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**Missing WTO rules and a non-functioning Appellate Body:
lessons from Argentina's biodiesel exports¹**

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Missing WTO rules and a non-functioning Appellate Body: lessons from Argentina's biodiesel exports

Revised version

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Abstract

This paper reviews the recent experience of importing countries' contingent protection measures against input subsidies from escalated export taxes in biodiesel imports from Argentina. The analysis indicates that the end result of a WTO that is empty of rules on primary agricultural export barriers opens the door for arbitrary policies by exporting countries and leaves importing countries without a legal right to impose compensating contingent measures. This was made clear by the findings of the WTO Panel and Appellate Body in the Argentina-EU biodiesel case. Nevertheless, under Trump's charge against the multilateral trading system, since December 2019 the WTO Appellate Body remains non-functioning and therefore, importing countries can now impose counteracting measures without risking a negative legal finding as the EU faced. As illustrated by the US contingent measures, a non-functioning Appellate Body now facilitates arbitrary measures by importing countries. The obvious solution to this mess is to include WTO rules on agricultural export barriers, and reinstate the the Appellate Body to normal functioning.

JEL Codes: F13, F14, Q18.

Trade policy institutions; Biodiesel; Agricultural export barriers; Argentina; Contingent protection; European Union; US unilateralism; WTO Appellate body).

Acronyms

AD:	Antidumping
AB:	WTO Appellate Body
AFIP:	Administración Federal de Ingresos Públicos
CARBIO:	Cámara Argentina de Biocombustibles
CVD:	Countervailing duty also Countervailing agreement
DSB:	Dispute Settlement Body

GATT:	General Agreement on Tariffs and Trade
GOA:	Government of Argentina
ICSID:	International Center for Trade and Sustainable Development
INAI:	Instituto para las Negociaciones Económicas Internacionales
INDEC:	Instituto Nacional de Estadísticas y Censos
INDECOPI:	Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual
IS:	Input subsidy
MECON:	Ministerio de Economía y Finanzas Públicas
POI:	Period of investigation
QRs:	Quantitative restrictions on exports
UR:	Uruguay Round
USDA:	United States Department of Agriculture
WTO:	World Trade Organization

I. Setting the issue: missing WTO rules on agricultural export barriers

Under multilateral trade rules, obligations come hand in hand with rights. A country's obligations to follow certain rules, say compliance with multilateral safeguard rules, automatically entails that country's right to demand that other WTO Members also comply with such obligations. In this way, Members ensure that their trade institutions (rules of the game) remain at par with that of their trading partners.

What happens when WTO Agreements provide no rules on certain trade policies? We argue that absence of rules in one area cripples the system and opens the door to policy arbitrariness. Such absence also raises legal difficulties as occurs for example, when importing countries seek to counteract the negative consequences of policies associated with some unregulated trade flow. This will come out quite clearly in our analysis of Argentina's subsidized biodiesel export that have relied on agricultural export barriers.

Following the pressures that came mostly (but not exclusively) from industrial countries, the Uruguay Round failed to liberalize agricultural export barriers (ICSID 2014

and 2018)². For Argentina's governments since the early millennium years, this failure facilitated the implementation of escalated export tax policies. This escalation, according to which the export tax rate on the processed product is lower than the rate applied on its major intermediate primary inputs, results in subsidies that may cause injury to the competing industries of importing countries.

The WTO legal vacuum on agricultural export barriers led Argentina's governments to once again set high barriers against the country's major agricultural products. Table 1 shows that for three of these products, barriers included high export taxes as well as discretionary quantitative export controls (QRs). The numbers in the last row indicate that on average, during these years³, primary agricultural producers received prices that were at least one third below international prices⁴.

These excessively high export barriers had visible costs on the country's aggregate agricultural output⁵. For example, in 2014 the area planted to wheat accounted for 3.6 million hectares but by 2019 when the export barriers had been reduced, this area had increased to 5.3 million hectares, or by 47%. Table 1 shows that wheat was the product most highly discriminated by export barriers. Likewise, the heavy-handed QRs against bovine meat exports that were implemented during these years, is the leading policy explaining a reduction in the bovine stock from around 60 million heads to around 50 million heads.⁶ More generally, while the cereal output of the four main products

² This is one major shortcoming of this Round, but there are others that have been reviewed for example, in Finger and Nogues (2003).

³ Time series of these barriers can be consulted in Nogues (2016). The numbers in Table 1 are representative of the height of barriers that prevailed between 2007 and 2015. Figure 1 and text comments complement the discussion on the pattern of export taxes up to 2019.

⁴ Quantitative export restrictions on wheat and bovine meat were instituted in early 2006 as a response to the 2006-2008 food price inflation crisis (FAO 2014). The criticisms to this policy response comes not so much from the policy itself, but from the fact that these QRs were maintained well after the crisis had receded.

⁵ Several studies have addressed the long-run consequences of Argentina's price discrimination against agriculture including among others Colome et. al. (2011), Diaz Alejandro (1975), Nogués (2016), Reca (1980), and Sturzenegger and Salazni (2007).

⁶ Wherever export QRs were applied, easy rents were created, and over these years their dollar value reached a minimum of USD 9 billion (Nogues 2016). How these rents were distributed is anyone's guess.

(soybean, maize, wheat and sunflower) was around 113 million tons in 2015, by 2018 when export barriers had been lowered, it had increased to around 130 million tons.

Table 1: Export barriers on wheat, maize, bovine meat and soybean around 2014 (%)

Type of barrier	Wheat	Maize	Bovine meat	Soybean
Ad-valorem export tax	23	20	15	35
Equivalent export tax of quantitative restrictions (QRs)	16	17	20	0
Aggregate export barrier	39	37	35	35

Source: Author's elaboration on the basis of data presented in Nogues (2016).

Argentina has a long tradition of promoting industrialization through high and discretionary import barriers that implied an important export subsidy rate. Except for short periods of time, ambitious import-substitution policies have been sustained since the early 1930s. The costly and highly protectionist bent of the early post millennial governments saw in the WTO legal vacuum on export barriers, an opportunity for further industrialization of primary products by establishing escalated export taxes. Under such a policy, soybean oil, wheat, and maize were taxed at higher rates than biodiesel, wheat flour, and meat. For example, while the export tax on chicken meat was 5%, the tax on maize was around 37% (Table 1) implying a 25% input subsidy rate per dollar exported (Nogues 2016).

The biodiesel industry was born and initially grew rapidly by the Government's arbitrary tuning of these export barriers. The goal was to develop a new agro-processing industry that would add further value to the 50-55 million tons of soybean that the country was producing annually. Consequently, in only three years, biodiesel output increased from 215 thousand tons in 2007, to 2,800 thousand tons in 2012 while exports grew by close to ten times from 163 thousand tons in 2008, to 1,557 thousand tons in 2012 (Table 4) when Argentina became the world leading exporter.

Quite suddenly, here was a country that was rapidly encroaching international biodiesel markets but it so happened that some of the destinations housed domestic industries that their governments were ready to protect from "unfair competition". By resorting to the WTO agreements regulating the establishment of import barriers, a

group of major importing countries sought ways to compensate the implicit subsidy in biodiesel imports from Argentina. These barriers have taken the form of antidumping surcharges (regulated by the WTO “Agreement on Implementation of Article VI of the General Agreement on Tariff and Trade 1994” published in WTO 1995), and in some cases countervailing measures (regulated by the WTO “Agreement on Subsidies and Countervailing Measures” also in WTO 1995). Requests for protection against biodiesel imports from Argentina were raised in three destinations: the EU, Peru and the US. To what extent did these barriers adjust to the multilateral rules? To what extent were these instruments capable of counteracting the effects of subsidized biodiesel imports?

The evidence discussed in section IV, shows that under existing rules on contingent protection (mainly antidumping and countervailing measures), barriers implemented by importing countries have not always prevailed. In fact, in one clear and sounding WTO dispute with Argentina, the EU was mandated by this organization’s Appellate Body to reduce its initially high level of antidumping barriers. This ruling as we shall argue, can also be traced to the fact that in the WTO, escalated export barriers remain unregulated.

During most of the period we study, the WTO remained in full control of its mandate. Nevertheless more recently, Trump’s nationalistic policies have crippled its Dispute Settlement Body (DSB) by refusing to appoint judges to its Appellate Body that consequently, now remains non-operational⁷.

The rest of the paper is organized as follows. In order to provide a benchmark number against which to compare the importing countries’ measures, Section II offers an estimate of the subsidy rate created by escalated export taxes benefiting the biodiesel industry. Section III provides an overview of the cyclical trend of Argentina’s biodiesel exports related to the trade measures that over time were taken by the EU, Peru and the US. Section IV offers a brief summary of the Argentina-EU WTO dispute. Section V concludes.

II. Input subsidies from escalated export barriers: estimate for Argentina’s biodiesel exports

⁷ See for example, The Diplomat (2019). WTO Panels can still process disputes but unless there is a previous agreement between the demanding and the responding parties, rulings cannot be enforced.

Under escalated export taxes, the dollar value of the input subsidy per ton exported (IS_j) can be shown to equal:

$$IS_j = -PI_j D_j + a_{1j} P_{Ia1j} D_1 \quad (1)$$

where j stands for biodiesel; IS_j : input subsidy per ton of biodiesel exported; PI_j : international FOB price of biodiesel per ton; D_j : export tax rate on biodiesel; a_{1j} : quantity of soybean oil necessary to produce one ton of biodiesel; P_{Ia1j} : FOB price of soybean oil per ton; D_1 : export tax rate on soybean oil. Equation (1) is the difference between revenues without and with escalated export taxes. Since other inputs are assumed not to be affected by export policies, taking this difference nets them out of equation (1)⁸.

The first term on the right hand side with a negative sign represents the reduced income from the tax on biodiesel exports while the second term with a positive sign represents the savings from lower input prices from the export tax on soybean oil. Therefore input subsidies from escalated export taxes increase: i) as the tax rate on biodiesel exports (D_j) is lowered; ii) with the physical intensity of subsidized soybean oil (a_{1j}) and, iii) the higher the export tax rate on this input (D_1). The time invariant parameters of this equation include: a) $a_{1j}=1,1$ according to industry experts one liter of biodiesel output requires approximately 1,1 liters of soybean oil and, b) D_1 : 32% is the export tax rate on soybean oil that remained unchanged between 2008 and late 2015 when they began to be gradually reduced.

Therefore, the aggregate yearly dollar value of input subsidies received by biodiesel exporters (AR_j), and the subsidy rate (SR_j) are estimated by:

$$AR_j = IS_j \times E_j \quad (2)$$

$$SR_j = AR_j / PI_j \times E_j$$

where E_j is yearly tons of biodiesel exports.

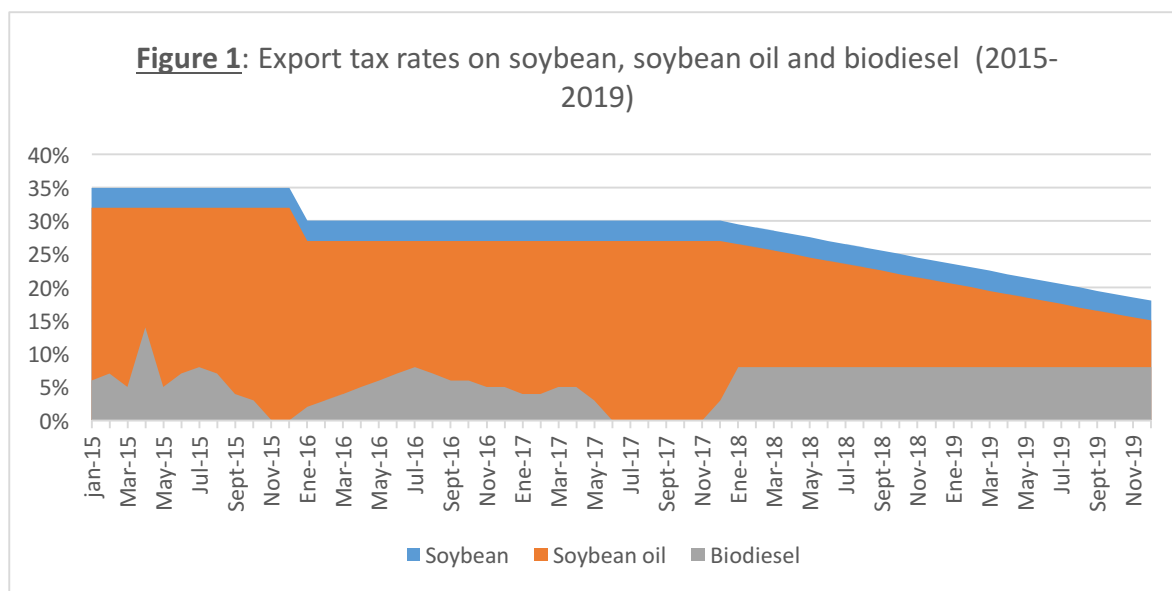
Table 2 presents estimates of these equations for the years between 2010 and 2015. Except for 2013, the numbers in the last column show that the input subsidy rate varied between 15% and 29%⁹. On the other hand, the aggregate dollar value of these subsidies

⁸ Soybean oil represents between 80% and 90% of biodiesel input costs (Cowley and Hillman 2018).

⁹ These input subsidy rates are not that different from the rates estimated for other agro-industries whose exports during these years also benefited from escalation of export taxes (Nogués 2016).

peaked in 2011 with USD 338 million, and bottomed two years later in 2013 with USD 30 million. This significant decline was mostly caused by: 1) a 16% decline in international biodiesel prices, 2) an increase in the tax rate on biodiesel exports from 17% to 22% and, 3) a 26% decline in aggregate exports, primarily explained by lower demand from the EU after it initiated an antidumping investigation (Section III). The reverse occurred during 2014, when the value of input subsidies increased again caused primarily by a reduction in the average tax on biodiesel exports from 22% to 16%.

These are two instances illustrating just how unstable export taxes on biodiesel have been and the extent to which they impact on the amount and rate of input subsidies. For more recent years, Figure 1 offers a graphic illustration of this policy instability. It shows high and quite stable export tax rates on soybeans and soybean oil that lasted until 2018 when a period of sliding reductions was announced¹⁰. In contrast, the rate on biodiesel exports remained highly unstable including at times, zero rates. On average, between 2007 and 2019 the tax rate on biodiesel remained well below those applied on soybean and soybean oil¹¹.



Source: Author's elaboration on the basis of the figure in INAI (2018) p13.

¹⁰ This preannounced sliding reduction was not always complied with as the discussion of the US contingent measures in section III will show. See Federal Register (2019), and also INAI (2018a).

¹¹ The new Government assuming in December 2019 rapidly revised export tax rates upward and for soybean it now stands at 33%. Although we have not computed the subsidy rate for recent years, the trends shown in Figure 1 indicates that at least until 2018, it remained on the high side.

In Argentina, the Executive holds the power to establish trade policies and therefore, the changing value of export taxes on biodiesel should be seen as reflecting changing circumstances surrounding including as we shall see, attempts to ameliorate the impact of contingent barriers applied by importing countries. Such numerous adjustments are evidence of what Krueger (1974) has characterized as rent-seeking behavior.

Summing up, Argentina's biodiesel exports have received important input subsidies that have been fully financed by thousands of soybean producers who facing high export taxes have sold their produce at prices that on average, have been 1/3 below international prices. While biodiesel exporters gained handsome rents from these barriers, the national economy suffered major losses from high export barriers on primary agricultural exports¹².

Table 2: Input subsidy accruing to biodiesel producers from export tax escalation

Year	FOB biodiesel prices per ton (USD)	FOB soybean oil prices per ton (USD)	Export tax on biodiesel (Dj)	IS per ton ISj (USD) (a)	Biodiesel exports (000 tons)	Total IS (ARj) (mill USD)	Input subsidy rate SRj (b)
2010	1,068	914	14%	172	1,358	234	19%
2011	1,608	1,211	14%	201	1,682	338	16%
2012	1,404	1,157	17%	169	1,557	263	15%
2013	1,430	967	22%	26	1,149	30	3%
2014	1,074	833	16%	121	1,603	194	16%
2015	881	682	6.6%	182	788	143	29%

Notes: (a) estimated from equation (1) and, (b) IS per ton exported/value of exports per ton.

Source: Author's elaboration based on data from: (i) FOB biodiesel prices: Biodiesel-National Weekly Ag Energy Roundup, USDA-Agricultural Marketing Service, <http://www.ams.usda.gov/mnreports/lswagenergy.pdf>, and Diesel-U.S.DOE, Energy Information Administration, Monthly Retail On-Highway Diesel Prices <http://www.eia.gov/oog/info/wohdp/diesel.asp>; (ii) FOB soybean oil prices: Ministerio de Agricultura, Argentina, (iii) export tax rate on biodiesel and soybean oil from AFIP (Agencia Federal de Impuestos Publicos) and, iv) quantity and value of exports per ton estimated from Secretaria de Agroindustria (2019 and Table 4).

¹² We note that the bulk of soybeans harvested is not owned by biodiesel producers. The biodiesel and the soybean oil industries are owned mostly by the same multinational grain exporting firms that hold no significant investments in primary agricultural land.

III. Contingent protection against biodiesel imports from Argentina: measures and trade impacts

As mentioned, Argentina's biodiesel is made mainly from soybean oil, so developing this industry was seen by private interests and the Government as an opportunity to advance one step further in the processing stages of the domestically harvested soybeans¹³. Around 2007 Argentina's biodiesel industry was nonexistent, but by 2011/12, it had become the fourth world producer and the leading world exporter. How did this occur so rapidly?

In 2006 concentrated multinational soybean oil exporters having a high degree of overlap with major multinational grain trading companies¹⁴ agreed with the government on a set of incentives that would attract accelerated investment flows into biodiesel production¹⁵. The initial takeoff of the biodiesel industry relied on export sales that were supported by input subsidies from escalated export taxes. Starting in 2008, soybean oil exports faced a tax of 32% that remained unchanged until late 2015 when it began to be gradually reduced (Figure 1).

Under Argentina's accelerated export growth, it is no surprise that biodiesel producers in importing countries sought to compensate its "unfair subsidies" with import barriers. Table 3 summarizes the salient contingent protection actions taken by the EU, Peru and the US, i.e. the three destinations that initiated and completed contingent investigations against imports from Argentina. In what follows we review these cases and their impact on Argentina's biodiesel exports.

¹³ Biodiesel, it has been asserted, has environmental benefits as it is biodegradable, produced from a renewable resource and mostly free of sulfur and aromatic compounds that are potentially carcinogenic. It lowers CO₂ emissions thus reducing greenhouse gases (<http://carbio.com.ar/certificacion/>) Nevertheless, there also are valid claims arguing that environmental benefits are not as important as claimed by the industry in part because the expansion of soybean production has been at the expense of the depletion of forests. See for example Keles and Choumert (2017), and Murnaghan (2017).

¹⁴ Some of the major firms include Cargill, Bunge, Vicentin, LDC Argentina, Molinos, etc.

¹⁵ Although escalated export taxes have been the target of most contingent barriers, it is important to highlight that Law 26,093/2006, and Decree 109/2007 also provide tax incentives to the biodiesel industry.

European Union

Table 4 shows biodiesel exports for 2007-2018. In the case of the EU (Spain being the country of entry) Argentina's exports peaked during 2011/2012 but by 2013 the boom receded when the industry began facing foreign trade barriers. In 2012, the EU initiated antidumping and countervailing investigations and exports to this destination started falling. Between 2011 –the peak year of Argentina's exports to the EU- and 2014 when the final determination of the antidumping investigation was published, they had fallen by 56% (Table 4).

Table 3: Contingent protection measures against biodiesel imports from Argentina¹⁶

Country	Date	Type of action	Note	Measure	Source
European Union	29/08/2012	AD	Initiation	na	Diario Oficial de la UE (29/8/2012)
	26/11/2013	AD	Final determination	22%-26%	Diario Oficial de la UE (26/11/2013)
	10/11/2012	CVD	Initiation	na	Diario Oficial de la UE (10/11/12)
	25/04/2014	WTO Panel on AD duties	Panel established	AD	WTO document: WT/DS473/AB/R
	26/10/2016	WTO Appellate Body	Report circulated	EU should adjust its AD	WTO document: WT/DS473/AB/R
	18/10/2018	Revision of AD duties	Implementation of the Appellate Body's ruling	4,5%-8,1%	Diario Oficial de la UE (19/10/2018)
Peru	21/07/2014	CVD	Initiation	na	
	19/10/2016	CVD	Final determination	USD15-31 per ton	Res 011-2016/CDB-INDECOPI
	26/04/2015	AD	Initiation	na	El Peruano 25/10/2016*
	25/10/2016	AD	Final determination	USD ton 122-192	Res 0145-2018/SDC-INDECOPI
	05/12/2018	Consultation	Na	na	WTO (2016)
US	07/04/2017	CVD	Initiation	na	International Trade Administration: https://enforcement.trade.gov/download/factsheets/factsheet-multiple-biodiesel-ad-cvd-initiation-041317.pdf
	09/11/2017	CVD	Final determination	71%-72%	International Trade Administration: https://www.trade.gov/enforcement/factsheets/factsheet-multiple-biodiesel-cvd-final-110917.pdf
	09/07/2109	CVD	Change of circumstances: final determination	0,2%-10%	Federal Register 9/7/2019: https://www.federalregister.gov/documents/2019/07/09/2019-14556/biodiesel-from-argentina-preliminary-results-of-changed-circumstances-reviews-of-the-antidumping-and
	07/04/2017	AD	Initiation	na	
	26/04/2018	AD	Final determination	60%-86%	Federal Register 4/25/2018 https://www.federalregister.gov/documents/2018/04/26/2018-08775/biodiesel-from-argentina-and-indonesia-antidumping-duty-orders
	09/07/2019	AD	Change of circumstances	71%-72%	Federal Register 9/7/2019: https://www.federalregister.gov/documents/2019/07/09/2019-14556/biodiesel-from-argentina-preliminary-results-of-changed-circumstances-reviews-of-the-antidumping-and

na: not applicable.

*This petition was initially presented to INDECOPI in 2014 but at this time, it was turned down. Later, the domestic biodiesel producer appealed this decision and the investigation was officially initiated on April 26, 2015:

<https://www.indecopi.gob.pe/documents/20182/956827/Resoluci%C3%B3n+N%C2%BA+189-2016CDB-INDECOPI.pdf/408703ac-a29c-f538-85bb-0830de9531e5>

Source: Author's elaboration with information from sources indicated in the last column.

¹⁶ As mentioned, this list is not exhaustive of all the trade policy actions taken by these three countries against biodiesel imports. For example, Peru still maintains measures against biodiesel from the US and several of the EU cases covered in Table 3, also included imports from Indonesia.

Nevertheless, because Argentina found new export opportunities mostly in Peru and the US, during these years and in quantity terms, aggregate biodiesel exports fell by only 5% (Table 4).

Table 4: Argentina's biodiesel exports by country of destination (000 tons unless otherwise noted)

Country	2007	2011	2012	2013	2014	2015	2016	2017	2018
Spain	21	890.0	869.4	270.5	390.0	6.3	0	90.0	0
USA	112.3	0	0	413.6	159.1	593.5	1,473.9	963.3	0
Peru	0	193.2	166.5	197.6	261.7	164.3	145.5	42.7	16.2
Subtotal	133.3	1,083.2	1,035.9	881.7	810.8	764.1	1,619.4	596.0	16.2
Total (000 tons)	162.5	1,681.9	1,557.4	1,149.2	1,602.7	788.2	1,626.3	1,650.1	1,401.3
Total (million USD)	133.1	2,076.5	987.5	987.5	1,244.3	486.7	1,175.8	1,244.1	977.7

Source: Data published in Secretaría de Agroindustria (2019):

[https://www.agroindustria.gob.ar/sitio/areas/bioenergia/informes/_archivos//000003_Informes%20Biocombustibles%202019/190700_Informe%20biocombustibles%20\(Julio%202019\).pdf](https://www.agroindustria.gob.ar/sitio/areas/bioenergia/informes/_archivos//000003_Informes%20Biocombustibles%202019/190700_Informe%20biocombustibles%20(Julio%202019).pdf)

It has long been shown that exports to a given destination start declining around the date when the importing country initiates an antidumping and/or a CVD investigation. For example in an early paper on this subject Prusa (1996) found that even "... AD actions that are rejected still have an important impact on named country trade, especially during the period of investigation..." (reference from this paper's abstract). The EU completed its AD investigation in November 2013 when Argentina's exports stood at 270.5 million tons, a reduction of 70% from the amount exported in 2011.

The EU proceeded to implement antidumping barriers that varied between 22% and 26% according to the exporting company (Table 3)¹⁷. These orders of magnitude are

¹⁷ The investigations' findings showed higher margins of dumping than those reported in Table 3. Nevertheless, given the EU's lesser duty policy, the effective rates the EU Commission finally imposed are those shown in this table.

not far from the rates of input subsidies reported in Section II. Nevertheless, Argentina's legal advisors concluded that the EU's investigation had flaws and consequently the Government decided to challenge its AD measures particularly the way in which it determined the margin of dumping. The next section offers a brief summary of why the WTO Panel and Appellate Body sided with Argentina. In spite of this, we note that during the length of time elapsed between the initiation of the antidumping investigation and the Appellate Body ruling in 2016, the EU industry continued protected with high levels of antidumping barriers that partially explains why exports to this destination have not resumed in significant quantities¹⁸.

Although as said, in late 2012 the EU dropped the subsidy investigation, it is of interest to cite the reason why it was opened in the first place: *"The subsidies consist of the provision of inputs (soybean or soybean oil in case of Argentina and palm oil in case of Indonesia) at below-market prices by means of government policies implemented and enforced by a policy of export taxes. In both countries concerned¹⁹, an export tax is charged on the input product(s), at rate(s) which is/are often higher than that charged on the export of biodiesel. This approach effectively obliges the input producers to sell on the domestic market, thus creating an excess of supply, depressing prices to a below-market level and artificially reducing the costs of the biodiesel producers. It is alleged that the above schemes are subsidies since they involve a financial contribution from the Government of Argentina and Indonesia (in the form of the entrustment and/or direction of the input producers to provide goods to the domestic biodiesel industry, or through income or price support) and confer a benefit to the recipients because the goods are provided for less than adequate remuneration. They are alleged to be limited to certain enterprises producing a subset of products in the agricultural sector, and are therefore specific and countervailable"* (European Union 2012). According to the CVD Agreement, a countervailing duty has to meet two tests: 1) there must be a financial contribution by the government (Article 1 of the CVD agreement) and, 2) such a contribution should

¹⁸ More generally, assuming that a trade action is subject to a WTO dispute, the lapse of time between the initiation of an investigation and the implementation of the AB ruling covers several years. Table 3 shows that in the case of biodiesel this lapse of time was six years from 2012 to 2018.

¹⁹ Indonesia is the other country.

confer benefits to a specific firm or industry (Article 2 of the CVD agreement (WTO 2016). Given the absence of direct financial contribution and that export barriers on soybean oil are not specifically targeted to benefit the biodiesel industry, the CVD barrier was according to these rules, legally vulnerable²⁰.

Peru

After the boom and burst experience of Argentina's biodiesel exports to the EU, the export pattern continued to be cyclical growing initially fast to new markets but quite promptly they start declining around the time some of these countries initiate AD and/or CVD investigations. In much the same way as shown by the experience in the EU, Peru became a chosen market that although not as significant, it maintained open trade for biodiesel, or so it appeared initially. Following the request from the domestic biodiesel producer, the government initiated a CVD investigation in August 2014 –the peak year of Argentina's exports to this destination-, and an antidumping case in April 2015. Definite CVD measures were implemented in 2015²¹, and AD duties in 2016 (Table 3). Consequently, exports to Peru declined from 262 thousand tons in 2014, to only 16 thousand tons in 2018, or by 94% (Table 4)²².

Although the CVD measures were low, the antidumping duties reported in Table 3 are higher although not as high as those that were initially established by the EU²³. It is of interest to note that in this case INDECOPI (Instituto Nacional de Defensa de la

²⁰ The CVD rules and their applicability in this case are also discussed in Cowley and Hillman (2017).

²¹ An analysis of the programs countervailed by Peru can be found in Report 007-2016/CBD-INDECOPI.

²² We note that Argentina's exports to Peru were already at a high level before 2014 in part because in earlier years this country had implemented AD duties against biodiesel imports from the US that were still in place by 2015 (<https://enforcement.trade.gov/trcs/foreignadcvd/peru.html>). Consequently, at the time, Peru's biodiesel importers shifted sources from the US, to other countries including Argentina.

²³ Using the simple average of the extreme AD specific duties in table 3 (USD 122 and USD 192 per ton) and the 2014 biodiesel price in Table 2, Peru's implicit average AD rate is 15%. An independent estimate presented in the Biodiesel Magazine puts Argentina's "underpricing of biodiesel exports" to Peru in the 17% to 31% range. When commenting on Peru's AD measures, this source explained that "...Argentina biodiesel pricing benefits from differential export taxes which help to keep prices lower than most products in the destination markets to which it is exported": <http://www.biodieselmagazine.com/articles/1770088/peru-imposes-stiff-antidumping-duties-on-argentine-biodiesel>.

Competencia y de la Protección de la Propiedad Intelectual), Peru's agency in charge of administering the WTO contingent protection agreements,²⁴ also opted for "reconstructing" Argentina's domestic price. The investigation by INDECOPI argued that prices and quantities of biodiesel sales in Argentina's domestic market are regulated by the government and therefore, they cannot be taken as market prices (Res 0145-2018/SDC-INDECOPI)²⁵.

As was the case with the EU, Argentina had problems with INDECOPI's investigation and in December 2018 it began the initial steps (consultation) required for eventually moving to a full-fledged dispute under the rules of the WTO Dispute Settlement Body. Argentina contended that "...Peru failed to determine the margin of dumping by comparison with the cost of production in the country of origin..." as indicated by the Antidumping Agreement (WTO 2016). In regard to the CVD measures Argentina argued that: "...Peru failed to conduct an objective examination, based on positive evidence of other factors that may have caused injury to the domestic industry and, consequently, attributed the injury caused by other factors to the allegedly subsidized and dumped imports..." (see also Cowley and Hillman, 2017). Argentina's arguments never became part of a full-fledged WTO dispute probably because shortly after, Trump's attack on the WTO crippled its Dispute Settlement Mechanism²⁶.

United States

After exports to the EU and Peru collapsed, the US became a major destination of Argentina's biodiesel exports. History by repeating itself once again, would show that

²⁴ Peru's INDECOPI is one of the several agencies created by Latin American countries in order to administer the WTO agreements on contingent protection. At the time of its assessment, this agency was shown to be another example of a professional administration of the WTO rules (Finger and Nogues 2006).

²⁵ See also Sonnet and others (2014), for a detailed discussion of Argentina's governmental regulations in the domestic market.

²⁶ The reason lies in the US opposition to support candidates that have come up for filling the vacant chairs in the Appellate Body. Currently, there is only one judge while three out of a maximum of seven is the minimum required for quorum (The Diplomat 2019). This has paralyzed the WTO dispute settlement mechanism at a time when demands for its services are running at an all time high. For a discussion on the specifics of the US criticisms to the functioning of the Appellate Body, see Council on Foreign Relations (2020).

export growth to this destination would soon also collapse. Table 4 shows that biodiesel exports to the US increased from 159 thousand tons in 2014, to 1,474 thousand tons in 2016, or by more than nine times in two years. In 2017, the US initiated antidumping and CVD investigations that eventually ended in unexplainable high import barriers and consequently, by 2018 biodiesel exports to this destination were “zero”, and have since remained at this level since then.

In the CVD case, the US line of argumentation was that: “... *domestic prices for soybeans were below world market prices by more than \$100 per metric ton, depending on the month, as a result of the export tax on soybeans...*”. As to the targeting rule required by the CVD agreement, the US Government explained that the GOA had stated that “...*export duties are a valid development tool, since they enable many developing countries to cease being mere suppliers of raw materials ...*” (International Trade Administration as referenced in Table 3). This argument by Argentina was a shot in its foot as it was used by the US to argue that export tax escalation is a development tool and therefore the input subsidy they create is a specific subsidy. In the final determination reached on November 2017, the US established absurdly high CVD duties of 71%-72% (Table 3).

On the antidumping case the US government concluded that: “*We consequently find that the subject imports had significant price effects. They significantly undersold the domestic like product and this underselling led to a significant shift in market share away from the domestic industry and towards subject imports throughout the period of investigation. They also prevented the domestic industry from increasing prices commensurately with costs in 2016 and in 2017*” (USITC 2017, p. 31 of reference in Table 3). Consequently, in April 2018 the US established final antidumping duties also absurdly high ranging from 60% to 86% (Table 3)²⁷.

Adding the initial CVD surcharges and the antidumping duties implies an unreasonably high US import barrier in the order of 150% i.e. around six times higher than our estimate of the input subsidy from escalated export taxes (Section II), and still

²⁷ Note that these arguments attribute the existence of subsidies and dumping to the same cause i.e. prices of soybean oil below world prices.

higher differences with the barriers that the EU and Peru had implemented earlier. In attempting to reduce the damage to its biodiesel industry, in September 2018 the government of Argentina issued a series of Decrees that reduced quite considerably the degree of escalation of export taxes to a low 4% differential. The expectation was that the US would reconsider the height of the import barriers it had initially imposed. The Federal Register (2019 reference in Table 3) stated that: *“...as of September 2018, the export tax on soybeans stood at 28.3 percent (nearly identical to where it was during the POIs) and the export tax on biodiesel stood at 25.3 percent (versus 3.96 percent through May 2016 and 5.04 percent from June 2016 until June 2017, at which point it was lowered to zero) ...”* (reference in Table 3). Consequently, with this action the US accepted to undertake a review of *“Change of Circumstances”* that eventually led to the establishment of much lower CVD surcharges: from 71%-72% to 0,2%-10% (Table 3).

Nevertheless, the US stood by its earlier decisions on antidumping duties: *“...after reviewing the record evidence ... under the totality of circumstances analysis of the AD investigation, we find that there remains a price gap that still exists between domestic and world prices, as a result of the export tax on soybeans... Thus, we find that there are insufficient changed circumstances to warrant a reconsideration of our finding that the GOA's intervention in soybean pricing through the export tax on soybeans renders prices paid by biodiesel producers outside the ordinary course of trade...”* (Federal Register 9/7/2019 see Table 3).

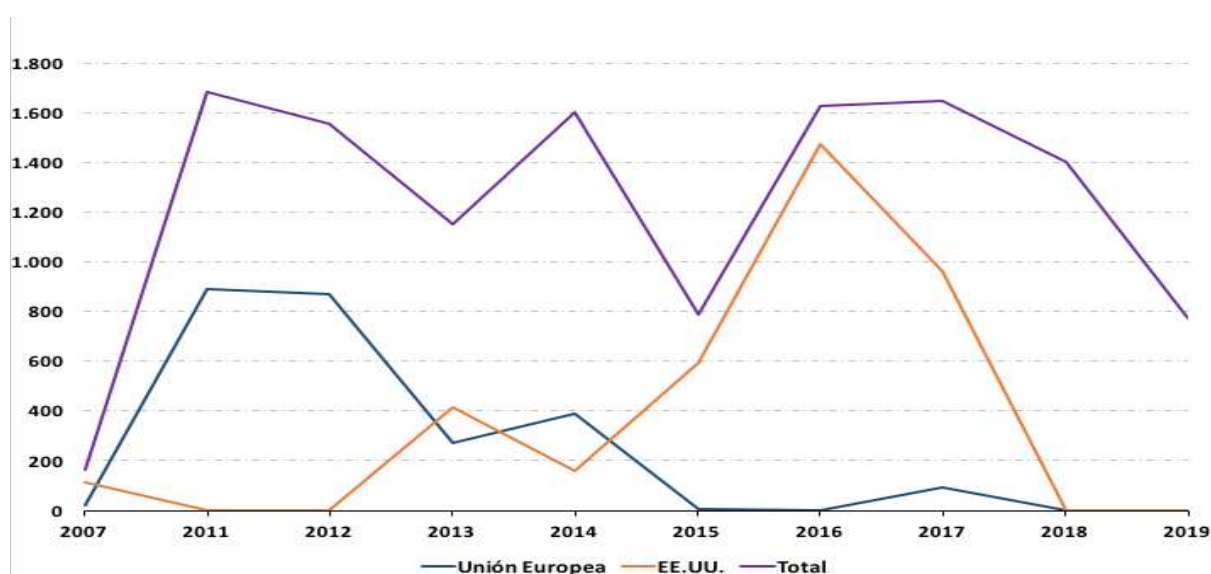
The US antidumping measures remain well above reasonable orders of magnitude of input subsidies to a degree that they are suspect of being in violation of the WTO rules. If so, Argentina would have had a chance of contesting these barriers but for the reasons mentioned regarding the non-operation of the WTO Appellate Body, this option is no longer open.

Export response to contingent protection actions

Figure 2 shows that between 2011 and 2017 aggregate biodiesel exports remained highly cyclical averaging around 1,400 thousand tons per year but following US measures, they are now on a free fall. The figure also portrays the trade impact of contingent protection actions. Validating Prusa's (1994) findings the figure shows that each peak year is followed by a decline in exports associated with the initiation of

contingent protection investigation/decision. This occurred in 2012-13 with the EU investigation; in 2014-15 with Peru's investigation, and in 2016-17 with the US investigation. Furthermore, estimates suggest that during 2019 the industry had around a 50% idle capacity. This, plus the dim export outlook from the accumulation of contingent protection barriers leaves the industry with no other feasible choice but to seek increasing sales to the domestic market. In essence, this option translates into a government decision to increase the cut of diesel with biodiesel that now stands at 10%. As hinted by a Congress member who recently proposed increasing this rate to "at least" 27%, the lobbying and rent-seeking process on this government policy has started²⁸.

Figure 2: Argentina's biodiesel exports: 2007-2019 (thousand tons)



Source: Based on Table 4.

IV. WTO Appellate Body ruling against the EU's AD duties²⁹

As mentioned, in March of 2014 Argentina requested the WTO to form a Panel that should decide whether the EU antidumping investigation had abided by the WTO rules in the Antidumping Agreement. The Panel's Report sided with Argentina and following appeal by the EU, the Appellate Body distributed its findings on October 2016

²⁸ A summary of some Congress members' statements supporting such an increase, can be consulted in: <https://www.ambito.com/politica/senado/el-dio-media-sancion-la-prorroga-al-regimen-biocombustibles-n5144358>

²⁹ This section relies quite heavily on Cowley and Hillman (2017). A summary of this case can be found in WTO (2016a).

upholding the Panel's decision. The driving issue referred to the EU's estimate of the margin of dumping defined in the AD Agreement to be present when a product "...is introduced into the commerce of another country at less than its normal value, if the export price of the product from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country..." (WTO 1995, article 2.1 of the Antidumping Agreement p 168). Therefore, the higher the domestic price in relation to the export price, the higher the margin of dumping and consequently, the higher the AD barrier that authorities are entitled to establish.

Most often this margin is estimated by comparing the price of sales in the home market ("normal value" in the language of the AD agreement), with the export price or the price at which the product is sold in the importing country. As mentioned, the AD agreement identifies two cases when the normal value can differ from the home market price: i) when there are no significant home market sales or, ii) when there are particular home market situations that prevent relying on home market prices. When i) or ii) are present, the rules in the AD agreement allow the "normal value" to be estimated from "cost of production". The EU considered that the export tax on soybeans created an unfair cost advantage to biodiesel producers so it decided to reconstruct prices.

Argentina's line of argumentation was that in estimating normal value, the Commission should have used "... actual prices paid for goods in the country of origin, no matter how distorted or far from reality such prices might be". In turn, the EU argued that the rules do not require to "... blindly follow actual prices paid if those prices bear no rational relationship to a 'real price' due to government's intervention that distort the actual prices..." (Cowley and Hillman 2017 p7). In the event, both the WTO Panel and its Appellate Body sided with Argentina and the EU had to reduce the antidumping rates quite significantly (Table 3). Following these rulings, Argentina was free to set escalated export taxes discretionally, while the EU was prevented from compensating this unfair policy. Both policy effects are rooted in the absence of WTO on agricultural export barriers.

In the abstract of their paper, Cowley and Hillman (2017) summarized the outcome of the Appellate Body ruling by stating that: *"In this case, the EU made*

adjustments to the price of biodiesel's principal input – soybeans – in determining the cost of production of biodiesel in Argentina. The adjustment was made based on the uncontested finding that the price of soybeans in Argentina was distorted by the existence of an export tax scheme that resulted in artificially low soybean prices...". The adjustment to the domestic price of soybeans and soybean oil took into account the impact of export taxes falling on these products. Nevertheless, the Appellate Body *"...found that the EU was not permitted to take tax policy-induced price distortions into account in calculating dumping margins.* Consequently, the AB ruled that the EU should adjust its antidumping duties and on October, 2018 they were lowered from from 22-26%, to 4,5%-8,1% (Table 3).

At the time, the Appellate Body ruling in the Argentina-EU case would appear to have closed the door for other countries attempting to compensate with contingent protection barriers, the input subsidies created by escalated export taxes. This, nevertheless, has not been the case. Since the Appellate Body ruling against the EU was circulated in 2016, Peru and the US initiated and reached final positive determinations in AD investigations (Table 3). Argentina might have also opted to legally challenge these barriers but unless the Trump-driven measures that have translated into a non-operational Appellate Body are ended, WTO "rules can no longer be enforced as envisaged"³⁰.

V. Final remarks

The experience of contingent protection measures against subsidized biodiesel imports from Argentina point to a number of conclusions including that: i) lack of WTO rules on primary agricultural export barriers facilitated Argentina's implementation of high and costly export barriers; ii) these barriers were then tuned to subsidize a nascent biodiesel industry that in its early years showed accelerated export growth; iii) in contrast, application of WTO contingent protection measures to compensate these subsidies, encountered difficulties to an extent that a WTO Panel and the Appellate Body ruled in favor of Argentina and against the EU's antidumping duties, iv) the reason

³⁰ This quotation is from an anonymous referee who stressed this point forcefully. On Trump's policies see for example Bown and Irwin (2019), and Krueger (2020).

underlying this decision can also be traced to the absence of WTO rules on agricultural export barriers and, v) more recently, Peru and the US also initiated and implemented contingent measures with the later imposing absurdly high barriers.

Argentina could have eventually challenged these barriers but the US has now crippled the WTO Dispute Settlement Mechanism and importing countries are no longer threatened by dispute outcomes as the faced by the EU. Under this scenario the future of Argentina's subsidized biodiesel exports remains dim.

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