesel through several measures is also granted to other biofuels, those measures are limited to a group of enterprises or industries. They are, therefore, specific under Article 4(2)(a) of the basic Regulation.
- (253) Following the disclosure of the information document, CARBIO claimed that the measures are not limited to the biodiesel industry and therefore not specific. CARBIO repeated this claim after final disclosure without providing any new evidence. The Commission considered that the inherent characteristics of the good provided, soybeans, limits its possible use to certain enterprises only ⁽¹⁰¹⁾. Therefore, the Commission rejected CARBIO's claim that the subsidy is not specific to the biodiesel industry.

3.2.3. Conclusion

- (254) The Commission found that through a set of measures the GOA provided support to the biodiesel industry including through the provision of soybean for less than adequate remuneration. The GOA conferred a benefit to the recipients which is specific, thus amounting to a countervailable subsidy.
- (255) Following the disclosure of the information document, CARBIO claimed that the Commission was relying solely on the export tax on soybeans to reach its conclusion of financial contribution and/or income and price support.
- (256) The Commission disagreed. Since the initiation of the this investigation, the Commission found there were other tools used by the GOA (in addition to the export tax on soybeans) that would be investigated as part of the GOA's support to the biodiesel industry ⁽¹⁰²⁾. As explained before, the Commission considered the export tax as one of the instruments for the provision of soybeans for less than adequate remuneration on the Argentinian domestic market, which constitutes a countervailable subsidy. The other measures taken by the GOA show that the GOA directed the soybean growers to sell their soybeans for an artificially low price to the biodiesel industry and the GOA thus had a clear intention to support the domestic biodiesel industry.
- (257) Although the Commission found that some of the other subsidies alleged in the complaint did not constitute a countervailable subsidy during the investigation period (in particular, the Biodiesel Supply Agreement or certain tax exemptions), they formed an integral part of the set of measures pursuing the support of the biodiesel

⁽¹⁰¹⁾ Panel Report, United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R, para. 7.116. See also Appellate Body Report WT/DS436/AB/R United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India, 8 December 2014, para. 4398.

⁽¹⁰²⁾ See Memorandum on sufficiency of evidence, 30 January 2018, p. 6 ('These elements will be examined during the investigation. However, at this stage the Commission considers that there is sufficient evidence tending to indicate the existence of a countervailable subsidy. In particular, the export taxes appear to be one of the tools devised by the GoA to direct soybean and soybean oil producers to provide their inputs to the biodiesel producers. The GoA also appears to provide incentives to input suppliers to maintain their high production artificially to the benefit of biodiesel producers') and p. 14 ('Where the complaint does not provide sufficient evidence of a particular subsidy or subsidy programme, the Commission reserves its rights to investigate them in the course of these proceedings in accordance with Article 10(7) of the Basic Regulation').

industry and underlined the existence of income/price support for the biodiesel industry. In other words, the fact that some subsidies were not found to be used by the sampled exporting producers during the period of investigation does not deny the existence of the GOA's set of measures to support the domestic biodiesel industry.

- (258) The Commission examined the totality of the evidence available in this investigation to support its findings. As the Appellate Body acknowledged in *US — Countervailing Duty Investigation on DRAMS*, ‘individual pieces of circumstantial evidence are unlikely to establish entrustment or direction; the significance of individual pieces of evidence may become clear only when viewed together with other evidence’ ⁽¹⁰³⁾.
- (259) Therefore, the Commission assessed not only the export tax on soybeans but a set of GOA's measures supporting the biodiesel industry and in that process the Commission put all evidence, direct and circumstantial, together to come to the determination that, on the basis of the totality of evidence, there was entrustment or direction of private bodies and/or income/price support.

3.2.4. Calculation of the subsidy amount

- (260) The subsidy rate established with regard to this set of measures during the investigation period for the sampled exporting producers amounts to:

Table 3

The GOA's support to the biodiesel industry

Company/group	Subsidy rate
LDC Argentina SA	26,14 %
Group Renova	25,05 %
Group T6	33,15 %

3.3. Government mandated purchase of domestic biodiesel for more than adequate remuneration and/or income or price support (Biodiesel Supply Agreement)

3.3.1. Introduction

- (261) The complainant alleges that the GOA has concluded Biodiesel Supply Agreements ('Agreements') with biodiesel producers in Argentina, under Chapter II of the Biofuels Law of 2006 (law 26.093 of 2006) ⁽¹⁰⁴⁾. Those Agreements were designed to provide biodiesel to the domestic market given the blending mandate in force during the period since 2010. This mandate requires blending companies to purchase biodiesel and blend it with mineral diesel before sale.
- (262) The GOA established individual and collective quotas for biodiesel to supply the domestic market, and the complainant alleges that parties to the Agreements include sampled exporting producers such as LDC, Vicentin and Renova.
- (263) The Agreements establish that producers with quotas are obliged to supply biodiesel to the blending companies at a price set by the GOA, at a level that deliberately ensures that the cost of production of the producers are covered, plus profit.
- (264) Based on the fixing of an artificially high price and quantity to be provided by the producers to the blending companies, the complainant alleges that this is a countervailable subsidy.

⁽¹⁰³⁾ Appellate Body Report, *US — DRAMS*, para. 154.

⁽¹⁰⁴⁾ Law 26.093 of 12 May 2006. Régimen de Regulación y Promoción para la Producción y Uso Sustentables de Biocombustibles. Autoridad de aplicación. Funciones. Comisión Nacional Asesora. Habilitación de plantas productoras. Mezclado de Biocombustibles con Combustibles Fósiles. Sujetos beneficiarios del Régimen Promocional. Infracciones y sanciones.

3.3.2. Findings of the investigation

- (265) During its investigation the Commission found that no Biodiesel Supply Agreement had been signed since calendar year 2015. This 2015 Agreement had not been extended and was no longer in force.
- (266) However, under law 26.093 of 2006 the Ministry of Energy and Mining, as the Enforcement Authority of the blending mandate regime in force, has continued to allocate quotas and has continued to set the price at which the blending companies have to purchase biodiesel. This has been done de facto in the absence of a Biodiesel Supply Agreement.
- (267) During the investigation period, the Ministry of Energy and Mining allocated quotas, on the basis of estimated demand, to companies in Argentina with a capacity of up to 50 000 metric tonnes of biodiesel per year.
- (268) None of the sampled exporting producers received a quota during the investigation period.

3.3.3. Conclusion

- (269) Given that none of the sampled exporting producers received a quota during the investigation period, none of these companies sold biodiesel on the domestic market through the quota system in force during the investigation period. In addition, no Biodiesel Supply Agreement was in force during the investigation period with respect to the exporting producers. Therefore, there was no benefit from any quota system received by the sampled exporting producers during the investigation period.

3.4. Provision of loans and export financing on preferential terms and preferential lending

3.4.1. Introduction

- (270) The complainant asserted that the Banco de la Nación Argentina ('BNA') is one of the country's largest banks and is entirely state-owned. It noted that the GOA effectively manages the BNA on a day-to-day basis through its authority to appoint all members of the board.
- (271) The complainant alleged that the BNA lends money to micro, small and medium enterprises for investment and working capital, and that these loans were made at preferential rates.

3.4.2. Findings of the investigation

- (272) During the verification visit to the GOA, the Commission requested details of all loans provided by the BNA and other publicly owned banks, together with the terms of the loans and the interest rate charged.
- (273) The loans granted to the sampled companies were examined and compared to the loans provided by privately owned banks, to see whether any lending was made at preferential terms. This was examined in terms of interest rates and also loan conditions.
- (274) No evidence was found of any preferential lending to the sampled exporting producers during the period of investigation.

3.4.3. Conclusion

- (275) The Commission concluded that no preferential lending was provided to the sampled exporting producers during the investigation period.

3.5. Government revenue forgone or not collected under the Biofuels Law of 2006

3.5.1. Introduction

- (276) The complainant alleged that Article 15 of the 2006 Biofuels Law ⁽¹⁰⁵⁾ provides for the possibility for biofuel producers to reduce the tax base on which the minimum presumed income tax is calculated. The complainant also alleged that Article 15.1 of the same law authorises accelerated depreciation for capital goods.

⁽¹⁰⁵⁾ BIOCMBUSTIBLES Ley 26.093 Régimen de Regulación y Promoción para la Producción y Uso Sustentables de Biocombustibles. Autoridad de aplicación. Funciones. Comisión Nacional Asesora. Habilitación de plantas productoras. Mezclado de Biocombustibles con Combustibles Fósiles. Sujetos beneficiarios del Régimen Promocional. Infracciones y sanciones.

3.5.2. Findings of the investigation

- (277) The investigation found that none of the sampled exporting producers benefited from the promotional benefits set out in Article 15 of the Biofuels Law during the investigation period.

3.5.3. Conclusion

- (278) That measure was not used during the investigation period by the sampled exporting producers and thus the Commission concluded it did not need to be countervailed.

3.6. Provincial tax exemptions provided by the Province of Cordoba

3.6.1. Legal basis

- (279) The complainant alleged that the Province of Cordoba provided provincial tax exemptions to the biodiesel industry under Provincial Act 9397 ⁽¹⁰⁶⁾, passed in 2007. The Act provides that projects approved by the Enforcement Authority for the production, development and sustainable use of biofuels will be exempt for 15 years from payment of taxes.

3.6.2. Findings of the investigation

- (280) The investigation found that the tax exemptions were available to biofuel producers located in the province of Cordoba. Provincial Act 9397 provides under Sections 5 and 6 for exemptions from provincial taxes for projects for the production, development and sustainable use of biofuels. The Commission did not find any evidence, and interested parties did not allege either, that the tax benefits provided through Provincial Act 9397 specifically to the biodiesel industry is part of a broader scheme of tax benefits widely available in the province of Cordoba.

3.6.3. Conclusion

- (281) Companies producing biodiesel located in the province of Cordoba benefit from tax exemptions for 15 years from income tax, stamp duty, real estate tax, fund for the financing of the education system tax and fund for the financing of works of infrastructure tax. Those tax exemptions are intended to benefit domestic companies producing biodiesel, as set out in the Provincial Act 9397. Although one exporting producer within the sample was located in the province of Cordoba, it was not producing biodiesel in that province. The other sampled exporting producers were not located in that province. Therefore, the Commission concluded that that tax exemption was not used by the sampled exporting producers during the investigation period.

3.7. Provincial tax exemptions provided by the Province of Buenos Aires

3.7.1. Legal basis

- (282) The complainant alleged that the province of Buenos Aires established a provincial Law 13.719 which adheres to the 2006 Biofuels Law, to exempt beneficiaries from the payment of taxes if they are qualified and registered as biofuels producers under the 2006 Law.

3.7.2. Findings of the investigation

- (283) The investigation found that the tax exemptions were available to biofuel producers located in the province of Buenos Aires. However, none of the sampled exporting producers of biodiesel were located in the province.

3.7.3. Conclusion

- (284) The Commission found that none of the sampled exporting producers benefited from the tax exemptions set out in the Provincial Law 13.719 during the period of investigation.

⁽¹⁰⁶⁾ Ley no 9397 Adhesion de la provincial a ley nacional no 26.093, y declaracion de interes public de la promocion de la produccion, procesamiento y uso sustentable de biocombustibles.

3.8. Province of Santiago del Estero System of Promotion and Industrial Development (PSPID) — Provincial Law No 6.750

3.8.1. Legal basis

- (285) The complainant alleged that industries in the province of Santiago del Estero could benefit from various tax advantages and exemptions under the framework of Provincial Law 6.750, passed in 2005.

3.8.2. Findings of the investigation

- (286) None of the sampled exporting producers were located in that province.

3.8.3. Conclusion

- (287) The Commission found that none of the sampled exporting producers benefited from the measures set out in the Provincial Law 6.750 during the period of investigation.

3.9. Agreement on municipal taxes between Louis Dreyfus Argentina and the Municipality of General Lagos

3.9.1. Introduction

- (288) The complainant alleged that there is an agreement on municipal taxes between the exporting producer Louis Dreyfus Argentina and the municipality of General Lagos. The agreement was published as Municipal Ordinance 26/2016 ⁽¹⁰⁷⁾. That agreement provides that Louis Dreyfus Argentina pays a monthly lump sum to the municipality of General Lagos, rather than pay a percentage (0,5 %) of its gross revenue.

3.9.2. Findings of the investigation

- (289) The investigation found that the agreement was still in force during the investigation period ⁽¹⁰⁸⁾. In discussion with representatives of the municipality of General Lagos, the Commission found that the agreement would be valid until 2020.
- (290) During the verification of LDC in Buenos Aires, the Commission checked the payment of municipal taxes by LDC, and the estimation of the tax that would have been due had the agreement not been in force. The Commission found that the amount that LDC paid to the municipality for 2017 was higher than the amount LDC would have paid under the standard tax law.

3.9.3. Conclusion

- (291) Therefore, the Commission found that LDC did not benefit from that measure during the period of investigation.

3.10. Percentage tax rate reduction under the 'Pacto Fiscal' (Decree 14/1994)

3.10.1. Introduction

- (292) The complainant alleges that the Pacto Fiscal, as published by Decree 14/1994, provides for exemptions of taxes. The Pacto Fiscal, or 'Federal Pact for Employment, Production and Growth held between the Federal State and the Provincial States' was an agreement between the provinces and the National Government that established certain principles for provincial tax policy.

3.10.2. Findings of the investigation

- (293) The Pacto Fiscal is a framework agreement that requires a provincial law to implement its principles. The Commission has therefore found that this Pacto Fiscal had been itself put into practice by the provincial tax schemes already discussed.

3.10.3. Conclusion

- (294) The Commission has therefore found no separate benefit under that measure. Yet, like other measures setting up tax benefits for the domestic biodiesel industry, that measure is relevant as part of the GOA's set of measures engineered to support this industry.

⁽¹⁰⁷⁾ Ordenanza 26/2016, General Lagos, 16 June 2016.

⁽¹⁰⁸⁾ Article 2 of Ordenanza 26/2016, General Lagos, 16 June 2016. During the verification visit at the company's premises the Commission's services verified the validity of the agreement by confirming the due payments.

3.11. Real Estate exemption under the Santa Fe Industrial Law: exemption from paying real estate tax under Provincial Law No 8.478/1979 (Article 4) of Industrial Promotion; Provincial tax exemptions provided by the Province of Santa Fe; Article 183.29 Santa Fe Stamp Tax Exemption and Article 127 Santa Fe turnover tax exemption for export sales

3.11.1. Introduction

- (295) The complainant alleged that the Province of Santa Fe provided various tax exemptions to the domestic biodiesel industry through Provincial Law 8.478, Article 183.29, Article 127 and the Santa Fe provincial law 12.692 ⁽¹⁰⁹⁾.

3.11.2. Findings of the investigation

- (296) The investigation found that Law 8.478, and Article 183.29 and Article 127 had been superseded or otherwise replaced by Provincial law 12.692. Provincial law 12.692 provides for exemptions from provincial taxes for domestic companies involved in the research, development, generation, production and use of products related to renewable energy, and in particular the production of biodiesel. Biofuel production is specifically mentioned in Provincial law 12.692 under Article 5(d). The Commission did not find any evidence, and interested parties did not allege either, that the tax benefits provided through that measure specifically to a category of industries, including the biodiesel industry, is part of a broader programme of tax benefits widely available in the province of Santa Fe.

3.11.3. Conclusion

- (297) Companies producing biodiesel located in the province of Santa Fe benefit from tax exemptions for 15 years from income tax, stamp duty, real estate tax and vehicle duties. That tax exemption concerns domestic companies producing biodiesel, as set out in the Provincial law 12.692. The tax exemption is therefore a subsidy due to the revenue foregone by the GOA, and *de jure* specific to certain industries, including the domestic biodiesel industry. It is therefore a benefit from a countervailable subsidy.

3.11.4. Calculation of the subsidy amount

- (298) The amount of countervailable subsidy was calculated in terms of the benefit conferred on the recipients during the investigation period. This benefit was calculated as the difference between the total tax payable according to the normal tax rate and the total tax actually paid during the investigation period by the sampled exporting producers.
- (299) Following the disclosure of the information document and the accompanying calculations to the sampled exporting producers as well as following final disclosure, two of the companies claimed that the allocation base should be different (over the total turnover of soybean based products or over the turnover of all industrial activities in the Province of Santa Fe). As the companies only received the tax exemption because of their biodiesel production, the Commission considered this exemption specific to the production to biodiesel and, therefore, concluded that this exemption should only be allocated to the turnover of biodiesel and not to the total turnover of the company. Consequently, that claim was rejected.

Table 4

Provincial revenue foregone under Santa Fe Provincial laws

Company/group	Subsidy rate
LDC Argentina SA	0,06 %
Group Renova	2,15 %
Group T6	0,28 %

⁽¹⁰⁹⁾ Ley no 8.478 Santa Fe, and Registrada bajo el no 12.692 la Legislatura de la Provincia de Santa Fe.

3.12. Conclusion on subsidisation

- (300) The Commission calculated the amount of countervailable subsidies in accordance with the provisions of the basic Regulation for the sampled exporting producers by examining each subsidy or subsidy programme, and added these figures together to calculate a total amount of subsidisation for each exporting producer for the investigation period. To calculate the overall subsidisation, the Commission first calculated the percentage subsidisation, being the subsidy amount as a percentage of the company's total turnover. This percentage was then used to calculate the subsidy allocated to exports of the product concerned to the Union during the investigation period. The subsidy amount per tonne of product concerned exported to the Union during the investigation period was then calculated, and the margins below calculated as a percentage of the Costs, Insurance and Freight ('CIF') value of the same exports per tonne.
- (301) In accordance with Article 15(3) of the basic Regulation, the total subsidy amount for the cooperating companies not included in the sample was calculated on the basis of the total weighted average amount of countervailing subsidies established for the cooperating exporting producers in the sample with the exclusion of negligible amounts as well as the amount of subsidies established for items which are subject to the provisions of Article 28(1) of the basic Regulation.
- (302) However, the Commission did not disregard findings related to the GOA's support to biodiesel industry, even if it had to rely partially on facts available to determine the existence of subsidisation.
- (303) Indeed, the Commission considered that the facts available and used in those cases did not substantially affect the information needed to determine the amount of subsidisation in a fair manner, since the Commission used the import data provided by the sampled exporting producers. Exporters who were not asked to cooperate in the investigation will not be prejudiced by using this approach ⁽¹¹⁰⁾.
- (304) Given the high rate of cooperation of Argentinian exporting producers, the amount for 'all other companies' was set at the level of the highest amount established for the sampled companies. The 'all other companies' amount will be applied to those companies which did not cooperate in the investigation.
- (305) Following final disclosure, all exporting producers claimed that the Commission should calculate the subsidy amounts by taking into account the export tax on biodiesel as an offset to the benefit received from the export tax on soybeans. This was rejected by the Commission as there was no evidence that the GOA imposed an export tax on biodiesel to 'offset' the benefit received from the soybeans provided for less than adequate remuneration.
- (306) The same exporting companies also requested an adjustment for anti-dumping duties. The Commission considered that there was no legal basis for granting this adjustment, as there is no evidence that anti-dumping duties can offset subsidies granted upon exporting producers. In any event, this claim was rejected because no anti-dumping duties were actually paid by the exporting producers during the IP.

Table 5

Amount of countervailable subsidies

Company/group	Amount of countervailable subsidies
LDC Argentina SA	26,2 %
Group Renova	27,2 %
Group T6	33,4 %
Other cooperating companies	28,2 %
All other companies	33,4 %

⁽¹¹⁰⁾ See also, *mutatis mutandi*, WT/DS294/AB/RW, US — Zeroing (Article 21.5 DSU), Appellate Body Report of 14 May 2009, paragraph 453.

4. INJURY

4.1. Definition of the Union industry and Union biodiesel production

- (307) During the investigation period, 54 producers in the Union that were members of the EBB and a further 196 known non-member producers manufactured the like product. All these producers constitute the 'Union industry' within the meaning of Article 9(1) of the basic Regulation.
- (308) As indicated in recital (19), the Commission provisionally selected three Union producers in the sample representing 19 % of the total Union production of the like product.
- (309) As referred to in recital (20), the Commission received a number of comments on the provisional sample. The provisional sample consisted of the three proposed Union producers: Bioagra-Oil SA (Poland), Masol Iberia Biofuel, S.L.U. (Spain) and Saipol (France).
- (310) CARBIO indicated that all three proposed Union producers are unsuitable for inclusion in the sample. CARBIO mentioned, inter alia, that Saipol almost exclusively uses rapeseed from France, whereas for maximum efficiency the company should blend various types of feedstock.
- (311) CARBIO further indicated that Masol uses predominantly palm oil at transfer prices from its Indonesian parent company.
- (312) With regard to Bioagra-Oil, CARBIO referred to the limited choice of raw material this company has, due to the specific national implementation of the Renewable Energy Directive in Poland.
- (313) CARBIO also suggested ADM Hamburg AG or Verbio as representative companies for the sample of Union producers. CARBIO further noted with regard to Verbio that this company is a pure biodiesel producer (without a vertically integrated crushing business) and that it is located at the German-Polish border, servicing the broader eastern European market, including the part of the Polish market which is not subject to the earlier mentioned legislation.
- (314) The complainant explained that neither Saipol, nor Masol use any type of feedstock exclusively. The investigation confirmed that indeed both companies, Saipol and Masol, use more than one feedstock in their production.
- (315) On the basis of the comments received, the Commission decided to maintain Saipol and Masol Iberia Biofuel in the sample. Due to the fact that the Commission did not receive a rebuttal of the allegation contained in recital (312) that Bioagra oil has a limited choice of raw materials, the Commission decided to replace it in the sample of Union producers by Verbio Vereinigte BioEnergie AG (Germany).
- (316) The Commission established the total Union production of biodiesel during the investigation period at around 13 million tonnes.

Table 6

Union biodiesel production (tonnes)

	2014	2015	2016	Investigation period
Total Union production	11 353 223	11 789 896	11 958 862	13 071 053
<i>Index</i>	<i>100</i>	<i>104</i>	<i>105</i>	<i>115</i>

Source: EBB.

- (317) The total Union biodiesel production figures presented in Table 6 is based on data received from the EBB. The EBB compiles data concerning production that it receives from its members, which account for around 70 % of the biodiesel production in the Union. With regard to non-member producers accounting for around 30 % of the biodiesel production in the Union, it gathers the information concerning production from the relevant national industry associations and from other publicly available sources. The methodology and correctness of the data gathered by the EBB was subject to a verification visit under Article 26 of the basic Regulation carried out at the premises of the EBB. The Commission did not receive comments from interested parties with regard to that data.

- (318) The total Union biodiesel production gradually increased by 5 % between 2014 and 2016. A more significant increase in production can be noted during the investigation period, where production increased by another 10 percentage points. The Union production in the investigation period did not increase at the same rate as Union consumption because of subsidised imports from Argentina that started entering the Union market at the end of the investigation period.

4.2. Union biodiesel consumption

- (319) The Commission established the Union consumption of biodiesel based on the information submitted by the EBB and import and export statistics.
- (320) Union consumption developed as follows:

Table 7

Union biodiesel consumption (tonnes)

	2014	2015	2016	Investigation period
Total Union consumption	11 907 151	11 791 953	11 435 468	14 202 127
<i>Index</i>	100	99	96	119

Source: EBB, EU import statistics.

- (321) The Commission established the Union consumption by adding imports of biodiesel into the Union to the sales of the Union industry on the Union market. The Union's biodiesel consumption slightly decreased by 4 % until 2016. It increased in the investigation period by 19 % as compared with 2014. The consumption of biodiesel depends on two major factors, the consumption of diesel fuel and the content of biodiesel in this fuel.
- (322) Following final disclosure, CARBIO noted the revision of methodology of calculating the Union biodiesel consumption, and in this regard suggested that the reason for this change was the unreliable production data of the Union industry.
- (323) The Commission changed the methodology of calculating the consumption in order to limit the complexity of this calculation, and to eliminate the need to include the level of Union exports in this calculation. The level of production data of the Union industry remained unchanged. As explained in recital (358), the Commission verified the methodology of collecting data by the EBB, including the production data, and found it reliable.
- (324) Compared to fossil-based fuel, biodiesel produces less air pollutants such as particulates, carbon monoxide, sulphur dioxide, hydrocarbons, and air toxins, but may produce more nitrogen oxide. In addition, the plants used as feedstock for production of biodiesel (soy, oil palms, rapeseed, etc.) offset future CO₂ emissions by absorbing CO₂ when growing.
- (325) The steadily increasing demand and the Union production results from the energy policy of the Union. The Renewable Energy Directive 2009/28/EC ⁽¹¹¹⁾ establishes that *'each Member State shall ensure that the share of energy from renewable sources in all forms of transport in 2020 is at least 10 % of the final consumption of energy in transport in that Member State'*.
- (326) That policy means that Member States of the Union need to set as a target that biofuels represent 10 % of all transport fuel sales by 2020. The implementation, current levels and methodology of calculating the biofuel content is not uniform throughout all Member States of the Union, but the progressively increasing mandate results in some 5 % to 7 % of biodiesel content being mixed into conventional fossil diesel fuel already now.

⁽¹¹¹⁾ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ L 140, 5.6.2009, p. 16.)

- (327) The fact that more biodiesel is being mixed into conventional fossil diesel fuel is an important element in the analysis of biodiesel market trends in the Union. The cost of production and prices of biodiesel are generally higher than the cost of production and prices of fossil-based diesel. It is therefore only due to the Renewable Energy Directive 2009/28/EC that producers of fuels (refineries) purchase biodiesel to mix it with fossil-based fuel.
- (328) The consumption of biodiesel is directly linked to mandates in Member States to mix certain levels of biodiesel in fossil fuels. The consumption of biodiesel is set to increase as and when more Member States reach the targets set by Renewable Energy Directive 2009/28/EC to be implemented by 2020. Other factors, such as the increase in the use of means of transportation using diesel engines, also have an impact on the consumption of biodiesel.

4.3. Imports from the country concerned

4.3.1. Volume and market share of the imports from the country concerned

- (329) The Commission established the volume of biodiesel imports based on Union import statistics from the Surveillance 2 database ⁽¹¹²⁾. The Commission established the market share of the imports on the basis of the Union biodiesel consumption established in Table 7.
- (330) Biodiesel imports into the Union from the country concerned developed as follows:

Table 8

Import volume (tonnes) and market share

	2014	2015	2016	Investigation period
Volume of imports from Argentina (tonnes)	0	31 340	0	394 005
Market share	0 %	0,3 %	0 %	2,8 %

Source: EU Import statistics based on Surveillance 2 database, EBB.

- (331) Because of the anti-dumping duties concerning imports, inter alia, from Argentina, imposed on 26 November 2013 by Regulation (EU) No 1194/2013 ⁽¹¹³⁾ there were no or negligible imports from Argentina to the Union between 2014 and August 2017. The negligible imports from Argentina in 2015 comprised of four separate import transactions that were reported in Spain, and, therefore, the Commission does not consider them as representative.
- (332) In September 2017, those anti-dumping duties applicable to imports of biodiesel from Argentina were significantly reduced by Regulation (EU) 2017/1578 ⁽¹¹⁴⁾ of 18 September 2017 and as a result, imports from Argentina started to increase rapidly and significantly, to reach a 2,8 % market share in the investigation period.
- (333) Biodiesel imports per month to the Union from Argentina during the second half of 2017 developed as follows:

Table 9

Import volume (tonnes) per month

	7/2017	8/2017	9/2017	10/2017	11/2017	12/2017
Volume of imports from Argentina (tonnes)	0	0	29 975	57 526	188 986	117 518

Source: EU Import statistics based on Surveillance 2 database.

⁽¹¹²⁾ Database of specific products under 'surveillance' or monitoring imported into the Union customs territory in the present and past years, maintained by the Directorate-General for Taxation and Customs Union.

⁽¹¹³⁾ Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia (OJ L 315, 26.11.2013, p. 2).

⁽¹¹⁴⁾ Commission Implementing Regulation (EU) 2017/1578 of 18 September 2017 amending Implementing Regulation (EU) No 1194/2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia (OJ L 239, 19.9.2017, p. 9).

- (334) There were no imports from Argentina between January and August 2017. The monthly import statistics in Table 9 show the rapid and significant increase of biodiesel imports following the reduction of the anti-dumping duties applicable to imports of biodiesel from Argentina.
- (335) Biodiesel imports per month to the Union from Argentina, during the period following the investigation period, in the first eight months of 2018 developed as follows:

Table 10

Import volume (thousand tonnes) per month

2018	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug
Volume of imports from Argentina ('000 tonnes)	173	161	131	30	119	161	141	177

Source: EU Import statistics based on Surveillance 2 database.

- (336) Imports of biodiesel from Argentina continued in 2018. The exported biodiesel arrives to the Union market in large single shipments, normally a full vessel. It is therefore less meaningful to analyse the monthly level of imports.
- (337) The level of imports did not slow down in the first 8 months of 2018. To the contrary, the estimated market share of Argentinian imports to the Union, presuming that the Union consumption remained unchanged, amounts to 11,5 % during the first 8 months of 2018. This shows that both the estimated market share and the average monthly import levels increased.
- (338) It is also important to note that there was no reduction of import levels from Argentina following registration of imports as of 25 May 2018 onwards. In fact, August 2018 was the month with the second highest level of imports from Argentina for the entire period considered.

4.3.2. Prices of imports from the country concerned and price undercutting

- (339) As indicated in recital (334), imports into the Union from Argentina started only towards the end of the investigation period, and there were no imports or only negligible imports in the years 2014-2016. The evolution of prices in the period considered, for 2015 and the investigation period is shown in Table 11 as follows.

Table 11

Import price

	2014	2015	2016	Investigation period	January-August 2018
Import prices from Argentina (EUR per tonne)	—	633	—	636	613

Source: EU Import statistics based on Surveillance 2 database.

- (340) During the period following the investigation period, the weighted average price of biodiesel imported from Argentina, for the volumes imported as described in recital (335), decreased to 613 EUR per tonne. Consequently, after the investigation period the average import price decreased by 3,6 % in comparison with the import price during the investigation period.
- (341) The Commission determined the price undercutting during the investigation period by comparing:
- the weighted average sales prices per product type of the sampled Union producers charged to unrelated customers on the Union market, adjusted to an ex-works level, and
 - the corresponding weighted average prices per product type of the imports from the sampled Argentinian producers to the first independent customer on the Union market, established on a CIF basis, with appropriate adjustments for importation costs.

- (342) Following the disclosure of the information document, a clerical error in the currency conversion of the CIF values into EUR was corrected for Group T6, leading to a decrease of the CIF value in EUR for Group T6.
- (343) Following the disclosure of the information document the Commission received comments from the GOA, CARBIO, and the unrelated importer Gunvor with regard to the adjustments made to the CIF price of the imports from the sampled Argentinian producers to the first independent customer on the Union market.
- (344) The GOA, CARBIO and the unrelated importer Gunvor stated that the export price of biodiesel from Argentina should be increased by conventional customs duties of 6,5 %. In addition, CARBIO and the unrelated importer Gunvor claimed that the export price of biodiesel from Argentina should be increased also by the anti-dumping measures ranging from 6,5 % to 8,1 % during the period of September 2017 to December 2017, that is for the four months during the investigation period when imports from Argentina started.
- (345) Following final disclosure, the GOA commented that the price undercutting calculation conducted by the Commission should include the anti-dumping duties. CARBIO submitted the same comment concerning inclusion of the anti-dumping duties at the earlier stage of the proceeding and reiterated it following final disclosure. The exporting producers also commented in this regard, claiming that the anti-dumping duties should be added.
- (346) The Commission accepted the claim with regard to the conventional customs duties to be added to the CIF price and has changed its calculations accordingly.
- (347) The Commission rejected the claim with regard to the anti-dumping duties to be added to the CIF price, finding the request in this regard unjustified. In the case at hand, the Commission considered that it is more appropriate to analyse the behaviour of the exporting producers absent the anti-dumping duties since, in the context of a threat of injury analysis, it has to analyse the future impact of the import prices on the Union industry, in accordance with Article 8(8)(d) of the basic Regulation. In addition, the measures imposing the anti-dumping duties were terminated on 18 October 2018 ⁽¹¹⁵⁾. Consequently, the anti-dumping duties will no longer have an effect on the import prices in the future and the anti-dumping duties already collected will have to be repaid or remitted with retroactive effect.
- (348) Following the disclosure of the information document, CARBIO commented that the Commission claims that since only one unrelated importer cooperated in the current investigation, the importation costs used in the 2013 anti-dumping investigation should also be used in this case. CARBIO further claimed that the Commission did not specify why it rejected the importation costs submitted by the unrelated importer in question. Gunvor also claimed that the actual importation cost submitted by it should be used. CARBIO reiterated this claim in the comments following final disclosure.
- (349) The Commission confirmed that for the methodology explained in recital (341) the reference used for adding the importation costs was the importation costs used in the investigation resulting in the anti-dumping duties imposed by Regulation (EU) No 1194/2013 ⁽¹¹⁶⁾. The reason for using those costs was that the only unrelated importer cooperating in the current investigation requested its data to remain confidential. In addition, the importation costs used in the previous investigation contained differentiated specific categories of importation costs and their quantification. This information was not available from the cooperating unrelated importer in the current investigation. No interested party provided any evidence showing any relevant differences between the importation costs of the product concerned used in 2013 and the importation costs incurred during the period of investigation. Moreover, the importation costs were expressed in EUR in 2013. Since the ARS exchange rate declined around 8 times since 2012, and inflation in the Eurozone since 2013 was very low (around 5 % in total over the last 6 years), the Commission considered it appropriate to use the importation costs provided in the previous investigation.
- (350) Following the disclosure of the information document, the Commission corrected a clerical error with regard to the calculation of the CIF value of the sampled exporting producers.

⁽¹¹⁵⁾ Commission Implementing Regulation (EU) 2018/1570 of 18 October 2018 terminating the proceedings concerning imports of biodiesel originating in Argentina and Indonesia and repealing Implementing Regulation (EU) No 1194/2013 (OJ L 262, 19.10.2018, p. 40).

⁽¹¹⁶⁾ The importation costs were expressed in EUR. Given the very low inflation level (the Harmonised Index of Consumer Prices published by Eurostat increased by a total of 4 % between 2012 and the investigation period) importation costs did not have to be updated.

- (351) As a result, the Commission made price comparisons on a type-by-type basis for transactions at the same level of trade, duly adjusted where necessary, and after deduction of rebates and discounts.
- (352) The comparison on a type-by-type basis focused on a comparison of the CFPP, irrespective of the feedstock used. Another characteristic that the Commission took into account was whether a product was subject to 'double-counting' in most Member States. 'Double-counting' allows the refinery to calculate the content of a specific type of biodiesel in a diesel fuel it produces twice (e.g. a 3 % content of 'double counting' biodiesel would be considered equivalent to a 6 % content). For Germany, where a different way of calculating the efficiency of CO₂ emission reduction is in place, the Commission also took into account this specificity of the German market.
- (353) The Commission established that in most cases the final customer purchasing biodiesel is not aware of, nor concerned by, the feedstock that was used in the production, but requires a product that fulfils a certain maximum CFPP level. This level would vary depending on the season and climatic conditions. During summer months and in warmer regions, customers accept higher CFPP levels, and require lower CFPP level biodiesel during winter months and in colder regions.
- (354) The Commission expressed the result of the comparison as a percentage of the sampled Union producers' turnover during the investigation period. It showed a weighted average undercutting margin by the imports of sampled exporters from the country concerned on the Union market of between 9,5 % and 15,2 %.

4.4. Economic situation of the Union industry

4.4.1. General remarks

- (355) In accordance with Article 8(5) of the basic Regulation, the examination of the impact of the subsidised imports on the Union industry included an evaluation of all economic indicators having a bearing on the state of the Union industry during the period considered.
- (356) As mentioned in recital (19), sampling was used for the determination of the threat of injury and the negative impact on the level of the sales prices, quantities sold, market share and profits of the Union industry.
- (357) For the injury determination, the Commission distinguished between macroeconomic and microeconomic injury indicators. The Commission evaluated the macroeconomic indicators on the basis of data contained in the questionnaire replies from the sampled Union producers and on the basis of the information provided by the EBB.
- (358) The Commission verified the methodology of collection of data submitted by the EBB and that the information was supported by adequate documentation and research procedures.
- (359) Both sets of data were found to be representative of the economic situation of the Union industry.
- (360) The macroeconomic indicators are: production, production capacity, capacity utilisation, sales volume, market share, growth, employment, productivity, magnitude of the amount of subsidisation, and recovery from past subsidisation or dumping.
- (361) The microeconomic indicators are: average unit prices, unit cost, labour costs, inventories, profitability, cash flow, investments, return on investments, and ability to raise capital.
- (362) Following the disclosure of the information document the Commission sent two additional sets of questions concerning the period following the investigation period. One set of questions was sent to the three sampled companies and another set to the EBB. The Commission analysed the replies provided by all parties concerned. The Commission used the information received for its findings concerning the period following the investigation period.

4.4.2. Macroeconomic indicators

4.4.2.1. Production, production capacity and capacity utilisation

- (363) The total Union production, production capacity and capacity utilisation developed over the period considered as follows:

Table 12

Production capacity and capacity utilisation

	2014	2015	2016	Investigation period
Production capacity (tonnes)	15 074 688	16 009 878	16 561 814	16 594 853
<i>Index</i>	100	106	110	110
Capacity utilisation	75 %	74 %	72 %	79 %
<i>Index</i>	100	98	96	105

Source: EBB.

- (364) The production capacity steadily increased by 10 % throughout the period considered, to take account of the growing demand.
- (365) Similarly, as in the case of the information on production, the EBB compiles data concerning capacity from its members, including national associations, and with regard to non-members, it gathers the information concerning capacity from other publicly available sources.
- (366) The production capacity figures do not include a significant part of capacity that is considered idle. The EBB explained that a number of installed biodiesel plants have not been operational for several years and should be considered as long-term-out-of-production. These plants, although nominally installed, would only be able to restart the production after investment in technical adaptation and after a significant period.
- (367) Capacity utilisation of the Union industry increased by 5 % (or 4 percentage points) from 75 % to 79 % in the period considered. The industry achieved the highest level of capacity utilisation during the investigation period.

4.4.2.2. Sales volume and market share

- (368) The Union industry's sales volume and market share developed over the period considered as follows:

Table 13

Sales volume and market share

	2014	2015	2016	Investigation period
Sales volume on the Union market (tonnes)	11 363 729	11 305 117	10 920 665	13 004 462
<i>Index</i>	100	99	96	114
Market share	95,4 %	95,9 %	95,5 %	91,6 %

Source: EBB, import and export statistics.

- (369) The Union industry's sales decreased by 4 % between 2014 and 2016, and then increased in the investigation period by 18 percentage points, i.e. 14 % higher than in 2014.

- (370) The factors driving the sales are the same factors driving consumption, which are described in recitals (324) to (328). Imports did not affect the sales level to a significant extent in the years 2014-2016, which was a reason for the stable levels of both sales and market share.
- (371) It was the reduction of duties from Argentina in 2017 that changed the picture of the market. Despite of the fact that imports started only towards the end of the year, the Union industry has lost 3,8 percentage points of market share compared to 2014. As explained in recital (333) this significant decrease of market share coincides with the imports of the product concerned entering the Union market in the last four months of the investigation period.
- (372) Following the disclosure of the information document CARBIO submitted a comment with regard to the market share of the Union industry established for the years 2015 to 2016, indicating that although there were no imports from Argentina, the Union industry was losing market share in that period.
- (373) The Commission verified the subject data and identified an error in calculating the Union consumption in the information document, which led to incorrect market shares of the Union industry. This error was corrected, and Tables 7 and 13 contain the corrected figures.
- (374) As a result of that correction, the Union market share in years 2015 to 2016 remained stable and decreased only during the investigation period due to increased volumes of Argentinian imports.

4.4.2.3. Growth

- (375) While the Union consumption grew by 19 % during the period considered, the sales and production of the Union industry increased by only 14 % and 15 % respectively. The Union industry was therefore not fully able to benefit from the market growth during the period considered, since a significant part of this growth was absorbed by increasing quantities of subsidised Argentinian imports during the investigation period.

4.4.2.4. Employment and productivity

- (376) Employment and productivity developed over the period considered as follows:

Table 14

Employment and productivity

	2014	2015	2016	Investigation period
Number of employees	2 406	2 763	2 762	2 733
<i>Index</i>	100	115	115	114
Productivity (tonne/employee)	4 718	4 267	4 329	4 782
<i>Index</i>	100	90	92	101

Source: EBB.

- (377) Employment in the Union developed differently to trends in production, sales and consumption. The relatively high increase of the employment happened in 2015, when it grew by 15 % year-to-year. Since then, it remained at a stable level, including the investigation period.
- (378) The increase of 2015 should be regarded as a reaction of the Union industry to an improving condition of the biodiesel market and expectation of future improvement. At the same time, the small decrease of employment in the investigation period does not yet represent the reaction to the increased imports from Argentina. The Union industry did not yet reduce capacity during the investigation period, and therefore employment remained stable.

4.4.2.5. Magnitude of the amount of the countervailable subsidies and recovery from past subsidisation or dumping

- (379) The impact of the subsidised imports from the country concerned on the Union industry was substantial, given the significant volumes and low prices of these imports.
- (380) On 26 November 2013 the Union imposed definitive anti-dumping duties on imports of biodiesel from, inter alia, Argentina. The duties were based on the injury elimination level ranging between 22 % and 25,7 %.
- (381) As stated in recital (332), those anti-dumping duties were significantly reduced in September 2017 and as a result, biodiesel imports from Argentina started to notably increase. As noted in recital (330) the estimated market share of Argentinian biodiesel imports in the Union reached 2,8 % in the investigation period. The estimated market share of Argentinian biodiesel imports in the Union for the last quarter of 2017 is above 10 %. Imports of biodiesel from Argentina into the Union continued to increase after the investigation period, and in spite of the registration of imports, the estimated market share of Argentinian imports in the Union for the first half of 2018 remained at above 10 %.
- (382) Import statistics for the period following the investigation period referred to in detail in recital (335) shows that level of imports until August 2018 continued, and even further increased, in spite of the registration of imports as of 18 May 2018.
- (383) The significant and rapid increase of biodiesel imports from Argentina into the Union started in September 2017 and imports continued in spite of the registration of imports. As a consequence of their low prices significantly undercutting the Union industry's prices, the Union industry lost market share and was not able to fully benefit from the market growth.

4.4.3. Microeconomic indicators

4.4.3.1. Prices and factors affecting prices

- (384) The weighted average unit sales prices of the sampled Union producers to unrelated customers in the Union developed over the period considered as follows:

Table 15

Sales prices in the Union

	2014	2015	2016	Investigation period
Average unit sales price in the Union on the total market (EUR/tonne)	817	715	765	832
<i>Index</i>	100	87	94	102
Unit cost of production (EUR/tonne)	797	728	767	827
<i>Index</i>	100	91	96	104

Source: Sampled Union producers.

- (385) The weighted average unit sales price of the sampled Union producers to unrelated customers decreased significantly in 2015 by 13 %. Prices subsequently increased in 2016 and the investigation period to reach a level 2 % above that of 2014.
- (386) The unit cost of production of the sampled Union producers followed the trend of prices, and decreased in 2015 by 9 %. The unit cost increased in 2016 and the investigation period to reach a level 4 % above that of 2014. This followed the price evolution of the main raw material, rapeseed, that increased by 8 % between 2014 and the investigation period ⁽¹¹⁷⁾.

⁽¹¹⁷⁾ European Commission, Directorate-General for Agriculture and Rural Development, Market-Observatory: https://ec.europa.eu/agriculture/market-observatory/crops_en, accessed on 27 November 2018, rapeseed — EU Rouen (EUR/t).

- (387) The average unit sales price and unit cost concern the sampled Union producers, but are not directly comparable. This is because prices concern only sales to unrelated customers in the Union, while costs are for the total production.
- (388) The evolution of the price of biodiesel is linked to the market price evolution of the feedstock, which is either the agricultural produce or the oil. The cost of feedstock constitutes the main cost factor and extensively determines the total cost of production, and as a result, the market sales price.
- (389) Following the disclosure of the information document the Commission received comments from the GOA concerning the weighted average unit sales price of the sampled Union producers to unrelated customers. The GOA stated that this price decreased significantly in 2015 by 13 % and that the Commission had not made any analysis in order to dissociate other causes of possible injury, even though it was irrefutable that Argentinian imports during 2015 represented only a 0,5 % market share.
- (390) The Commission noted that, as explained in recital (388), the evolution of the price of biodiesel is linked to the market price evolution of the feedstock. Indeed, the international price of rapeseed oil decreased by 14,5 % between 2014 and 2015 ⁽¹¹⁸⁾. This corresponds to the 13 % decrease of the weighted average unit sales price of sampled Union producers indicted by the GOA and, at the same time, confirms the statement that the cost of feedstock determines the market sales prices.

4.4.3.2. Labour costs

- (391) The average labour costs of the sampled Union producers developed over the period considered as follows:

Table 16

Average labour costs per employee

	2014	2015	2016	Investigation period
Average labour costs per employee (EUR)	66 530	71 573	65 237	65 874
<i>Index</i>	100	108	98	99

Source: Sampled Union producers.

- (392) The average labour costs were stable, with the exception of 2015 when they were higher than in the other years. This was the year when the Union industry started significantly increasing the level of employment. As can be observed, in the following periods, 2016 and the investigation period, where the steady increase of employment was happening throughout the full year, the average labour costs remain at a very similar, stable level.

4.4.3.3. Inventories

- (393) Stock levels of the sampled Union producers developed over the period considered as follows:

Table 17

Inventories

	2014	2015	2016	Investigation period
Closing stocks (tonnes)	117 074	85 725	92 291	87 864
<i>Index</i>	100	73	79	75

Source: Sampled Union producers.

⁽¹¹⁸⁾ Source: World Bank, International prices of imported raw materials — Rapeseed Oil

- (394) Stock levels of the sampled Union producers were highest in 2014. They decreased by 27 % between 2014 and 2015 and were at a comparable level since then. The level of stocks did not follow the increased production and sales in the investigation period. Given that the product under investigation is sold in bulk, a single delivery can comprise a significant volume of more than 10 000 tonnes. Therefore, a single delivery can have a significant impact on the stock level, depending on the precise transaction date. Therefore, the level of stocks is a less meaningful indicator for the Union industry.

4.4.3.4. Profitability, cash flow, investments, return on investments and ability to raise capital

- (395) Profitability, cash flow, investments and return on investments of the sampled Union producers developed over the period considered as follows:

Table 18

Profitability, cash flow, investments and return on investments

	2014	2015	2016	Investigation period
Profitability of sales in the Union to unrelated customers (% of sales turnover)	5,0 %	– 0,1 %	0,9 %	0,8 %
<i>Index</i>	100	– 3	18	16
Cash flow (EUR)	95 181 923	23 004 159	26 458 832	35 102 719
<i>Index</i>	100	24	28	37
Investments (EUR)	8 970 184	19 697 707	8 039 845	38 946 892
<i>Index</i>	100	220	90	434
Return on investments	78 %	– 3 %	18 %	16 %
<i>Index</i>	100	– 4	23	21

Source: Sampled Union producers.

- (396) The Commission established the profitability of the three sampled Union producers by expressing the pre-tax net profit of the sales of the like product to unrelated customers in the Union as a percentage of the turnover of those sales. The profitability is based on cost of goods sold.
- (397) The profitability was low in the whole period considered. Only in 2014 it reached 5 %, whereas there was no profit in 2015 and it did not exceed 1 % in 2016 and the investigation period. The higher profitability in 2014 was mainly due to the extraordinary and financial income of one of the sampled Union producers. Without those items, the profitability of the Union industry in 2014 would be comparable with the other years of the period considered.
- (398) The profitability of the Union industry decreased further in the period following the investigation period and for the first six months of 2018 turned into a loss of 1,7 %.
- (399) In spite of low profit levels, the Union industry was generating a positive cash flow from its operations in the whole period considered. It was able to self-finance its activities. But also in the case of cash flow, the Union industry generated the highest level in 2014, and did not exceed 37 % of that level in any of the following years.
- (400) The Union industry continued to invest during the whole period considered, reaching their highest level of investments during the investigation period. Therefore, the sudden arrival of subsidised imports from Argentina towards the end of the investigation period has not yet negatively affected the level of investments carried out by the Union industry.

- (401) The return on investments is the profit in percentage of the net book value of investments. The return on investment significantly decreased by 79 % during the period considered, largely reflecting the trend of profitability.
- (402) The financial performance of the Union Industry in terms of profits during the investigation period limited its ability to raise capital.
- (403) Following the disclosure of the information document, the GOA claimed that the low profitability of the Union industry during the whole period between 2014 and the investigation period cannot be the result of the imports from Argentina that resumed only in September 2017. In this context, the unrelated importer, Gunvor, also commented following the disclosure of the information document that the Union industry is not suffering from material injury.
- (404) Following final disclosure, the GOA and CARBIO reiterated their comments with regard to the performance of the Union industry and made reference to a number of performance indicators that developed positively. The GOA also reiterated its conclusion that in the absence of imports from Argentina the economic situation of the Union industry was not affected by the imports from Argentina.
- (405) The Commission observed that the trends, including the trends of profitability, show that the Union industry appears not to have fully recovered from the effects of past dumping. This refers to the period between 2014 and the investigation period that the GOA indicated in its comment. In addition, although imports from Argentina indeed resumed only in September 2017, the fact that they reached an estimated market share of more than 10 % in the last quarter of 2017 cannot be unrelated to the Union industry reaching only 0,8 % profitability during the investigation period (and ultimately losses afterwards). Consequently, that claim was rejected.

4.5. Economic indicators following the investigation period

- (406) The Commission requested and received replies to additional questions to the sampled Union producers. The post-investigation period data, like the microeconomic indicators for the investigation period, were presented as a weighted average of the three sampled Union producers.
- (407) For the post-investigation period, for certain macroeconomic indicators such as capacity, capacity utilisation, production and sales the information could only be analysed for the sampled Union producers, due to the time limits of the investigation. Therefore, the figures for the investigation period are not directly comparable to the figures given in Section 4.4.2. The figures nevertheless allow an analysis of the development of the situation of the sampled Union producers after the investigation period.
- (408) The production, sales and unit costs and unit sales prices, of the sampled Union producers developed as follows:

Table 19

Union industry following the investigation period

	Investigation period	January-March 2018	April-June 2018
Total production (tonnes)	2 614 770	602 303	585 734
<i>Index (annualised)</i>	100	92	90
Sales volume on the Union market (tonnes)	2 657 665	591 108	648 698
<i>Index (annualised)</i>	100	89	98
Unit cost of production (EUR/tonne)	827	793	787
<i>Index</i>	100	96	95

	Investigation period	January-March 2018	April-June 2018
Average unit sales price in the Union on the total market (EUR/tonne)	832	765	773
<i>Index</i>	100	92	93

Source: Sampled Union producers.

- (409) The developments during the period following the investigation period are presented in comparison to the investigation period for the first and second quarter of 2018, with values indexed to the investigation period.
- (410) The capacity of the sampled Union producers in the first half of 2018 remained stable whereas the capacity utilisation decreased from 85 % to 76 %.
- (411) Both, the production and sales decreased in the first and the second quarter following the investigation period.
- (412) Both, the unit costs and the unit sales prices decreased in both quarters following the investigation period. The unit cost of production decreased by 5 % while the average sales price decreased by 7 %, leading to the decrease in profitability described in recital (398).

4.6. Conclusion on injury

- (413) Apart from a negligible figure of imports in 2015, there were no imports of biodiesel from Argentina to the Union market before September 2017. Although these imports started only late in the investigation period, the imports reached a level that allowed them to reach a market share of 2,8 % in the investigation period increasing to an estimated market share of more than 10 % in the last quarter of 2017, which appears to be confirmed for the first half of 2018, in spite of the registration of imports.
- (414) During the period considered the injury indicators showed a mixed picture. Production and sales of the Union industry largely followed the market demand, were stable between 2014 and 2016, and increased in the investigation period, without fully benefitting from the market growth towards the end of the period considered, which was partly taken by the subject imports. Investments significantly increased during the period considered. This was a positive development indicating that the industry started to recover. The start of the increase of employment in 2015 can also be regarded as an indication that the Union industry started to improve its condition in the absence of subsidised imports from Argentina.
- (415) In the period following the investigation period the majority of economic indicators showed a clear further deterioration of the economic situation of the Union industry. This concerns the capacity utilisation, production, sales and unit sales prices, as described above.
- (416) However, the profitability of the Union industry remained low for most of the period considered, and it did not manage to further improve its productivity per employee. This indicates that the Union industry did not manage to reach the level of regular, profitable operations in this short time. The situation further deteriorated in the first six months of 2018 when the Union industry reported losses.
- (417) The Commission found that the investigation period was already negatively influenced by imports from Argentina and the period following the investigation period indicated further deterioration of the situation of the Union industry. In spite of an increase of sales and production, caused by increasing consumption during the investigation period, the Union industry did not show indications of improving its economic situation. In fact, during the investigation period, the Union industry showed almost no profits in view of the pressure exercised by the low prices of the subject imports. The low profits during the investigation period turned into losses in the first six months of 2018. The trends examined before show that the Union industry appears not to have fully recovered from the effects of past dumping. Whilst not being conclusive on the existence of material injury during the period of investigation, the Commission will examine whether there is, at the very least, a threat of material injury.

5. THREAT OF INJURY

5.1. Introduction

- (418) In accordance with Article 8(8) of the basic Regulation, the Commission examined whether the subsidised imports from the country concerned amount to a threat of material injury to the Union industry.
- (419) In the analysis of a threat of material injury to the Union industry, in accordance with Article 8(8), second subparagraph, of the basic Regulation, consideration is given to such factors as:
- the nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom,
 - a significant rate of increase of subsidised imports into the Union market indicating the likelihood of substantially increased imports,
 - sufficient freely disposable capacity of the exporting producer on the part of the exporter or an imminent and substantial increase in such capacity indicating the likelihood of substantially increased subsidised exports to the Union, account being taken of the availability of other export markets to absorb any additional exports,
 - whether imports are entering at prices that would, to a significant degree, depress prices or prevent price increases which otherwise would have occurred, and would probably increase demand for further imports, and
 - the level of inventories.

5.2. The nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom

- (420) In recital (304), the Commission concluded on the existence of countervailable subsidies in accordance with the basic Regulation. Those subsidies found show that the imports of the product concerned potentially benefit from governmental support. The significant undercutting found during and after the investigation period is expected to affect even more negatively the delicate economic situation of the Union industry already observed during the investigation period. Moreover, as explained in recital (158), the GOA's measures supporting the domestic biodiesel industry ensure that biodiesel exports remain very competitive because of the lower costs of obtaining soybeans (as opposed to Union producers who are impacted by higher price fluctuations in the costs of the rapeseeds). It is therefore foreseeable that the subsidised imports of the product concerned, because of the nature of the GOA's support measures, could continue to negatively affect the Union industry's economic situation.

5.3. Significant rate of increase of subsidised imports into the Union market indicating the likelihood of substantially increased imports

- (421) There is a clear link between the sudden and substantial increase of biodiesel imports to the Union market from Argentina since September 2017 and the reduction of the anti-dumping duties imposed as of that month, as shown in Table 9. This indicates the ability of the Argentinian exporting producers to quickly react to the changing market conditions. In addition, the data showing Argentinian biodiesel imports following the investigation period confirms that, in spite of the registration of imports, the Argentinian exporting producers continue to export to the Union market similar quantities to the ones exported during the investigation period, once the anti-dumping duties were reduced or lifted.
- (422) Therefore, in view of the attractiveness of the Union market for the Argentinian exports, the Commission considered that after the reduction of anti-dumping duties in September 2017, the fact that the volume of biodiesel imports from Argentina have increased significantly indicates the likeliness that such imports will continue to increase. The analysis of imports during the period of January to August 2018 set out in recital (463) confirms actual further increase of biodiesel imports from Argentina.

5.4. Sufficient freely disposable capacity and absorption capacity of third countries

- (423) According to the OECD agricultural statistics ⁽¹¹⁹⁾ of the world biodiesel consumption, in 2017 Argentina had only around 3,5 % of the worldwide consumption. As indicated in recital (202), Argentina exported during the investigation period 57 % of its production.

⁽¹¹⁹⁾ OECD-FAO Agricultural Outlook 2016-2025 — © OECD 2016, https://www.oecd-ilibrary.org/agriculture-and-food/data/oecd-agriculture-statistics_agr-data-en, accessed on 10 September 2018.

- (424) The low level of Argentinian consumption compared with the worldwide consumption, and consumption in the Union at around 40 % and the USA at around 25 % clearly indicates that the Argentinian biodiesel sector is export-oriented and dependent on these markets (see also recital (209)).
- (425) The spare capacity of the Argentinian biodiesel producers during the investigation period is estimated at more than 1,2 million tonnes. That estimate is based on information received from the sampled exporting producers, which represent 84 % of all exports to the Union, extrapolated to the whole Argentinian industry.
- (426) The spare capacity of the Argentinian biodiesel producers remained at a similar level in the period following the investigation period according to the information provided to the Commission by the EBB.
- (427) On 27 August 2017, the USA imposed provisional countervailing duties against imports of biodiesel from Argentina at rates between 50 % and 60 % and then on 9 November 2017 definitive duties at rates between 71,45 % and 72,28 %. In October 2017, the USA imposed provisional anti-dumping duties ranging from 54,36 % to 70,05 %. On 3 January 2018, the USA confirmed those duties in its Final Determination ⁽¹²⁰⁾, slightly modifying the levels to range from 60,44 % to 86,41 %.
- (428) The magnitude of the level of duties imposed in the USA, which before the imposition of those duties was the most important export market for Argentina, gives strong indications that those biodiesel exports were immediately redirected to the Union market. This redirection is reinforced by the almost simultaneous decrease of anti-dumping duties on Argentinian biodiesel in the Union. This development is shown in Table 20 below:

Table 20

Export volume (tonnes) per month

Volume of exports from Argentina (tonnes)	7/2017	8/2017	9/2017	10/2017	11/2017	12/2017
To the USA	220 360	14 483	0	0	0	0
To the Union	0	60 000	30 000	200 000	185 000	163 091

Source: Argentinian Export Statistics.

- (429) The level of exports from Argentina to the Union provided in Table 20 does not equate the level of imports to the Union from Argentina provided in Table 9 in recital (333). The difference is not only due to a different source of data, but mainly to a different timing in registering export and import transactions in the respective statistics.
- (430) As indicated in recital (425), there is sufficient freely disposable capacity in Argentina which is even increasing due to a change in the pattern of sales (namely the exclusion of the USA market). That indicates the likelihood of substantially increasing quantities of subsidised exports to the Union. There are no other known export markets that could absorb those additional exports, since the USA and the Union together account for around 2/3 of the global consumption of biodiesel.
- (431) Following the disclosure of the information document, with regard to the absorption capacity of the export markets for the Argentinian exporting producers, on 10 July 2018 the authorities of Peru confirmed the imposition of anti-dumping and countervailing duties, totalling together from 137,4 to 399,8 USD per tonne.
- (432) The Commission found indications that the threat of a continued redirection of imports from Argentina may cause injury to the Union industry.

⁽¹²⁰⁾ International Trade Administration: 'Biodiesel From Argentina: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances', document number 2018-04137.

5.5. Price level of subsidised imports

- (433) Biodiesel imports from Argentina that arrived in the Union market during the last four months of the investigation period were imported at substantially lower prices than the prices charged by the Union industry. As explained in recital (354), the Commission established for the investigation period weighted average undercutting margins of between 9,5 % and 15,2 %. The comparison of prices observed in the import statistics compared with sales prices of the Union industry confirms this difference. The prices of biodiesel imported from Argentina decreased even further during the period following the investigation period.

5.6. Level of inventories

- (434) The evolution of level of inventories of the sampled Union producers is described in detail in recital (394). As explained, due to the fact that the product concerned is sold in bulk the level of inventories is a less meaningful indicator for the threat of injury.

5.7. Conclusion

- (435) In view of the analysis of the factors concerning threat of injury listed in recital (419), the Commission concluded that the fragile economic condition of the Union industry is likely to be aggravated by the imminent and continuing massive quantities of subsidised imports of biodiesel from Argentina. Therefore, at the very least there was a threat of a clearly foreseeable and imminent injury to the Union industry at the end of the investigation period, which supports a finding of threat of injury under Article 8(8) of the basic Regulation.
- (436) Following final disclosure, the GOA disagreed with the conclusion of the Commission and stated that the increase of imports was due to the fact that imports from Argentina were illegally deprived of the Union market during the period of 2012 to 2017. The GOA also added that the Commission has not assessed evidence in order to confirm that the increase of biodiesel imports from Argentina will continue in the future.
- (437) The Commission provided in recital (428) detailed information on the development of monthly imports of biodiesel from Argentina during the investigation period. In recital (463) the Commission provided information about the level of imports of biodiesel from Argentina in the period from January to August 2018. This information indicates that imports that started in September 2017 continued, in spite of their registration, following the investigation period.
- (438) The imports, which the Commission found to be subsidised, and their continuing massive quantities imported to the Union constituted a threat of a foreseeable and imminent injury to the Union industry at the end of the investigation period. The Commission did therefore not change its finding of threat of injury under Article 8(8) of the basic Regulation.
- (439) Following final disclosure, CARBIO commented, with regard to the analysis of the economic indicators following the investigation period, that prices of RME are seasonal, that in the period of August to October 2018 the RME prices were at a record high, and that sales of Union industry during the period following the investigation period increase if compared to 2016.
- (440) The Commission took note of these comments. However they neither contradict nor change the Commission conclusion, in particular with regard to injury during the investigation period, set out in recital (417).

6. CAUSATION

- (441) In accordance with Article 8(5) of the basic Regulation, the Commission analysed whether the threat of material injury to the Union industry was caused by the existing subsidised imports from the country concerned. In accordance with Article 8(6) of the basic Regulation, the Commission also examined whether other known factors could at the same time have threatened to injure the Union industry. The Commission ensured that any possible threat of injury caused by factors other than the subsidised imports from Argentina was not attributed to the subsidised imports. Those factors are imports from third countries and export performance of the Union industry.

6.1. Effects of the subsidised imports

- (442) As stated in recital (334), there were no imports or only negligible imports to the Union from Argentina in the years 2014-2016 as well as during the first months of the investigating period. However, the imports increased significantly during the last months of the investigation period. As indicated in recital (381) the estimated market share of the Argentinian imports for the last quarter of 2017 is above 10 % and remained above 10 % during the first quarter of 2018 that is after the investigation period and in spite of the registration of imports. As shown in recital (354), the Argentinian biodiesel imports were undercutting the Union industry prices by 9,5 % to 15,2 % during the investigation period.
- (443) In view of the coincidence in time between, on the one hand, the significant and sudden increase of the subsidised imports of Argentinian biodiesel at prices below those of the Union industry, and, on the other hand, the Union industry's estimated loss of market share in the last quarter of 2017 and the first quarter of 2018, together with its inability to achieve profits, the Commission concluded that those subsidised imports had a negative impact on the situation of the Union industry. Moreover, the insignificant domestic consumption in Argentina, the significant spare capacity of the Argentinian biodiesel producers, and the foreclosure of the second biggest export market of USA have directed the excess production from Argentina to the Union, which constitutes 40 % of the worldwide consumption. Thus, the Union has become one of the most attractive destinations for Argentinian subsidised imports of biodiesel, to the detriment of the Union industry.
- (444) Following the disclosure of the information document, the GOA claimed that the imports from Argentina do not represent a significant increase of imports or market shares. The unrelated importer Gunvor noted in this regard that imports return to their historical averages.
- (445) In this regard, the Commission considered reaching an estimated market share exceeding 10 % in the last quarter of 2017 as compared to a 0 % market share during the first eight months of 2017 as a significant increase.
- (446) In addition, following the disclosure of the information document CARBIO stated that in the context of a threat of injury analysis the Commission must indicate the likelihood of substantially increased imports, and that an increase in imports which is due merely to the return of allegedly normal conditions of trade and competition, resulting from the removal of unjustified anti-dumping duties, does not indicate a likelihood that imports will continue to increase substantially.
- (447) As explained in recitals (335) to (338), imports of biodiesel from Argentina continued in 2018 and reached an estimated level of 11,5 %. In addition, there was no reduction of import levels from Argentina following the registration as of 25 May 2018 onwards. This, combined with the spare capacity of the Argentinian biodiesel producers described in recital (425) and the attractiveness of the Union market, indicates the likelihood that imports will continue to increase substantially in the future. In the Commission's view, this increase in imports originating from Argentina reflects unfair trading conditions (as opposed to normal trade conditions without the previous anti-dumping measures in place) because of the subsidies found to exist.
- (448) Therefore, the Commission considered that the subsidised imports of Argentinian biodiesel are causing a threat of material injury to the Union industry.

6.2. Other known factors

- (449) The Commission also examined whether other known factors, individually or collectively, are capable of attenuating the causal link established between the subsidised imports and the threat of injury found to exist.
- (450) Following the disclosure of the information document CARBIO claimed that the Union industry had not managed to achieve a gradual recovery during the period considered, that is also during the time that there was no imports from Argentina. CARBIO further argued that this is evidence that there are other factors that impact on the performance of the Union industry.
- (451) The Commission concluded in recital (416) that the profitability of the Union industry indeed remained low for most of the period considered and it did not manage to reach the level of regular, profitable operations. However, as explained in recital (405), the Commission observed that the Union industry appears not to have fully recovered from past dumping found in the previous investigation. Moreover, the fact that the Union producers

use rapeseeds as an input (compared to the Argentinian export producers, using soybeans) does not explain the price differences between the Union biodiesel and the Argentinian biodiesel. Should the exporting producers purchase the soybeans at undistorted prices, their export prices would be very similar to the Union prices. Thus, as further developed below, the investigation has not established any factors that would have attenuate the causal link between subsidised imports and the threat of injury found. Consequently, that claim was rejected.

6.3. Imports from third countries

(452) The volume of imports from other third countries developed over the period considered as follows:

Table 21

Imports from third countries

Country		2014	2015	2016	Investigation period
People's Republic of China	Volume (tonnes)	5 395	1 160	38 497	217 313
	<i>Index</i>	100	22	714	4 028
	Market share	0,0 %	0,0 %	0,3 %	1,6 %
	Average price (EUR/tonne)	941	826	763	812
Malaysia	Volume (tonnes)	340 240	349 571	273 427	378 395
	<i>Index</i>	100	103	80	111
	Market share	2,9 %	2,9 %	2,3 %	2,7 %
	Average price (EUR/tonne)	883	880	975	1 007
All countries except Argentina, China and Malaysia	Volume (tonnes)	197 787	104 765	202 879	207 953
	<i>Index</i>	100	53	103	105
	Market share	1,7 %	0,9 %	1,7 %	1,5 %
	Average price (EUR/tonne)	820	791	762	891

Source: EU Import statistics based on Surveillance 2 database.

- (453) Other than imports from Argentina, imports from only two other countries, the People's Republic of China ('the PRC') and Malaysia, have exceeded a market share of 1 % in any given year.
- (454) The only significant imports from the PRC appeared in the investigation period and reached a market share of 1,6 %.
- (455) Imports from Malaysia were at a stable level throughout the period considered with a market share between 2,3 % and 2,9 %.
- (456) Imports from third countries other than Argentina, the PRC or Malaysia never exceeded a combined market share of 1,7 %. Therefore, none of these countries could have had any significant influence the market share of the Union industry, in particular given the stable quantities of such imports.
- (457) The average price of biodiesel imported from the PRC during the investigation period was 812 EUR per tonne. This was the only time when such imports were in significant quantities. With regard to Malaysia, the average import price ranged from 883 EUR per tonne in 2014 and increased to over 1 000 EUR per tonne in the investigation period. At the same time the volumes increased only by 11 % during the period considered, which is below the increase in demand leading to a loss of market share.

- (458) In this regard, the average import price from Argentina was 636 EUR per tonne in the investigation period, which is significantly lower than all other market players. The statistical information does not precisely indicate differences in the characteristics of the biodiesel imported to the Union. Price differences result from different levels of CFPP and from whether the biodiesel imported can be subject to 'double-counting' or not.
- (459) Following the disclosure of the information document the GOA claimed that there is no causal link between the imports from Argentina and injury to the Union industry due to other factors, namely imports from other countries.
- (460) Following final disclosure, the GOA reiterated its claim that the Commission failed to examine the effects of all possible factors other than imports of biodiesel from Argentina that might be causing injury to the Union industry.
- (461) Following final disclosure, CARBIO reiterated its claim that the threat of injury was not caused by imports from Argentina.
- (462) With regard to imports from other countries, the Commission provided detailed information above. The two other countries with significant imports during the investigation period were Malaysia and the PRC, that held 2,7 % and 1,6 % market share in the Union, respectively. These market shares are appreciably lower compared with a market share established for the last quarter of 2017 for imports from Argentina of more than 10 %. Moreover, the average price for imports from Malaysia and PRC was 1 007 and 812 EUR per tonne respectively. These prices, compared to 636 EUR per tonne of biodiesel imported from Argentina during the investigation period show that the imports from Malaysia and PRC, both in volume and value, did not attenuate the causal link established between the subsidised imports and the threat of injury found to exist.
- (463) Following the disclosure of the information document CARBIO commented on the increasing imports from Indonesia. The imports from other third countries during the first eight months of 2018, compared to imports from Argentina during the same period presented in recital (335) were following:

Table 22

Imports from third countries January-August 2018

	Volume of imports (tonnes)	Estimated market share	Average price (EUR)
Argentina	1 092 024	11,5 %	613
People's Republic of China	173 693	1,9 %	686
Indonesia	467 769	5,0 %	667
Malaysia	303 421	3,2 %	732
All countries except Argentina, the PRC and Malaysia	150 159	1,6 %	542

Source: EU Import statistics based on Surveillance 2 database.

- (464) As analysed in more detail in recitals (336) to (338), imports from Argentina continued following the investigation period in spite of registration of imports. Their estimated market share, assuming an unchanged consumption level and annualised for comparability, amounts to 11,5 %. Imports from the PRC remained at a very similar level, reaching a market share of 1,9 % compared to 1,6 % during the investigation period. It is significant that imports of biodiesel from Indonesia into the Union appeared again, and reached an estimated market share of 5 % during the period of January-August 2018. At the same time, these imports were less than half the quantity of imports from Argentina. Imports from Malaysia increased slightly reaching an estimated market share of 3,2 % as compared to 2,7 % during the investigation period.
- (465) With regard to the average price per tonne of imports from third countries, the price per tonne of biodiesel imported from Argentina remains by far the lowest among the four countries with significant imports. The average prices of imports from the PRC and Malaysia have also decreased during the first eight months of 2018.

- (466) On that basis, the Commission concluded that the exports from third countries, although they might have contributed to the lack of recovery of the Union industry, did not attenuate the causal link between subsidised imports and the threat of injury found. The Commission concluded that it is unlikely that exports from third countries would be the main cause of injury in the imminent future.

6.4. Export performance of the Union industry

- (467) None of the sampled Union producers exported biodiesel during the period considered. The export statistics in Table 23 are therefore based on a publicly available source, and provide information for the whole Union industry:

Table 23

Export performance of the Union industry

	2014	2015	2016	Investigation period
Export volume (tonnes)	98 552	111 884	190 633	217 146
<i>Index</i>	<i>100</i>	<i>114</i>	<i>193</i>	<i>220</i>

Source: Eurostat export statistics

- (468) The level of biodiesel exports of the Union industry was limited. It did not exceed 3,5 % of its total sales on the Union market in any year of the period considered. The export performance of the Union industry cannot have been a cause for the lack of recovery of the domestic industry and its delicate economic situation in the investigation period.
- (469) CARBIO in its submission commented that the low level of imports could not be the cause of injury suffered by the Union industry and repeated this argument following the disclosure of the information document. In this regard, the Commission notes that even less significant imports of the product concerned can have the effect of suppressing prices on the Union market. The imports from Argentina significantly exceed the threshold of negligible injury mentioned in Articles 10(9) and 14(4) of the basic Regulation, and in the last quarter of the investigation period even exceeded 10 %.
- (470) CARBIO further claimed that there is no injurious effect of imports, because these depend on seasonal variations, the price of diesel and supply of feedstock. The information that the Commission received from the cooperating exporting producers, the Union producers and from public sources also included information concerning seasonal variations, the price of diesel and supply of feedstock. It allowed the Commission to take also these factors into account in its analysis.
- (471) Following final disclosure, CARBIO reiterated the comment that the Union industry is not facing a threat of material injury and that the alleged threat of material injury was not caused by imports from Argentina. In addition, CARBIO makes reference to findings of the Commission Regulation (EU) 2018/1570 ⁽¹²¹⁾, referred to in recital (347) in which the Commission concluded that it is not possible to establish a causal link between the dumped imports from Argentina and the material injury suffered by the Union industry.
- (472) With regard to the reference made to Regulation (EU) 2018/1570, the Commission noted that the finding of this Regulation concerned material injury and not threat of injury, and that the investigation period reassessed by the Commission was 1 July 2011 to 30 June 2012, as compared to investigation period of January to December 2017 of this Regulation. Given the different time periods and the different legal standards, the findings of that Regulation are not relevant for the Commission's findings in this investigation.

⁽¹²¹⁾ OJ L 262, 19.10.2018, p. 40.

6.5. Reduction of production of the Union industry

- (473) In the course of the analysis for the registration of imports, the Commission also took note of two companies that announced reductions in the production of biodiesel in March 2018, namely Saipol, the largest European biodiesel producer, and ADM ⁽¹²²⁾.
- (474) Following the disclosure of the information document, the EBB provided additional information concerning the negative impact of increasing imports from Argentina on six companies of the Union industry. The information relating to five of the companies referred to a negative impact on their profitability. For one of the six companies, production will be substantially reduced as a result of the Argentinian imports. One of the six companies also indicated Argentinian imports had had a substantially negative impact on their revenue. These companies account for more than 10 % of Union production and capacity taken together.

6.6. Conclusion

- (475) The Commission established that there is a causal link between the threat of injury suffered by the Union industry and the subsidised imports of biodiesel from Argentina. There is a coincidence in time between the sharp increase of, in the particular, the level of the subsidised imports at low prices undercutting the Union industry's prices, and the drop of the Union industry's performance, in particular from the last quarter of 2017 onwards. The Union industry was unable to reap the benefits of increased Union consumption and had to limit its increase in production, lost market share and was unable to achieve profits. Those negative developments continued in the period following the investigation period. The Union industry had no other choice but to follow the price level set by the subsidised imports in order to avoid a further shrinking of its market share. This resulted in a loss-making situation which is likely to further deteriorate.
- (476) The Commission distinguished and separated the effects of all known factors on the situation of the Union industry from the injurious effects of the subsidised imports.
- (477) The other identified factors such as exports from other third countries, export sales performance of the Union industry, and a reduction of capacity of the Union industry did not attenuate the causal link.

7. UNION INTEREST

- (478) In accordance with Article 31 of the basic Regulation, the Commission examined whether it could clearly conclude that it was not in the Union interest to adopt measures in this case, despite the determination of injurious subsidisation. The Commission bases the determination of the Union interest on an appreciation of all the various interests involved, including those of the Union industry, importers and consumers.

7.1. Interest of the Union industry

- (479) Biodiesel is an important element of an effort to reduce greenhouse gas emissions and improve the energy supply in the Union.
- (480) The Union industry uses mainly feedstock produced by the Union agriculture. The upstream agricultural oil sector largely depends on the biodiesel industry. Imports of biodiesel from Argentina would therefore not only influence the biodiesel industry, but also the agricultural sector in the Union.
- (481) After the disclosure of the information document, the EBB submitted further evidence of injury suffered by the Union industry, such as negative impact on their profitability and a substantial reduction of production (see recitals (362) and (474)).
- (482) The Commission found that the situation of the Union industry is fragile since it has not fully recovered from the dumping previously suffered. The Commission therefore concluded that the imposition of countervailing duties would be in the interest of the Union industry.

⁽¹²²⁾ Information about reductions in the production of biodiesel of Saipol and ADM is made available to the interested parties on the file.

7.2. Interest of unrelated importers

- (483) As referred to in recital (30), only one unrelated importer, Gunvor International BV, replied to the questionnaire sent by the Commission. In its reply, the importer submits that it is against the imposition of measures and that the situation of the Union industry is caused by an inefficient production system and management.
- (484) The Commission observes that importers of biodiesel are very often traders on the Union market that not only do import, but also trade with biodiesel purchased from Union producers. However, the Union producers, especially the larger ones, rely to a significant extent on their own distribution channels. The Commission therefore does not expect the importers would be able to fully replace the level of imports affected by measures with biodiesel purchased from Union producers. The possible negative effect on importers can however partially be balanced by the increased volume of trade of biodiesel purchased from the Union industry.

7.3. Interest of users/consumers

- (485) Producers of diesel fuel, that is refineries, purchase the biodiesel, imported or produced by Union industry. Due to legal requirement, refineries need to add biodiesel to the fossil fuel sold on the market.
- (486) In this regard it is the final consumer that would be affected by the price increase following imposition of measures. The price of fossil fuels is, with rare exemptions, lower than price of biodiesel, but given its content of normally no more than 10 %, the negative effect of price increase of biodiesel is only partially passed on to the consumer.

7.4. Conclusion

- (487) The Commission found that the imposition of duties would have the negative effect of increasing consumer prices. However, because of the limited content of biodiesel in the final product purchased by consumers (typically less than 10 %), this negative effect on the price of diesel fuel would only be a small proportion compared to the direct change in the price of biodiesel on the Union market.
- (488) Following the disclosure of the information document the EBB stated that the Commission has acted inconsistently with its obligations by finding it was unable to conclude on Union interest despite the lack of any compelling reasons showing that the imposition of measures would be against Union interest.
- (489) The Commission in its information document found it imperative to examine the effects of changes that took place shortly before issuing the information document and happened after the end of the investigation period.
- (490) The EBB further commented that the Commission failed to clearly state the reasons on which its ultimate finding was based that it remained unclear as to whether the imposition of measures would be in the interest in the Union.
- (491) The Commission, as explained in recital (489), found it imperative to further examine additional information with regard to Union interest and this was the reason for the decision of not imposing provisional measures.
- (492) The Commission examined all additional information obtained following the disclosure of the information document, that included in particular, but was not limited to, the replies to additional questionnaires received from the EBB and the sampled Union producers, statistics on biodiesel imports to the Union after the investigation period and other data provided by interested parties following the disclosure of the information document. On the basis of the examination of this additional information, and further evidence of injury suffered by the Union industry, such as negative impact on profitability and a substantial reduction of production explained in recitals (366)(363) and (473), the Commission concluded that there are no compelling reasons under Article 31 of the basic Regulation that it would not be in the interest of the Union to impose measures.

8. DEFINITIVE COUNTERVAILING MEASURES

- (493) On the basis of the conclusions reached by the Commission on subsidy, threat of injury, causation and Union interest, a definitive countervailing duty should be imposed to prevent the materialisation of the imminent threat of material injury caused to the Union industry by the subsidised imports.

8.1. Injury elimination level

- (494) To determine the level of the measures, the Commission first established the amount of duty necessary to eliminate the threat of injury suffered by the Union industry.
- (495) When calculating the injury elimination level the Commission considered that this level should allow the Union industry to cover its costs of production and obtain a profit before tax that could be reasonably achieved by an industry of this type in the sector under normal conditions of competition, i.e. in the absence of subsidised imports, on sales of the like product in the Union.
- (496) The injury elimination level was calculated on the basis of a comparison of the weighted average price of the subsidised imports, as established for the price undercutting calculations in recital (354), and the non-injurious price of the Union industry for the like product. The non-injurious price was established by adding to the cost of production a reasonable profit level. The target profit margin was set at 11 %, that is the level used by the Commission in its previous investigation with measures imposed on 26 November 2013.
- (497) Following the disclosure of the information document CARBIO argued that the target profit should be the profit from the period between 2015 and September 2017 and not the 11 % target profit used in the previous investigation. CARBIO reiterated this claim following final disclosure.
- (498) The Commission used the target profit of the previous investigation, because, irrespective of establishing injury or not, the Commission observed that the Union industry appears not to have fully recovered from the effects of past dumping, and therefore the profit levels reached during the period considered are not representative. In this respect, the Commission still considers the profit used in its previous investigation as appropriate and prevailing in a situation of low volumes of subsidised imports.
- (499) The injury elimination level for 'other cooperating companies' and for 'all other companies' is defined in the same manner as the subsidy rates for these companies in recital (304).

8.2. Retroactive imposition of countervailing duties

- (500) As stated in recital (10), the Commission made imports of the product concerned originating in Argentina subject to registration by the registration Regulation in view of the possible retroactive application of any countervailing measures under Article 24(5) the basic Regulation.
- (501) Pursuant to Article 16(4) of the basic Regulation, duties may be levied retroactively 'on products which were entered for consumption no more than 90 days prior to the date of application of provisional measures'. The Commission observes that no provisional measures were imposed in this case.
- (502) On that basis, the Commission considers that one of the legal conditions under Article 16(4) of the basic Regulation is not met and therefore the duties should not be levied retroactively on the registered imports.
- (503) Following final disclosure, the EBB stated that the duties should be levied retroactively on the registered imports, as the four conditions for the retroactive collection of duties under Article 16(4) of the basic Regulation are met. In particular, EBB stated that the second part of Article 16(4) referring to 'not prior to the initiation of the investigation' should be applied in the case at hand as it should be read separately from the text 'no more than 90 days prior to the date of application of provisional measures'.
- (504) Article 16(4) of the basic Regulation sets out that duties may be levied retroactively only 'on products which were entered for consumption no more than 90 days prior to the date of application of provisional measures but not prior to the initiation of the investigation'. The second part of Article 16(4) referring to 'not prior to the initiation of the investigation' cannot be read separately from the rest of the text of that Article as the Article does not allow for that.
- (505) Consequently, in the absence of provisional duties, which, if in place, are a retroactive application of definitive duties, as set out in recital (502), the Commission considers that the legal conditions under Article 16(4) of the basic Regulation are not met and therefore the duties should not be levied retroactively on the registered imports.

8.3. Definitive measures

- (506) In the light of the foregoing and in accordance with Article 15(1) of the basic Regulation, a definitive countervailing duty should be imposed at a level sufficient to eliminate the threat of injury caused by the subsidised imports without exceeding the amount of subsidisation found.
- (507) Given the high rate of cooperation of Argentinian exporting producers, the 'all other companies' duty was set at the level of the highest duty imposed on the sampled companies. The 'all other companies' duty will be applied to those companies which did not cooperate in this investigation.
- (508) For the other cooperating non-sampled Argentinian exporting producers listed in Table 24, the definitive duty rate is set at the weighted average of the rates established for the cooperating exporting producers in the sample.
- (509) On that basis, the definitive duty rates to be imposed are set as follows:

Table 24

Definitive Countervailing Duty

Company/Group	Injury elimination level	Amount of subsidisation	Countervailing duty rate
LDC Argentina SA	31,7 %	26,2 %	26,2 %
Group Renova	25,0 %	27,2 %	25,0 %
Group T6	33,9 %	33,4 %	33,4 %
Other cooperating companies — COFCO Argentina SA and Cargill SACI	29,6 %	28,2 %	28,2 %
All other companies	33,9 %	33,4 %	33,4 %

- (510) The individual company countervailing duty rates specified in this Regulation was established on the basis of the findings of this investigation. Therefore, individual countervailing duty rates reflect the situation found during this investigation with respect to the companies concerned. Those individual duty rates (as opposed to the countrywide duty applicable to 'all other companies') are thus exclusively applicable to imports of products originating in the country concerned and produced by the companies concerned. Imported products produced by any other company not specifically mentioned in the operative part of this Regulation, including entities related to those specifically mentioned, cannot benefit from those rates and are subject to the duty rate applicable to 'all other companies'.
- (511) A company may request the continued application of those individual duty rates despite subsequently changing its name or the name of one of its entities. The request must be addressed to the Commission. The request must contain all the relevant information enabling to demonstrate that the change does not affect the right of the company to benefit from the individual duty rate which applies to it. If the change of name of the company does not affect its right to benefit from the duty rate which applies to it, a notice informing about the change of name will be published in the *Official Journal of the European Union*.
- (512) Should developments after the investigation period lead to a change in circumstances of a lasting nature, appropriate action in accordance with Article 19 of the basic anti-subsidy regulation may be taken.
- (513) In view of the case-law of the Court of Justice ⁽¹²³⁾, it is appropriate to provide for the rate of default interest to be paid in case of reimbursement of definitive duties, because the relevant provisions in force concerning customs duties do not provide for such an interest rate, and the application of national rules would lead to undue distortions between economic operators depending on which Member State is chosen for customs clearance.

⁽¹²³⁾ Judgment in *Wortmann*, C-365/15, EU:C:2017:19, paragraphs 35 to 39.

9. DISCLOSURE

- (514) Interested parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of a definitive countervailing duty on imports of biodiesel, originating in Argentina.
- (515) Interested parties were also granted a period within which they could make representations subsequent to this disclosure. The comments submitted by interested parties were duly considered, and, where appropriate, the findings have been modified accordingly.

10. FORM OF THE MEASURES

- (516) Following final disclosure, eight cooperating exporting producers, including their related companies in Uruguay and Switzerland, and together with CARBIO, offered price undertakings in accordance with Article 13(1) of the basic Regulation.
- (517) The Commission accepted these undertaking offers by Implementing Decision (EU) 2019/245 ⁽¹²⁴⁾, as it considers that they eliminate the injurious effects of the subsidised imports and limit to a sufficient degree the risk of circumvention.
- (518) Whenever the Commission withdraws, under Article 13(9) of the basic Regulation, its acceptance of an undertaking following a breach by referring to particular transactions and declares the relevant undertaking invoices as invalid, a customs debt shall be incurred at the time of acceptance of the declaration for release into free circulation of these transactions.
- (519) The measures provided for in this Regulation are in accordance with the opinion of the Committee established by Article 15(1) of Regulation (EU) 2016/1036 of the European Parliament and of the Council ⁽¹²⁵⁾,

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive countervailing duty is imposed on imports of fatty-acid mono-alkyl esters and/or paraffinic gasoils obtained from synthesis and/or hydro-treatment, of non-fossil origin, in pure form or as included in a blend, currently falling within CN codes ex 1516 20 98 (TARIC codes 1516 20 98 21, 1516 20 98 29 and 1516 20 98 30), ex 1518 00 91 (TARIC codes 1518 00 91 21, 1518 00 91 29 and 1518 00 91 30), ex 1518 00 95 (TARIC code 1518 00 95 10), ex 1518 00 99 (TARIC codes 1518 00 99 21, 1518 00 99 29 and 1518 00 99 30), ex 2710 19 43 (TARIC codes 2710 19 43 21, 2710 19 43 29 and 2710 19 43 30), ex 2710 19 46 (TARIC codes 2710 19 46 21, 2710 19 46 29 and 2710 19 46 30), ex 2710 19 47 (TARIC codes 2710 19 47 21, 2710 19 47 29 and 2710 19 47 30), 2710 20 11, 2710 20 15, 2710 20 17, ex 3824 99 92 (TARIC codes 3824 99 92 10, 3824 99 92 12 and 3824 99 92 20), 3826 00 10 and ex 3826 00 90 (TARIC codes 3826 00 90 11, 3826 00 90 19 and 3826 00 90 30) and originating in Argentina.

2. The rates of the definitive countervailing duty applicable to the net, free-at-Union-frontier price, before duty, of the product described in paragraph 1 and produced by the companies listed below shall be as follows:

Company	Definitive countervailing duty	TARIC additional code
Aceitera General Deheza SA	33,4 %	C493
Bunge Argentina SA	33,4 %	C494
LDC Argentina SA	26,2 %	C495
Molinos Agro SA	25,0 %	C496
Oleaginosa Moreno Hermanos SACIFyA	25,0 %	C497
Vicentin SAIC	25,0 %	C498

⁽¹²⁴⁾ Commission Implementing Decision (EU) 2019/245 of 11 February 2019 accepting undertaking offers following the imposition of definitive countervailing duties on imports of biodiesel originating in Argentina (See page 71 of this Official Journal).

⁽¹²⁵⁾ Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ L 176, 30.6.2016, p. 21).

Company	Definitive countervailing duty	TARIC additional code
COFCO International Argentina SA	28,2 %	C490
Cargill SACI	28,2 %	C491
All other companies	33,4 %	C999

3. Unless otherwise specified, the provisions in force concerning customs duties shall apply. The default interest to be paid in case of reimbursement that gives rise to a right to payment of default interest shall be the rate applied by the European Central Bank to its principal refinancing operations, as published in the C series of the *Official Journal of the European Union*, in force on the first calendar day of the month in which the deadline falls, increased by one percentage point.

Article 2

1. Imports declared for release into free circulation shall be exempt from the countervailing duty imposed by Article 1, provided that they are manufactured, shipped and invoiced by companies from which undertakings are accepted by the Commission and whose names are listed in Implementing Decision (EU) 2019/245, as from time to time amended, and have been imported in conformity with the provisions of the same Commission Implementing Decision.

2. The imports mentioned in paragraph 1 shall be exempt from the countervailing duty on condition that:

- (a) such imports are accompanied by an undertaking invoice which is a commercial invoice containing at least the elements and the declaration stipulated in Annex 1 of this Regulation; and
- (b) such imports are accompanied by an Export Undertaking Certificate according to Annex 2 of this Regulation; and
- (c) the goods declared and presented to customs correspond precisely to the description on the undertaking invoice.

3. A customs debt shall be incurred at the time of acceptance of the declaration for release into free circulation:

- (a) whenever it is established, in respect of imports described in paragraph 1, that one or more of the conditions listed in that paragraph and paragraph 2 are not fulfilled; or
- (b) when the Commission withdraws its acceptance of the undertaking pursuant to Article 13(9) of Regulation (EU) 2016/1037 in a Regulation or Decision which refers to particular transactions and declares the relevant undertaking invoices as invalid.

Article 3

The companies from which undertakings are accepted by the Commission and whose names are listed in the Implementing Decision (EU) 2019/245 as subsequently amended, and subject to certain conditions specified therein, will also issue an invoice for transactions which are not exempted from the countervailing duty. This invoice is a commercial invoice containing at least the elements stipulated in Annex 3 to this Regulation.

Article 4

Registration of imports resulting from Implementing Regulation (EU) 2018/756 making imports of biodiesel originating in Argentina subject to registration shall be discontinued. No definitive countervailing duty will be levied retroactively for registered imports.

Article 5

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 11 February 2019.

For the Commission

The President

Jean-Claude JUNKER

ANNEX 1

The following elements shall be indicated in the Commercial Invoice accompanying the Company's sales to the European Union of goods, which are subject to the Undertaking:

- (1) The heading 'COMMERCIAL INVOICE ACCOMPANYING GOODS SUBJECT TO AN UNDERTAKING'.
- (2) The name of the Company issuing the Commercial Invoice and the name of the Company manufacturing the goods.
- (3) The Commercial Invoice number.
- (4) The date of issue of the Commercial Invoice.
- (5) The TARIC additional code under which the goods on the invoice are to be customs-cleared at the European Union frontier.
- (6) The exact plain language description of the goods and:
 - technical specifications of the company product code number (CPC),
 - the company product code number (CPC),
 - CN code,
 - quantity (to be given in units expressed in Metric Tons).
- (7) The description of the terms of the sale, including:
 - price per unit (Metric Ton),
 - the applicable payment terms,
 - the applicable delivery terms,
 - total discounts and rebates.
- (8) Name of the Company acting as an importer to which the invoice is issued directly by the Company.
- (9) The name of the official of the Company that has issued the Commercial Invoice and the following signed declaration:

'I, the undersigned, certify that the goods sold for export to the European Union covered by this invoice were manufactured by (Company name and address) (TARIC additional code) in Argentina within the scope and under the terms of the Undertaking accepted by the European Commission through Implementing Decision (EU) 2019/245. I declare that the information provided in this invoice is complete and correct.'

ANNEX 2

Export undertaking certificate

The following elements shall be indicated in the Export Undertaking Certificate to be issued by CARBIO for each Commercial Invoice accompanying the Company's sales to the European Union of goods which are subject to the Undertaking:

- (1) The name, address and telephone number of the Cámara Argentina de Biocombustibles ('CARBIO').
- (2) The name of the company mentioned in Implementing Decision (EU) 2019/245 issuing the Commercial Invoice and the name of the Company manufacturing the goods.
- (3) The Commercial Invoice number.
- (4) The date of issue of the Commercial Invoice.
- (5) The TARIC additional code under which the goods on the invoice are to be customs cleared at the European Union frontier.
- (6) The exact description of the goods, including:
 - the technical specification of the goods, the company product code number (CPC) (if applicable),
 - CN code.
- (7) The precise quantity in units exported expressed in Metric Tons.
- (8) The number and expiry date (three months after issuance) of the certificate.
- (9) The name of the official of CARBIO that has issued the certificate and the following signed declaration:

'I, the undersigned, certify that this certificate is given for direct exports to the European Union of the goods covered by the Commercial Invoice accompanying sales made subject to the undertaking and that the certificate is issued within the scope and under the terms of the undertaking offered by [company] and accepted by the European Commission through Implementing Decision (EU) 2019/245. I declare that the information provided in this certificate is correct and that the quantity covered by this certificate is not exceeding the threshold of the undertaking.'
- (10) Date.
- (11) The signature and seal of CARBIO.

ANNEX 3

The following elements shall be indicated in the Commercial Invoice accompanying the Company's sales to the European Union of goods, which are subject to the countervailing duties:

- (1) The heading 'COMMERCIAL INVOICE ACCOMPANYING GOODS SUBJECT TO COUNTERVAILING DUTIES'.
 - (2) The name of the Company issuing the Commercial Invoice and the name of the Company manufacturing the goods.
 - (3) The Commercial Invoice number.
 - (4) The date of issue of the Commercial Invoice.
 - (5) The TARIC additional code under which the goods on the invoice are to be customs-cleared at the European Union frontier.
 - (6) The exact plain language description of the goods and:
 - technical specifications of the company product code number (CPC),
 - the company product code number (CPC),
 - CN code,
 - quantity (to be given in units expressed in Metric Tons).
 - (7) The description of the terms of the sale, including:
 - price per unit (Metric Tons),
 - the applicable payment terms,
 - the applicable delivery terms,
 - total discounts and rebates.
 - (8) The name and signature of the official of the Company that has issued the Commercial Invoice.
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