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To: joe_gilson@grassley.senate.gov
Subject: Phosphate Fertilizer Appeal Update
Date: Monday, September 18, 2023 4:24:00 PM
Attachments: [image001.png](#)

Hi
Joe

Thank you again for your office's interest in the countervailing duty case on phosphate fertilizers from Morocco. As you may recall, our client OCP North America has had two pending appeals before the US Court of International Trade since last year.

Late last week, the court issued a ruling in one of those cases regarding the Department of Commerce's calculation of the duty rate and remanded the matter back to the Department of Commerce for correction. [This article](#) ran over the weekend which gives a good summary of the issue and decision.

In addition, OCP's statement may be found [here](#).

I anticipate senior leaders from the company will be in Washington in the coming weeks and hope we will have an opportunity to meet with you and/or your boss. We look forward to working with you on this further and would be pleased to respond to any questions you may have in the meantime.

Kind regards,

Hunt Shipman

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Judge Scorns 'Nonsensical' Moroccan Fertilizer Duty Calcs

By **Jennifer Doherty**

Law360 (September 15, 2023, 6:03 PM EDT) -- A U.S. Court of International Trade judge chided the U.S. Department of Commerce for "unreasonable" and "nonsensical" calculations related to subsidies on phosphate fertilizer from Morocco, tossing the duty order back to the agency.

Judge Timothy C. Stanceu rejected claims from OCP SA, which dominates Morocco's phosphate mining and fertilizer production industries, that Commerce's countervailing duty investigation was unlawful. However, he agreed that the agency was wrong to omit OCP's selling, general and administrative expenses in calculating its production costs.

"In light of record evidence that OCP engaged in mining activities and incurred SG&A costs in doing so, the Department's exclusion of all SG&A expenses from the [cost of production] buildup was per se unreasonable," Judge Stanceu said in his opinion Thursday, remanding Commerce's anti-subsidy duties.

OCP provided Commerce with an itemized list of the business expenses supporting its mining operations, basing its figures on the total SG&A expenses across all its business operations.

Commerce reasoned that the agency could not confirm that all the support expenses were directly tied to mining and also couldn't parse which ones to count.

Based on that conclusion, Commerce dropped all of OCP's support expenses as it calculated the company's production costs and how much it would have to charge for its phosphate to cover those costs.

Commerce then compared that estimated price to a benchmark price for phosphate, and it deemed the gap between the price it constructed for OCP and the higher benchmark price to be the benefit OCP gained from subsidies.

Judge Stanceu denounced Commerce's approach in his opinion, calling out the agency's demand that OCP tease out isolated data for mining from its centralized support costs.

"Defendant's argument implying that OCP could have segregated the relevant expenses is nonsensical. OCP could not place on the record 'segregated' SG&A cost data that did not exist."

The judge also identified problems in Commerce's analysis of OCP's profit rate, including

the agency's move to include the same SG&A costs in that calculation that it excluded from the company's costs of production.

OCP's suit over the countervailing duties was consolidated with one brought by U.S. fertilizer producer The Mosaic Co., which launched the tariff probe with its petition back in 2020. Mosaic also filed a suit assailing Commerce's final duty rate, which it argued should be higher.

Both companies took issue with the benchmark Commerce used to assess OCP's prices. The Moroccan company said its own phosphate prices were included in the global average Commerce cited, driving up the benchmark price.

Mosaic, on the other hand, argued that Commerce wrongly included prices for lower-quality phosphate, driving the benchmark price down, a position Judge Stanceu called "unconvincing."

He endorsed Commerce's discretion to ask OCP for more information in the course of its investigation about government programs it used, and its eventual decision, with Mosaic's prodding, to countervail three of the five OCP listed.

However, the judge decried the "absurd result" of Commerce's decision to treat one of those, Morocco's tax fines reduction program, as a countervailable subsidy.

He emphasized that record evidence established it as a "common, ordinary tax administration program, available to all taxpayers, under which the taxing authority may mitigate a penalty," not a specific benefit enjoyed by OCP.

The judge gave Commerce 90 days to complete its remand determination.

Counsel for the government and both companies did not respond to requests for comment Friday.

OCP is represented by Leslie C. Bailey of Arnold & Porter and by Jordan B. Bakst, Alexander David Chinoy, Cynthia Cristina Galvez, Micaela McMurrrough, William George Isasi and Edward John Thomas III of Covington & Burling LLP.

Mosaic is represented by Stephanie Ellen Hartmann, Alexandra S. Maurer, David J. Ross, and Natan Pinchas Lyons Tubman of WilmerHale.

The government is represented by Sosun Bae, Ebonie I. Branch and Ann Camille Motto of the U.S. Department of Justice's Commercial Litigation Branch and by Mykhaylo Alexander Gryzlov of the U.S. Department of Commerce's Office of Chief Counsel for Trade Enforcement and Compliance.

The consolidated case is The Mosaic Co. v. U.S., case number 1:21-cv-00116, at the U.S. Court of International Trade.

--Editing by Andrew Cohen.

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The OCP Group welcomes the US Court of International Trade's decision

16 Sep 2023



The OCP Group welcomes the September 14 decision by the US Court of International Trade on our appeal challenging the countervailing duty of 19.97% imposed on imports of fertilizers from Morocco into the United States. OCP has prevailed on multiple claims, and looks forward to continuing to cooperate fully with the Department of Commerce as it reconsiders the duty on the basis of the Court's ruling.

We remain strongly committed to supporting US farmers and we look forward to being able once again to serve as a trusted source for reliable supply of crop nutrients which are vital to US agriculture.



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