

**Escalated export taxes and WTO rules as trade  
institutions: lessons from Argentina's biodiesel exports<sup>1</sup>**

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## **Escalated export taxes and WTO rules as trade institutions: lessons from Argentina's biodiesel exports**

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### **Abstract**

For developing countries, the Uruguay Round had mixed results: some positive, some negative, and some negotiating areas only made marginal progress. In our view, adoption of the WTO rules for administering import barriers on contingent protection (mainly antidumping and countervailing measures), entailed a major positive institutional shift away from the high degree of trade policy arbitrariness that prevailed before. In contrast, strong pressures against liberalization of agricultural trade, resulted in the failure of this Round to establish rules on primary agricultural export barriers. Included among these are escalated export taxes that entail input subsidies. This paper reviews the experience of importing countries' contingent protection measures that sought to compensate the input subsidies from escalated export taxes in biodiesel imports from Argentina. The end result of a WTO that is empty of rules on primary agricultural export barriers has been the implementation of arbitrary policies taken by both the exporting and some importing countries. The non-functioning of the WTO Appellate Body created by US unilateral policies ensures that further arbitrary policy by Argentina in favor of its biodiesel industry will be retaliated by equally arbitrary policies by any importing country that so desires. We conclude that in much the same way that WTO rules on import barriers reduced the high degree of arbitrariness that used to characterize developing countries' import-substitution policies, multilateral rules on agricultural export barriers would imply a further positive institutional change for the benefit of both exporting and importing countries.

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: WTO rules as “institution building”**

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<sup>2</sup>.

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

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<sup>2</sup> The WTO is under attack from Trump’s trade policies (Bown and Irwin 2019). Although these events don’t detract from our message, Trump’s trade actions have made further progress on multilateral negotiations unlikely. We come to this again below.

policy arbitrariness. Such absence also raises legal difficulties as occurs, for example, when importing countries seek to counteract the negative consequences of policy arbitrariness associated with some unregulated trade flow. This will come out quite clearly in our analysis of Argentina's biodiesel exporting experience presented below.

This section sets the scenario. It starts with a brief discussion of Argentina's arbitrary and high taxation against primary agricultural exports and some of their productive consequences. This high taxation translated into low cost of inputs (subsidized inputs) to agro-processing industries such as biodiesel production. The discussion then stresses the institutional significance of WTO rules on contingent protection policies (essentially antidumping and subsidy/countervailing), particularly for developing countries. These were also the rules that importing countries used in order to compensate for the negative effects of subsidized biodiesel from Argentina. This country's biodiesel industry paid prices for their major primary inputs (soybean and soybean oil) that were more than one third below international prices (section II).

#### 1. *Industrialization through escalated export taxes*

Following the pressures that came mostly (but not exclusively) from industrial countries, the Uruguay Round failed to liberalize agricultural agricultural export barriers (ICSID 2014 and 2018)<sup>3</sup>. This failure opened the door to the implementation of escalated export tax policies that entail input subsidies. 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.

Between 2003 and late 2015, 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 years<sup>4</sup>, primary

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<sup>3</sup> This is one major shortcoming of this Round but there are others that we have reviewed in Finger and Nogues (2003).

<sup>4</sup> 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.

agricultural producers received prices for their products that were at least one third below international prices<sup>5</sup>.

**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).

These excessively high export barriers had visible costs on the country's aggregate agricultural output<sup>6</sup>. For example, in 2014 wheat accounted for 3.6 million hectares but by 2019 when the barriers on exports had been mostly lifted, the area had increased to 5.3 million hectares or by 47%. Table 1 shows that wheat was the product most highly discriminated by export taxes and QRs. 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.<sup>7</sup> More generally, while the cereal output of the four principal products (soybean, maize, wheat and sunflower) was around 113 million tons in 2015, by 2018 when export barriers had been significantly reduced, it had increased to around 130 million tons.

Argentina has a long tradition of promoting industrialization through high and discretionary trade barriers. Except for short periods of time, ambitious import-substitution policies have been sustained since the early 1930s. The highly protectionist bent of the early post millennial governments saw in the WTO legal vacuum on export

<sup>5</sup> Quantitative export restrictions on wheat and bovine meat were instituted in early 2006 as a response to the 2006-2008 food price inflation that became a major international crisis (FAO 2014). The criticisms to this response comes not so much from the policy itself but from the fact that these QRs were maintained well after the crisis had receded.

<sup>6</sup> 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 (2011 and 2015), Reca (1980), and Sturzenegger and Salazni (2007).

<sup>7</sup> 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.

barriers, an opportunity for further industrialization of primary products by establishing escalated export taxes through higher rates on primary inputs than on the processed products. Under such a policy, soybean oil, wheat, and maize were taxed at higher rates than biodiesel, wheat flour, and meat. This resulted in subsidized exports of these products. 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 liters in 2007, to 2,800 thousand liters in 2012 while exports grew by close to ten times from 163 thousand tons in 2008, to 1,557 thousand tons in 2012. By this year Argentina had become the leading world exporter of biodiesel.

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 developing and developed countries, sought ways to compensate the implicit subsidy in biodiesel imports from Argentina. The evidence discussed below in section III, shows that under existing rules on contingent protection (antidumping and countervailing), barriers implemented by importing countries have not always prevailed. In fact, in one clear and sounding WTO dispute, the EU was mandated by this organization's Appellate Body to reduce quite significantly 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. Since then, Trump's nationalistic policies have crippled this Organization's Dispute Settlement Body (DSB) by refusing to appoint judges to its Appellate Body (AB) that now remains non-operational<sup>8</sup>. We argue below that Argentina may have had a chance of

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<sup>8</sup> See for example, The Diplomat (2019).

winning further WTO disputes similar to the one it won against the EU but now the WTO dispute mechanism is non-functioning.

2. *Developing countries and WTO rules on contingent protection: antidumping and countervailing measures*

In order to compensate for the negative impact of subsidized biodiesel imports, major importing countries implemented barriers that had clear negative effects on Argentina's biodiesel exports. These barriers have mainly 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).

As one of the importers is a developing country (Peru), it is interesting to highlight the institutional significance of these countries' adoption of the WTO contingent protection policies (antidumping and countervailing policies). The conclusion of the Uruguay Round in 1994 implied two major changes in the administration of developing countries' import barriers resulting in a major positive institutional shift. First, the binding of a maximum tariff rate<sup>9</sup>, and, second, in order to go beyond this maximum level, countries have to abide by the rules embedded in three major multilateral agreements: the antidumping agreement; the subsidy/countervailing agreement, and the agreement on safeguards (WTO 1995). In relation to the antidumping and the subsidy/countervailing agreement, the safeguard agreement has been used less often and was never used by importing countries for regulating biodiesel imports from Argentina<sup>10</sup>.

Several regulations embedded in these agreements had been followed for decades by industrial countries (some of them since the creation of the GATT in 1947 and even

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<sup>9</sup> In the case of Argentina, the bound maximum rate stands at 35%.

<sup>10</sup> Article XX of the GATT 1994 (WTO 1995) establishes other exceptions for raising import barriers on grounds such as moral objectives. Also, Article XXI of GATT 1994 (WTO 1995) allows countries to raise import barriers on national security grounds. This rule was invoked by Trump when raising import barriers against China and against steel imports from certain origins. These measures marked the initial steps of what Bown and Irwin (2019) have recently called "Trump's assault on the global trading system".

earlier)<sup>11</sup>, but for developing countries who until the Uruguay Round negotiations requested and received “special and differential treatment” from industrial countries (Hoekman and others 2004), adoption of these rules implied a major institutional change. Developing countries’ traditional “institutional structures” for administering import policies had been long characterized by high degrees of freedom that often translated into arbitrariness. One description characterizes these traditional institutional structures as including “...Many different import control instruments...*such as*...tariffs, surcharges, benchmark custom values, import licensing and export prohibitions. Application of restrictions was done through processes that allowed wide discretion to government officials. Safeguards and antidumping measures as the GATT and WTO define them were rarely used” (Finger and Nogues 2006, p 25).

Under most definitions of “institution”, adoption of these WTO rules implied a major institutional shift. According to North (1990): “...Institutions are the humanly devised constraints that structure political, economic and social interactions” (p 97). Quite clearly then, for developing countries, adoption of WTO rules on contingent protection implied a significant institutional shift to the constraints that structure their international trade relations<sup>12</sup>.

It is of significance to highlight that the institutional shift that we stress here was in line with the liberal trade policies that many developing countries were adopting at the time. Starting in the late 80s and early 90s, Latin American countries began implementing ambitious trade reforms that represented the first time in decades they were moving towards outward-oriented policies. This opening-up process was not the outcome of multilateral negotiations as has been argued for example by Bagwell and Staiger (2010). These liberalization policies were taken by the leadership elites that saw in the poor economic performance associated with high and often prohibitive protection the need to move away from their decades-long experiences with import-substitution policies. Most of these trade liberalization measures preceded the signing of the

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<sup>11</sup> For the history of the antidumping regulations see for example Nelson (2006).

<sup>12</sup> We stress with emphasis the significance of *rules vs discretion* but this does not necessarily imply an open support to these WTO agreements. For example, criticisms to the WTO antidumping agreement abound but it is not the purpose to address them here. See for example Finger (2003), and Nelson (2006).



Uruguay Round agreements by several years. Although some of them were financially supported by the Bretton Woods institutions, the leading ideas and policy leadership came from within these countries (Finger and Nogues 2006)<sup>13</sup>.

This Round came to a close while patterns of trade and production were still adjusting to these unilateral liberalization policies. In this context, adoption of the WTO contingent protection agreements was functional to the political-economy needs of those who, at the time, had the responsibility of leading these liberalization processes. Among others, these politicians sought to create binding constraints to ensure that openness would be sustained when others came to administer their countries' trade regimes<sup>14</sup>. The political-economy also required that flexibilities through escape valves that permitted raising barriers beyond WTO bound levels should be institutionalized. This is precisely what the adoption of the WTO contingent protection policies provided.

How did developing countries adjust to this significant institutional shift from arbitrariness to a new rules-based system? An assessment conducted around the 10th anniversary of the adoption of these WTO rules concluded that Latin American countries were performing well: many petitions for higher import protection had been turned down and few disputes had been raised by exporting countries against contingent measures taken by these countries. To a significant extent, this outcome was driven by the professional staff that had been selected for working at the offices specially created for this purpose (Finger and Nogues 2006, chapter 1)<sup>15</sup>.

The rules embedded in the AD and CVD agreements sought to distill which petitions for import protection merit being investigated from those that did not. Requests for import protection against biodiesel from Argentina were raised to governments in three destinations: the EU, Peru and the US. To what extent were these instruments capable

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<sup>13</sup> In the political arena, financial support to a trade liberalization program, has no binding constraint to sustain it. The borrowing country may use the funds and easily reverse part or the whole liberalization program with no significant consequence. Binding multilateral trade rules supported by an operative AB are another matter simply because if a country is found in violation, the WTO may open the door to the approval of retaliatory measures to be taken by the country that suffers the consequence of such violation.

<sup>14</sup> From the perspective of "institution building", Baracat and others (2015) offer an assessment of how these binding rules were or were not helpful in sustaining open markets in Argentina and Peru.

<sup>15</sup> As far as we know and except for Argentina, the other countries that we studied (Brazil, Chile, Colombia, Costa Rica, Mexico and Peru) continued the process of "institutionalizing" these WTO rules.

of counteracting the effects of biodiesel imports that were subsidized through escalated export taxes?

To answer this and related questions, the rest of the paper is organized as follows. In order to provide a benchmark number against which to compare the surcharges applied by importing countries, 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 dispute against the EU's antidumping measures where the WTO Panel and its Appellate Body ruled in favor of Argentina. Section V concludes.

## **II. Input subsidies from escalated export barriers: estimate for Argentina's biodiesel exports**

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  $IS_j$ : 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)<sup>16</sup>.

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 due to the export tax on soybean oil. The logic of this expression is as follows: 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 soybean oil required to produce one ton of biodiesel ( $a_{1j}$ ) and, iii) the higher the export tax rate on soybean oil ( $D_1$ ). The time invariant parameters of this equation include: i)  $a_{1j}=1,1$  according to industry experts one liter of biodiesel output requires

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<sup>16</sup> Soybean oil represents around 80% of biodiesel input costs (Cowley and Hillman 2018).

approximately 1,1 liters of soybean oil and, ii) D1: 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<sub>j</sub>), is estimated by:

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

where E<sub>j</sub> is yearly tons of biodiesel exports.

Table 2 presents estimates of equations (1) and (2) for the years between 2010 and 2015<sup>17</sup>. Except for 2013, the numbers in the last column show that the input subsidy rate varied between 21% and 31%<sup>18</sup>. On the other hand, the aggregate dollar value of these subsidies estimated from expression (2) peaked in 2011 with USD 384 million, and bottomed two years later in 2013 with USD 34 million. This significant decline was mostly caused by two factors: 1) the increase in the tax rate on biodiesel exports from 17% to 22% and, 2) a 27% decline in exports, primarily explained by lower demand from the EU after it initiated antidumping and countervailing investigations (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 announced<sup>19</sup>. In contrast, until this year the tax rate on biodiesel exports remained highly unstable including zero rates in some periods. On average during the period included in Figure 1 and even before as

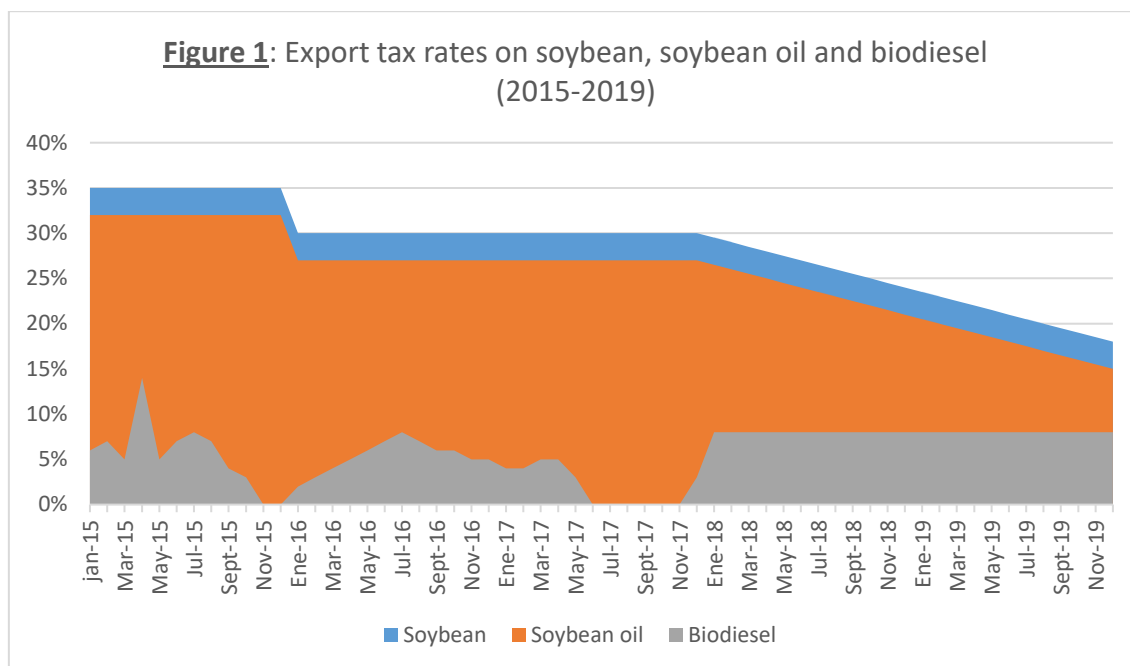
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<sup>17</sup> Table 2 covers the years of high policy instability when Argentina's discretion on its trade policies reached a record level including not only high barriers on agricultural exports but also, the application of bureaucratic quantitative controls on all imports. For a discussion of these controls and their multilateral repercussions, see Baracat and others (2015).

<sup>18</sup> 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).

<sup>19</sup> This preannounced sliding reduction was not always complied with as the discussion of the US contingent measures in section III will show. See also INAI (2018a).

shown in Table 2, the export tax rate on biodiesel remained well below those applied on soybean and soybean oil<sup>20</sup>.



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

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 trade in biodiesel including as we shall see, attempts to ameliorate the impact of contingent barriers applied against its biodiesel exports<sup>21</sup>.

Summing up, Argentina's biodiesel exports have received important input subsidies from escalated export taxes that –and this is important to keep in mind–, have been fully financed by thousands of soybean producers who have sold their produce at prices that on average and until late 2015 were 1/3 below international prices. While biodiesel exporters gained handsome rents from these barriers, the national economy suffered major losses from very high export barriers on primary agricultural exports (section I)<sup>22</sup>.

<sup>20</sup> The new Government assuming power in December 2019 rapidly revised export tax rates and for soybean it now stands at 133%.

<sup>21</sup> Such numerous adjustments of the export tax rate on biodiesel that most of the times sought to maintain high input subsidies (rents) falls within what Krueger (1974) has characterized as rent-seeking behavior. As occurs most of the times with arbitrary policies, the distribution of the rents they create remains unknown.

<sup>22</sup> 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.

**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 exported (USD) (a)	Biodiesel exports (000 tons)	Total IS (mill USD)	Rate of input subsidy (b)
2010	1,068	914	14%	172	1,545	266	29.7
2011	1,608	1,211	14%	201	1,910	384	31.1
2012	1,404	1,157	17%	169	1,770	289	25.4
2013	1,430	967	22%	26	1,296	34	4,0
2014	1,074	833	16%	121	1,315	159	20.5
2015	881	682	6.6%	182	895	163	26.4

**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) biodiesel exports from Bolsa de Cereales de Rosario (2019), and value of exports per ton estimated from Secretaria de Agroindustria (2019).

### 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 soybeans<sup>23</sup>. 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?

<sup>23</sup> 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).

In 2006 concentrated multinational soybean oil exporters having a high degree of overlap with major multinational grain trading companies<sup>24</sup> agreed with the government on a policy package that would attract accelerated investment flows into biodiesel production. Law 26,093 was passed in 2006 and its regulatory Decree 109 was issued in 2007. 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). After passage of this legislation, several of the firms exporting soybean oil with a 3% tax differential with soybeans (32% export tax on soybean oil vs 35% export tax on soybeans as shown in Table 1), shifted production from soybean oil to biodiesel whose exports enjoyed a much higher tax differential. For example, for 2010 and 2011 the tax differential was 18% (a 32% tax on soybean oil vs a 14% export tax on biodiesel) resulting in input subsidies that during these years reached USD266 million and USD384 million respectively (Table 2). Although over time this differential has fluctuated, it has since remained well above the tax differential between soybean and soybean oil.

Because during the takeoff years input subsidies supported high export growth, it is no surprise that biodiesel producers in major importing countries sought to compensate this advantage with import barriers. Initially, the first importer to react was the EU because during these years it was the major destination. Table 3 summarizes the salient contingent protection actions taken by the EU, Peru and the US, i.e. the three destinations that have challenged Argentina's escalated export policies. In what follows we review these cases and their impact on Argentina's biodiesel exports.

**Table 3:** Contingent protection measures against biodiesel imports from Argentina<sup>25</sup>

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<sup>24</sup> Some of the major firms include Cargill, Bunge, Vicentin, LDC Argentina, Molinos, etc.

<sup>25</sup> 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 cases covered in Table 3 also included imports from Indonesia.

Country	Date	Type of action	Note	Measure	Source
European Union	29/8/2012	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)
	25/4/2014	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	21/7/2014	CVD	Initiation	Na	
	19/10/2016	CVD	Final determination	USD15-31 per ton	Res 011-2016/CDB-INDECOPI
	26/4/2015	AD	Initiation	Na	El Peruano 25/10/2016*
	25/10/2016	AD	Final determination	USD ton 122-192	Res 0145-2018/SDC-INDECOPI
	5/12/2018	Consultation	na		WTO (2016)
US	7/4/2017	CVD	Initiation	Na	<a href="https://enforcement.trade.gov/download/factsheets/factsheet-multiple-biodiesel-ad-cvd-initiation-041317.pdf">International Trade Administration: https://enforcement.trade.gov/download/factsheets/factsheet-multiple-biodiesel-ad-cvd-initiation-041317.pdf</a>
	9/11/2017	CVD	Final determination	71%-72%	<a href="https://www.trade.gov/enforcement/factsheets/factsheet-multiple-biodiesel-cvd-final-110917.pdf">International Trade Administration: https://www.trade.gov/enforcement/factsheets/factsheet-multiple-biodiesel-cvd-final-110917.pdf</a>
	9/7/2109	CVD	Change of circumstances: final determination	0,2%-10%	<a href="https://www.federalregister.gov/documents/2019/07/09/2019-14556/biodiesel-from-argentina-preliminary-results-of-changed-circumstances-reviews-of-the-antidumping-and">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</a>
	7/4/2017	AD	Initiation	Na	
	26/4/2018	AD	Final determination	60%-86%	<a href="https://www.federalregister.gov/documents/2018/04/26/2018-08775/biodiesel-from-argentina-and-indonesia-antidumping-duty-orders">Federal Register 4/25/2018 https://www.federalregister.gov/documents/2018/04/26/2018-08775/biodiesel-from-argentina-and-indonesia-antidumping-duty-orders</a>
	9/7/2019	AD	Change of circumstances	71%-72%	<a href="https://www.federalregister.gov/documents/2019/07/09/2019-14556/biodiesel-from-argentina-preliminary-results-of-changed-circumstances-reviews-of-the-antidumping-and">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</a>
	9/7/2109	CVD	Change of circumstances: final determination	0,2%-10%	<a href="https://www.federalregister.gov/documents/2019/07/09/2019-14556/biodiesel-from-argentina-preliminary-results-of-changed-circumstances-reviews-of-the-antidumping-and">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</a>
	7/4/2017	AD	Initiation	Na	
	26/4/2018	AD	Final determination	60%-86%	<a href="https://www.federalregister.gov/documents/2018/04/26/2018-08775/biodiesel-from-argentina-and-indonesia-antidumping-duty-orders">Federal Register 4/25/2018 https://www.federalregister.gov/documents/2018/04/26/2018-08775/biodiesel-from-argentina-and-indonesia-antidumping-duty-orders</a>
	9/7/2019	AD	Change of circumstances	71%-72%	<a href="https://www.federalregister.gov/documents/2019/07/09/2019-14556/biodiesel-from-argentina-preliminary-results-of-changed-circumstances-reviews-of-the-antidumping-and">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</a>

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.

### European Union

Table 4 shows biodiesel exports for 2007-2018. In the case of the EU (mostly Spain) Argentina's exports peaked during 2011/2012 but by 2013 the boom receded when the industry began facing foreign trade barriers. In August 2012, the EU initiated an antidumping investigation and in November of this year, it also initiated a countervailing investigation against biodiesel imports from Argentina (and Indonesia)<sup>26</sup>.

Around the time that these investigations were initiated, exports to the EU started falling. Between 2011 –the peak year of Argentina's exports to this destination– and 2014 when the final determination of the antidumping investigation was published, they had fallen by 56% (Table 4 shows that Spain). Nevertheless, because Argentina found new export opportunities mostly in Peru and the US, during these years 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 Secretaria 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 imports to a given destination start declining around the date when this 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

<sup>26</sup> It should be said that in many countries biodiesel domestic markets are heavily regulated. For a review of the EU's and the US policies see for example Moschini and others (2012).



during the period of investigation...” (reference from this paper’s abstract)<sup>27</sup>. 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 barriers that varied between 22% and 26% according to the exporting company (Table 3)<sup>28</sup>. These orders of magnitude are not far from the rates of input subsidies reported in Section II. This is unlike the experience of Argentina in the US market discussed below.

Nevertheless, Argentina’s legal advisors concluded that the EU’s investigation had flaws and consequently its 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 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 AB ruling, the EU industry continued high level of antidumping protection<sup>29</sup>.

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 concerned, 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*

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<sup>27</sup> For other similar trade responses to contingent protection investigations see for example Finger (2003).

<sup>28</sup> The investigation’s findings showed higher margins of dumping than those reported in Table 3. Nevertheless, given the EU’s lesser duty policy, the effective rates in the EU Commission finally imposed are those shown in this table.

<sup>29</sup> 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 AB ruling covers several years. Table 3 shows that in the case of biodiesel this lapse of time was six years.

*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). Why did the EU dropped this investigation remains unclear. One possibility is that 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 confer benefits to a specific firm or industry (Article 2 of the CVD agreement (WTO 2016). On this basis, it may have appeared at the time that a CVD barrier against to compensate a generalized export tax on soybean and soybean oil that lowered their prices to all domestic buyers may have, in the event of a dispute, not been found to comply with the specificity test. In addition, there was no direct financial contribution from the government, and therefore a CVD barrier was according to the rules, vulnerable<sup>30</sup>.

### 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 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. Upon the request from the domestic biodiesel producer, the government initiated a CVD investigation in August 2014 and an antidumping case in April 2015 the year when exports to this destination bottomed. Definite CVD measures were implemented in 2015<sup>31</sup>, and definite 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). We note that Argentina’s exports to

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<sup>30</sup> The CVD rules and their applicability in this case are discussed in detail by Cowley and Hillman (2017).

<sup>31</sup> An analysis of the programs countervailed by Peru can be found in Report 007-2016/CBD-INDECOPI.

Peru were already at a high level before 2014 in part because earlier 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 traders shifted import sources from the US to other countries including Argentina.

Although the definite 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 EU<sup>32</sup>. It is of interest to note that in this case INDECOPI (Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual), Peru's agency in charge of administering the WTO contingent protection agreements<sup>33</sup> 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)<sup>34</sup>.

As 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 plus a reasonable amount for administrative, selling and general costs and for profits..." as indicated by the

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<sup>32</sup> Using the simple average of the extreme AD 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>.

<sup>33</sup> Peru's INDECOPI is one of the several agencies created by Latin American countries in order to administer the WTO agreements on contingent protection. As mentioned, 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).

<sup>34</sup> See also Sonnet and others (2014) for a detailed discussion of Argentina's governmental regulations in the biodiesel domestic market.

Antidumping Agreement<sup>35</sup> (WTO 2016). Argentina's arguments never became part of a full-fledged WTO dispute probably because Trump's attack on the WTO has crippled its Dispute Settlement Mechanism as its Appellate Body is no longer functioning<sup>36</sup>.

### 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 export growth to this destination was also soon to collapse. Initially, 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. Consequently, by 2018 biodiesel exports to the US were nil! (Table 4)

In the CVD case, the US line of argumentation was as follows: *"...In the CVD investigation, we concluded 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. We also concluded that "the effect on soybean prices paid by the respondents is not incidental to, but a direct result of, a system designed by the GOA to ensure the availability of relatively low-priced soybeans for domestic processing industries, notably the biodiesel industry"*.

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

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<sup>35</sup> 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..."* (WTO 2016). See also Cowley and Hillman (2017).

<sup>36</sup> The reason lies in the 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.

is a specific subsidy. In the final determination reached on November 2017, the US established absurdly high CVD duties of 71%-72% (Table 3).

In estimating the margin of dumping 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, p31 reference in Table 3). Consequently, in April 2018 the US established final antidumping duties also absurdly high ranging from 60% to 86% (Table 3).

Adding the initial CVD surcharges and the antidumping duties raised the US import barrier against imports from Argentina to an economically unjustifiable rate of around 150% i.e. around six times higher than our estimate of the input subsidy from escalated export taxes (Section II), and still higher differences with the barriers that the EU and Peru had implemented earlier. In attempting to reduce the damage to its biodiesel industry, the government of Argentina issued a series of Decrees that reduced quite considerably the degree of escalation of export taxes by raising the rate on biodiesel. The expectation was that the US would reconsider the height of the import barriers it had initially imposed as it happened. 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 (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, which continues to impede external trade and competitive domestic pricing for 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 likely to be in violation of the WTO rules. If so, Argentina would have likely had a chance of contesting successfully these US barriers but for the reasons mentioned regarding the non-operationally of the WTO Appellate Body, this option is no longer open.

#### **IV. WTO Appellate Body ruling against the EU's AD duties<sup>37</sup>**

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 AB's distributed its findings on October 2016 upholding the Panel's decision. The driving issue referred to the EU's estimate of the margin of dumping defined in the AD Agreement 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 it is sold in the importing country. 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. The EU's investigating authority (EU Commission) concluded that the price of biodiesel in Argentina's market was

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<sup>37</sup> This section relies quite heavily on Cowley and Hillman (2017). A summary of this case can be found in WTO (2016a).

distorted by Governmental regulations<sup>38</sup>. 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 governments 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 eventually the EU had to reduce the antidumping rates quite significantly (Table 3). According to this ruling, Argentina was free to set input subsidies through escalated export taxes, but under the WTO rules the EU was prevented from compensating this unfair policy.

In the abstract of their paper, Cowley and Hillman (2017) summarized the outcome of the AB 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 AB *“...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 against biodiesel imports from Argentina and on October, 2018 it announced lower revised antidumping surcharges of 4,5% to 8,1% (Table 3).

The AB ruling in the Argentina-EU case would appear to have closed the door for other countries attempting to compensate with antidumping duties, input subsidies created by escalated export taxes. This, nevertheless, has not been the case. Since the

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<sup>38</sup> The bulk of biodiesel sales in the domestic market is bought by the petroleum industry for blending purposes. These prices are regulated by the government (Sonnet and others 2014).

Appellate Body ruling was circulated in 2016, Peru and the US initiated and reached final positive determinations in AD investigations (Table 3). The antidumping measures these countries have implemented eventually brought biodiesel imports from Argentina to a halt (Table 4). Argentina initiated consultations with Peru that sought to challenge this country's barriers, but this case never became a full-fledged WTO dispute. Argentina might have also opted to challenge the apparently unreasonably high US barriers but unless the Trump-driven measures that have translated into a non-operational AB are ended, WTO "rules can no longer be enforced as envisaged"<sup>39</sup>.

## **V. Final remarks**

Our analysis of contingent measures against subsidized biodiesel imports from Argentina through escalated export taxes point to a number of conclusions on multilateral trade rules as institution building. They include that: i) lack of rules on primary agricultural export barriers facilitated discretionary export taxes resulting in important input subsidies in favor of a nascent biodiesel industry and in few years Argentina became the world leading exporter; ii) because of this vacuum in multilateral rules, application of WTO contingent protection policies by importing countries encountered difficulties to an extent that in one instance, a WTO Panel and its Appellate Body ruled in favor of Argentina and against the EU's antidumping duties, iii) this ruling can also be traced to the absence of WTO rules on agricultural export barriers, iv) in spite of this ruling, other importing countries (Peru and the US) initiated and implemented contingent measures that also brought to a halt biodiesel imports from Argentina and, v) absence of rules plus a non-functioning AB has opened the door to the possibility of arbitrary measures by importing countries as the case of the absurdly high US contingent barriers indicate. Argentina can no longer challenge these countries' measures as Trump's policies have undermined the WTO Dispute Settlement Mechanism.

Beyond these conclusions on WTO rules as trade institutions, the paper stresses that Argentina's heavy taxation on primary agricultural exports translated into significant output and export costs. We conclude that in much the same way that adoption of WTO

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<sup>39</sup> 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).



rules on contingent protection reduced the arbitrariness that used to characterize developing countries' trade policies under the import-substitution strategy, if ever multilateral negotiations are to restart, new rules on barriers to agricultural exports would imply a further positive and quite significant institutional change for the benefit of Argentina and the world trading system.

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