An Update on the Countervailing Duties on Phosphate Fertilizer Imports

May 2024

Executive Summary

The natural element phosphorus is essential to all plant, animal, and human life. As such, it plays a key role in crop growth. Put simply, phosphate fertilizers are an essential and irreplaceable element for agriculture globally.

In the United States, farmers depend on these critical fertilizers to maintain their soil's fertility in order to grow strong and productive crops that go on to feed people across the country and around the world.

The phosphorus needed to produce these critical crop nutrients comes from phosphate ore (also called "phosphate rock"). Importantly, this ore, which was formed over millions of years, is finite and not available everywhere. The largest reserves – amounting overall to 85% of global reserves -- are in China, Morocco, Russia, Saudi Arabia and the United States. These countries are also the largest producers of phosphate fertilizers.

Over time, U.S. reserves of phosphate ore have steadily declined in both quantity and quality. Today, U.S. production of phosphate fertilizers cannot fully meet the needs of U.S. farmers. Despite this, the largest U.S. producer of phosphate fertilizer that represents nearly 70 percent of domestic production, the Mosaic Company, has in recent years consistently exported almost half of its production to clients overseas, even while its annual production volumes have been shrinking. Just last year, Mosaic shuttered its White Springs facility, removing approximately 700,000 tons of dry fertilizer from production.

At the same time, Mosaic has announced that they will divert some phosphate ore away from fertilizer production toward production of purified phosphoric acid (PPA), which is used in the production of lithium-iron-phosphate (LFP) batteries. Specifically, Mosaic's St. James, Louisiana facility will produce 100,000 tons of PPA annually. That feedstock would have gone to produce 200,000 tons of dry fertilizer, a further reduction of Mosaic's already-shrinking production of phosphate fertilizers on which US farmers depend, at the same time that Mosaic seeks to block imports from other reliable sources such as Morocco.

This gap in supply could easily be met through the importation of phosphate fertilizers; however, recently imposed tariffs are a major barrier to major phosphate producing countries accessing the U.S. market and serving the needs of U.S. farmers. Specifically, phosphate fertilizer imports from China, Russia and Morocco are all subject to U.S. tariffs.

Beijing imposes restrictions on its exports to prioritize its own domestic demand, and U.S. tariffs on imports of Chinese fertilizers make them far more expensive for US farmers. Compounding the problem, in 2020, the Mosaic Company filed a countervailing duty (CVD)

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petition alleging that the domestic phosphate fertilizer industry was being harmed by unfairly subsidized imports from Russia and Morocco. The petition was successful, forcing Russian and Moroccan producers out of the U.S. market and leaving U.S. farmers at a competitive disadvantage, unable to access adequate supply of these vital crop nutrients.

While a much smaller domestic producer, Simplot, actively supported Mosaic's petition, the second largest U.S. phosphate fertilizer producer, Nutrien, declined to do so, citing the importance of free trade.

Fortunately, a wide and diverse set of key actors – members of Congress, farmer associations and others – are actively opposing these tariffs. Despite this, however, this long, complicated, and burdensome process still drags on four years later and could continue for many more years.

It is abundantly clear that this effort to restrict fertilizer trade with Morocco only hurts American farmers while benefiting one U.S. company – Mosaic – which is unwilling and unable to adequately supply the needs of U.S. farmers. At the same time, Mosaic provides product to farmers from Brazil, India, and other countries who are expanding production.

A Trusted Partner

Morocco and the United States have long maintained good trade and diplomatic relations. In fact, Morocco was one of the first countries to recognize the United States as a trade partner when George Washington was President. This relationship was further solidified in 2004 when both countries entered into a Free Trade Agreement aiming to reduce and eliminate barriers to trade.

Tariffs Put U.S. Farmers at a Competitive Disadvantage

While U.S. farmers continue to suffer from lack of adequate, reliable, and affordable access to a key input, their competitors in global export markets are able to access these crop nutrients easily. At many points since this process began, U.S. farmers have had to pay a significant premium for much-needed fertilizers while Mosaic continues to export fertilizer abroad.

The significant reduction in the volume, variety and reliability of phosphate fertilizer supplies for the U.S. market has hurt U.S. farmers and the distributors, retailers, and cooperatives on which they rely for these vital inputs.

Even in the best of times, U.S. farmers and their families face a complex set of challenges and uncertainties in trying to produce high-quality, abundant harvests that can feed their fellow Americans and maintain the United States' role as a major global food supplier.

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The negative pressures on U.S. farmers also have an impact on the supply and cost of food for American families – at a time when broader inflationary pressures remain a major concern in the United States.

The Complex and Time-intensive Logistics of Fertilizer Supply

Phosphorus is vital to root growth and early development of crops, and typically is applied twice a year: before spring planting to support the early stages of the crop's growth, and in the fall to be well-established in the soil for the next spring's planting.

Because the ideal periods for each fertilizer application are relatively short (several weeks) and the precise timing of spring application is uncertain and depends on the timing of the winter/spring transition that year, supplies of fertilizer need to be on-hand at the farmer's local retailer or cooperative before the start of the application season.

A bulk product shipped in large volumes (measured in tons), fertilizer must be shipped well before the anticipated start of the planting season. Even if coming from one of the few domestic producers, the fertilizer typically travels by river barge, train and truck to arrive in advance at local storage facilities. As you might expect, fertilizer supply coming from foreign producers takes even longer to arrive at its destination.

For example, supply from Morocco—the closest foreign shipping option—takes roughly 14 days to cross the Atlantic by ship, after which the product begins its journey from the Port of New Orleans, or another U.S. port destination.

Each separate agricultural region has unique soils and crop mixes, and therefore requires specific fertilizer application practices and priorities. Weather conditions and transport/storage logistics also play an important role in supply and time to market.

Once the bulk fertilizer arrives at storage locations near the farmers, it is virtually impossible to back-load and move it elsewhere if demand patterns unexpectedly shift in response to weather conditions or other demand factors that could not have been predicted at the time orders are placed.

In short, anticipated demand needs to be estimated, and orders placed, as much as 4 to 6 months before the expected application period, and once it has arrived at its intended destination it cannot be reshipped to another region.

A "100-year Weather Event" and the Collapse of Demand for Fertilizer

In the months leading up to the spring 2019 U.S. fertilizer application season, there was strong demand for phosphate fertilizers, driving large orders for shipments from both domestic and foreign suppliers. Those shipments arrived – as they should -- before the beginning of the application season, filling local storage facilities from which farmers

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receive just-in-time deliveries for applying the nutrients to their fields in the short window between the post-winter thaw and spring planting.

However, no one anticipated historic levels of rainfall—a "100-year weather event"—soaking the center of the country during three successive application seasons: fall 2018, spring 2019, and fall 2019.

In spring 2019, over 20 million acres of prime farmland (out of an average U.S. planted area of roughly 90 million acres) could not be planted and were registered in the "prevented planting" crop insurance programs that compensate farmers for their lost revenue for acres that cannot be planted in a given year. This caused a severe collapse in demand for spring fertilizers in major U.S. farming regions that year.

As the flooded regions had already taken delivery of fertilizer shipments ordered months before based on anticipated demand, but it could not be applied, the logistics, long travel times and time-sensitivity of fertilizer application meant that the surplus fertilizer in wet regions could not be transferred to respond to continued demand in other regions.

Mosaic, as one of the highest-cost producers because of their challenges with ore quality and older production facilities, ended up losing money in their phosphate business in 2019. Rather than admitting that there was an unanticipated weather-related collapse in demand, Mosaic claimed there was over-supply in the market and sought to blame the foreign producers supplying the U.S. market. In June 2020, Mosaic filed a complaint with the U.S. Government to impose countervailing duties on imports of phosphate fertilizers from Russia and Morocco.

An Overview of the CVD Process

The CVD investigation process, which has its roots in legislation dating back to the Great Depression, is designed to protect U.S. industries against unfair foreign competition, in the form of foreign government subsidies. Where subsidies are found to benefit foreign production and imports of subsidized products cause injury to a U.S. domestic industry, additional duties are imposed on imports that are intended to counteract (countervail) the benefits to foreign producers from the alleged subsidies.

The CVD process has a number of complex steps:

- American companies representing, in general, at least 50% of domestic production of the products the same as, or similar to the allegedly subsidized imports can file a petition with the U.S. International Trade Commission (ITC) and Department of Commerce (DOC).
- The ITC conducts a preliminary investigation and determines whether there is "a reasonable indication of material injury" to the domestic industry from alleged advantages caused by the allegedly unfairly subsidized foreign imports.

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- If the ITC preliminarily finds injury, the DOC then must determine whether a foreign producer received countervailable subsidies and what level of countervailing duties should be applied to counteract the alleged subsidy benefits and "level the playing field."
- If the DOC finds countervailable subsidies, the ITC must make a final injury determination.
- Once those final decisions are made on injury and countervailable subsidies, the foreign producers have the right to appeal both agency decisions. This appeal process can be slow and complex, taking years to complete.
- At the same time, the DOC begins the "administrative review" process to assess whether the CVD rate should be adjusted based on updated data related to the alleged subsidies.
    - Administrative reviews can be requested by Mosaic on an annual basis and typically lead to either an increase or a decrease in the CVD rate, which is then imposed retrospectively on imports that typically occurred two years prior.
    - This retrospective rate-setting process imposes an intolerably high degree of uncertainty on the importer as to what level of final duties will ultimately be due for shipments they have already imported.
    - This concern is not theoretical; a major U.S. company recently agreed to purchase – and be the "importer of record" for – a shipment of Russian phosphate fertilizer that had a provisional CVD cash deposit rate of roughly 9%. After the U.S. importer accepted the shipment, the Department of Commerce raised the final CVD rate to roughly 28%, leaving the U.S. company with an additional bill to the U.S. Government of roughly $50 million.
- Adding burdens of this nature to the U.S. agricultural supply chain has potentially disastrous economic consequences for U.S. farmers.

Where We Are Now

Several parallel tracks of this process continue at the same time, making the process not only highly complex, but fraught with uncertainty for those trying to serve U.S. farmers who face critical shortages of phosphate fertilizer.

- *Appeal of the original findings by the ITC and DOC*: OCP and several other parties appealed the original injury and subsidy decisions of the ITC and DOC to the U.S. Court of International Trade. After a lengthy process, the two judges handling those two separate appeals issued rulings in September 2023 that strongly criticized the findings of both agencies and "remanded" the matter back to the two agencies for reconsideration. Unfortunately, the ITC responded by reasserting its earlier finding and declining to change its decision. While the DOC amended its determination to significantly lower the overall CVD rate to 7.41%, it continued to find that OCP

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benefited from countervailable subsidies. We now await the rulings of the judges in both the ITC and DOC proceedings on these remand determinations.

- *Annual "Administrative Review" of CVD rates*: As mentioned above, while the investigation appeals process continues and the countervailing duties are still in effect, the DOC (on request from either or both sides in the case) can review its initial rate decision on an annual basis based on updated data and new allegations of subsidization put forth by Mosaic. If the rate is changed in either direction, that new rate is retrospectively applied to any imports in the period of review (normally imports occurring two years prior), leaving the importer with great uncertainty regarding the final duties it will owe and potential exposure to high additional retroactive payments of duties. While the first administrative review of the CVD rate for Moroccan imports from 2021 led to a significant reduction in the rate from 19.97% down to 2.21%, the ongoing second review, which covers imports from 2022, could lead to a retroactive increase in the rate. Indeed, a preliminary decision in the second Administrative Review was announced on April 29, 2024, potentially raising the rate on Moroccan imports to 14.21% for reasons that we consider to be deeply flawed. A final decision on this revised rate is expected in October/November 2024.

  Shortly after the release of the preliminary results of the second administrative review, Mosaic requested a third administrative review that will commence in June 2024 covering imports from 2023.

  Since the imposition of the CVD order, OCP has sold only modest imports of a "phosphate-only" fertilizer product, Triple Super Phosphate (TSP) in the U.S. Many U.S. farmers highly value TSP for application in the fall when they do not want also to apply nitrogen, which is not needed until spring planting. TSP is not produced in the U.S., due to the lower quality of U.S. phosphate ore, but Mosaic convinced the DOC to include TSP in the scope of the CVD order. So, in effect, the domestic fertilizer industry, having managed to convince the U.S. Government that all phosphate fertilizers are interchangeable and should be subject to countervailing duties, is consciously seeking to make it difficult for U.S. farmers to access a highly valued product that is not even produced in the United States.

The Broad and Inclusive Effort to End These Duties

From the beginning of this CVD process, there has been a broad, diverse, and vocal coalition against these unwarranted tariffs. In a bipartisan, bicameral effort, a broad coalition of elected officials have co-signed multiple letters to the two agencies handling this process and to the Biden Administration more generally, calling for an end to these duties.

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A very large and diverse group of grower associations – national, state, and local – have also raised their voices repeatedly. These letters and statements can be found on the website that has been developed to keep key stakeholders informed and involved in this matter: www.standwithUSfarmers.com.

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