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February 8, 2021

MEMORANDUM TO: Christian Marsh
Acting Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Affirmative Determination of the Countervailing Duty Investigation of Phosphate Fertilizers from the Kingdom of Morocco

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I. SUMMARY

The Department of Commerce (Commerce) determines that countervailable subsidies are being provided to producers and exporters of phosphate fertilizers (fertilizers) from the Kingdom of Morocco (Morocco), as provided in section 705 of the Tariff Act of 1930, as amended (the Act). Below is the complete list of issues in this investigation for which we received comments from interested parties.

General Issues

Comment 1: Whether the Petition Demonstrated Sufficient Industry Support
Comment 2: Whether Commerce's "Other Assistance" Question Is Contrary to Law

Mining Rights for Less Than Adequate Remuneration (LTAR)

Comment 3: Whether Commerce Should Revise the Phosphate Rock Benchmark
Comment 4: Whether to Include or Exclude HQ, Support, Debt, and Other Costs as Costs of Producing Phosphate Rock
Comment 5: Whether to Include a Profit Component
Comment 6: Whether Freight Costs Are Double Counted in the Mining Costs
Comment 7: The Appropriate Quantity for the Mining Rights for LTAR Benefit Calculation
Comment 8: The Appropriate Analysis for the Provision of Mining Rights for LTAR

Creditworthiness

Comment 9: Whether Commerce Correctly Analyzed OCP S.A. (OCP)'s Financial Ratios

[1] Banque Centrale Populaire (BCP).
[2] Attijariwafa Bank Group (AWB).
[3] Credit Agricole du Maroc (CAM).
[4] Morocco dirhams (MAD).

II. BACKGROUND

A. Case History

The mandatory respondent in this investigation is OCP. On November 30, 2020, Commerce published its *Preliminary Determination*.[5] On December 29, 2020, Commerce published its *Amended Preliminary Determination*.[6] On January 6, 2021, Commerce released its Post-Preliminary Determination.[7]

During the course of this investigation, travel restrictions were imposed that prevented Commerce personnel from conducting on-site verification. In the *Preliminary Determination*, Commerce notified interested parties that it was unable to conduct on-site verification.[8] In lieu of on-site verification, Commerce sent supplemental questionnaires to OCP and the Government of Morocco (GOM) to collect additional or supporting documentation related to information that the parties had already submitted to the record.[9] On December 30, 2020, we received timely supplemental questionnaire responses from both OCP and the GOM.[10] We used these questionnaire responses to[11] verify the information relied upon in making this final determination, in accordance with section 782(i) of the Act.

On January 6, 2021, we invited parties to comment on the *Preliminary Determination*, Post-Preliminary Determination, and the December 30, 2020, responses to Commerce's in-lieu of on-site verification questionnaire responses.[12] On January 13, 2021, the petitioner,[13] OCP, and the GOM timely filed case briefs.[14] On January 19, 2021, all interested parties submitted rebuttal briefs.[15]

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[5] *See Phosphate Fertilizers from the Kingdom of Morocco: Preliminary Affirmative Countervailing Duty Determination*, 85 FR 76522 (November 30, 2020) (*Preliminary Determination*) and accompanying Preliminary Decision Memorandum (PDM).

[6] *See Phosphate Fertilizers from the Kingdom of Morocco: Amended Preliminary Determination of Countervailing Duty Investigation*, 85 FR 85585 (December 29, 2020) (*Amended Preliminary Determination*) and accompanying PDM.

[7] *See* Memorandum, "Post-Preliminary Determination of Countervailing Duty Investigation: Phosphate Fertilizers from the Kingdom of Morocco," dated January 6, 2020 (Post-Preliminary Determination).

[8] *See Preliminary Determination* at 85 FR 76523.

[9] *See* Commerce's Letter to OCP, "Supplemental Questionnaire in Lieu of On-Site Verification," dated December 17, 2020; *see also* Commerce's Letter to GOM, "Supplemental Questionnaire in Lieu of On-Site Verification," dated December 17, 2020.

[10] *See* (GOM ILOV SQR).

[11] *See* OCP's Letter, "Response to Questionnaire in Lieu of On-Site Verification," dated December 30, 2020 (OCP ILOV SQR); *see also* the GOM's Letter, "In Lieu of On-Site Verification Questionnaire Response of the Government of the Kingdom of Morocco," dated December 29, 2020 (GOM ILOV SQR).

[12] *See* Commerce's Letter, dated January 6, 2021.

[13] The petitioner is the Mosaic Company.

[14] *See* Petitioner's Letter, "Petitioner's Case Brief," dated January 13, 2021 (Petitioner's Case Brief); *see also* OCP's Letter, "OCP's Case Brief & Request for a Closed Hearing," dated January 13, 2021 (OCP's Case Brief) and the GOM's Letter, "Case Brief," dated January 13, 2021 (GOM's Case Brief).

[15] *See* Petitioner's Letter, "Petitioner's Rebuttal Brief" (Petitioner's Rebuttal Brief); the GOM's Letter, "Rebuttal Brief" (GOM's Rebuttal Brief); and OCP's Letter, "OCP's Rebuttal Brief" (OCP's Rebuttal Brief), all dated January 19, 2021.

On December 30, 2020, pursuant to 19 CFR 351.310(c), the petitioner, OCP, and the GOM filed hearing requests.[16] On January 26, 2021, all interested parties who had requested a hearing withdrew their requests.[17]

B. Period of Investigation

The period of investigation (POI) is January 1, 2019, through December 31, 2019.

III. SUBSIDIES VALUATION

A. Allocation Period

Commerce made no changes to the allocation period, ten years, and the allocation methodology used in the *Preliminary Determination*.[18] No issues were raised by interested parties in case briefs regarding the allocation period or the allocation methodology.

B. Attribution of Subsidies

Commerce made no changes to the methodologies used in the *Preliminary Determination* for attributing subsidies.[19]

C. Denominators

The sales denominators used in our calculations have not changed from the *Preliminary Determination*.[20] For a further discussion of the denominators used for each program, *see* Final Calculation Memorandum.[21]

IV. BENCHMARKS AND INTEREST RATES

A. Creditworthiness

We have revised our finding from the *Preliminary Determination* that OCP was uncreditworthy during 2016 and 2017, and creditworthy in 2018.[22] Specifically, we now determine that OCP is creditworthy in all three years. *See* Comment 9, below. As a result, we have not applied an

[16] *See* Petitioner's Letter, "Petitioner's Hearing Request," dated December 30, 2020; *see also* OCP's Letter, "Request for a Hearing," dated December 30, 2020, and the GOM's Letter, "Request for Hearing," dated December 30, 2020.
[17] *See* Petitioner's Letter, "Withdrawal of Petitioner's Hearing Request;" the GOM's Letter, "Withdrawal of Request for Hearing;" and OCP's Letter, "Withdrawal of Request for Hearing," all dated January 26, 2021.
[18] *See Preliminary Determination* PDM at 3, "Allocation Period."
[19] *Id*. at 3-5, "Attribution of Subsidies."
[20] *Id*. at 5.
[21] *See* Memorandum, "OCP S.A. Calculations for the Final Determination," dated concurrently with this memorandum (Final Calculation Memorandum).
[22] *See Preliminary Determination* PDM at 5-6, "Creditworthiness."

uncreditworthy risk premium to any interest or discount rates used in our final subsidy calculations.[23]

B. Interest Rates

Consistent with the *Preliminary Determination*, we used, as our long-term interest rate benchmark, either OCP's comparable long-term commercial loans or bonds or the appropriate foreign government bond interest rates, depending on the terms of the loan or bond.[24] For the short-term interest rate benchmark, we used OCP's comparable commercial loans.[25]

V. ANALYSIS OF PROGRAMS

A. Programs Determined to Be Countervailable[26]

We made no changes to our *Preliminary Determination* and our Post-Preliminary Determination with respect to the methodologies used to calculate the subsidy rates for the following programs, except where noted below. For descriptions, analyses, and calculation methodologies for these programs, *see* the *Preliminary Determination* and the Post-Preliminary Determination. Except where noted below, no issues were raised regarding these programs in the parties' case briefs. The final program rates are as follows:

1. Government Loan Guarantees

We made no changes to our methodology for calculating a subsidy rate under this program. For further discussion, *see* Comment 19. The final subsidy rate for this program is 0.06 percent *ad valorem* for OCP.

2. Provision of Phosphate Mining Rights for LTAR

As discussed in Comments 4 through 6, we made changes to our methodology for calculating a subsidy rate under this program. The final subsidy rate for this program is 18.42 percent *ad valorem* for OCP.

3. Tax Incentives for Export Operations

As discussed in Comment 20, we made changes to our methodology for calculating a subsidy rate under this program. The final subsidy rate for this program is 1.27 percent *ad valorem* for OCP.

[23] *See* Final Calculation Memorandum.
[24] *See Preliminary Determination* PDM at 7, "Long-Term Financing."
[25] *Id*. at 6-7, "Short-Term Loans."
[26] *See* Final Calculation Memorandum

4. Reductions in OCP's Tax Fines and Penalties

We made no changes to our methodology for calculating a subsidy rate under this program. The final subsidy rate for this program is 0.05 percent *ad valorem* for OCP.

5. Revenue Exclusions for Minimum Tax Contributions

We made no changes to our methodology for calculating a subsidy rate under this program. The final subsidy rate for this program is 0.07 percent *ad valorem* for OCP.

6. Customs Duty Exemptions for Capital Goods, Machinery, and Equipment

We made no changes to our methodology for calculating a subsidy rate under this program. While we made no changes to our methodology for calculating subsidy rates under this program, we are no longer applied a uncreditworthy risk premium for years 2016 and 2017. *See* Comment 9. The final subsidy rate for this program is 0.10 percent *ad valorem* for OCP.

B. Programs Determined Not to Have Conferred a Benefit

Commerce made no changes to its *Preliminary Determination* or to its Post-Preliminary Determination with regard to programs determined not countervailable during the POI, except where noted below.[27]

1. OCP Bond Program

As discussed in Comment 15, we made changes to our methodology for calculating the subsidy rate under this program, which resulted in no benefit.

2. Value-Added Tax (VAT) Reform-VAT Refunds
3. VAT Exemptions for Capital Goods, Machinery, and Equipment
4. VAT Exemptions for Local Purchases under Article 94-I of the Moroccan Tax Code
5. Inward Processing Regime: VAT and Customs Duty Exemptions
6. Rail Transport Services for LTAR

C. Programs Determined Not Used or Not to Have Conferred a Measurable Benefit

Commerce made no changes to its *Preliminary Determination* or its Post-Preliminary Determination with regard to the following programs determined not used or not to have conferred a measurable benefit to OCP during the POI:[28]

[27] *See Preliminary Determination* PDM at 14-16; *see also* Post-Preliminary Determination at 7-14.
[28] *See Preliminary Determination* PDM at 14 and 17; *see also* Post-Preliminary Determination at 7.

1. Direct Loans[29]
2. OCP Bond Services for LTAR
3. Provision of Phosphogypsum Waste Disposal
4. Inter-Enterprise Mining Vocational Training Fund

VI. ANALYSIS OF COMMENTS

General Issues

Comment 1: Whether the Petition Demonstrated Sufficient Industry Support

OCP's Case Brief:[30]

- Commerce did not have sufficient industry support to justify the initiation of the investigation. Thus, Commerce cannot lawfully impose CVD duties on imports of phosphate fertilizers.
- Section 702(c)(5) of the Act defines "domestic producers or workers" for industry support purposes to include certain interested parties. [31] Thus, Commerce must consider the views of these interested parties.[32]
- Because Commerce did not adjust the industry support calculations to account for the views of these interested parties, Commerce cannot fully evaluate industry support for a petition and cannot find that the 50 percent industry support threshold has been met.[33]
- Commerce explained that it did not consider the views of these interested parties because these entities did not provide Commerce with any volume data.[34] This shifted the burden of establishing industry support onto the commenting parties.[35] However, Commerce is legally obligated to investigate and account for these viewpoints or rely on other information accounting for them.[36]
- Furthermore, Commerce failed to account for bulk-blended NPK fertilizer producers in its industry support calculations, even though NPK fertilizers are covered by the scope.
- Bulk blenders, who produce a significant amount of the domestic like product, qualify as "domestic producers" and should have been included in the industry support calculation.
- Commerce has not addressed evidence placed on the record that total U.S. production of like product, including bulk-blended NPK fertilizers, is much higher than the estimate listed in the Petition.[37] Thus, the petitioner's industry support is lower than 50 percent.

[29] *See Preliminary Determination* PDM at 14. The calculation of the benefit resulted in a subsidy rate that is less than 0.005 percent; therefore, this program did not confer a measurable benefit to OCP during the POI.
[30] *See* OCP's Case Brief at 4-10.
[31] *See* Memorandum, "Business Proprietary Information Accompanying the Issues and Decisions Memorandum," dated concurrently with this memorandum (IDM BPI Memorandum) at Note 1.
[32] *Id*.
[33] *Id*.
[34] *Id*. at Note 2.
[35] *Id*. at Note 3.
[36] *Id*.
[37] *See* "Petitions for the Imposition of Countervailing Duties," dated June 26. 2020 (Petition).

Petitioner's Rebuttal Brief:[38]

- Commerce is statutorily prohibited from reconsidering its determination of industry support, pursuant to section 702(c)(4)(E) of the Act. Commerce has previously considered requests to reconsider industry support improper.[39]
- The Court of International Trade (CIT) and the Court of Appeals for the Federal Circuit (CAFC) have held that section 702(c)(4)(E) prohibits Commerce from reconsidering a finding of adequate industry support once an investigation is initiated.[40]
- OCP does not cite to any case law or Commerce decision for the proposition that there are any exceptions to the statutory bar on reconsideration of industry support.
- Regarding the opposition of certain interested parties, Courts have repeatedly recognized that Commerce has "broad discretion" in deciding to initiate an investigation.[41] Furthermore, the CIT has previously upheld Commerce's decision to rely on a petitioner's industry support data when the opposing domestic manufacturer "provided no information as to its share of the domestic market."[42]
- Commerce's decision not to poll the industry was an appropriate exercise of its discretion in determining whether there was sufficient industry support.
- In its Initiation Checklist, Commerce explained that bulk-blended NPK fertilizers fall outside the scope of the investigation based on information provided by Mosaic and supported by industry publications.[43]

Commerce's Position:

Section 702(c)(4)(E) of the Act directs Commerce as follows with respect to the consideration of comments by interested parties regarding industry support:

> Before the administering authority makes a determination with respect to initiating an investigation, any person who would qualify as an interested party under section 771(9) if an investigation were initiated, may submit comments or information on the issue of industry support. *After the administering authority makes a determination with respect to initiating an investigation, the determination regarding industry support shall not be reconsidered*.[44]

[38] *See* Petitioner's Rebuttal Brief at 4-8.
[39] *Id*. at 4 (citing *Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Final Affirmative Determination*, 85 FR 11962 (February 21, 2020) (*Wood Cabinets from China*), and accompanying Issues and Decision Memorandum (IDM) at Comment 1).
[40] *Id*. at 5 (citing *PT Pindo Deli Pulp v. United States*, 825 F. Supp. 2d 1310, 1323 (CIT 2012) and *Downhole Pipe & Equipment, L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015)).
[41] *Id*. at 6 (citing *Minebea Co., Ltd. v. United States*, 782 F. Supp. 117, 119 (CIT 1992) (*Minebea*) and *Citrosuco Paulista, S.A. v. United States*, 704 F. Supp. 1075, 1085–86 (CIT 1988)).
[42] *Id*. (citing *Minebea*, 782 F. Supp. at 119).
[43] *Id*. at 7 (citing Countervailing Duty Initiation Checklist, dated July 16, 2017 (Initiation Checklist), Attachment II at 14)).
[44] *See* section 702(c)(4)(E) of the Act (emphasis added); *see also Certain Uncoated Groundwood Paper from Canada: Final Determination of Sales at Less Than Fair Value*, 83 FR 39412 (August 9, 2018), and accompanying IDM at Comment 1.

Therefore, Commerce is statutorily precluded from reconsidering its industry support determination at this stage of the investigation. As a result, we continue to rely on our determination of industry support provided in the Initiation Checklist. We will not reconsider our initiation decision and will not consider any new arguments regarding initiation, which were not properly raised at the initiation stage.[45]

As stated in the Initiation Checklist:

> We find that…the petitioner has provided reasonably available information to account for all production of the domestic like product in its industry support calculation and has demonstrated the industry support required by section 702(c)(4)(A) of the Act…Commerce further finds that the domestic producers and workers who support the Petitions account for more than 50 percent of the total production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petitions. Therefore, we find that there is adequate industry support within the meaning of section 702(c)(4)(A) of the Act.[46]

With respect to OCP's arguments regarding the consideration of the viewpoints of certain interested parties,[47] Commerce addressed these arguments in detail at the initiation stage of the investigation.[48] While OCP raises additional new arguments on this issue that were not made prior to initiation, when OCP had an opportunity to raise them, we have not considered those arguments pursuant to section 702(c)(4)(E) of the Act.

Further, with respect to the inclusion of bulk-blended NPK fertilizers, Commerce also addressed OCP's arguments in detail at the initiation stage of the investigation.[49] Specifically, we stated:

> Commerce finds that it is not appropriate to include bulk blenders in the domestic industry because the industry support calculation properly accounts for all phosphate fertilizers produced in the United States. Thus, it necessarily includes the phosphate fertilizers produced in the United States that may be comingled or mechanically mixed or blended into a bulk blend that contains phosphate fertilizers. As a result, it is not appropriate to collect data from companies that perform such blending techniques and doing so could result in double-counting.[50]…Further, Commerce finds that the petitioner provided sufficient information to establish all known producers of the domestic like product…Moreover, with regard to the bulk

[45] *See* Initiation Checklist at Attachment II.
[46] *Id.* at Attachment II, 13-14.
[47] *See* IDM BPI Memorandum at Note 1.
[48] *See* Initiation Checklist at Attachment II, 10-11.
[49] *Id.* at Attachment II, 13-14.
[50] *Id*. at Attachment II, 14 (citing *Certain Corrosion Inhibitors from the People's Republic of China: Initiation of Less-Than-Fair-Value Investigations*, 85 FR 12506 (March 3, 2020), and the Antidumping Duty Initiation Checklist: Certain Corrosion Inhibitors from the People's Republic of China, dated February 27, 2020, at Attachment II (included in Petitioner's Response at Exhibit 1); *see also Biodiesel from Argentina and Indonesia: Initiation of Less-Than-Fair-Value Investigations*, 82 FR 18428 (April 19, 2017), and the Antidumping Duty Initiation Checklist: Biodiesel from Argentina, dated April 12, 2017, at Attachment II).

blenders identified by OCP,[51] the record does not contain information indicating that any are producers of phosphate fertilizers. Further, in the Argus NPK Analytics Report cited in the OCP Submission, it states that, "blending is more a technique than a finished product," and therefore bulk blending activities do not warrant inclusion in the industry support calculation.[52]

Thus, we determined that record information regarding the production of the domestic like product supported a conclusion that the petitioner properly accounted for all production of the domestic like product and demonstrated adequate industry support for initiating the investigation, which we are not revisiting for the final determination.

Comment 2: Whether Commerce's "Other Assistance" Question Is Contrary to Law

OCP's Case Brief:[53]

- Under the law, Commerce can investigate a potential subsidy by either: 1) investigating a program on the basis of a petitioner's allegation; or 2) investigating potential countervailable subsidies that it "discovers."[54]
- In the rare circumstances in which Commerce self-initiates an investigation, it must have sufficient information that an investigation is warranted.[55]
- With respect to potential countervailable subsidies "discovered" during investigations, section 775 of the Act provides that Commerce "shall include {a} practice, subsidy, or subsidy program in the proceeding" that was not alleged in the Petition but is "discover{ed}" during the investigation, if the practice "appears to be a countervailable subsidy."
- A program "appears to be a countervailable subsidy" if it appears to demonstrate each element of a countervailable subsidy and if Commerce has some evidence to support the appearance of the subsidy.[56]
- When considering practices "discovered" during the course of an investigation, Commerce may not "go{} on 'fishing expeditions,' investigating any and all government practices that might affect the respondents."[57]
- Commerce's use of the "other assistance" question[58] exceeds Commerce's authority and permits Commerce to investigate potential subsidies prior to meeting the threshold legal requirements for including a potential subsidy in the investigation.
- Furthermore, Commerce has not defined what it considers to be "other assistance," and the term is overbroad as there is no meaningful limit on what constitutes "assistance."

[51] *See* OCP's Letter, "Pre-Initiation Comments on Industry Support," dated July 14, 2020 (OCP Submission) at 7-8 and Exhibits 2 through 3.
[52] *See* OCP Submission at Exhibit 2, p. 34; *see also* Initiation Checklist at Attachment II, 14.
[53] *See* OCP's Case Brief at 15-18.
[54] *Id*. at 15 (citing section 702(b) of the Act) and at 16 (citing section 775 of the Act and 19 CFR 351.311).
[55] *Id*. at 16 (citing section 702(a) of the Act; *NEC Corp. v. United States*, 978 F. Supp. 314, 317 (CIT 1997); and *Common Alloy Aluminum Sheet from the People's Republic of China: Initiation of Less-Than-Fair-Value and Countervailing Duty Investigations*, 82 FR 57214 (December 4, 2017)).
[56] *Id*. at 16 (citing *Allegheny Ludlum Corp. v. United States*, 25 C.I.T. 816, 821-24 (July 18, 2001) (*Allegheny II*)).
[57] *Id*. at 16 (citing *Stainless Steel Plate in Coils from Belgium: Final Results of Redetermination Pursuant to Court Remand, Court No. 99-06-00362* (CIT June 7, 2000) (September 5, 2001) at Issue 2).
[58] *Id*. at 17 (citing Commerce's Letter, "Countervailing Duty Questionnaire, dated July 25, 2020, at 46).

- On this basis, Commerce improperly sought information on a number of possible subsidies, including the following five subsidies on which Commerce initiated an investigation: (1) reductions in tax fines and penalties; (2) revenue exclusions from minimum tax contributions; (3) customs duty exemptions for capital goods, machinery, and equipment; (4) VAT exemptions for capital goods, machinery, and equipment; and (5) rail transport services for LTAR.

Petitioner's Rebuttal Brief:[59]

- Commerce acted in accordance with its legal authority when it inquired about "other assistance."
- Pursuant to section 775 of the Act, Commerce must "consolidate in one investigation . . . all subsidies known by petitioning parties to the investigation or by {Commerce} relating to that merchandise." Thus, asking about other forms of government assistance is part of Commerce's obligation under the Act to investigate all potentially countervailable subsidies.
- Commerce has previously determined that the "other assistance" question is consistent with its broad discretion to seek information it deems relevant to its determination.[60]
- Commerce has previously considered and rejected the argument that Commerce unlawfully examined "other subsidies" without first satisfying the initiation standard.[61]
- Commerce has also previously addressed and rejected the contention that the phrase "other assistance" is vague or overbroad.[62]

Commerce's Position:

We disagree with OCP that Commerce unlawfully examined "other subsidies" without first finding that the initiation standard had been satisfied. Commerce has addressed these and similar arguments numerous times in the past.[63]

OCP is correct in stating that investigations into potentially countervailable subsidies to a class or kind of merchandise are initiated in one of two ways. First, an investigation can be self-

[59] *See* Petitioner's Rebuttal Brief at 11-12.
[60] *Id*. at 11 (citing *Certain Steel Racks and Parts Thereof from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 84 FR 35592 (July 17, 2019), and accompanying IDM at 13; and *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances*, 82 FR 51814 (November 8, 2017) (*Softwood Lumber from Canada*), and accompanying IDM at 29).
[61] *Id*. at 12 (citing *Multilayered Wood Flooring from the Peoples Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2017*, 85 FR 76011 (November 27, 2020), and accompanying IDM at 63–64).
[62] *Id*. at 12 (citing *Certain Collated Steel Staples from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 85 FR 33626 (June 2, 2020), and accompanying IDM at 28; and *Softwood Lumber from Canada* and accompanying IDM at 29).
[63] *See, e.g., Countervailing Duty Investigation of Stainless Steel Sheet and Strip from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 82 FR 9714 (February 8, 2017), and accompanying IDM at 16-21; and *Countervailing Duty Order on Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2017*, 85 FR 22718 (April 23, 2020), and accompanying IDM at Comment 8).

initiated by Commerce.[64] Second, a domestic interested party may file a petition for the imposition of countervailing duties on behalf of an industry.[65] Under the second mechanism, those parties are obligated to support their subsidy allegations with information reasonably available to them, and those allegations must identify the elements of a countervailable subsidy (*i.e.*, specificity, benefit, and financial contribution).[66] However, OCP ignores the fact that once an investigation has been initiated through one of the above mechanisms, then, under section 775 of the Act, Commerce may also investigate potential subsidies it discovers in the course of the proceeding.

Specifically, in the course of an investigation, Commerce may "discover{} a practice which appears to be a countervailable subsidy, but was not included in the matters alleged in the countervailing duty petition."[67] In such a case, Commerce "*shall* include the practice, subsidy, or subsidy program in the proceeding."[68] As the petitioner states in its case brief, section 775 of the Act imposes an affirmative obligation on Commerce to "consolidate in one investigation … all subsidies known by petitioning parties to the investigation or by {Commerce} relating to {subject} merchandise" to ensure "proper aggregation of subsidization practices."[69] Commerce's regulations carve out a limited exception to its obligation to investigate what "appear{}" to be countervailable subsidies: when Commerce discovers a potential subsidy too late in a proceeding, it may defer its analysis of the program until a subsequent review, if any.[70]

OCP cites to *Allegheny II* to support the existence of a threshold countervailability finding requirement before including non-initiated programs in an investigation. However, *Allegheny II* is distinguishable, as it concerned Commerce's decision not to investigate a late-filed subsidy allegation. In that disparate context, the CIT examined what it meant for a practice to "appear" to be countervailable within the meaning of section 775 of the Act, such that Commerce had an obligation to investigate the discovered program.[71] Commerce explained that when an allegation was insufficient, it was not required to go on "fishing expeditions" to determine whether an alleged subsidy or practice was countervailable. However, the facts of this investigation differ. Here, Commerce requested information regarding potentially countervailable subsidies in order to determine whether any such assistance appeared to be countervailable (*i.e.*, the elements necessary for the imposition of countervailing duties are present) and attributable to subject merchandise. The request was within its independent investigative authority and not precluded by *Allegheny II*.

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[64] *See* section 702(a) of the Act.
[65] *See* section 702(b) of the Act.
[66] *See* section 702(b)(1) of the Act.
[67] *See* section 775 of the Act.
[68] *Id*. (emphasis added).
[69] *See* S. Rep. No. 96-249, at 98 (1979); *see also Allegheny Ludlum Corp. v. United States*, 112 F. Supp. 2d 1141, 1150 (CIT 2000) (*Allegheny I*).
[70] *See* 19 CFR 351.311(b)(2).
[71] *See Changzhou Trina Solar Energy Co., Ltd., et al v. United* States, , 195 F. Supp. 3d 1334, 1343 (CIT 2016) (*Trina Solar*) ("{B}ecause the issue here is not whether Commerce was required to examine these additional programs pursuant to a petitioner's request that the agency invoke {section 775 of the Act}, cf. *Allegheny II*, 25 CIT at 824 …, but rather whether Commerce reasonably exercised its own independent investigative authority, *Allegheny Ludlum {i.e., Allegheny II}* is not controlling.").

Moreover, Commerce's question regarding "all other assistance" is not vague and does not exceed Commerce's information-collecting authority.[72] Commerce has broad discretion to determine which information is relevant to its determination and to request that information. Thus, consistent with the CIT's holding in *Trina Solar*,[73] we find that Commerce's "other assistance" question enables Commerce to effectuate its obligation to investigate subsidies that it discovers that appear to be countervailable in the course of a proceeding and is consistent with its broad discretion to seek information it deems relevant to its determination. Commerce also pursues information regarding "other assistance" expressly to satisfy the intent of the CVD law, to investigate and catalogue all potentially countervailable subsidies, and to consolidate all relevant subsidies into a single investigation.[74] Consistent with U.S. law, Commerce is not precluded from inquiring about other assistance to make determinations.[75] Commerce "has independent investigative authority" to ask questions about other governmental assistance, beyond the subsidies alleged by the petitioner.[76]

Given that we acted consistently with our statutory authority, prior CIT determinations, and practice in investigating the five programs at issue, we find that we properly inquired into the programs that OCP reported in response to our "other subsidies" question. We also note that the petitioner timely filed new subsidy allegations with respect to the five programs at issue, and we initiated investigations on these five programs[77] and addressed them in our Post-Preliminary Determination and this final determination, where appropriate.

Mining Rights for Less Than Adequate Remuneration (LTAR)

Comment 3: Whether Commerce Should Revise the Phosphate Rock Benchmark

Petitioner's Case Brief:[78]

- The world market benchmark price for phosphate rock that Commerce constructed is too low, given the value of the phosphate rock that OCP obtains under the phosphate mining rights provided by the GOM.
- The bone phosphate of lime (BPL) information that OCP submitted is incomplete because OCP only reported average BPL content levels for its locally consumed and exported rock and did not provide BPL content levels for its rock that was produced and held in storage during the POI.[79]
- Commerce should question the reliability of the BPL information that OCP reported.

[72] *See Trina Solar 2016*, 195 F. Supp. 3d at 1346 ("Commerce's inquiry concerning the full scope of governmental assistance provided by the {Government of China} and received by the Respondents in the production of subject merchandise was within the agency's independent investigative authority pursuant to {sections 702}(a) and {775 of the Act}, this inquiry was not contrary to law").
[73] *See Trina Solar*, 195 F. Supp. 3d at 1346.
[74] *Id*., 195 F. Supp. 3d at 1342-43.
[75] *Id*., 195 F. Supp. 3d at 1345-46.
[76] *Id*., 195 F. Supp. 3d at 1346.
[77] *See* Petitioner's Letter, "New Subsidy Allegations," dated October 14, 2020; *see also* Memorandum, "New Subsidy Allegations," dated November 3, 2020.
[78] *See* Petitioner's Case Brief at 3-13.
[79] *Id*. at 5 (citing OCP's Letter, "OCP S.A. Supplemental Questionnaire Response Part Four," dated November 9, 2020 (OCP 11/9/20 SQR) at 2, FN 1).

- Commerce should consider OCP's statements about phosphate ore and rock quality that it submitted[80] to the International Trade Commission (ITC).[81]
- In its *Preliminary Determination*, Commerce included two Egyptian phosphate rock prices in its benchmark calculation: the CRU price of Egyptian rock with a BPL content level range of 60-68 percent and the Profercy price of Egyptian rock with a $P_2 0_5$ content level of 30-31 percent.[82] The record demonstrates that Egyptian phosphate rock prices should be excluded from the benchmark price because there are significant differences between Egyptian rock and OCP's rock.
- Egyptian phosphate rock is low quality in terms of its $P_2 0_5$ and BPL content level, is degraded by its carbonate and iron content, and is mostly used in low-value application markets.[83]
- In contrast, 6 out of 8 of the types of phosphate rock originating from the Khouribga and Gantour mining sites have BPL content levels in the range of 65-75 percent.[84] There is no evidence that shows OCP's phosphate rock is low-quality or only acceptable for low-value applications.
- In order to account for the fact that it selected rock prices on a free-on-board (FOB) basis from industry publications[85] and did not use benchmark prices reported on a cost and freight (CFR) basis in its *Preliminary Determination*, Commerce should add amounts for freight, import duties, and VAT to reach a "delivered" benchmark price that can be compared to OCP's rock costs inclusive of transportation costs.
- Commerce's regulations concerning the provision of goods or services for LTAR state that it will use delivered prices (inclusive of import duties) to construct a Tier 1 or Tier 2 benchmark.[86] Commerce's practice is to use delivered benchmarks in Tier 3 LTAR analyses as well where the benchmark is, or approximates, a world market price for the good being valued and there is suitable data available.
- In *Silicon Metal from Australia*, Commerce analyzed the provision of quartz for LTAR by comparing the respondent's per-unit costs, including transportation expenses, to "average quartz prices for several global silicon metal producers reported by CRU" that also included transportation costs.[87]

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[80] *Id*. at 7-8 (citing Petitioner's Letter, "Comments on Deficiencies and Submission of Factual Information Supplemental Questionnaire Response of November 9, 2020," dated November 19, 2020 (Petitioner 11.19 Comments) at Exhibit 1 at 3-4, 10, and 15-16).

[81] Information publicly available in OCP's Rebuttal Brief at 12-13.

[82] *Id*. at 8 (citing Memorandum, "Preliminary Determination Calculations for OCP.S.A.," dated November 23, 2020 (OCP Prelim Calc Memo) at Attachment 1, Calculation Worksheet: Phosphate Rock Benchmark).

[83] *Id*. at 8-9 (citing Petitioner's Letter, "Submission of Factual Information to Rebut, Clarify, or Correct," dated November 16, 2020, at Exhibit 1).

[84] *Id*. at 9 (citing Petitioner's Benchmark Submission, dated November 4, 2020, at Exhibit 8(a)).

[85] *Id*. at 10 (citing *Preliminary Determination* PDM at 12 Petition at Volume II at Exhibit II-23).

[86] *Id*. at 11 (citing 19 CFR. 351.511(a)(2)(iv) and *Countervailing Duties; Final Rule*, 63 FR 65348, 65378 (November 25, 1998) (*CVD Preamble*) ("Paragraph (a)(2)(iv) provides that, in determining the adequacy of remuneration, the Department will adjust comparison prices to reflect the price a company would pay if it imported the good or service. This adjustment will account for delivery charges and import duties. In addition, if the price of the imported good includes antidumping or countervailing duties imposed by the country in question, we would use the price inclusive of those duties for comparison purposes.")).

[87] *Id*. (citing *Silicon Metal from Australia: Final Affirmative Countervailing Duty Determination*, 83 FR 9834 (March 8, 2018) (*Silicon Metal from Australia*), and accompanying IDM at Comment 5).

- In *Cold-Rolled Steel from Russia*, Commerce relied on a Tier 3 benchmark analysis to countervail mining rights for LTAR but excluded freight entirely from its benefit calculation after it found that it did not have suitable freight rate data to arrive at a freight-inclusive benchmark price and a freight-inclusive government price.[88] Unlike in that proceeding, there is substantial freight data on the record for both sides of the comparison.
- Commerce should use the mining costs inclusive of transportation costs that OCP reported[89] for the government side and apply the Maersk data and the phosphate rock freight data that the petitioner submitted[90] for the market benchmark side to calculate amounts for freight, VAT, and import duties.
- If Commerce declines to add freight charges to the phosphate rock benchmark, then it should at least exclude transportation costs from its calculation of OCP's mining costs or else it would be conducting the type of imbalanced benefit calculation that it tried to avoid in *Cold-Rolled Steel from Russia*.[91]

OCP's Case Brief:[92]

- Commerce used phosphate rock price information compiled by CRU, *Argus Phosphates*, Fertecon, and Profercy Phosphates to establish a world benchmark price for phosphate rock in its *Preliminary Determination*. However, the Argus pricing data that were provided in the petition are incomplete and should not be used to create a price benchmark.
- Commerce should not include the Argus pricing data from the petition because they are just a summary of information in a table that references underlying source data.[93] There is no evidence on the record of this underlying source data.
- In past proceedings Commerce has previously refused to rely on benchmark data submitted as a summary table that does not include primary factual support. In *Stainless Steel Kegs from China*, Commerce declined to rely on world benchmark prices consisting of "a monthly summary sheet of stainless steel coil prices, without the underlying data," finding that it could not determine the accuracy of the summary worksheet and how it was prepared without the underlying data.[94] Instead, Commerce used a price benchmark that included source data.

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[88] *Id*. at 12-13 (citing *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 81 FR 49935 (July 29, 2016) (*Cold-Rolled Steel from Russia*), and accompanying IDM at Comment 17 at 97 ("in the absence of any other suitable freight rate data, and in order to avoid an imbalance in the benefit calculation, we have excluded freight entirely from the benefit calculation")).

[89] *Id*. at 13 (citing OCP's Letter, "OCP S.A. Supplemental Questionnaire Response Part Three," dated November 6, 2020 (OCP 11/6/20 SQR) at Exhibit MIN2-3.)

[90] *Id*. (citing Petitioner's Letter, "Petitioner's Submission of Factual Information to Measure the Adequacy of Remuneration and Other Factual Information," dated November 4, 2020 (Petitioner's Benchmark Submission) at Exhibits 9-11).

[91] *Id*. at 13 (citing *Cold-Rolled Steel from Russia* IDM at 18-19).

[92] *See* OCP's Case Brief at 19-23.

[93] *Id*. at 20 (citing Petition at Exhibit II-23).

[94] *Id*. at 20-21 (citing *Refillable Stainless Steel Kegs from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, in Part*, 84 FR 57005 (October 24, 2019) (*Stainless Steel Kegs from China*), and accompanying IDM at Comment 4).

- If Commerce continues to use Argus pricing data in its final determination, it should at least remove the "North Africa" price from that source.
- Argus states its North Africa phosphate rock price consists of "sales to Europe, India, and Brazil from OCP/GCT."[95] Therefore, these price data are comprised of prices for Moroccan phosphate rock sold for export by OCP,[96] which would likely represent a large share of any rock price stemming from North Africa.
- Relying on the North Africa phosphate rock price from Argus would lead to a circular price comparison of OCP to itself. A benchmark that includes the prices in which it is being compared is not a real benchmark but rather a comparison of an alleged subsidy to itself.
- Commerce usually seeks to avoid circular price comparisons in constructing benchmarks and has rejected this kind of prospective benchmark source on multiple occasions. In *Softwood Lumber from Canada*, Commerce declined to apply a circular comparison methodology in measuring whether the Government of British Columbia (GBC) purchased electricity from a respondent for more than adequate remuneration. In that investigation, the respondent argued that Commerce should use a benchmark consisting of prices that the GBC paid for electricity purchased from other private companies under the same electricity program. Commerce determined that this methodology would amount to "comparing an allegedly subsidized price with the same allegedly subsidized price."[97]
- Commerce's preferred practice is to disregard private, in-country prices as benchmarks where the market for the good allegedly provided for LTAR may be distorted by significant government involvement[98] because in this context all potential in-country prices "would reflect the very market distortion which the comparison is designed to detect."[99]
- Therefore, Commerce should exclude Argus' North Africa rock price from its benchmark calculation to avoid comparing the OCP rock cost build-up to a benchmark that relies on OCP's prices for the same rock because this methodology leads to a circular price comparison.

[95] *Id*. at 21 (citing Petition at Exhibit II-26 at 10).
[96] *Id*.
[97] *Id*. at 22 (citing *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances*, 82 FR 51814 (November 8, 2017) (*Softwood Lumber from Canada*), and accompanying IDM at 167).
[98] *Id*. at 22-23 (citing *CVD Preamble* at 65377).
[99] *Id*. at 23 ((citing *e.g.*, *Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Affirmative Countervailing Duty Determination Final Affirmative Critical Circumstances Determination*, 79 FR 54963 (September 15, 2014), and accompanying IDM at "Provision of Gas for LTAR"); *Light-Walled Rectangular Pipe and Tube from the People's Republic of China: Final Affirmative Countervailing Duty Investigation Determination*, 73 FR 35642 (June 24, 2008), and accompanying IDM at Comment 7; *Steel Concrete Reinforcing Bar from the Republic of Turkey: Preliminary Determination in the Countervailing Duty Investigation*, 82 FR 12195 (March 1, 2017), and accompanying IDM at Section IX.A.1 (rejecting use of private Turkish natural gas prices as benchmark because "the GOT's overwhelming involvement in the Turkish natural gas market . . . would reflect the distortions of the GOT's presence in the market"); *Quartz Surface Products from India: Final Determination in the Countervailing Duty Investigation*, 85 FR 25398 (May 1, 2020), and accompanying IDM at Comment 3 (using Indian benchmark price in investigation of India would be "akin to comparing the benchmark to itself")).

Petitioner's Rebuttal Brief:[100]

- Commerce should reject OCP's argument to exclude *Argus Phosphates*' data from the phosphate rock benchmark calculation due to a lack of supporting documentation. There is substantial evidence on the record that confirms the accuracy of the Argus price data and explains the methodology used to collect and report those data.[101]
- The record contains an *Argus Phosphates* report that supports the data used in the 2019 Argus FOB Jordan (60 – 70 percent BPL) price that Commerce relied on in its calculation.[102]
- In making its argument that Commerce should exclude Argus' North Africa rock price from its benchmark calculation, OCP leaves out the fact that the North Africa price data include non-Moroccan prices. Argus identifies GCT as a Tunisian company, which means that including Argus North Africa data is different than using an in-country Moroccan price or comparing the phosphate rock benchmark to itself.[103]
- The Argus North Africa price represents a conservative indication of the market price of OCP's phosphate rock, understating the market price in OCP's favor.

OCP's Rebuttal Brief:[104]

- The petitioner's argument that OCP submitted incomplete and unreliable BPL information relies on unfounded speculation and a mischaracterization of the record. OCP provided Commerce information on the BPL content of its "expedited" rock, which is phosphate rock that is fully beneficiated[105] and designated either to be consumed locally or exported.[106]
- OCP stated that it did not provide the BPL content of the phosphate rock it holds in storage because that stored rock is also fully expedited and allocated for local consumption or for export sale.[107] The BPL content of that stored rock will be included in the BPL content of OCP's expedited phosphate rock at a future date when the stored rock is used internally or exported.
- The petitioner uses an undated table from OCP's website that contains information about OCP's phosphate rock for export in an attempt to undermine the reliability of OCP's submitted data.[108] This graphic does not account for internally consumed phosphate rock and is less reliable than the extensive laboratory testing data and certificates that OCP submitted.
- Commerce should also reject the petitioner's claims that other factors make the BPL information reported by OCP inaccurate.[109]

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[100] *See* Petitioner's Rebuttal Brief at 16-18 and Attachment 1.
[101] *Id*. at 16-17 and Attachment 1 (citing Petition at Exhibit I-20 at 7-11 and Exhibit II-23).
[102] *Id*. (citing Petition at Exhibits I-37, I-40, I-66, and I-70). The petitioner mistakenly cited Exhibit I-37 in the Petition as Exhibit I-73.
[103] *Id*. at 17 (citing Petition at Exhibit II-26 at 9-10).
[104] *See* OCP's Rebuttal Brief at 4-20.
[105] Beneficiation is "the process of removing impurities from phosphate ore and converting it to phosphate rock." *See* Petition at II-12 (citing Petition at Exhibit II-22).
[106] *Id*. at 5 (citing OCP 11/9/20 SQR at 2 and FN 1).
[107] *Id*.
[108] *Id*. at 6-7 (citing Petitioner's Case Brief at 4 and Petitioner's Benchmark Submission at Exhibit 8(l)).
[109] *Id*. at 7-9.

- Commerce should reject the petitioner's claim to remove Egyptian phosphate rock from the benchmark price. This assertion is based on speculation that just because the price of Egyptian rock is low, the rock has to be different, and should then be excluded.[110]
- The quotations that the petitioner highlights from OCP's submissions before the ITC serve to confirm that the pricing of OCP's phosphate ore and phosphate rock is based on BPL and $P_2 0_5$ content and not other factors.[111]
- Commerce followed the correct methodology for a Tier 3 analysis and excluded international delivery charges from the phosphate rock price benchmark.[112] Moreover, adding international freight charges to the benchmark would result in a distortion.[113]
- If Commerce fails to follow its regulations and its established practice, it should not use the Maersk data that the petitioner submitted because those data are for containerized shipments, and the record shows that phosphate rock is shipped in bulk and not in containers.[114]
- Commerce should also deny the petitioner's request that Commerce exclude transportation costs from the build-up of OCP's mining costs if it declines to add delivery charges to the benchmark because the cost build-up and benchmark are both intended to be on an FOB-basis and include inland freight.[115]

Commerce's Position:

For the reasons explained below, we have not made changes to the phosphate rock benchmark for the final determination.

BPL Level Information

We disagree with the petitioner's argument that OCP's phosphate rock BPL levels are inaccurate because OCP did not submit BPL level data for its phosphate rock held in storage.[116] In its submission providing the average BPL levels of their beneficiated phosphate rock, OCP reports that the phosphate rock held in storage is also eventually consumed locally or exported.[117] Therefore, we find that the BPL level data for phosphate rock held in storage is already accounted for in the other production processes.

Additionally, we disagree with the petitioner's assertion that OCP's submissions to the ITC undermine OCP's reported BPL information. The passages the petitioner quoted from OCP's

[110] *Id*. at 11-12. Furthermore, low or high prices do not mean that a particular benchmark source should be excluded.
[111] *Id*. at 12-13 (citing Petitioner's Case Brief at 7-8).
[112] *Id*. at 15-16 (citing 19 CFR. 351.511(a)(2)(iv).)
[113] *Id*. at 16 ("Because the mining rights at issue here reflect the right to extract a natural resource located in the country under investigation, there is no basis to add the charges to bring a tangible good to the country under investigation in the benchmark calculation").
[114] *Id*. at 19 (citing Petitioner's Benchmark Submission at Exhibits 9-11; *see also* OCP's Letter, "Information to Rebut, Clarify, or Correct Petitioner's Submission of Factual Information to Measure the Adequacy of Remuneration," dated November 16, 2020 (OCP Rebuttal NFI) at Exhibit 1).
[115] *Id*. at 19-20 ("Removing inland freight expenses from one side of the equation would introduce a distortion rather than correct one").
[116] *See* Petitioner's Case Brief at 5-6.
[117] *See* OCP 11/9/20 SQR at 2, FN 1.

submissions before the ITC[118] confirm that BPL and P_2O_5 levels determine OCP's phosphate rock prices.[119] We also disagree with the petitioner's claim that the method of transportation affects the reported BPL levels of OCP's phosphate rock; the petitioner presents insufficient evidence to support this claim.[120]

Benchmark Price Selection

With respect to removing the Argus pricing data from the phosphate rock benchmark, we disagree. OCP claims that we should exclude the Argus pricing data sourced from the Petition because it is only supported by a summary table without the underlying source data.[121] Despite OCP's contention, the Petition contains information which explains Argus' price reporting methodology.[122] Furthermore, the Argus summary table relies on data from phosphate rock prices sourced from four issues of *Argus Phosphates* that are included as exhibits in the Petition.[123] Therefore, we find that the facts in this case differ from those in *Stainless Steel Kegs from China*, as these exhibits in the Petition contain the underlying source data (*i.e.*, the prices of phosphate rocks for different quarters) that are used in the summary table.

We also decline OCP's request to remove Argus' price data for North Africa from the phosphate rock world price benchmark. Argus states that its North Africa phosphate rock price is "defined by sales to Europe, India and Brazil from OCP/GCT."[124] First, the North Africa price data include non-Moroccan prices from GCT, a Tunisian company.[125] Second, the North Africa price is an export price to Europe, India and Brazil, meaning that it is a market price that would reflect commercial realities in the world market. OCP's arguments largely pertain to Tier 1 distortion of domestic market analysis. The mere fact that domestic, in-country prices, including imports for a good or service, have been found to be distorted, do not, for purposes of this analysis, mean that the prices for goods exported from that market are also necessarily distorted.[126]

In addition, we disagree with the petitioner's argument that we should exclude Egyptian phosphate rock prices from the benchmark. The petitioner asserts that because Egyptian rock is low quality, Egyptian rock prices are lower than other rock prices on the record. As OCP stated in its rebuttal brief, Commerce's benchmark price is an average comprised of prices both above and below the average price.[127] Furthermore, Commerce's practice is not to exclude particular benchmark prices just because they are low or high.[128] Therefore, in the final determination, we

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[118] *See* Petitioner's Case Brief at 7-8 (citing Petitioner 11.19 Comments at Exhibit 1 at 3, 4, 10, and 15-16).
[119] *See* OCP's Rebuttal Brief at 12-13 (citing Petitioner's Case Brief at 7-8).
[120] *Id*. at 7-10. *See* IDM BPI Memorandum at Comment 3 at Note 1.
[121] *See* OCP's Case Brief at 19-20.
[122] *See* Petition at Exhibit I-20 at 7-11.
[123] *Id*. at Exhibits I-37, I-40, I-66, and I-70. *See also* Petitioner's Rebuttal Brief at "Attachment 1" for a demonstration of how the price for Argus FOB Jordan (68-70 percent BPL) is calculated and citations to the four issues of *Argus Phosphates* that are used.
[124] *Id*. at Exhibit II-26 at 10.
[125] *Id*. at Exhibit II-26 at 9.
[126] *See Countervailing Duty Investigation of Fine Denier Polyester Staple Fiber from the People's Republic of China: Final Affirmative Determination*, 83 FR 3120 (January 23, 2018), and accompanying IDM at Comment 4.
[127] *See* OCP's Rebuttal Brief at 11-12 (citing OCP Prelim Calc Memo at Attachment I., Tab "RockBenchmark").
[128] *See Certain Uncoated Groundwood Paper from Canada: Final Affirmative Countervailing Duty Determination*, 83 FR 39414 (August 9, 2018) (*Certain Uncoated Groundwood Paper from Canada)*, and accompanying IDM at Comment 31.

continue to use Egyptian phosphate rock prices in the benchmark used to value OCP's phosphate rock because it has a similar BPL or P_2O_5 content as OCP's phosphate rock.[129]

International Freight, Import Duties, and VAT

We disagree with the petitioner's argument that we should adjust the phosphate rock benchmark price for freight, import duties, and VAT OCP would have to pay if it imported the product.[130] Commerce's regulations do not require it to add delivery charges and import duties to a comparison price in a Tier 3 analysis.[131] We find that it would not be appropriate to add ocean freight, import charges, and the VAT that OCP would have to pay if it imported the rock to the benchmark price in this proceeding because OCP did not import phosphate rock.[132] The costs provided by OCP are for phosphate ore extraction, stone removal, beneficiation, and transportation of the rock in Morocco.[133] Commerce has excluded international delivery charges from cost build-ups for the provision of natural resource rights under Tier 3 analyses in past proceedings.[134] Therefore, to ensure an "apples-to-apples" comparison for the Tier 3 analysis, for the final determination, Commerce has not included international delivery charges, import duties, and VAT for importing the rock to the benchmark price for phosphate rock.

Comment 4: Whether to Include or Exclude HQ, Support, Debt, and Other Costs as Costs of Producing Phosphate Rock

Petitioner's Case Brief:[135]

- Commerce correctly excluded OCP's HQ, support, and debt costs from its calculation of OCP's mining costs in its *Preliminary Determination*. But Commerce erroneously added freight costs to this calculation and should make additional cost adjustments.
- Commerce previously found that there must be a principled basis to include a subsidy recipient's costs in the benefit calculation. By excluding OCP's HQ, support, and debt costs from the calculation in its *Preliminary Determination*, Commerce demonstrated that there needs to be a sufficiently close relationship between reported costs and the good at issue when conducting a benefit analysis.[136]
- Moreover, in assessing the GBC's provision of stumpage for LTAR in *Softwood Lumber from Canada*, Commerce found it appropriate to include reported costs that: (i) were obligatory or necessary – *i.e.,* costs that respondents "must incur" – in order to access and

[129] *See* Petition at Exhibit II-24 and OCP's Letter, "New Factual Information," dated November 4, 2020 (OCP Benchmarks NFI) at Exhibit 21.
[130] We also disagree with the petitioner's assertion that we should remove transportation costs from OCP's mining cost build-up if we decline to add freight to the phosphate rock benchmark. *See* Comment 7 for Commerce's position on this topic.
[131] *See* 19 CFR 351.511(a)(2)(iv).
[132] *See* OCP's Rebuttal Brief at 20 (citing OCP ILOV SQR at 17) ("We clarify at the outset that the costs associated with freight (line item 40 in Appendix MIN2-3) were not included as part of OCP's mining direct cost calculations (calculated in line item 91 in Appendix MIN2-3). These costs reflect ocean freight billed to OCP by its sea carriers and, thus, are not part of an FOB cost build-up.").
[133] *See* OCP 11/6/20 SQR at 4.
[134] *See Coated Free Sheet Paper from Indonesia: Final Affirmative Countervailing Duty Determination*, 72 FR 60642 (October 25, 2007) (*Coated Free Sheet Paper from Indonesia*), and accompanying IDM at Comment 14 at 56.
[135] *See* Petitioner's Case Brief at 14-17.
[136] *Id*. at 14 (citing OCP Prelim Calc Memo at 7).

harvest the underlying good at issue; and (ii) which were verified to be tied to the stumpage price, the respondents' tenure obligations, or to "expenses relating to accessing, harvesting, or hauling timber to the mills."[137]

- In order to prevent an over-inclusive mining cost build-up from distorting the mining rights benefit calculation, Commerce should remove OCP's cost items from its calculation unless the record shows that OCP must incur them to mine phosphate ore and produce beneficiated phosphate rock.
- Information in OCP's In-Lieu of On-Site Verification (ILOV) questionnaire response demonstrates that the mining costs included in the preliminary benefit calculation are incorrectly inflated for purposes of the benchmarking analysis because they include items that are not connected to costs necessary to produce phosphate rock.[138] In addition, the information that OCP reported in its ILOV questionnaire response about the elements that make up its HQ and support costs raises serious concerns about the other cost items that OCP did not describe in detail.[139]

OCP's Case Brief:[140]

- In constructing OCP's mining rights cost build-up in the *Preliminary Determination*, Commerce erroneously excluded amounts for HQ, support, and debt costs that are properly allocated to OCP's mining activities.
- OCP's HQ and support costs bolster all of the operations of the OCP corporate entity, including its mining activities. These HQ and support expenses include purchases of services (*e.g.*, IT services, catering, accounting, and facility management), external fees (*e.g.*, telecommunications, consulting and advertising, bank fees, and insurance), and amortization of equipment used by the entire company (*e.g.*, IT equipment).[141]
- Significant personnel expenses are also part of OCP's HQ and support costs. Some of the jobs and salaries that OCP classified as part of its HQ and support costs directly support mining operations.[142]
- Personnel in OCP's HQ departments play important roles in projects directly related to mining operations.[143]
- Financing and debt costs are another major cost in OCP's mining operations. These costs mainly represent interest expenses on loans OCP has used to fund capital improvements associated with its mining operations, including the slurry pipeline and rock storage facilities.[144]
- OCP allocated a portion of its HQ, support, and debt expenses to its mining cost build-up and Commerce should adopt this methodology.
- Commerce has included costs similar to OCP's HQ, support, and debt expenses in other proceedings involving cost build-ups for the provision of natural resource rights for LTAR allegations. In *Hot-Rolled Steel from India*, Commerce included "materials, labor,

[137] *Id*. (citing *Softwood Lumber from Canada* IDM at Comment 74).
[138] *Id*. at 15 (citing OCP ILOV SQR at 6-7).
[139] *Id*. at 15-17.
[140] *See* OCP's Case Brief at 23-34.
[141] *Id*. at 25 (citing OCP ILOV SQR at 6-7).
[142] *Id*. at 25-26 (citing OCP ILOV SQR at 29 and Exhibit VE-MIN-4).
[143] *Id*. at 26-28.
[144] *Id*. at 28.

depreciation, overhead, and royalties" in constructing a cost build-up for the provision of mining rights.[145]

- OCP must pay selling, general and administrative (SG&A) and financing expenses in order to run its mining operations. [146]
- OCP's HQ and support costs can be categorized as the types of expenses that are normally treated like SG&A in antidumping duty (AD) proceedings. Commerce is statutorily required to construct a cost of production in every AD proceeding[147] and treats SG&A and financing expenses as components of this cost.
- In previous proceedings, Commerce included corporate headquarter costs and corporate office expenses such as salaries and benefits, rent, travel expenses, electricity, vehicle expenses, and audit expenses, and other things as SG&A.[148] OCP's HQ and support costs consist of many of these expenses.[149]
- Commerce also has a practice of accounting for financing costs as a component of cost of production.

Petitioner's Rebuttal Brief:[150]

- Commerce should continue to exclude OCP's reported HQ and support expenses and debt costs from its OCP cost build-up in the mining rights benefit calculations.
- Commerce's practice is to include only those costs that the respondent verifiably shows that it must incur. In *Magnesium from Israel*, Commerce removed from the benchmark "the extraction costs incurred by" the respondent "in its operations."[151]
- The fact that the OCP corporate entity incurred costs that OCP categorizes as HQ/support and debt costs and OCP argues these costs are attributable to its mining operations does not mean that OCP must bear these costs to mine phosphate ore and produce phosphate rock.[152]
- The evidence on the record does not corroborate OCP's claims that its HQ/support and debt costs are necessary for its mining activities.[153]

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[145] *Id*. at 30 (citing *Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review*, 73 FR 1578, 1591-82 (January 9, 2008).
[146] *Id*. at 29-30 (citing *Softwood Lumber from Canada*, and accompanying IDM at 73).
[147] *Id*. at 32 (citing section 773(b)(2)(A)(ii) of the Act).
[148] *Id*. at 33 (citing *Certain Lined Paper Products from India: Notice of Final Results of the First Antidumping Duty Administrative Review*, 74 FR 17149 (April 14, 2009), and accompanying IDM at 8 (explaining that SG&A expenses usually include "corporate office expenses such as salaries and benefits, rent, travel expenses, electricity, vehicle expenses, insurance, transport expenses, audit expenses, etc."); *Notice of Final Results of Antidumping Duty Administrative Review and Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products from Canada*, 69 FR 75921 (December 13, 2004), and accompanying IDM at 97 (including corporate headquarter costs in its calculation of SG&A expenses).
[149] *Id*. (citing OCP ILOV SQR at 6; *see also* OCP's Letter, "OCP S.A. Supplemental Questionnaire Response Part Three," dated November 6, 2020 (OCP 11/6/20 SQR) at Exhibits MIN2-3 and MIN2-6).
[150] *See* Petitioner's Rebuttal Brief at 18-23.
[151] *Id*. at 19 (citing *Magnesium from Israel: Final Affirmative Countervailing Duty Determination*, 84 FR 65785 (December 29, 2019), and accompanying IDM at Comment 7).
[152] *Id*. at 20.
[153] *Id*. at 21.

- OCP's assertion that its finance and debt costs represent interest expenses on loans it has relied on for funding capital improvements associated with its mining operations[154] contradicts its claims from earlier in this investigation.[155]
- There is no support in Commerce's past proceedings to include corporate debts in its benefit calculations.

OCP's Rebuttal Brief:[156]

- Commerce should include all of OCP's reported mining costs and reject the petitioner's request that it remove certain direct and mining site overhead costs based on an arbitrary determination that these expenses are not adequately connected to OCP's mining activities.
- These expenses are tied to OCP's general ledger and reflect normal elements of a company's cost of production.[157]
- The petitioner's argument misinterprets Commerce's practice in a Tier 3 cost build-up and its reference to Commerce's determination in *Softwood Lumber from Canada* actually undermines its assertion.[158]
- Commerce has not previously questioned how these specific costs apply to OCP's mining activities and it should not remove these expenses from OCP's cost build-up now. The line items in question are related to OCP's mining operations.[159]
- OCP properly attributed a portion of the costs associated with activities performed at its corporate headquarters offices to phosphate rock.

Commerce's Position:

As an initial matter, when considering relevant cost adjustments, neither 19 CFR 351.511(a)(2)(iii) nor our *CVD Preamble*[160] imposes specific requirements that we need to take into consideration all costs incurred by a respondent company. The relevant regulation and guideline also do not require us to conduct cost analysis as if we are conducting an AD proceeding. Our benefit calculation at Tier 3 is based on a comparison of the actual per-unit cost build-up of OCP's beneficiated phosphate rock with a market price of phosphate rock.[161] The rationale behind this methodology is that we are investigating the provision of mining rights for LTAR and we cannot find a market price of mining rights with which we can make a direct comparison. Thus, in a Tier 3 analysis, we find it appropriate to conduct a benefit analysis not on mining rights *per se*, but on the value of the underlying good conveyed via the mining rights.

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[154] *Id*. at 22 (citing OCP's Case Brief at 28).
[155] *Id*. at 22 (citing OCP ILOV SQR at 19), ""Interest on loans… represents interest paid on various debts—bonds, loans, convertible debt, or lines of credit—that are broadly applicable or fund general corporate purposes."
[156] *See* OCP's Rebuttal Brief at 20-27.
[157] *Id*. at 21 (citing OCP's Case Brief at 29-34).
[158] *Id*. at 21-23 (citing OCP's Case Brief at 29-30 stating that "As OCP explained in its case brief, the Department included G&A and similar indirect costs when adjusting the log benchmark for British Columbia in *Softwood Lumber from Canada*. The rationale undergirding the inclusion of such costs is that the respondent 'must incur' them in order to access the resource rights that have been given to the respondents;" (citing *Softwood Lumber from Canada* IDM at 71).
[159] *Id*. at 24-27.
[160] *See CVD Preamble* at 65378.
[161] *See Preliminary Determination* PDM at 12.

Therefore, when considering cost adjustments, we will take into consideration the *relevant production costs* associated with producing the phosphate rock from the minerals in the ground as well as *the pricing of phosphate rock.*

OCP argued that we should follow our established practice and include HQ and support costs, including purchases of services (*e.g.*, IT services, catering, accounting, and facility management), external fees (*e.g.*, telecommunications, consulting and advertising, bank fees, and insurance), amortization of equipment used by the entire company (*e.g.*, IT equipment),[162] HQ personnel expenses and support costs, and financing and debt costs. As explained above, Commerce does not have an established practice on cost adjustments. The relevant regulation and guideline do not specify how we should conduct cost adjustments. By its nature the analysis depends upon available information concerning the benchmark and the underlying good. Therefore, cost adjustments must be developed on a case-by-case basis. Again, the relevant regulation and guideline do not require us to conduct cost analysis as if we are conducting an AD proceeding. In a prior case, we made a distinction between the cost adjustments at Tier 3 for a similar calculation and the cost of goods sold (COGS).[163]

Although OCP itemized the expenses that constitute its HQ/support costs and cost of debt into generic categories, we do not have sufficient information on how each of these line items contributed to OCP's mining operations[164] and how these costs are relevant to the pricing of phosphate rock. Moreover, to the extent that some items in OCP's HQ/support expenses in the cost build up could arguably be related to mining operations, the record does not contain sufficient evidence that would allow us to segregate and remove those costs which are considered unrelated to mining operations.

OCP's assertion that its finance and debt costs represent interest expenses on loans it has relied on for funding capital improvements associated with its mining operations is inconsistent with its reporting in its ILOV questionnaire response that "interest on loans… represents interest paid on various debts—bonds, loans, convertible debt, or lines of credit—that are broadly applicable or fund general corporate purposes."[165] In addition, we note that we have not identified any prior LTAR determination that included corporate debt as part of a benefit calculation.

Furthermore, we disagree with the petitioner regarding certain direct costs and have continued to include the individual expenses in OCP's mining cost build-up.[166] As noted above, Commerce does not have an established practice with respect to cost adjustments. Despite the petitioner's contention that there is no substantial evidence on the record demonstrating that certain direct costs should be deducted from OCP's mining rights cost build-up, we have no reason to doubt the veracity of OCP's books and records upon which OCP relied to report these costs. Where possible, Commerce will rely on a respondent's reported information to determine the existence

[162] *See* OCP's Rebuttal Brief at 25 (citing OCP ILOV SQR at 6-7).
[163] *See Coated Free Sheet Paper from Indonesia* IDM at Comment 14.
[164] *See* OCP 11/6/20 SQR at Exhibit MIN2-3 and OCP ILOV SQR.
[165] *See* Petitioner's Rebuttal Brief at 22 (citing OCP ILOV SQR at 19).
[166] *See* Petitioner's Case Brief at 16. The petitioner and OCP have treated these individual costs and their arguments with respect to them as business proprietary information. *See* IDM BPI Memorandum at Comment 4 at Note 1 for additional information with respect to these costs and Commerce's analysis of them.

and the amount of the benefit to the extent that such information is useable and verifiable.[167] Because there is no evidence on the record which would lead us to doubt the reliability of OCP's reported direct costs, and there is no evidence on the record to doubt these direct expenses are related to mining costs, we continue to include these costs in OCP's phosphate rock production cost build-up in the final determination.

Comment 5: Whether to Include a Profit Component

OCP's Case Brief:[168]

- In its calculations of the benefit conferred by the GOM's provision of phosphate mining rights, Commerce failed to include a profit component in building up OCP's phosphate rock costs. The cost build-up reported by OCP and used by Commerce in its *Preliminary Determination* listed data pertaining to profit line items but did not actually include them in the overall build-up formulas. This means that Commerce failed to include financial or non-current profits in its calculation of OCP's total direct costs.[169]
- Though OCP did not report its profit associated with operating income in its mining cost build-up exhibit, Commerce should add an amount for this part of profit, which would be the difference between revenues for all of the rock that is mined compared with the production costs for mining, beneficiating, and transporting the rock to the port or the processing facility.[170]
- Commerce's omission of a profit component in its *Preliminary Determination* stands in contrast with its practice in other cases involving the government provision of rights to extract natural resources in a Tier 3 LTAR analysis. In *Cold-Rolled Steel from Russia*, Commerce stated that its practice in investigations involving the provision of mining rights for LTAR is to add an amount for profit in calculating the price paid by a respondent to the government for mining rights.[171] Commerce included a profit component in other cases involving the alleged provision of mining rights for LTAR, namely in *Hot-Rolled Steel from India* and *Certain Oil Country Tubular Goods from India*.[172]
- Commerce must include a profit component in its cost build-up to reach an appropriate comparison between OCP's costs and the price benchmark because, as Commerce explained in *Hot-Rolled Steel from India*, adding profit to a respondent's per-unit cost is

[167] *See Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review; 2016*, 83 FR 50891 (October 10, 2018) and accompanying PDM at "D. Provision of Synthetic Yarn for LTAR," unchanged in *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2016*, 84 FR 11052 (March 25, 2019).
[168] *See* OCP's Case Brief at 34-41.
[169] *Id*. at 35-36 (citing OCP 11/6/20 SQR at Exhibit MIN2-3 (Excel Row 111, Line 91)).
[170] *Id*. at 36 (citing OCP 11/6/20 SQR at Exhibit MIN2-3).
[171] *Id*. at 37 (citing *Cold-Rolled Steel from Russia* IDM at 28 (adding profit in calculating price paid by a respondent to the Government of Russia for coal mining rights and explaining that such an approach is in line with Commerce's practice of including profit in proceedings involving mining rights for LTAR)).
[172] *Id*. at 37 (citing *Certain Hot-Rolled Carbon Steel Flat Products From India: Final Results of Countervailing Duty Administrative Review*, 73 FR 40295 (July 14, 2008) (*Hot-Rolled Steel from India*), and accompanying IDM at 73; *Certain Oil Country Tubular Goods From India: Final Results of Countervailing Duty Administrative Review*; 2013-2014, 82 FR 18282 (April 18, 2017), and accompanying IDM at 33 ("We also agree that the Department should include an amount for profit because the benchmark value . . . includes an amount for profit.")).

necessary to ensure an "apples to-apples" comparison with a profit-inclusive benchmark.[173]

- Commerce's practice has been to use a surrogate profit rate from a non-respondent company to construct a cost build-up under Tier 3. In *Cold-Rolled Steel from Russia*, Commerce calculated a profit rate using the financial statements of an Indian mining company; in *Hot-Rolled Steel from India*, Commerce similarly calculated a per-unit profit rate utilizing publicly available financial reports from two non-respondent mining companies; and in *Uncoated Paper from Indonesia*, Commerce calculated profit using a study providing profit information for the extraction industry in Indonesia.[174]
- Commerce should calculate a surrogate profit rate using the 2019 financial statements of JPMC, a Jordanian phosphate rock mining company that also produces fertilizer, phosphoric acid, and aluminum fluoride.[175] Because Commerce is constructing a cost build-up in this proceeding, it should calculate JPMC's profit rate as a percentage of costs.
- Applying OCP's proposed formula to figures in JPMC's financial statements results in a profit rate of 21.6 percent, which Commerce should then apply to OCP's fully-loaded costs, including its HQ, support, and debt costs.[176]
- Although the record contains profit indicators for OCP, none of these items provide the same level of specificity to phosphate mining as JPMC's financial statements. OCP 's unconsolidated financial statements can be used to calculate a profit rate that reflects all operations of the company, but unlike JPMC's financial statements, OCP's accounting records do not break down expenses and revenues by business unit.
- Commerce should apply JPMC's profit rate because of the complexity of constructing an income and profitability amount for OCP's mining operations that is independent from OCP's other business units.

Petitioner's Rebuttal Brief:[177]

- Commerce took the correct approach in its *Preliminary Determination* to the issue of adding an amount for profit to OCP's mining cost build-up.
- OCP's argument that Commerce should add an amount for profit to OCP's mining cost build-up using a ratio of pre-tax profits to costs of JPMC's "Phosphate unit" is incorrect.
- OCP's assertion that because JPMC's profit information is based on "fully-loaded costs," the profit rate should be applied to OCP's "fully-loaded costs (including HQ, support, and debt costs)" is also incorrect, as JPMC's costs should not control the treatment of OCP's costs.[178]

[173] *Id*. at 38 (citing *Hot-Rolled Steel from India* IDM at 73).
[174] *Id*. at 38-39 (citing *Cold-Rolled Steel from Russia* IDM at 107; *Hot-Rolled Steel from India* IDM at 73; and *Certain Uncoated Paper from Indonesia: Final Results of Countervailing Duty Administrative Review; 2015-2016*, 83 FR 52383 (October 17, 2018), and accompanying IDM at Comment 7 (using company-specific costs and surrogate profit source)).
[175] *Id*. at 39 (citing OCP Benchmarks NFI at Exhibit 22 at 120).
[176] *Id*. at 40 and Exhibit 3.
[177] *See* Petitioner's Rebuttal Brief at 23-25.
[178] *Id*. at 23 (citing OCP Case Brief at Exhibit 3).

- If Commerce decides to add an amount for profit relying on JPMC's 2019 financial statements, it should not use data from JPMC's Phosphate unit segment.[179]
- Instead Commerce should use JPMC's consolidated results, which eliminate related-party transactions.[180]

Commerce's Position:

We agree, in part, with OCP with regard to profit. OCP has argued that Commerce assumed that profit was already included in the phosphate rock production cost build-up, because certain profit line items were included in OCP's 2019 reported mining costs. Upon further review of the cost information reported by OCP, Commerce agrees with OCP that it should add a profit component to OCP's phosphate rock production cost build-up in order to properly compare it to the benchmark prices which are inclusive of profit.

However, we disagree with OCP's argument that we should use a surrogate profit ratio. In *Cold-Rolled Steel from Russia*, Commerce calculated a profit component using the financial statements of an Indian mining company because the profit rate from the Indian company was the only profit rate on the record for that proceeding.[181] In this proceeding, OCP provided the necessary information to calculate a profit rate derived from its 2019 unconsolidated financial statements.[182, 183] Thus, there is no need to resort to surrogate information.

Further, we disagree with OCP's proposed profit rate formula. In *Cold-Rolled Steel from Russia*, Commerce calculated a profit ratio for a provision of mining rights for LTAR program by dividing a company's profit before tax by its COGS.[184] For this final determination, we find it appropriate to calculate a profit ratio based on OCP's 2019 financial statements. Moreover, because we are trying to ascertain profits associated with producing phosphate rock, similar to the circumstance in *Cold-Rolled Steel from Russia*, we determine it appropriate to calculate a profit ratio for OCP by taking OCP's "income before taxes" (profit before tax) and dividing it by its "operating expense" (COGS) from its 2019 unconsolidated profit and loss statement.[185] For the final determination, we will multiply this profit rate by OCP's total phosphate rock production costs and then add the resulting amount to OCP's cost build-up to create a total cost inclusive of profit.[186]

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[179] *Id*. ("JPMC's Phosphate unit segment data reflects a significant amount of related-party transactions, and the available data are insufficient to eliminate those transactions from the segment data").
[180] *Id*. at 24 ("All intra-group assets, liabilities, equity, revenues, expenses, gains and losses resulting from intra-group transactions and dividends are eliminated in full") (citing OCP Benchmarks NFI at Exhibit 22 at 74).
[181] *See Cold-Rolled Steel from Russia* IDM at "4. Provision of Mining Rights for LTAR".
[182] *See* OCP IQR at GEN-4(a)(iii).
[183] OCP reports that it both sells and uses in its chemical production process the phosphate rock it produces. (*See* OCP IQR at GEN-3.) Therefore, the profit reflected in OCP's financial statements includes the profit from its sales of phosphate rock.
[184] *See Cold-Rolled Steel from Russia* IDM at "4. Provision of Mining Rights for LTAR".
[185] *See* OCP's Letter, "OCP S.A.'s Section III Questionnaire Response," dated September 17, 2020 (OCP IQR), at Exhibit GEN-4(a)(iii) at "Profit and Loss Statement."
[186] *See* Final Calculation Memorandum.

Comment 6: Whether Freight Costs Are Double Counted in the Mining Costs

Petitioner's Case Brief:[187]

- In its calculations of the mining rights benefit in its *Preliminary Determination*, Commerce incorrectly added a per-unit freight cost to OCP's per-unit phosphate rock production cost,[188] even though this total cost already included reported transportation costs that are related to phosphate rock production.
- OCP confirmed that its reported phosphate rock production costs include expenses associated with the transportation phase of the value chain. OCP stated that the data Commerce used to construct OCP's mining rights cost build-up reflects, among other things, OCP's reported "direct operating costs" for each mining site which "include costs associated with the extraction, stone removal, beneficiation, and transport phases of the value chain. These costs include items such as raw materials, energy, spare parts, transportation, mining taxes, personnel expenses, and amortization.[189]
- OCP never argued that Commerce should add additional freight costs to its reported phosphate rock production costs, and it confirmed that the source exhibit included all costs related to transportation and loading of phosphate rock from mining sites to factories or ports.[190]
- Commerce should remove its calculation of an average freight cost and the addition of that average freight expense to OCP's per-unit phosphate rock production cost.

No other interested parties commented on this issue.

Commerce's Position:

We agree with the petitioner and finds that we incorrectly added a per-unit freight cost to OCP's per-unit phosphate rock production cost. The record evidence demonstrates that the items we included in our per-unit freight cost calculation were also reported in OCP's direct operations costs for each of its mining sites.[191] Because these freight expenses were added twice, we have revised our benefit calculations for this program accordingly.

Comment 7: The Appropriate Quantity for the Mining Rights for LTAR Benefit Calculation

Petitioner's Case Brief:[192]

- In its preliminary mining rights benefit calculation in its *Preliminary Determination*, Commerce incorrectly multiplied the per-unit benefit by the metric tons of beneficiated phosphate rock OCP produced during the POI,[193] when it should have multiplied this per-unit benefit figure by the metric tons of phosphate ore that OCP extracted in 2019.

[187] *See* Petitioner's Case Brief at 17-19.
[188] *Id*. at 17 (citing OCP Prelim Calc Memo at 8, Step 4).
[189] *Id*. at 17-18 (citing OCP's Letter, "Pre-Preliminary Determination Comments," dated November 16, 2020 (OCP Pre-Prelim Comments) at Attachment 1 and OCP 11/6/20 SQR at 4-5 and Exhibit MIN2-3).
[190] *Id*. at 18 (citing OCP Pre-Prelim Comments at 9 and Attachment 1 and OCP ILOV SQR at 1).
[191] *See* OCP ILOV SQR at 1-2 and 35-36.
[192] *Id*. at 19-20.
[193] *Id*. at 19 (citing OCP Prelim Calc Memo at 8).

- The phosphate rock benefit calculations are supposed to determine the benefit the GOM conferred by granting OCP the right to mine phosphate ore. If Commerce does not multiply the per-unit benefit figure by the total amount of phosphate ore that OCP extracted during the POI, it will fail to accurately indicate the benefit that the GOM conferred to OCP under this program.

OCP's Rebuttal Brief:[194]

- Commerce should reject the petitioner's request that it assign the per-unit benefit for phosphate rock to phosphate ore because allotting a benefit amount determined on a per-ton basis of rock to the volume of ore would distort the benefit comparison and also lead to double counting of stored rock.[195]
- Phosphate rock is the first commercially traded good coming from the mine. Phosphate ore newly extracted from a mine cannot fairly be compared against a benchmark for processed phosphate rock because ore does not incur the same costs as rock that has passed through the value chain.[196]
- In its *Preliminary Determination*, Commerce calculated a benefit based on costs and prices for phosphate rock and that benefit should be allocated to the same good to maintain a consistent internal calculation.

Commerce's Position:

We agree with OCP that it is inappropriate to use phosphate ore in the benefit calculation and have continued to use the volume of phosphate rock beneficiated in 2019 to calculate the total benefit for this program. As noted by the petitioner, there are no market prices for phosphate ore,[197] and we are therefore required to use phosphate rock in our benefit calculation. Further, phosphate ore must undergo significant processing to remove impurities in order to be converted into phosphate rock, which can either be sold on the global market or manufactured into phosphate fertilizer.[198] Therefore, consistent with the *Preliminary Determination*, as we are calculating a per-unit cost of producing phosphate rock to compare against the per-unit benchmark price of phosphate rock, it is appropriate to apply the difference to the volume of phosphate rock OCP produced during the POI in order to achieve accuracy in the benefit calculation.[199]

[194] *See* OCP's Rebuttal Brief at 27-30.
[195] *Id*. at 28-30.
[196] *Id*. (citing OCP 11/6/20 SQR at 7 ("This further processing is extensive, consisting of extraction, stone removal, beneficiation, and transportation/loading. Substantial additional costs are incurred at each of these production stages.")).
[197] *See* Petition at II-11-II-12 ("Based on Petitioner's experience, phosphate ore is not a traded commodity, because it typically contains high levels of impurities and would be prohibitively expensive to transport in an unrefined state.").
[198] *Id*. at II-12.
[199] *See* Final Calculation Memorandum.

Commerce's practice is to make an "apples-to-apples" comparison between the benchmark and the good being compared to determine whether a benefit exists.[200] Therefore, we decline the petitioner's suggestion to multiply the benefit amount calculated on a per-ton basis of phosphate rock by the total volume of phosphate ore that OCP extracted during the POI.

Comment 8: The Appropriate Analysis for the Provision of Mining Rights for LTAR

GOM's Case Brief:[201]

- Commerce's preliminary finding that OCP's monopoly on mining phosphates provides a subsidy in the form of "undervalued phosphate ore"[202] is inconsistent with both the case record and its established practice of analyzing mining rights for LTAR allegations.
- Commerce's practice is to recognize that "mining rights" provide a countervailable "good" when those rights take the form of a required payment in exchange for the mined product.[203] Commerce analyzes that payment in order to determine a benefit.
- In *Cold-Rolled Steel from Russia*, Commerce found that Severstal's mining license obtained from the Russian government conferred a "good" (*i.e.*, coal).[204] Commerce then analyzed whether that good was provided for LTAR through the government-provided license.[205]
- In *Silicon Metal from Australia*, Commerce focused on the royalties Simcoa paid in exchange for mining rights for quartz and found no subsidy because the quartz royalty rates charged by the Government of Western Australia were consistent with market principles and did not confer a benefit.[206]
- The GOM's legal decree granting OCP a monopoly to mine phosphate ore[207] did not give OCP any phosphate ore and companies in Morocco do not compete to obtain these mining rights. Companies in Morocco only have to make two types of payments to the GOM to mine: a minor administrative fee to obtain a multi-year permit and extraction taxes assessed on the quantity of minerals mined.[208]
- OCP does not have to pay administrative fees to obtain mining permits because it conducts its mining activities under the monopoly granted by the GOM.[209] OCP already pays the highest extraction tax possible per ton of phosphate ore.[210]
- The petitioner never argued that OCP did not fully pay these taxes or that they provide a form of countervailable subsidy. Commerce provided no analysis of OCP's extraction

[200] *See, e.g.*, *High Pressure Steel Cylinders from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 26738 (May 7, 2012), and accompanying IDM at 44; and *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 73 FR 40480 (July 15, 2008), and accompanying IDM at Comment D.7 at 69.
[201] *See* GOM's Case Brief at 14-17.
[202] *Id*. at 14 (citing *Preliminary Determination* PDM at 11).
[203] *Id*. at 14-15.
[204] *Id*. at 15 (citing *Cold-Rolled Steel from Russia* IDM at 21).
[205] *Id*.
[206] *Id*. (citing *Silicon Metal from Australia* IDM at Comment 5).
[207] *Id*. at 16 (citing GOM IQR at V-1-V-2).
[208] *Id*. (citing GOM's letter, "Supplemental Questionnaire Response of the Government of the Kingdom of Morocco – Part 2," dated November 11, 2020 (GOM 11/11/20 SQR) at S-IX-121; and GOM IQR at V-4 and Exhibit V-7).
[209] *Id*. (citing GOM 11/11/20 SQR at S-IX-21).
[210] *Id*. (citing GOM IQR at V-4, V-9, and Exhibit V-9).

taxes when it concluded that OCP's mining rights were undervalued. Therefore, the only "good" resulting from OCP's monopoly is a waiver of an administrative fee, not "undervalued phosphate ore" as Commerce found in its *Preliminary Determination*.

- By not investigating any benefit OCP might have gained from the waiver of a small administrative permit fee, Commerce failed to investigate whether the only "good" provided by OCP's mining rights monopoly was provided for LTAR by the GOM. Thus, the basis for Commerce's financial contribution analysis of this alleged program is flawed.

Petitioner's Rebuttal Brief:[211]

- In making the argument that Commerce incorrectly analyzed the GOM's provision of phosphate mining rights to OCP, the GOM fails to identify any factual or legal errors in Commerce's analysis.
- The GOM's allegation that the only good resulting from OCP's monopoly is a waiver of a minor administrative permit fee and not undervalued phosphate ore misinterprets the statute.[212]
- In its Tier 3 analysis in its *Preliminary Determination*, Commerce measured the adequacy of remuneration in a manner following the approaches of the *Silicon Metal from Australia* and *Cold-Rolled Steel from Russia* CVD proceedings.[213] Commerce appropriately used a phosphate rock benchmark because the underlying good is phosphate ore and there are no world market prices for this ore.
- The GOM is correct that this case differs from *Silicon Metal from Australia* and *Cold-Rolled Steel from Russia*. However, that is because the GOM does not charge OCP anything for the right to mine phosphate ore. This demonstrates that the GOM's provision of phosphate mining rights is inconsistent with market principles.[214]

Commerce's Position:

As an initial matter, the GOM admits in its argument that it granted OCP the monopoly to mine phosphate ore.[215] Thus, the GOM provided OCP with access to a good, that is "phosphate ore." Further, the GOM charged extraction taxes associated with mining the good, thereby allowing OCP to access the "good." We agree with the petitioner that we correctly analyzed the provision of mining rights for LTAR in the *Preliminary Determination*. The GOM's assertion that the only "good" resulting from OCP's monopoly to mine phosphate ore, is a waiver of an administrative permit fee, misinterprets Commerce's regulations and practice. The GOM's argument ignores the fact that access to the "phosphate ore" was also provided by the GOM through the monopoly mining rights it granted OCP. We continue to find that the good at issue is the right to mine phosphates, and the appropriate method to determine whether the grant of that right conferred a benefit is to measure the adequacy of remuneration pursuant to 19 CFR 351.511(a)(2). Section 351.511(a)(2)(i) of our regulations states that Commerce will normally

[211] *See* Petitioner's Rebuttal Brief at 13-15.
[212] *Id*. at 13-14 ("This wrongly conflates a "revenue foregone" analysis under sections 771(5)(D)(ii) and 771(5)(E) with an LTAR analysis under section 771(5)(D)(iii) and 771(5)(E)(iv).").
[213] *Id*. at 14 (citing *Preliminary Determination* PDM at 12).
[214] *Id*. at 15 (citing GOM's Case Brief at 15-17).
[215] *See* GOM's Case Brief at 16.

seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question (Tier 1 analysis). If there is no such useable market-determined price, 19 CFR 351.511(a)(2)(ii) permits the use of a world market price for the good or service available to the purchasers in the country in question to measure the adequacy of remuneration (Tier 2 analysis). According to 19 CFR 351.511(a)(2)(iii), if there is no such world market price, Commerce will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles (Tier 3 analysis). In this investigation, we applied Tier 3 analysis to the provision of phosphate mining rights because there are no Tier 1 market-determined phosphate mining rights in Morocco or Tier 2 world market prices for mining rights that are available to purchasers in Morocco. Lastly, we note that we have consistently countervailed mining rights for LTAR as a good for LTAR program in other CVD proceedings.[216] Therefore, we continue to find that the mining rights granted by the GOM to OCP constitute a countervailable good and that we correctly applied a Tier 3 analysis for this program.

Creditworthiness

Comment 9: Whether Commerce Correctly Analyzed OCP's Financial Ratios

OCP's Case Brief:[217]

- Commerce failed to consider the totality of the evidence when determining OCP's creditworthiness.[218]
- Commerce improperly focused on the current and quick ratios and failed to evaluate these ratios correctly.[219] Further, Commerce failed to consider other ratios like debt-to-equity and debt-to-assets, as well as OCP's interest/debt coverage ratio and profitability.
- While Commerce used a benchmark of 2.0 for creditworthiness, there is no evidence to support that a current ratio of 2.0 is a proper benchmark to use in this investigation. Rather, the record evidence demonstrates that the proper benchmark is 1.0. A current ratio of 1.0 "suggest financial well-being" and that a company has the resources to remain solvent in the short-term.[220] OCP's 2016 and 2017 current ratios support it was creditworthy in both years.
- Commerce's use of a 1.0 quick ratio benchmark as a definitive threshold for creditworthiness is not supported by record evidence. Investopedia reports that Johnson & Johnson, with a quick ratio of 0.94, appears to be in a position to cover its current

[216] *See Silicon Metal from Australia* IDM at Comment 5; *see also Cold-Rolled Steel from Russia* IDM at Comment 15.
[217] *See* OCP's Case Brief at 56-62.
[218] *Id.* at 56 (citing *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 59212 (September 27, 2010), and accompanying IDM at Comment 33 (recognizing that financial ratios "cannot be considered in isolation")); *see also* OCP IQR at CRED-1 ("Generally, ratios are typically not used in isolation but rather in combination with other ratios . . . {which} will give you a comprehensive view of the company.").
[219] *Id.* at 57 (explaining Commerce should have calculated those ratios using debt in the numerator, rather than liabilities).
[220] *Id.* (citing OCP IQR at CRED-32, 33, and 34).

liabilities.[221] Like Johnson & Johnson, OCP's 2016 and 2017 quick ratios indicate it is in a position to cover its current liabilities.

- The current and quick ratios are considered liquidity ratios; both Standard & Poor's (S&P) and Fitch Ratings (Fitch) found OCP's liquidity sufficient.
- Commerce incorrectly calculated the debt-to-equity ratio as total liabilities over total equity rather than total debt over total equity.[222] Had Commerce used the proper calculation, OCP's debt-to-equity ratios would be below Commerce's benchmark of 1.0,[223] demonstrating OCP had sufficient equity to cover its debt. If Commerce continues to use total liabilities as the numerator, then it should use a benchmark of 2.0.[224]
- Record evidence indicates that a debt-to-assets ratio below 1.0 suggests strong financial health.[225] Commerce correctly acknowledges that the debt-to-assets ratio establishes OCP's creditworthiness. However, Commerce mistakenly used liabilities instead of debt to calculate this ratio.
- OCP's interest/debt coverage ratio and profitability, both of which were submitted to Commerce, further demonstrate that OCP is creditworthy. The standard benchmark for the interest/debt coverage ratio is 1.0, with a ratio above 1.0 being favorable.[226] OCP's interest/debt coverage ratio far exceeds this benchmark. Further, OCP's profitability in 2016 and 2017 indicated to investors and lenders that the company has strong financial health.[227]
- Commerce's regulations provide that a company's present financial health and its ability to meet its costs and fixed financial obligations with its cash flow are factors to consider in a creditworthiness analysis.[228] Commerce failed to consider evidence of OCP's historical financial performance as a successful issuer in the bond market and its ability to meet its financial obligations.
- OCP's bond market performance in the commercial market demonstrates its creditworthiness.[229] OCP successfully offered international bonds in 2014 and 2015. Moreover, the secondary market for OCP's 2016 bonds is very active demonstrating a favorable view of OCP's financial health.

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[221] *Id.* at 59 (citing OCP IQR at CRED-31).

[222] We note that OCP cited to several documents not on the record of this investigation to support its argument and thus its argument is not supported by evidence on the record.

[223] *Id.* at 60-61 ((citing *100- to 150-Seat Large Civil Aircraft from Canada: Final Affirmative Countervailing Duty Determination*, 82 FR 61252 (December 27, 2017) (*Aircraft from Canada*), and accompanying IDM at Comment 7 (considering debt-to-equity ratio above 1.0 to be "high"); and OCP IQR at CRED-39 (A ratio of 1.0 means that "creditors and investors are on equal footing in the company's assets," so a debt-to-equity ratio below 1.0 indicates that the firm is less leveraged by debt.)).

[224] *Id.* (citing OCP IQR at CRED-38 (employing liabilities in the numerator and explaining that "capital intensive industries . . . tend to have debt/equity ratio of over 1"), CRED-40 (providing a formula using liabilities in the numerator and stating that debt-to-equity ratios are industry-specific and that "{l}arge manufacturing and stable publicly traded companies have ratios between 2 and 5").

[225] *Id.* at 62 (citing *Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of Countervailing Duty Administrative Review*, 76 FR 77206 (December 12, 2011); and OCP IQR at CRED-41-43).

[226] *Id.* at 62 (citing OCP IQR at CRED-44 through 46).

[227] *Id.* at 63 (citing OCP IQR at CRED-31).

[228] *See* OCP's Case Brief at 64 (citing 19 CFR 351.505(a)(4)(B)-(C)).

[229] *Id.* at 64 (citing *Final Affirmative Countervailing Duty Determination: Structural Steel Beams from the Republic of Korea*, 65 FR 41051 (July 3, 2000), and accompanying IDM at Comment 1 (noting that issuance of commercial bonds is dispositive of a company's creditworthiness, where, as is the case here, the bond market was not controlled by the government)).

- OCP's actual financial history also demonstrates that it was able to satisfy its financial obligations in 2016 and 2017. OCP never missed any interest payments on its various financial obligations leading up to or in 2016 and 2017.[230]

Petitioner's Rebuttal Brief:[231]

- Commerce should reject OCP's argument that Commerce did not analyze OCP's financial ratios correctly.
- Commerce should reject OCP's suggestion that the Commerce depart from its standard practice with respect to benchmarks for current ratios and quick ratios. Commerce has consistently relied on benchmarks of 2.0 for current ratios and 1.0 for quick ratios in its creditworthiness analysis.[232]
- With respect to the current ratio, OCP misquotes its own evidence. The evidence cited to by OCP to support its contention that 1.0 is the appropriate benchmark more accurately supports the benchmark of 2.0.[233]
- With respect to the quick ratio, OCP's cite to a quick ratio of 0.94 allegedly demonstrating that Johnson & Johnson is in a position to cover its current liabilities omits the full sentence, which states that with a quick ratio of 0.94, Johnson & Johnson's "liquid assets aren't quite able to meet each dollar of short-term obligations."[234] Thus, the record evidence supports a quick ratio benchmark of 1.0.
- While OCP cites to discussion of OCP's liquidity in credit rating reports from Fitch and S&P as evidence of liquidity, Commerce properly considered the credit agency ratings and research reports on the record as relevant evidence of OCP's future financial position under 19 CFR 351.505(a)(4)(i)(D).
- OCP does not identify any legal authority in support of its arguments or cite any examples of prior cases where Commerce calculated the debt-to-equity and debt-to assets ratios using total debt as opposed to total liabilities. Articles that OCP submitted define the debt-to-equity ratio as total liabilities divided by shareholder equity and define the debt-to-assets ratio as total liabilities divided by total assets.[235]
- OCP highlights only two additional factors Commerce should consider: interest coverage ratio and profitability. Focusing on these in isolation presents an incomplete picture of OCP's overall financial health and ability to meet costs and fixed financial obligations with cash flow. However, other financial ratios such as OCP's cash flow and return on equity and net profit margin supports Commerce's finding that OCP is uncreditworthy in 2016.[236]

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[230] *Id.* at 65 (citing OCP IQR at BONDPURCH-14 and OCP's Letter, "OCP S.A. Supplemental Questionnaire Response," dated November 3, 2020 (OCP 11/3/20 SQR) at 9, and BONDPURCH 2-2 and BONDPURCH 2-6).
[231] *See* Petitioner's Rebuttal Brief at 32-37.
[232] *Id.* at 33 (citing, *e.g.*, *Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Rescission, in Part, 2017*, 84 FR 55913 (October 18, 2019), and accompanying IDM at 13; *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Intent To Rescind the Review, in Part; 2016*, 84 FR 5051 (February 20, 2019), and accompanying PDM at 15).
[233] *Id*. at 34 (citing OCP's Case Brief at 58; and OCP IQR at CRED-32, at 2).
[234] *Id.* (citing OCP's Case Brief at 59; and OCP IQR at CRED-35, at 4).
[235] *Id.* at 36 (citing OCP IQR at CRED-38-40 and CRED-42).
[236] *Id.* at 38 (citing *Wood Cabinets from China* IDM at 67).

- OCP's return on equity was well below 10 percent in each year from 2016 to 2018.[237] Investors generally consider a return on equity of less than 10 percent to be poor.[238]
- OCP acknowledges that "historical financial performance" is not one of the four factors that 19 CFR 351.505(a)(4)(i) directs Commerce to consider in a creditworthiness analysis. Moreover, the evidence that OCP identifies is not relevant to any of the four factors enumerated under 19 CFR 351.505(a)(4)(i).

Commerce's Position:

In the *Preliminary Determination*, we found that OCP was uncreditworthy during 2016 and 2017, and creditworthy in 2018.[239] In consideration of the interested parties case and rebuttal briefs, and upon further review of the evidence on the record, we determine that OCP was creditworthy in 2016, 2017, and 2018, for purposes of the final determination.

Section 351.505(a)(4)(i) of our regulations provides that Commerce will determine creditworthiness on a case-by-case basis. In making this determination, according to 19 CFR 351.505(a)(4)(i)(A)-(D), Commerce may examine, *inter alia*, the following four types of information: 1) receipt by the firm of comparable commercial long-term loans; 2) present and past indicators of the firm's financial health; 3) present and past indicators of the firm's ability to meet its costs and fixed financial obligations with its cash flow; and 4) evidence of the firm's future financial position.

According to 19 CFR 351.505(a)(4)(ii), for companies not owned by the government, Commerce normally considers a company's receipt of a comparable long-term loan from a commercial source, unaccompanied by a government-provided guarantee, to be dispositive of its creditworthiness. The *CVD Preamble* states that, "{w}e do not believe that the presence of commercial loans is dispositive of whether a government-owned firm could have obtained long-term financing from conventional commercial sources. This is because, in our view, in the case of a government-owned firm, a bank is likely to consider that the government will repay the loan in the event of default."[240] Therefore, for this investigation, because OCP is a government-owned firm, we primarily rely on the factors listed in 19 CFR 351.505(a)(4)(i)(B)-(D) in our examination of whether OCP is creditworthy.

We agree with OCP that we did not take the totality of OCP's financial circumstances into consideration when making our preliminary determination as to whether OCP was uncreditworthy in the alleged years (*i.e.,* 2016, 2017, and 2018). Rather, our focus was primarily on the financial information on the record relevant to the alleged years, and we did not take into consideration the other financial information on the record relevant to prior years (*i.e.*, 2013, 2014, 2015).[241] While we also considered the financial reports from the credit rating services

[237] *Id.* (citing Petition, Exhibit II-63 (showing OCP's return on equity was 0.05 in 2016, 0.06 in 2017, and 0.07 in 2018).
[238] *Id.* at 37 (citing Petition at II-28).
[239] *See Preliminary Determination* PDM at 6.
[240] *See CVD Preamble*, 63 FR at 65367.
[241] *See* OCP IQR at GEN-8(d)-(i) and CRED-31; *see also*, Memorandum, "Preliminary Creditworthiness Determination for OCP S.A.," dated November 23, 2020 (Preliminary Creditworthiness Memo).

Fitch and S&P, we similarly focused on the alleged years.[242] In making our preliminary determination as to whether OCP was uncreditworthy, we followed *Solar Panels from China*, [243] and other subsequent cases, where we emphasized our analysis and determination upon two ratios; the current and quick ratios.[244] However, as stated above, 19 CFR 351.505(a)(4)(i) provides that Commerce will determine creditworthiness on a case-by-case basis.

For the final determination, we have considered the totality of the financial information on the record pursuant to our regulations, including: 1) present and past indicators of OCP's financial health; 2) present and past indicators of OCP's ability to meet its costs and fixed financial obligations with its cash flow; and 3) evidence of the firm's future financial position.[245]

A reconsideration of OCP's quick and current ratios[246] demonstrates a general stability across the years 2013 through 2018.[247] OCP's current ratio, which gauges a company's short-term ability to pay off its debt, decreased 36 percent from 2013 to 2014, increased to 27 percent in 2015, and remained stable until 2017 when the current ratio decreased 17 percent, and increased 66 percent in 2018.[248] OCP's quick ratio, which measures the extent to which a business can cover current liabilities with current assets readily convertible to cash, decreased marginally between 2013 and 2014 to 0.85, where it remained just below 1 from 2014 through 2016, and then decreased to 0.73 in 2017 and increased to 1.5 in 2018.[249] While the current and quick ratios fluctuated somewhat across the years 2013 to 2018, the trend across this same period demonstrates that OCP was generally stable.

Furthermore, OCP's debt-to-asset (D/A) and debt-to-equity (D/E) ratios also demonstrate stability over the same period.[250] OCP's D/A ratios, which indicate the extent to which a company is financing its assets through debt as an indicator of how leveraged the company is,[251] remained stable from 2013 through 2018 (*i.e.,* 0.20 to 0.36).[252] These D/A ratios demonstrate that OCP would be able to repay its debt if creditors demanded payment. With respect to OCP's D/E ratio, which measures a company's ability to pay its long-term debt, it also remained stable

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[242] *Id.* at 4-5.
[243] *See, e.g., Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 FR 63788 (October 17, 2012) (*2012 Solar Cells from the PRC*), and accompanying IDM at 56.
[244] *See* Prelim Creditworthiness Memo at 3.
[245] *See* 19 CFR 351.505(a)(4)(i)(B)-(D).
[246] Commerce considers whether the firm's current ratio (current assets over current obligations) is above or below 2.0, and whether the firm's quick ratio (liquid assets over current obligations) is above or below 1.0. *See Solar Cells from the PRC* IDM at 56.
[247] In reviewing the information on the record, we note that OCP's consolidated financial statements are public documents. *See* OCP IQR at GEN-8(a) through (j). Therefore, the financial data used to calculate the financial ratios are public information. *See* Final Calculation Memorandum.
[248] OCP's current ratios: 1.98 in 2013, 1.28 in 2014, 1.63 and 1.62 in 2015 and 2016, respectively, 1.35 in 2017, and 2.23 in 2018. *See* Final Calculation Memorandum.
[249] OCP's quick ratios: 1.02 in 2013, 0.85 in 2014, 0.98, and 0.99 in 2015 and 2016, respectively, 0.73 in 2017, and 1.5 in 2018. *See* Final Calculation Memorandum.
[250] *Id.*
[251] We note that this ratio is used to compare one company's leverage with that of other companies in the same industry. *See* OCP IQR at CRED-41.
[252] *See* Final Calculation Memorandum.

through the 2013-2018 period, ranging from 0.86 to 1.14.[253] While OCP's D/E ratio increased from 0.86 to 1.23 (42 percent) from 2013 to 2014, the D/E ratio decreased from 2014 to 2018 from 1.23 to 1.14, respectively, which indicates OCP was not highly leveraged.[254] We note that both the D/A and D/E ratios are compared to companies within the same industry, but typically the higher the ratio, the more leveraged the company is. In this instance, the record contains both Fitch and S&P credit rating reports, and both rating agencies report that OCP's leverage is commensurate with its peers in the industry.[255]

Additionally, with respect to OCP's future financial position, we continue to rely on the Fitch and S&P credit reports on the record. Specifically, we note that OCP has maintained a BBB- rating, fluctuating between a negative and stable outlook in 2016, 2017, and 2018. With respect to OCP's future financial position, both credit rating agencies remark on OCP's financial policy of maintaining a strict cash-to-debt ratio so that it does not become over leveraged; however, both agencies also note that OCP carries a significant amount of debt. This disclaimer is consistent with the current and quick ratios, discussed above, which call into question OCP's ability to meet its debt obligations if the investors demanded repayment. Additionally, while these rating agencies remark on the fact that OCP must pay market prices for ammonia and sulfur, two main fertilizer inputs, both Fitch and S&P make the assumption that future demand for fertilizer will increase and note that OCP has increased its ability to produce tailor-made downstream fertilizer products.[256] For a further discussion regarding these credit reports, *see* Comment 12, below.

Additionally, we agree with OCP in part, that we incorrectly used total liabilities rather than total debt for the D/A ratio calculations.[257] However, we disagree that we used the incorrect numerator for the D/E ratio calculations. With respect to the D/E ratio, OCP used only current and non-current debt and financial loans in its numerator.[258] Information placed on the record by OCP indicates that D/E ratios use total liabilities in the numerator.[259] Accordingly, we have made no changes to the D/E ratio calculations for the final determination.[260]

With respect to the D/A ratio, information placed on the record by OCP indicates that the D/A ratio formula is the sum of short-term debt and long-term debt divided by total assets.[261] In our preliminary creditworthiness determination, we used total liabilities rather than total debt.[262] Based on the information on the record, we have revised the D/A ratio calculations[263] to accurately capture the total amount of debt OCP holds relative to its assets.[264]

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[253] *Id.*
[254] We note that this ratio is also used to compare one company's leverage with that of other companies in the same industry. *See* OCP IQR at CRED-38.
[255] *See* OCP IQR at CRED-19 (Fitch) and CRED-23 (S&P 2017 report); and GOM IQR at Exhibit IV-2 (S&P report in OCP's 2018 Bond Prospectus).
[256] *See* OCP IQR at BONDPURCH-5 and 6, and CRED-14 through 24.
[257] *See* OCP's Case Brief at 60-61.
[258] *See* OCP IQR at CRED-31
[259] *Id*. at CRED-40.
[260] *See* Final Calculation Memorandum.
[261] *See* OCP IQR at CRED-41 and CRED-42.
[262] *See* Preliminary Creditworthiness Memorandum.
[263] *See* Final Calculation Memorandum.
[264] *Id.*

Comment 10: Whether OCP is Uncreditworthy in 2018

Petitioner's Case Brief:[265]

- Commerce should find that OCP was uncreditworthy in 2018 and apply an uncreditworthy interest rate with respect to OCP's 2018 bond issuance.
- A market-oriented entity would have relied on OCP's 2017 financial statements in determining whether to participate in the 2018 bond issuance. To determine OCP's 2018 creditworthiness, Commerce should rely on information in OCP's 2018 bond prospectus and its 2016 and 2017 financial statements.[266]
- OCP issued its 2018 bond prospectus in April 2018, with a subscription period from May 2-4, 2018. Under Commerce's regulations,[267] Commerce cannot take OCP's 2018 financial information into consideration in determining whether OCP was creditworthy at the time of its 2018 bond issuance.[268]
- OCP's 2018 bond prospectus relies on 2016 and 2017 financial information, and Commerce used the 2016 and 2017 financial statements to determine OCP was uncreditworthy in those years.
- The relevant Fitch and S&P credit reports for Commerce's creditworthiness determination are from 2017. Moreover, record evidence demonstrates that Fitch set its 2017 OCP credit rating at "BBB-/Negative, which reflects "a one-notch uplift from state support."[269] If not for this state support, OCP's credit rating would be BB+ (*i.e.*, junk). In *2012 Solar Panels from China*, Commerce found a non-state-owned entity to be uncreditworthy based in part on a similar credit rating.[270]
- If Commerce continues to rely on OCP's 2018 financial statements to determine its 2018 creditworthiness, the only information that could possibly be relevant is that which is probative of OCP's financial condition as of May 2-4, 2018 (*i.e.*, the subscription period for the bond issuance).[271]
- The record evidence demonstrates that OCP's 2018 financial statements present a distorted picture of OCP's financial condition (*i.e.*, proceeds from the 2018 bond issuance and the VAT refund) at the time of the bond issuance in May 2018.[272]

GOM's Rebuttal Brief:[273]

- Commerce should not apply an uncreditworthy benchmark to the 2018 bond issuance.
- Putting aside the petitioner's unsupported theory of contemporaneity with respect to Commerce's 2018 OCP creditworthiness determination, as the GOM explained in its case brief, Commerce's creditworthiness determination was based entirely upon a presumption

[265] *See* Petitioner's Case Brief at 20-28.
[266] *See* Petitioner's Case Brief at 26
[267] *Id.* at 23 (citing 19 CFR 351.505(a)(4)).
[268] *Id.* at 22.
[269] *Id.* (citing OCP IQR at CRED-17. We note this information is publicly available at GOM IQR at Exhibit IV-2 at page 329 of the prospectus).
[270] *Id.* (citing *2012 Solar Panels from China* IDM at 58).
[271] *Id.* at 26.
[272] *Id.* at 27.
[273] *See* GOM's Rebuttal Brief at 21-22.

that does not exist, *i.e.*, that purchasers believed the GOM would guarantee the bond purchases. The 2016 and 2018 bond prospectuses explicitly state the opposite.[274]

- The petitioner correctly explains that the focus should be on what "a market-oriented entity considering whether to participate in OCP's 2018 bond issuance" would have believed.[275] The market recognized that both the 2016 and the 2018 bonds were safe investment opportunities, which is why they were oversubscribed by private parties.

OCP's Rebuttal Brief:[276]

- Commerce should continue to find OCP creditworthy in 2018 in accordance with its practice in considering the 2018 data.
- The petitioner does not cite to any Commerce practice to support its contention. In *2012 Solar Panels from China* cited by the petitioner to support its credit ratings argument, Commerce applied the practice the petitioner is requesting Commerce reject.
- Commerce's practice is to consider only the relevant year's financial ratios and credit ratings in its creditworthiness analysis.
- The prior history of OCP's commercial lending overcomes the presumption in the *CVD Preamble* that investors might assume an implicit government guarantee. Moreover, the 2018 bond prospectus explicitly stated that there "is no guarantee of the bond issue other than the commitment given by the issuer."[277]
- Commerce properly determined that OCP's current and quick ratios confirm OCP was creditworthy in 2018.
- Commerce incorrectly calculated the D/E and D/A financial ratios. When properly calculated and analyzed, these ratios support Commerce's 2018 creditworthiness determination.
- OCP's actual financial history clearly demonstrates that it was able to satisfy all of its financial obligations in 2018.
- OCP received an overall BBB- rating in 2018 from both Fitch and S&P, as well as a standalone credit rating of BBB- from S&P. Further, the 2017 Fitch and S&P credit ratings demonstrate OCP's creditworthiness as OCP received investment grade BBB- ratings from both agencies, and a standalone BBB- credit rating from S&P.[278]
- Commerce previously found a respondent company creditworthy even where the credit rating was a non-investment grade BB, which is two levels lower than OCP's BBB- rating.[279]
- If Commerce limits its analysis of OCP's 2018 creditworthiness to OCP's financial condition in 2016 and 2017, information on the record demonstrates OCP was creditworthy in those years.

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[274] *Id.* at 21 (citing GOM Case Brief at 7; and *Preliminary Determination* PDM at 10).
[275] *Id.* at 22 (citing Petitioner's Case Brief at 21).
[276] *See* OCP's Rebuttal Brief at 30-41.
[277] *Id.* at 34 (citing OCP IQR at BONDPURCH-6 at 358, 692).
[278] *Id.* at 38 (citing OCP IQR at CRED-19 and CRED-24).
[279] *Id.* at 39 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review and Rescission of Review, in Part; 2016*, 84 FR 45125 (August 28, 2019) (*2016 Solar Panels from China*), and accompanying IDM at Comment 9).

- Commerce should reject the petitioner's request to find OCP uncreditworthy in 2014, 2015, and 2019, because Commerce did not initiate an investigation into those years and failing to do so would be fundamentally prejudicial to OCP's due process rights.[280]

Commerce's Position:

As noted above, for the final determination, Commerce finds OCP creditworthy in 2016, 2017, and 2018 based on the totality of OCP's financial circumstances pursuant to 19 CFR 351.505(a)(4)(i)(B)-(D). As an initial matter, we disagree with the petitioner's contention that we should find OCP uncreditworthy in 2014, 2015, and 2019. It is Commerce's practice to make a determination regarding a firm's creditworthiness in the year(s) for which an uncreditworthiness allegation was made. Because the petitioner did not make an allegation inclusive of the years 2014, 2015, and 2019 at the initiation stage, we have not made a creditworthiness determination for these years.

The petitioner contends that Commerce should use OCP's 2017 financial information in making a creditworthiness determination for 2018 because according to Commerce's regulations at 19 CFR 351.505(a)(4)(i), Commerce will generally consider a firm to be uncreditworthy if, "based on information available at the time of the government-provided loan, the firm could not have obtained long-term loans from conventional commercial sources." As such, an investor in OCP's 2018 bonds would use OCP's 2017 financial information to determine whether to purchase those bonds.[281] We agree with the petitioner, in part. As discussed above, we have re-examined the years 2016 and 2017, and in doing so we have reviewed OCP's financial ratios and its credit rating history from 2013 to 2015. Consequently, we have re-examined all the financial information from 2013 to 2018 in making our creditworthy determination for 2018. As a result of this re-examination, we continue to determine that OCP is creditworthy in 2018 based on OCP's financial information from 2013 through 2018.

Comment 11: Whether Commerce Should Consider OCP's Long-Term Loans in the Creditworthiness Analysis

OCP's Case Brief:[282]

- To evaluate OCP's "present and past financial health" and its "recent past and present ability to meet its costs and fixed obligations with its cash flow," as required by the regulation,[283] Commerce must consider the totality of the circumstances and record evidence pertaining to OCP's financial health.[284]

[280] *Id*. at 43 (citing *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 761-62 (Fed. Cir. 2012)).
[281] *See* Petitioner's Case Brief at 26.
[282] *See* OCP's Case Brief at 51-56.
[283] *Id.* at 51 (citing 19 CFR 351.505(a)(4)(B)-(C)).
[284] *Id.* (citing *CVD Preamble*, 63 FR at 65366 (explaining that Commerce's regulations provide "flexibility" rather than a rigid "formulaic" approach); 19 CFR 351.505(a)(4)(i) (enumerating four factors for evaluation of creditworthiness); and OCP IQR at CRED-35 ("While such numbers-based ratios offer insight into the viability and certain aspects of a business, they may not provide a complete picture of the overall health of the business. It is important to look at other associated measures to assess the true picture.").

- The first factor in Commerce's regulations pertaining to creditworthiness requires consideration of "{t}he receipt by the firm of comparable commercial long-term loans."[285]
- Commerce erred in its interpretation of the *CVD Preamble*. The *CVD Preamble* explains that, even in the context of government-owned entities, Commerce will consider a history of commercial lending as an important part of its creditworthiness analysis.[286]
- The record demonstrates that OCP had long-term loans in 2016 and 2017.[287]
- The record demonstrates that OCP has regularly paid its debts with no assistance from the GOM. Fitch acknowledged that there has been no record of support from the GOM since 2008.[288] Moreover, the 2016 bond prospectus explicitly put investors on notice that neither the GOM, nor any other entity, was guaranteeing the bonds or would otherwise repay the debt.[289]

The Petitioner's Rebuttal Brief:[290]

- Commerce correctly did not consider OCP's long-term loans when determining OCP's creditworthiness consistent with 19 CFR 351.505(a)(4)(ii).
- OCP's arguments mischaracterize Commerce's regulation and the *CVD Preamble*. There is no "presumption" under 19 CFR 351.505(a)(4)(ii). Rather, the language of the regulation is clear: a firm's receipt of long-term commercial loans is only dispositive evidence of creditworthiness for firms that are not government-owned.[291]
- The commercial loans that OCP identifies do not support a finding that it was creditworthy in 2016, nor does its 2016 bond issuance. As Commerce found in *CORE from Korea*, a bond issuance or financing package cannot be considered a "comparable commercial loan" under 19 CFR 351.505(a)(4)(ii) where government-owned entities play a dominant role and are in a position to influence private entity's actions in making investment decisions.[292]

Commerce's Position:

As noted above, for the final determination, Commerce finds OCP creditworthy in 2016, 2017, and 2018 based on the totality of OCP's financial circumstances pursuant to 19 CFR 351.505(a)(4)(i)(B)-(D). Despite OCP's contention to the contrary,[293] we have not considered any long-term loans because OCP is a government-owned firm, and Commerce does not

[285] *Id.* at 52 (citing 19 CFR 351.505(a)(4)(i)(A)).
[286] *Id.* at 54 (citing *CVD Preamble*, 63 FR at 65367 (("{W}e believe that if commercial banks are willing to provide loans to the firm, we should not substitute our judgment and find the firm to be uncreditworthy… For government-owned firms, we will make our creditworthiness determination by examining this factor and the other factors.").
[287] *Id.* at 53 (citing OCP IQR at CRED-2).
[288] *Id.* at 54 (citing OCP IQR at CRED-17).
[289] *Id.* (citing OCP IQR at BONDPURCH-5, at 362, 628 (emphasis in original) ("This bond issue is not subject to any guarantee other than the commitment given by the issuer.")).
[290] *See* Petitioner's Rebuttal Brief at 30-32.
[291] *Id.* at 30-31 (citing *CVD Preamble*, 63 FR at 65367).
[292] *Id.* (citing *Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 81 FR 35310 (June 2, 2016) (*CORE from Korea*), and accompanying IDM at 31-32.
[293] *See* OCP's Case Brief at 54.

consider such financing to be the type of commercial lending that is dispositive of creditworthiness under 19 CFR 351.505(a)(4)(ii). OCP's reliance on the *CVD Preamble* as support for its receipt of commercial loans to demonstrate creditworthiness is misplaced.[294] The *CVD Preamble* is explicit with respect to lending and state-owned enterprises such as OCP:

> We do not believe that the presence of commercial loans is dispositive of whether a government-owned firm could have obtained long-term financing from conventional commercial sources. This is because, in our view, in the case of a government-owned firm, a bank is likely to consider that the government will repay the loan in the event of default. Accordingly, paragraph (a)(4)(ii) provides that the presence of comparable commercial loans will be dispositive of creditworthiness only for privately owned companies. For government-owned firms, we will make our creditworthiness determination by examining this factor and the other factors listed in paragraph (a)(4)(i).[295]

Accordingly, pursuant to our regulations and the clarification provided in the *CVD Preamble*, we have not considered OCP's commercial loans as dispositive in our creditworthiness determination.

Comment 12: Whether Commerce Misinterpreted OCP's Credit Ratings

OCP's Case Brief:[296]

- Commerce misunderstood the credit ratings from Fitch and S&P and the assumptions employed by the credit rating agencies in its conclusion that OCP's credit rating was below investment grade in 2016 and 2017. Rather, these credit ratings demonstrate that OCP's standalone credit rating was investment grade in 2016 and 2017, supporting that OCP was creditworthy in those years.
- Commerce misunderstood the Government-Related Entities (GRE) methodology employed by S&P. Under the GRE methodology where a company already has a credit rating at the same level as the country, no GRE-based uplift occurs.[297] In 2016 and 2017, OCP had a standalone credit rating of BBB- and Morocco had a standalone rating of BBB-.[298] Thus, S&P did not provide OCP with a bump up in its credit rating.
- Commerce also based its finding that OCP was uncreditworthy in 2016 and 2017 on Fitch's revision in 2017 of the financial outlook metric which went from "stable" to "negative" for OCP. However, OCP received the negative outlook only in 2017, which cannot be used retroactively to qualify OCP's creditworthiness in 2016.
- Both credit rating agencies found OCP to be investment-grade (*i.e.*, creditworthy) in both 2016 and 2017, receiving an overall BBB- standalone rating in both 2016 and 2017 from

[294] *Id.*
[295] *See CVD Preamble* at 65637.
[296] *See* OCP's Case Brief at 66-71.
[297] *Id.* at 67.
[298] *Id.* (citing OCP IQR at CRED-22 at 8, CRED-23 at 11.

each agency.[299] Record evidence demonstrates that a credit rating of BBB- is investment grade and indicative of a low risk of credit default.[300]

- Commerce has previously found an investment grade credit rating is dispositive of creditworthiness.[301] In *2016 Solar Panels from China*, Commerce found the respondent creditworthy in 2015 where it received a credit rating of BB from Fitch and S&P. Here, OCP's credit rating of BBB- is higher by two levels than the rating received by the respondent in that case.
- Commerce incorrectly found that Fitch built into its credit rating the assumption the GOM may intervene if OCP is unable to meet its debt obligations. OCP was never financially supported by the GOM and Fitch acknowledged in its rating that there is no evidence of GOM support since 2008.[302]

Petitioner's Rebuttal Brief:[303]

- OCP's argument ignores much of Commerce's reasoning in its discussion of OCP's credit ratings and contradicts record evidence that the credit rating agencies considered the linkage between the GOM and OCP.
- In *2012 Solar Panels from China*, Commerce found a non-state-owned entity to be uncreditworthy based on a credit rating below investment grade.[304]

Commerce's Position:

As noted above, for the final determination, Commerce finds OCP creditworthy in 2016, 2017, and 2018 based on the totality of OCP's financial circumstances pursuant to 19 CFR 351.505(a)(4)(i)(B)-(D). We agree, in part, with OCP that we misinterpreted S&P's credit ratings. In the Preliminary Creditworthiness Memorandum, we reviewed the Fitch and S&P ratings for 2016, 2017, and 2018.[305] Under 19 CFR 351.505(a)(4)(i)(D), Commerce may rely on evidence of the firm's future financial position, such as market studies and country/industry economic forecasts (*e.g.*, credit rating reports) when examining a firm's creditworthiness. Despite OCP's contention, Commerce explained that during the 2016-2018 period, S&P used a GRE rating methodology,[306] which Fitch began using in 2018.[307] Under the GRE methodology, a government-owned firm's credit rating is linked to the government's credit rating.[308] We disagree with OCP that we found Fitch provided OCP an up-lift in 2016. Instead, we found that, in 2018, under the GRE methodology, Fitch set OCP's credit rating at BBB- to align with Morocco's credit rating of BBB-, despite OCP's stand-alone credit rating of bb+.[309]

[299] *Id.* at 69 (citing OCP IQR at CRED-16,18, 22, and 23).
[300] *Id.* (citing OCP IQR at CRED-25).
[301] *Id.* (citing *2016 Solar Panels from China* IDM at Comment 9).
[302] *Id.* at 70 (citing OCP IQR at CRED-17).
[303] *See* Petitioner's Rebuttal Brief at 39-42.
[304] *Id.* at 41 (citing *2012 Solar Panels from China* IDM at 58).
[305] *See* Preliminary Creditworthiness Memorandum at 4-5.
[306] *Id.* at 4; *see also* GOM IQR at Exhibits IV-2 and 4.
[307] *See* OCP's IQR at CRED-19.
[308] *Id.* at Exhibits CRED-20 through 24.
[309] *See* Preliminary Creditworthiness Memorandum at 4, *see also* OCP IQR at CRED-19.

We agree with OCP that we misstated S&P's GRE methodology with respect to OCP. In providing S&P's hypothetical example of its GRE methodology, we indicated that S&P provided OCP an up-lift from bb+ to BBB-.[310] OCP is correct that it received no such uplift from S&P.[311] In providing S&P's hypothetical example, we should have stated that, under the GRE methodology, *if* OCP's stand-alone credit rating would have been bb+,[312] the BBB- rating would remain unchanged given OCP's strong ties with the government.[313] Further, in misstating S&P's hypothetical example, we inadvertently concluded that without the GRE methodology, OCP's credit rating in 2016 and 2107 would be bb+.[314] This is incorrect, as S&P assigned OCP a credit rating of BBB-/Stable in both 2016 and 2017.[315]

As noted above, we have taken into account all of OCP's financial information on the record in our reconsideration of OCP's creditworthiness determination for 2016, 2017, and 2018, which includes the credit ratings provided by Fitch and S&P.

Financial Contribution

Comment 13: Whether BCP Is an Authority and Provides a Financial Contribution

Petitioner's Case Brief:[316]

- BCP is an authority within the meaning of section 771(5)(B) of the Act. Commerce assesses five factors to determine whether an entity is an authority.[317] Application of these factors demonstrates BCP is an authority.
- Although the GOM asserts that it divested its controlling interest in BCP in 2014, it fails to note that the government transferred its interest to the Banques Populares Regionales (BPRs), which are part of the BCP cooperative and are also public bodies.[318]
- OCP acknowledges GOM ownership or control of BCP in its financial statements.[319] The World Bank describes BCP as a partially-privatized state bank.[320]
- With respect to government presence on BCP's board of directors, the previous CEO and Board Chairman Mohamed Benchaaboun was appointed CEO by the King of Morocco,

[310] *See* Preliminary Creditworthiness Memorandum at 4.
[311] *See* GOM IQR at Exhibits II-2 and 3.
[312] *Id.*
[313] *Id.* at Exhibit II-3, S&P's 2017 credit report at 3, ("If we were to revise down the SACP {stand alone credit profile} to 'bb+,' the 'BBB-' rating would remain unchanged given the one-notch uplift we would apply for government support.").
[314] *See* Preliminary Creditworthiness Memorandum at 5.
[315] *See* GOM IQR at Exhibits II-2 and 3.
[316] *See* Petitioner's Case Brief at 28-35, 46-50.
[317] *Id.* at 29 (citing *Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 FR 37122 (June 23, 2003) (*DRAMs from Korea*), and accompanying IDM at 16-17).
[318] *Id*. at 29-30 (citing Petitioner's Letter, "Submission of Factual Information to Rebut, Clarify, or Correct the Government of Morocco's Supplemental Questionnaire Response of November 3, 2020," dated November 13, 2020 (Mosaic 11/13/20 NFI Submission), at Exhibit 6, at 19 (stating that "{o}n April 17, 2014, 6% of BCP's capital held by the Treasury was transferred to the regional popular banks for a total amount of MAD 2.055 billion.")).
[319] *Id.* at 30 (citing Petition at Exhibit II-7, 49, and 52).
[320] *Id.* (citing Petition, Exhibit II-6, at 108).

who subsequently appointed him Minister of Economy and Finance.[321] Further, BCP's board of directors includes four representatives from the BPRs, the CEO of OCP, a former executive of OCP, and Chairman of the Management Board of Mutuelle Centrale Marocaine D'Assurances (MCMA), a close confidante of the late King of Morocco.[322]

- Commerce should apply facts available that BCP pursues government policies because OCP did not provide the necessary information as requested.[323]
- The GOM maintains significant involvement and control over BCP. BCP and the BPRs are collectively known as Crédit Populaire du Maroc (CPM). CPM operates under the supervision of the Steering Committee of CPM, whose chair, by law, is subject to ratification by the Minister of Finance.[324]
- Serving government policies and interests is part of BCP's mandate. CPM is responsible for fostering the activity and development of businesses through the distribution of credit, as well as local and regional banks.[325] The record evidence demonstrates close ties between BCP and OCP.[326]
- BCP was established by law in 1961 and converted into a public limited company pursuant to Dahir No. 1-93-147 (July 6, 1993).[327]
- Commerce erred by not finding certain entities, and their affiliates, are authorities, and thus failed to countervail bond purchases by these entities in 2016 and 2018.
- The record demonstrates that state-owned entities purchased a significant portion of the 2016 and 2018 bonds. The significance of GOM purchases is even more apparent when the purchases are viewed by tranche.[328]
- The record demonstrates that OCP is an SOE, whose board of directors, comprised almost entirely of GOM ministers, approved the bond issuance.
- The bond purchases took place at a time when the GOM's official "Government Programme" included the "{c}ontinuation and strengthening of sectoral strategies relating to the productive sectors in the fields of agriculture, sea fishing, energy and mining," including, *inter alia*, by "{r}einforcing Morocco's leadership in the phosphate field and keeping up with the OCP Group's investment program."[329]

GOM Case Brief:

- If Commerce continues to find that the 2016 bond purchases constitute countervailable loans, then its benefit calculation must be limited to only those entities which it found are

[321] *Id.* at 31 (citing GOM's Letter, "Supplemental Questionnaire Response of the Government of the Kingdom of Morocco," dated November 4, 2020 (GOM 11/4/20 SQR) Exhibit SII-4 and Mosaic 11/13/20 NFI Submission at Exhibit 7).
[322] *Id.* at 31.
[323] *Id.* at 34.
[324] *Id.* (citing Petitioner's Letter, "Initial Deficiency Comments and Request for Extension of Time to Submit Factual Information to Rebut, Clarify, or Correct OCP's Initial Questionnaire Response," dated September 28, 2020, (Mosaic 9/28/20 Initial Deficiency Comments) at Exhibit 10, Art. 12).
[325] *Id.* at 32 (citing Mosaic 9/28/20 Initial Deficiency Comments, Exhibit 10, Art. 1).
[326] *Id.* at 33 (citing Petition at Exhibit II-8, at 39, and Exhibit II-49, at 28).
[327] *Id.* at 34 (citing Mosaic 9/28/20 Initial Deficiency Comments at Exhibit 10; and GOM 11/4/20 SQR at Exhibit SII-3, Art. 1 (amending Art. 17 of Law No. 12-96)).
[328] *Id.* at 50 (citing OCP IQR at BONDPURCH-12; and OCP 11/3/20 SQR at BONDPURCH2-1).
[329] *Id.* at 50 (citing GOM IQR at III-3 and Exhibit V-8, at 36-37).

an "authority," *i.e.*, CDG and CDG Capital.[330] Commerce incorrectly included in its benefit calculation bonds purchased by entities that Commerce did not determine were "authorities." There is no record evidence indicating that these entities possess, exercise, or are vested with government authority or are controlled by the GOM.[331]

- Commerce should not have included bonds purchased by private individuals through "UCITS,"[332] which are pension and mutual funds managed by GOM entities. Despite the GOM management of these funds, the actual purchasers, *i.e.*, those providing any financial contribution, were private entities.[333]
- The record demonstrates that these entities were required under the law to make investment decisions based only on the welfare of the private investors, not in accordance with any GOM plan.[334] Moroccan law sets forth investment obligations for UCITS in managing their portfolios to guarantee that they diversify their portfolio and mitigate risk,[335] and the AMMC[336] can enforce financial penalties or terminate such fund managers if they act contrary to the needs of their investors.

OCP's Case Brief:

- While Commerce preliminarily found CDG is an authority, it made no such finding for the other investors that purchased the 2016 bonds. Specifically, Commerce preliminarily countervailed purchases from six investors, but only made an authority determination for one investor. As a result, Commerce was in error because it countervailed the bond purchases by these five investors without establishing that any were an authority as required under section 771(5)(B) of the Act. [337]
- Commerce looks to "whether an entity possesses, exercises, or is vested with government authority."[338] The record does not support that the five remaining investors are authorities.[339]

[330] *See* GOM Case Brief at 11.
[331] *Id.* (citing *Wind Towers from Indonesia* IDM at Comment 1; *Certain Fabricated Structural Steel from Canada: Final Negative Countervailing Duty Determination*, 85 FR 5387 (January 30, 2020), and accompanying IDM at Comment 13).
[332] Undertakings for the Collective Investment in Transferable Securities (UCITS). UCITS are investment funds similar to mutual funds. *See* OCP IQR at BONDPURCH-9.
[333] *Id.* (citing GOM IQR at II-3-4; and GOM 11/4/20 SQR at SV-1 and 3).
[334] *Id.* (citing GOM 11/4/20 SQR at Exhibit SV-8 (Dahir 1-93-213, requiring that the funds be managed in the interest of the shareholders and providing liability to those shareholders if a UCITS doesn't follow the law)).
[335] *Id.* (citing GOM 11/4/20 SQR at Exhibit SV-8).
[336] Autorite Marocaine des Marches de Capitaux (AMMC) or Moroccan Capital Market Authority, which is the GOM equivalent of the Securities and Exchange Commission. *See* GOM IQR at II-2 n.2.
[337] *See* OCP's Case Brief at 86-88.
[338] *Id*. at 87 (citing *Wind Towers from Indonesia* IDM at Comment 1; and *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 61 F. Supp. 3d 1306, 1316-17 (CIT 2015)).
[339] OCP incorporates by reference the GOM's arguments submitted in its case brief that demonstrate neither of these entities are authorities. *See* OCP's Case Brief at 88.

GOM's Rebuttal Brief:[340]

- Commerce correctly did not consider BCP, Al Mada, or AWB to be "authorities" because they are independent commercial entities in Morocco not owned by the GOM and not vested with GOM authority.
- The petitioner ignores Commerce's normal practice and focuses on a five-factor test that Commerce no longer applies, repeatedly stating that this five-factor test is not "compelling."[341] Instead, Commerce analyzes "whether an entity possesses, exercises, or is vested with government authority in order to determine whether it is an 'authority' under section 771(5)(B) of the Act."[342]
- There is no evidence on the record that BCP, Al Mada, or AWB possess, exercise, or are vested with GOM authority, and the petitioners make no argument of the kind. To the contrary, the record demonstrates that BCP and AWB are independent commercial banks, subject to the same laws that govern all private banks in Morocco.[343]
- The record also shows that Al Mada is a private company. Indeed, the record demonstrates that each entity acts on its own behalf and is not required to answer to, or take direction from, the GOM.[344]
- The petitioner provides no argument or evidence (based either on Commerce's current standard or its old five-factor test) for finding that the BPRs are public bodies.[345] The BPRs are the regional affiliates of BCP and are independent banks. There is no evidence that they are GOM authorities.
- None of BCP's board members identified by the petitioner are GOM officials.
- While the petitioner argues that the GOM still maintains the authority to ratify the chair of that committee because that particular Article was not revoked, that Article was not explicitly revoked because it became *inutile* when the law was amended in 2010 to require the Chairman of the Board of Directors of BCP to automatically be the Chairman of the Steering Committee.[346]
- There is no evidence to support the petitioner's argument that serving GOM policies is BCP's mandate and that BCP has an interest in OCP's activities. While the petitioner cites only to the focus of CPM in promoting small businesses, there is no evidence that BCP is required to service this goal, and the record demonstrates the opposite by the fact that OCP is one of BCP's clients. Nor does BCP's investment in OCP demonstrate promotion of a GOM policy.
- The petitioner states that BCP was created by statute. Although recognizing BCP underwent reforms to become a public limited company, the petitioner dismisses this legal fact by repeating previous arguments about BPRs and the steering committee, which are not correct.

[340] *See* GOM's Rebuttal Brief at 5-14.
[341] *Id.* at 5 (citing, *e.g.*, *Utility Scale Wind Towers from Indonesia* IDM at Comment 1 (Commerce is not "compelled to apply the five-factor test")).
[342] *Id.*
[343] *Id.* at 6 (citing GOM IQR at VI-10).
[344] *Id.* (citing GOM IQR at II-23 and 25, VI-14, SV-12 and Exhibit SV-4 and SII-2).
[345] *Id.* at 7 (citing Petitioner's Case Brief at 30).
[346] *Id.* (citing OCP's Letter, "Submission of Factual Information to Rebut, Clarify, or Correct Petitioner's Factual Information," dated October 19, 2020 (OCP Rebuttal Factual Information), at Exhibit 3 at 47 (Law No. 44-08)).

- Commerce correctly found that certain authorities' purchases of OCP's 2018 bond issuance did not confer a countervailable subsidy because these authorities paid the same interest rate as private lenders.[347]
- The petitioner's arguments regarding these entities are wrong and even if they are considered authorities, the petitioner has not explained why their affiliates are authorities.

Petitioner's Rebuttal Brief:

- Section 771(5)(B) of the Act defines the term "authority" as "a government of a country or any public entity within the territory of the country." Commerce properly countervailed purchases of OCP's 2016 bonds by certain GOM entities as all the entities at issue meet this definition.[348] Further, the GOM has identified the entities as public entities in its submission to Commerce.[349]

OCP's Rebuttal Brief:[350]

- The petitioner incorrectly contends that Commerce applies a five-factor test to determine whether an entity is an authority. Commerce is not "compelled to apply the five-factor test," and in recent years has applied a different test.[351] Commerce evaluates "whether an entity possesses, exercises, or is vested with government authority."[352]
- BCP does not perform a governmental function. Unlike in *NOES from Korea*, BCP is not a "policy bank." In contrast to the policy bank in that case, BCP's purpose is to operate in a commercial manner, and it performs normal banking functions.[353]
- The GOM does not exercise control over BCP because it does not directly or indirectly own shares of the bank. BCP's board of directors and CPM's board of directors are entirely from the private sector, with none of the directors concurrently serving as GOM officials.[354]
- While BCP was created by statute in 1961, it was later formed as a limited liability company subject to the general banking laws of Morocco.[355]
- The petitioner provides no analysis or facts to support its assertion that the BPRs are authorities.

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[347] *See* GOM's Rebuttal Brief at 22.
[348] *See* Petitioner's Rebuttal Brief at 54.
[349] *Id.* at 54-55 (citing GOM IQR at SV-7; GOM 11/4/20 SQR at SV-4; and OCP 11/3/20 SQR at BONDPURCH2-1).
[350] *See* OCP's Rebuttal Brief 44-46, 52-62, 71-77.
[351] *Id.* at 46 (citing *Wind Towers from Indonesia* IDM at Comment 1).
[352] *Id.*
[353] *Id.* at 47-48 (citing *Non-Oriented Electrical Steel from the Republic of Korea: Final Negative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 79 FR 61605 (October 14, 2014) (*NOES from Korea*), and accompanying IDM at Comment 7).
[354] *Id.* at 48 (citing OCP Rebuttal Factual Information at Exhibit 3 at 65-66; and GOM 11/4/20 SQR at Exhibit SII-4).
[355] *Id.* at 49 (citing *Circular Welded Carbon Steel Pipes and Tubes from Turkey: Final Results of Countervailing Duty Administrative Review; Calendar Year 2013 and Rescission of Countervailing Duty Administrative Review, in Part*, 80 FR 61361 (October 13, 2015) (*Pipes and Tubes from Turkey*), and accompanying IDM at Comment 7 (looking at whether an entity is created by statute can be a factor in considering whether the government exercises meaningful control over that entity)).

- The GOM did not identify RCAR[356] as a state-owned shareholder of BCP because RCAR manages assets owned by private entities.[357] RCAR owns 6.1 percent of BCP which does not demonstrate GOM control.
- The petitioner cannot discuss actual government presence on BCP's board because none in fact exists.[358]
- The petitioner's argument that the GOM controlled BCP when BCP provided financing after June 8, 2015, lacks any foundation in the record evidence and is incorrect.[359]
- There is no basis on which to find that BCP pursues governmental policies or interests and no basis to make such a finding based on adverse facts available.[360]
- Commerce should reject the petitioner's arguments that certain entities which purchased OCP's bonds are authorities.[361] Further, the petitioner failed to demonstrate, and the record does not support, that these entities are authorities.
- The petitioner does not demonstrate that these 16 purported affiliates of these entities possess, exercise, or are vested with government authority.[362]
- Record evidence demonstrates that these UCITS asset management entities are focused on protecting the interests of their private investors and thus, are fundamentally commercial in nature, rather than authorities.[363]
- Even if certain entities are incorrectly considered authorities, there are substantial comparable (indeed, identical) bond purchases by private investors. Because these private bond purchases were made on the exact same terms and at the same interest rates as the purchases by the alleged authorities, they demonstrate that no benefit was provided to OCP.
- If Commerce incorrectly expands which entities it considers to be authorities and also narrows its analysis to consider the bond purchases on a tranche-specific level, the petitioner concedes that private investors still purchased a meaningful volume of bonds from each of these tranches.[364] Further, these bonds were purchased on the exact same terms by both public and private entities demonstrating no benefit was conferred.

Commerce's Position:

Section 771(5)(B) of the Act defines "authority" as a "government of a country or any public entity within the territory of a country." Based on the totality of the record evidence, we disagree BCP is an "authority" within the meaning of section 771(5)(B) of the Act. Thus, we determine that BCP's lending and financial activities do not constitute a financial contribution within the meaning of section 771(5)(D) of the Act.

[356] Régime Collectif d'Allocation de Retraite (RCAR).
[357] *Id.* at 54 (citing GOM IQR at II-35 n.8, II-36 n.10).
[358] *Id.* at 55-56.
[359] *Id.* at 57-58.
[360] *Id.* at 58-61.
[361] *See* OCP's Rebuttal Brief at 72.
[362] *Id.* at 74.
[363] *Id.* at 75.
[364] *Id.* at 77-78 (citing Petitioner's Case Brief at 48).

The petitioner points to a five-factor test to support its argument concerning whether BCP is an "authority" and argues that the application of the test leads to the conclusion that BCP is an authority.[365] As an initial matter, although Commerce has found the five-factor test instructive in other proceedings, we do not agree that Commerce is compelled to apply the five-factor test in this instance.[366] In fact, in recent CVD proceedings, we have analyzed the totality of record evidence and whether it demonstrates that the government has meaningful control over an entity such that it possesses, exercises, or is vested with government authority in order to determine whether it is an "authority" under section 771(5)(B) of the Act.[367] The petitioner points to no evidence on the record that the GOM has meaningful control of BCP. Nor does the petitioner point to any evidence on the record that GOM policies or directives guide the business decisions of BCP.

First, the petitioner points to the BPRs' partial ownership of BCP as evidence of GOM ownership.[368] The BPRs are the regional affiliates of BCP and are independent banks.[369] There is no evidence on the record that the BPRs are GOM authorities.

Second, the petitioner contends that the GOM exercises control over BCP via its board of directors. As evidence, the petitioner points to a previous CEO who later became a GOM employee,[370] four representatives from the BPRs, OCP's CEO, a friend of the monarch's secretary, and a close confidante of the late King of Morocco.[371] As noted by the GOM, the record indicates that none of these board members are GOM officials,[372] thus, the GOM does not exercise control of BCP via its board of directors.

Third, the petitioner argues that the GOM still maintains the authority to ratify the chair of the CPM Steering Committee, which oversees BCP, because the Article providing the GOM with that authority was not revoked.[373] However, that Article was not explicitly revoked because the law was amended in 2010 to require the Chairman of the Board of Directors of BCP to automatically be the Chairman of the Steering Committee. Since that time, the GOM does not have authority to ratify that position because that the fulfillment of that position is automatic.[374] While evidence on the record demonstrates that the GOM held positions on BCP's board of directors until 2015, following the sale of GOM's remaining shares in BCP in 2015, the GOM officials were no longer members of BCP's board of directors.[375]

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[365] *See* Petitioner's Case Brief at 29 (citing *DRAMs from Korea* IDM at 16-17).
[366] *See, e.g.*, *Certain Oil Country Tubular Goods from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2012*, 79 FR 52301 (September 3, 2014), and accompanying IDM at Comment 6; and *Certain Steel Nails from the Sultanate of Oman: Final Negative Countervailing Duty Determination*, 80 FR 28958 (May 20, 2015), and accompanying IDM at Comment 3.
[367] *See, e.g., Wind Towers from Indonesia* IDM at Comment 1.
[368] *See* Petitioner's Case Brief at 29-30.
[369] *See* OCP Rebuttal Factual Information at Exhibit 4 at 74.
[370] *See* Petitioner's Case Brief at 31 (citing GOM 11/4/20 SQR, Exhibit SII-4 and Mosaic 11/13/20 NFI Submission, Exhibit 7).
[371] *Id.* at 31.
[372] *See* OCP Rebuttal Factual Information at Exhibit 3 at 65-66; and GOM 11/4/20 SQR at Exhibit SII-4
[373] *See* Petitioner's Case Brief at 31.
[374] *See* GOM 11/4/20 SQR at SII-13 and Exhibit SII-3.
[375] *Id. See also* GOM IQR at Exhibit II-32, at 52.

Fourth, the petitioner argues that serving GOM policies is BCP's mandate and that BCP has an interest in OCP's activities. However, the petitioner cites only the focus of CPM in promoting small businesses. As noted above, there is no evidence that BCP is required to service this goal, and indeed, the record demonstrates the opposite based on the fact that OCP (not a small business) is one of BCP's clients. In addition, BCP's investment in OCP does not demonstrate promotion of a GOM policy. This is a commercial bank making an investment in a large Moroccan company, *i.e.*, a normal commercial venture, not a GOM policy activity.

Additionally, we disagree with the petitioner that there is a basis for using facts available to find that BCP pursues government policies or interests.[376] Pursuant to section 776(a) of the Act, Commerce shall, subject to section 782(d) of the Act, use the facts otherwise available if necessary information is not available on the record, or an interested party or any other person: (1) withholds information that has been requested; (2) fails to provide such information by the deadlines or in the form and manner requested, subject to sections 782(c)(1) and 782(e) of the Act; (3) significantly impedes the proceeding; or (4) provides such information but the information cannot be verified. Under section 776(b) of the Act, Commerce may use facts available with an adverse inference only when it finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information.

The petitioner contends that OCP failed to provide information Commerce requested regarding BCP.[377] However, Commerce made no such request of OCP.[378] Accordingly, because OCP did not fail to provide information requested of it with respect to BCP, there is no basis to use facts available in determining BCP's status as an authority.

Finally, the petitioner correctly identifies that BCP was created by statute and recognizes that it was converted into a public limited liability whose majority shares are held by the BCRs. However, taking the totality of the evidence into account, this single fact alone does not demonstrate that BCP is an authority. As discussed above, there is no information on the record that the BCRs are government authorities or that they operate in any other manner than regional banks under CPM.[379]

Based on the foregoing analysis, we find that following 2015 GOM does not exercise meaningful control over BCP. That is the year when it shed its last remaining ties with the GOM, and thus, BCP is not an authority within the meaning of section 771(5)(B) of the Act for purposes of this POR. Accordingly, any of its financial activities with OCP do not constitute financial contributions under section 771(5)(D)(iii) of the Act.

[376] *See* Petitioner's Case Brief at 34.
[377] *Id.*
[378] *See* Commerce's Letter to OCP, "Supplemental Questionnaire," dated October 13, 2020.
[379] *See* GOM IQR at Exhibit II-32, at 52.

Comment 14: Whether Al Mada and AWB Are Authorities and Provide A Financial Contribution

Petitioner's Case Brief:[380]

- The GOM's contention that it is not Commerce's practice to find an entity an "authority" based on the personal property interest owned or indirectly controlled by a government employee or senior government official is nonsensical.
- Pursuant to section 771(5)(B) of the Act and Commerce's five factor analysis, Al Mada (previously known as SNI)[381] is an authority.
- The GOM failed to provide the necessary information to determine the total government ownership of Al Mada. Accordingly, Commerce should find, based on facts available, that Al Mada is majority-owned by the GOM.[382]
- The available record evidence demonstrates that several members of Al Mada's board of directors are either representatives of or have very close ties to the GOM. Commerce should infer from the GOM's failure to provide complete information regarding the remaining board members that they are either current or former representatives of the GOM or have close ties to the GOM.
- With respect to government control, Al Mada is controlled by the Royal Family.
- Al Mada (SNI) plays an active role in the pursuit of governmental policies and interests. For example, Al Mada supports creation of "national champions" capable of supporting Morocco's economic development, supports the GOM's strategy towards Africa, and fostering the global leadership of Moroccan companies like OCP.
- SNI, Al Mada's predecessor, was created by Royal Decree on October 22, 1966.[383]
- AWB is an authority whose principal shareholder is Al Mada. In total, the Royal Family and GOM entities own a controlling interest of AWB.[384] Further, because AWB refused to provide a copy of its shareholder agreement, Commerce should infer, based on facts available, that AWB is majority-owned by the GOM.[385]
- While the GOM reported that no current or former government employees serve as board members or senior managers at AWB, evidence on the record demonstrates that several AWB board members are current or former employees of Al Mada or other entities related to the Royal Family.[386]
- The GOM controls AWB through Al Mada, Wafa Assurance, and other GOM entities. Thus, GOM entities have a majority ownership interest in AWB and effectively have control over AWB's activities.

[380] *See* Petitioner's Case Brief 35-46.
[381] Société Nationale d'Investissement (National Investment Company or SNI).
[382] *See* Petitioner's Case Brief at 37 (citing GOM 11/4/20 SQR, Exhibit SV-3 and SV-4).
[383] *Id.* at 41 (citing GOM 11/4/20 SQR, Exhibit SV-4 (Al Mada Articles of Incorporation at 1)).
[384] *See* Petitioner's Case Brief at 41.
[385] *Id.* at 41-42.
[386] *Id.* at 43

- AWB supported various government-sponsored programs, including programs to expand Moroccan exports and develop strategically-important sectors of the economy.[387]
- AWB's principal shareholder Al Mada was created by statute.

GOM's Rebuttal Brief:[388]

- The petitioner's argument for why Al Mada and AWB are "authorities" relies primarily upon those entities' partial ownership by the Royal Family. The record demonstrates that there is no evidence of any GOM ownership in Al Mada, and the GOM reported that it "is unaware of any GOM ownership interest in Al Mada."[389]
- There is a legal distinction between the property of the State of Morocco (the GOM) and the property of the Sovereign and his family. Under Morocco's constitutional and legal structure, the Royal Family's private holdings are distinct from the GOM's assets. The GOM demonstrated that this fact is foundational in the Moroccan Constitution, which grants the GOM and the Sovereign only the powers vested to each under that Constitution.[390]
- The petitioner's arguments under the inapplicable five-factor test for both Al Mada and AWB fail. The petitioner's arguments for each factor are wrong because they rely upon Royal Family ownership, which the petitioner unlawfully equates with GOM ownership.
- The petitioner's arguments about Al Mada's ownership of AWB are wrong because they are based upon Al Mada owning 50 percent of Wafa Assurance, *i.e.*, not a controlling interest,[391] and the record demonstrates that the ownership interest appears to be even less.
- Regarding Al Mada's and AWB's board of directors, the petitioner fails to demonstrate a GOM presence on Al Mada's board of directors. With respect to AWB, the petitioner's arguments are based exclusively upon its arguments regarding Al Mada, and thus, are also incorrect.
- Rather than providing Commerce with any meaningful analysis of GOM control over Al Mada, the petitioner merely states that the GOM has control over Al Mada based on ownership, which is incorrect and irrelevant.[392]
- While the petitioner argues Al Mada pursues GOM policies, the SNI statements indicate only that SNI will act like a normal commercial investment fund with policies to invest in capital intensive industries across many sectors and countries and gain "non-majority shareholding" in "talented companies." This normal commercial activity is reflected in Al Mada's corporate documentation.[393]
- AWB has an independent risk management function "to maintain quality and objectivity in the decision-making process," and risk managers must sign off on all credit-related decisions.[394]

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[387] *Id.* at 45 (citing Petition, Exhibit II-58, at 53; and GOM IQR at Exhibit II-59, at 108 ("Attijariwafa bank's commitment to developing the domestic economy is unfailing. The Bank wholeheartedly supports the major government-backed programmes.")).
[388] *See* GOM's Rebuttal Brief 5-14.
[389] *Id.* at 8 (citing GOM 11/4/20 SQR at SII-12).
[390] *Id.* at 9 (citing GOM 11/4/20 SQR at SI-2-SI-4 and Exhibit SI-1).
[391] *Id.* at 11 (citing GOM IQR at II-35 (identifying Wafa Assurance's 6.3% share of AWB)).
[392] *Id.*
[393] *Id.* (citing GOM 11/4/20 SQR at SII-12, Exhibit SV-4).
[394] *Id.* (citing GOM IQR at Exhibit II-26).

- Regarding Royal Family support for OCP, the article cited to by the petitioner simply indicates that the King inaugurated an OCP pipeline and there is "royal will" to develop the phosphate market. The article has nothing to do with Al Mada supporting GOM policies. Rather, it reflects a Head of State's normal activities, which includes inaugurating many projects for many companies across many sectors.
- Al Mada's articles of incorporation explain that the 1966 royal decree was repealed in 1994.[395] The petitioner fails to address this change in the law. AWB was not formed by statute, and so, the petitioner attempts unreasonably and without explanation to impute Al Mada's creation onto AWB.
- Because Al Mada and AWB are private entities that are not GOM owned or controlled, the GOM has no ability to compel them to disclose information. Nonetheless, the petitioner argues three times that Commerce should apply adverse facts available (AFA) because of the GOM's failure to provide information that the GOM does not possess and cannot acquire.
- Commerce cannot accept the petitioner's AFA invitation without developed factual or legal argument.[396]
- While the petitioner argues the GOM failed to provide necessary shareholder and board member information, the petitioner makes no attempt to explain why such information was necessary. As explained, the record demonstrates without rebuttal that the missing Al Mada and AWB information was not necessary because it would not have changed the facts with regard to these entities and the GOM.
- Commerce could only apply an adverse inference under section 776(b) of the Act, which requires that Commerce find that the GOM failed to cooperate to the best of its ability. The record demonstrates that the GOM cooperated with its best efforts to acquire the requested information from entities that the GOM does not control.

OCP's Rebuttal Brief:[397]

- The petitioner incorrectly contends that Commerce applies a five-factor test to determine with an entity is an authority. Commerce is not "compelled to apply the five-factor test," and in recent years has applied a different test.[398] Commerce evaluates "whether an entity possesses, exercises, or is vested with government authority."[399]
- AWB is not an authority because it does not perform a governmental function, rather it is a private company that makes banking decisions on a commercial basis.[400] There is no indication that its corporate purpose is designed to promote the policies of the GOM.[401] Unlike in *NOES from Korea*, AWB is not a "policy bank" designed to "implement government industrial policies through the provision of financing."
- The GOM does not directly own any shares of AWB and indirectly owns a small percentage. Further, the GOM certified that it is not involved in AWB's business

[395] *Id.* at 12 (citing GOM 11/4/ 20 SQR at Exhibit SII-2).
[396] *Id.* at 13 (citing *Coal. for Fair Trade in Garlic v. United States*, 437 F. Supp. 3d 1347, 1358 (CIT 2020) ("It is well-settled that undeveloped arguments, such as this one, are 'deemed waived'") (internal citation omitted)).
[397] *See* OCP's Rebuttal Brief at 44-52.
[398] *Id.* at 46 (citing *Wind Towers from Indonesia* IDM at Comment 1).
[399] *Id.*
[400] *Id.* at 50 (citing OCP IQR at 36; and GOM IQR at Exhibit II-26 at 16-17).
[401] *Id.* (citing *NOES from Korea* IDM at Comment 7).

decisions and that no current or former government employees serve as AWB board members or senior managers.[402]

- Like other commercial banks in Morocco, AWB is "subject to the general laws regarding banks and bond issuance," meaning it does not benefit from any sort of special status.[403]
- The GOM does not have a controlling interest in Al Mada, and the petitioner's arguments regarding AFA misstate the record evidence and ignore the legal requirements for the application of AFA.[404]
- Under Morocco's constitutional and legal structure, the Royal Family's private holdings are distinct from the GOM's assets, and AWB does not have the requisite indicia of government control to be regarded as an authority.[405]
- OCP and counsel are unaware of a single instance in which Commerce has found a government authority based solely on an entity's links to the private holdings of a ruling family. Such a decision would fail to respect the structure of Morocco's government and invite reciprocal treatment of U.S. commercial entities in which government officials own an interest.[406]
- The petitioner's attempt to find the GOM's control of Al Mada based on AFA fails. The GOM cooperated fully with Commerce's requests for information and demonstrated that it sought the requested information, but that it could not compel compliance of a private party. The courts have recognized that under these circumstances, there is no basis to find that the respondent failed to cooperate or that AFA is appropriate.[407]
- The petitioner provides no evidence that Al Mada pursues government interests in Morocco. Further, the petitioner fails to address the change in law that the 1966 royal decree establishing Al Mada was repealed in 1994.[408]

Commerce's Position:

As explained above, section 771(5)(B) of the Act defines "authority" as a "government of a country or any public entity within the territory of a country." Based on the totality of the record evidence, we disagree that Al Mada or AWB are authorities within the meaning of section 771(5)(B) of the Act. Thus, we determine that AWB's financial activities do not constitute financial contributions within the meaning of section 771(5)(D)(iii) of the Act.

Again, the petitioner points to a five-factor test to support its argument concerning whether Al Mada and AWB are authorities and argues that the application of this test leads to the conclusion that Al Mada's shareholdings, in conjunction with shareholding from other GOM entities, demonstrate that AWB is an authority.[409] As noted above, although Commerce has found the

[402] *Id.* at 51 (citing GOM IQR at II-34-II-35; and OCP IQR at App. LOAN-4); and OCP's Rebuttal Brief at 68 through 71.
[403] *Id.* (citing GOM IQR at II-24, Exhibit II-7; and GOM 11/4/20 SQR at Exhibit SI-2).
[404] *Id.* at 62.
[405] *Id.* at 63 (citing GOM IQR at II-23-II-24; and GOM 11/4/20 SQR at SI-2 and 4).
[406] *Id.* at 64.
[407] *Id* (citing *GPX International Tire Corp. v. United States*, 942 F. Supp. 2d 1343, 1359 (CIT 2013) (*GPX*) ("{The Department} cannot rely on an unaffiliated party's failure to cooperate to justify the application of an AFA rate unless the exporter under investigation also is found responsible for the behavior in some way.")).
[408] *Id.* at 67 (citing GOM 11/4/20 SQR at Exhibit SII-2).
[409] *See* Petitioner's Case Brief at 35 (citing *DRAMs from Korea* IDM at 16-17).

five-factor test instructive in certain other proceedings, we do not agree that Commerce is compelled to apply the five-factor test in this instance.[410] In this case, consistent with other recent proceedings,[411] we have analyzed whether the GOM has meaningful control over the entities at issue such that the entities possess, exercise, or are vested with government authority in order to determine whether it is an "authority" under section 771(5)(B) of the Act.

We note that certain information relating to Al Mada and AWB is business proprietary. Business proprietary information related to the discussion of whether Al Mada and AWB are authorities is found in the accompanying BPI Memorandum.[412]

The petitioner's argument for why Al Mada and AWB are authorities rests primarily their partial ownership by Morocco's Royal Family.[413] The petitioner's contends that it is nonsensical that the personal property interest owned or indirectly controlled by a government employee or senior government official does not demonstrate control of that entity. In making this argument, however, the petitioner has not addressed the distinction made by the Moroccan Constitution (Constitution), and other GOM laws, between the Head of State and the Head of Government.

As an initial matter, the Moroccan Constitution makes a distinction between the Head of State and the Head of Government and describes the powers attributed to each.[414] The Constitution does not provide that the Sovereign of Morocco (or King), in his official capacity, is able to create or manage corporate entities.[415] Additionally, Moroccan Law No. 69-00 provides for GOM control over certain entities based on the involvement of the state, but the law does not recognize GOM control over entities merely due to the King's or Royal Family's involvement with those entities.[416] Under this constitutional and legal structure, the Royal Family's private holdings are entirely distinct from the GOM's assets.[417] Therefore, under this structure, the Royal Family's personal shareholdings do not equate to GOM ownership.

The petitioner argues that we should apply facts available to find that Al Mada is majority owned by the GOM. As discussed in Comment 13 above, under section 776(b) of the Act, Commerce may use facts available with an adverse inference only when it finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Here, the GOM explained that Al Mada is a private investment fund and it has no authority to compel it to provide documentation.[418] However, notwithstanding this explanation, the GOM put forth maximum efforts to provide the requested information and was able to

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[410] *See, e.g.*, *Certain Oil Country Tubular Goods from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2012*, 79 FR 52301 (September 3, 2014), and accompanying IDM at Comment 6; *Certain Steel Nails from the Sultanate of Oman: Final Negative Countervailing Duty Determination*, 80 FR 28958 (May 20, 2015), and accompanying IDM at Comment 3.
[411] *See, e.g., Wind Towers from Indonesia* IDM at Comment 1.
[412] *See* IDM BPI Memorandum.
[413] *See* Petitioner's Case Brief at 35-46.
[414] *See* GOM 11/4/20 SQR at Exhibit SI-1.
[415] *Id.*
[416] *Id.* at Exhibit SI-2 at 3 and Exhibit SI-4.
[417] *See* GOM IQR at II-23-24; *see also* GOM 11/4/20 SQR at SI-2-4 and Exhibit SI-1 ("Article 42 of the Moroccan Constitution states explicitly that HM The Sovereign, as the head of state, '. . . exercises its missions through Dahirs within the limits of the powers expressly vested to him by the . . . Constitution'").
[418] *See* GOM 11/4/20 SQR at SII-12 and Exhibit SII-2.

provide relevant shareholder information and registration documentation, which does not demonstrate GOM ownership of Al Mada.[419] Further, AWB explained why it was unable to obtain further documentation from Al Mada. The courts have recognized that under these circumstances, there is no basis to find that the respondent failed to cooperate or that AFA is appropriate.[420]

Furthermore, we find the petitioner's arguments regarding GOM presence on Al Mada's board of directors unconvincing. The petitioner points out that three members of Al Mada's board of directors are GOM officials.[421] However, even if Commerce were to consider these individuals GOM officials, this fact alone is insufficient to demonstrate the GOM's control over Al Mada's board of directors, which makes decisions by majority vote.[422]

Additionally, we disagree that Al Mada pursues GOM policies and interests based on statements regarding Al Mada's predecessor entity, SNI, and statements regarding the Royal Family's support for OCP.[423] The article the petitioner cites as support for Al Mada's support of GOM policies and directives indicates that SNI will act like a normal commercial investment fund with policies to invest in capital intensive industries across many sectors and countries.[424] The article further reports that Al Mada's (SNI's) "bias is toward non-majority shareholding."[425] Further, the King's statements regarding OCP only demonstrate the Head of State celebrating an achievement by a company which is important to the Moroccan economy, *i.e.*, OCP. There is no evidence on the record which demonstrates that Al Mada or the King provides support to OCP in pursuit of GOM policies or directives. The record contains no GOM policies or directives supporting OCP's investment projects or its business activities. In sum, there is no evidence that the GOM exercises meaningful control over Al Mada.[426] Therefore, based on the record evidence, we find that Al Mada is not an "authority" pursuant to section 771(5)(B) of the Act.

AWB

The petitioner's argument that AWB is an "authority" rests primarily on the shares of AWB held by Al Mada and GOM entities, and on its contention that Al Mada is an "authority."[427] With respect to AWB's ownership, the record demonstrates that Al Mada owns 46.43 percent of

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[419] *Id.*
[420] *See GPX*, 942 F. Supp. 2d at 1343, 1359 ("{The Department} cannot rely on an unaffiliated party's failure to cooperate to justify the application of an AFA rate unless the exporter under investigation also is found responsible for the behavior in some way.").
[421] *See* Petitioner's Case Brief at 37; *see also* IDM BPI Memorandum Note 2.
[422] *See* GOM 11/4/20 SQR at Exhibit SII-2; *see also Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from Taiwan: Final Negative Countervailing Duty Determination*, 81 FR 35299 (June 2, 2016), and accompanying IDM at Comment 1 (finding the Government of Taiwan could not exert meaningful control where only three members of board of directors (out of eight total directors) were nominated by the Taiwan Authority because board decisions required a majority vote).
[423] *See* Petitioner's Case Brief at 39-40.
[424] *See* Petition at Exhibit 56.
[425] *Id.*
[426] Commerce has found that banks which operate without considerations of profit, and act to implement government industrial policies through the provision of financing to industries and enterprises are policy banks. *See NOES from Korea* IDM at Comment 7.
[427] *See* Petitioner's Case Brief at 41-42.

AWB, CDG[428] owns 1.70 percent, and RCAR[429] owns 6.44 percent.[430] As explained above, we find that Al Mada is not an "authority" pursuant to section 771(5)(B) of the Act. While we found that CDG is an authority in the *Preliminary Determination*, we find that the 8.14 percent combined ownership of AWB by CDG and RCAR does not demonstrate that the GOM's meaningful control of AWB.

We also disagree with the petitioner's contention that AWB pursues GOM policies or interests. The petitioner points to a line in AWB's 2016 annual report which indicates that AWB supports developing the domestic economy.[431] However, this statement does not demonstrate that AWB is following or implementing a government policy, rather it speaks to a 2016 initiative related to auto-entrepreneurship.[432] Other than this general statement that AWB is willing to help auto-entrepreneurship, there is no further information to demonstrate that AWB is following a directive or law which requires AWB to follow or implement a government policy. Rather, information on the record demonstrates that AWB acts as a normal commercial enterprise which invests in opportunities for profit.[433]

Therefore, after analyzing the record evidence, for the final determination, we find that the GOM does not have meaningful control over AWB and, thus, that AWB is not an authority within the meaning of section 771(5)(B) of the Act.

OCP 2016 and 2018 Bond Issuance

Comment 15: Whether OCP's 2016 Bond Issue Conferred a Benefit

OCP's Case Brief:[434]

- Commerce improperly found a benefit in conjunction with the purchases of OCP's 2016 bond offering because it employed an uncreditworthy benchmark interest rate to calculate that benefit. In contrast, with respect to the 2018 bond purchases it found no benefit because the bonds were sold to majority GOM-owned investors and private investors at the same interest rate. These same facts hold true for the 2016 bond purchases. Commerce's analysis renders an absurd result: OCP is found to receive a subsidy from the GOM unless OCP pays a higher rate of interest to majority GOM-owned investors than OCP pays to identically-situated private investors purchasing the 2016 bonds on the exact same terms.[435]
- The purchase of OCP's 2016 bonds did not confer a benefit because there is *no difference* in the amount OCP paid on the bonds purchased by majority GOM-owned investors as compared to the amount OCP paid to private investors. Further, private investors made most of the 2016 bond purchases.[436]

[428] Commerce found this GOM entity is an authority. *See Preliminary Determination* PDM at 8.
[429] RCAR is a social welfare fund managed by CDG. *See* GOM 11/4/20 SQR at Exhibit SV-4.
[430] *See* GOM IQR at Exhibit II-31.
[431] *See* Petition at Exhibit 59.
[432] *Id.*
[433] *See* GOM IQR at Exhibit II-26 starting at pdf 4985.
[434] *See* OCP's Case Brief at 71, and 76-82.
[435] *Id.* at 76- 77.
[436] *Id.*

- The bonds purchased by private investors were, in the terms of the Act, "a comparable commercial loan that {OCP} could actually obtain on the market," demonstrating no benefit was conferred.[437]
- The CVD law has never required companies to treat government entities on more favorable terms than the private investors.[438] This incongruous result is contrary to the Act which provides that no subsidy results when a company secures debt financing on the same terms from government and private investors.
- Commerce's regulations do not require it to apply an uncreditworthy benchmark interest rate. Commerce's regulation provides that Commerce "*normally* will calculate" an uncreditworthy benchmark interest rate.[439] Thus, Commerce is not required to do so and must exercise its discretion *not* to do so here where application of the regulation would achieve a factually nonsensical result which violates the Act.[440]

GOM's Case Brief:[441]

- Despite finding no distinction between the 2016 and 2018 bond issuance, Commerce found that a benefit existed with respect to the 2016 bonds based on the sole reason that Commerce applied uncreditworthy interest rates to the 2016 bonds.
- Commerce should not have relied on its practice of not finding comparable commercial loans dispositive in this instance because it does not apply. Although Commerce treated the 2016 bond issuance as a loan program, it failed to consider as comparable loans the many private purchases of the 2016 bonds.
- The comparable private-party bond purchases are dispositive of OCP's creditworthiness because the reason behind Commerce's practice of not considering commercial loans for government-owned firms to be dispositive does not exist. The basis of not considering commercial loans as dispositive evidence of creditworthiness[442] is not applicable here because the 2016 bond prospectus explicitly states that there is no government guarantee.[443] Therefore, the private purchases are long-term commercial loans that are explicitly *not* guaranteed by the government, and thus, are dispositive evidence of OCP's creditworthiness.
- Commerce's practice with respect to creditworthiness does not instruct Commerce to disregard comparable private loans. To the contrary, the *CVD Preamble* instructs that "{f}or government-owned firms, we will make our creditworthiness determination by examining this factor and the other factors listed in paragraph (a)(4)(i)."[444] Regardless of

[437] *Id.* at 78 (citing section 771(5)(E)(ii) of the Act).
[438] *Id.* at 80 (citing section 771(5)(E) of the Act and 19 CFR. 351.505(a)(1)).
[439] *Id.* at 81 (citing 19 CFR 351.505(a)(3)(iii)).
[440] *Id.* at 81 (citing *Peer Bearing Co.-Changshan v. United States*, 884 F. Supp. 2d 1313, 1327 (CIT 2012) (regulation's use of "the word 'normally' in describing the method . . . thereby allows the reasonable exercise of discretion in making such determination."). Commerce has relied on a regulation's use of the word "normally" to argue that it was afforded discretion to depart from the normal situation and employ an alternative methodology. *See, e.g.*, *Chang Chun Petrochem. Co. v. United States*, 906 F. Supp. 2d 1369, 1377 (CIT 2013); and *SeAH Steel Corp. v. United States*, 704 F. Supp. 3d 1353, 1373 (CIT 2010)).
[441] *See* GOM's Case Brief at 3-11.
[442] *Id.* at 7-8.
[443] *Id.* at 8 (citing GOM IQR at Exhibit II-2).
[444] *Id*. at 9 (citing *CVD Preamble*, 63 FR at 65367).

the identity of the purchaser, whether they be an authority or private investor, the terms set out in the prospectus governed the bond issuance and its purchase.
- While Commerce recognized, and the record demonstrates, that the 2016 OCP bond offering was an attractive investment, Commerce did not take this into account in its creditworthiness determination. Commerce also did not consider CDG and CDG Capital's risk assessments conducted prior to purchasing the 2016 bonds, which is evidence of CDG's actions as a reasonable private investor.

Petitioner's Rebuttal Brief:
- Consistent with its well-established practice for calculating benefit in the case of uncreditworthy companies, Commerce used an uncreditworthy benchmark to measure the benefit for OCP's 2016 bonds.[445]
- Despite the GOM's and OCP's arguments, once Commence finds a government-owned company to be uncreditworthy, the terms of any of its commercial loans, or the terms on which private entities purchased bonds, are irrelevant to the benefit calculation.[446]
- OCP mischaracterizes Commerce's creditworthiness methodology by suggesting that Commerce's approach created an absurd result. If OCP were a privately-owned firm, private entities would not have been willing to purchase OCP's bonds on the terms that they did.[447]
- In past cases involving a financing package that includes both government and private participation, Commerce has disqualified the private loans where they accounted for a relatively small portion of the overall package and likely took into account or were influenced by the behavior of the government lenders.[448] In this case, it is highly likely that private investors were influenced by the GOM's involvement, OCP's close ties with the GOM, and OCP's role in the economy.[449]

Commerce's Position:

In the *Preliminary Determination*, to calculate the benefit for this program, we treated the bonds sold to GOM entities as loans under section 771(5)(E)(ii) of the Act. We compared the amount of interest paid during the POI on these bonds to the amount of interest that the respondent would have paid on private bonds.[450] For bonds sold in 2016, as a result of Commerce's preliminary finding that OCP was uncreditworthy in the 2016, Commerce used an uncreditworthy interest rate as the benchmark rate, which resulted in a benefit for the bonds sold to GOM entities in that year. The benefit was the difference between the uncreditworthy interest rate and the interest rate paid by OCP on those bonds.[451] For the 2018 bonds sold to GOM entities, we preliminarily determined those bonds conferred no benefit because the bonds in each

[445] *See* Petitioner's Rebuttal Brief at 48.
[446] *Id.* at 50.
[447] *Id.*
[448] *Id.* at 51 (citing *Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 81 Fed. Reg. 35,310 (June 2, 2016), and accompanying IDM at 31).
[449] *Id.* at 52 (citing *CORE from Korea* IDM at 31-32).
[450] *See* 19 CFR 351.505(a).
[451] *See Preliminary Determination* PDM at 9-10.

tranche were sold at a single interest rate[452] and there was no difference between that rate and the benchmark interest rate, which was the rate that was offered to private entities.[453] Accordingly, because the bonds were sold at the same rate to government entities, private entities, and mutual funds, there was no benefit.[454]

As noted above, for the final determination, Commerce determined that OCP is creditworthy in 2016, 2017, and 2018 based on the totality of OCP's financial information pursuant to 19 CFR 351.505(a)(4)(i)(B)-(D).[455] Because we are finding OCP creditworthy in 2016, we are no longer applying an uncreditworthy interest rate to the terms of the bonds purchased by GOM entities in that year. Therefore, for the final determination, because the 2016 and 2018 bonds were sold at the same interest rate to government entities, private entities, and mutual funds, we find there is no benefit conferred on OCP during the POI.

Comment 16: Whether OCP's Bond Issuance is Specific

GOM's Case Brief:[456]

- Commerce inappropriately conflated CDG Capital's actions as the *placer* of the 2016 bond with GOM entities' actions as *purchasers* of those bonds.[457] Commerce's specificity finding (based upon the bond issuance) has nothing to do with the subsidy it was analyzing (based upon the bond purchases). Therefore, Commerce made no determination that the "loans" were specific to OCP.
- Section 771(5A) of the Act requires that a subsidy be specific for it to be countervailable. Because Commerce did not determine that any bond purchases were specific, its preliminary determination that the bond purchases were countervailable is not permitted by the statute and should be reversed in the final determination.

OCP's Case Brief:[458]

- Commerce erred when it found the 2016 and 2018 bond issuances *de jure* specific. CDG Capital's placement services did not expressly limit, on an enterprise or industry basis, which investors could purchase OCP's bonds.
- Commerce's specificity finding conflates the purchases of bonds with another alleged program under consideration—the provision of bond issuance services--which the Commerce found not to confer a countervailable subsidy.
- While Commerce determined that the purchase of OCP's bonds should be analyzed as loans,[459] its practice is to consider whether the loans were made pursuant to a policy or

[452] *See* OCP 11/3/20 SQR at Exhibit BONDPURCH2-1.
[453] *Id.*
[454] *See Preliminary Determination* PDM at 9.
[455] *See* Final Creditworthiness Memorandum.
[456] *See* GOM's Case Brief at 5.
[457] *Id.* at 5 (citing the *Preliminary Determination* PDM at 9).
[458] *See* OCP's Case Brief at 72-74.
[459] *Id.* at 74 (citing 19 CFR 351.102(b)(31); and *Final Affirmative Countervailing Duty Determination; Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 FR 37122 (June 23, 2003) (*DRAMS from Korea Investigation*), and accompanying IDM at 24).

plan limiting access to such financing.[460] Commerce lacks the evidence it relies on under its practice to find the bonds *de jure* specific because the bond purchases were not made pursuant to a GOM plan or program.

- The petitioner incorrectly asserts that specificity exists because the GOM provided the bond financing to OCP as part of OCP's capital expenditure (CapEx) program.[461] OCP's CapEx program is not a government plan or policy, but a commonplace investment plan for capital-intensive companies, including the petitioner.[462]
- The GOM has made clear that GOM investors purchased OCP's bonds as part of their own investment objectives that were in no way tied to OCP's CapEx plan.[463]
- The bond issuances are also not *de facto* specific because the record demonstrates that CDG Capital purchased only a small number of OCP's bonds and the other investors which purchased OCP's 2016 and 2018 bonds also purchased bonds from a wide variety of companies.[464]

Petitioner's Rebuttal Brief:[465]

- Commerce initiated OCP's 2016 and 2018 bond issuances on the basis of *de jure* and *de facto* specificity.[466] Contrary to OCP's argument, Commerce is not assessing whether the bond *purchasers* received a subsidy, it is assessing whether OCP received a subsidy, and whether that subsidy is specific.
- OCP acknowledges this program involved a single recipient when it replied to the Department's requests for the information by asserting that "{t}he bond issuances involved only OCP."[467] The program is *de jure* specific because the bonds were serviced and placed an authority. This program is also *de facto* specific because the actual recipients of the subsidy were limited in number and OCP received a disproportionate amount of the subsidy.
- OCP's claim that Commerce should analyze whether CDG Capital "expressly limit{ed}, on an enterprise or industry basis, which investors could purchase OCP's bonds" has no basis in the statute or in the record.[468]
- OCP's argument that OCP's CapEx plan is not a governmental project or plan" is without merit. OCP is a state-owned enterprise (SOE), whose board of directors is composed almost entirely of government ministers who approved the bond issuance and its terms. Further, the bond issuances occurred when the GOM's "Government Programme"

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[460] *Id.* (citing *Certain Oil Country Tubular Goods from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, Preliminary Negative Critical Circumstances Determination*, 74 FR 47210 (September 15, 2009) (*OCTG from China*), and accompanying PDM at Comment 21 (finding lending to be *de jure* specific, where the lending was "made pursuant to government directives," after a careful consideration of the relevant laws and government plans pursuant to which the loans were provided)).
[461] *Id.* (citing Petition at II-29).
[462] *Id.* (citing OCP IQR at BONDPURCH-2 and BONDPURCH-4).
[463] *Id.* at 74 (citing GOM IQR at II-18).
[464] *Id.* at 75-75 (citing *Inland Steel Indus., Inc. v. United States*, 188 F.3d 1349, 1355, 1359 (Fed. Cir. 1999) (sustaining Commerce's finding that loans were not specific where the law creating the government-owned bank "did not limit the industries to which loans can be made"); GOM IQR at II-8, VI-19 and Exhibit II-16; and OCP 11/3/20 SQR at BONDPURCH2-1).
[465] *See* Petitioner's Rebuttal Brief at 42-47.
[466] *Id.* at 44 (citing Initiation Checklist at 7-8).
[467] *Id.* (citing GOM IQR at SV-18-20).
[468] *Id.* at 45 (citing OCP Case Brief at 73).

included reference to Morocco's leadership in phosphates and the OCP Group's investment program and the GOM's purchase of the bonds.[469]

Commerce's Position:

As noted above, because we are no longer applying an uncreditworthy interest rate to OCP's 2016 bonds and we are finding that OCP's 2016 and 2018 bond issuances conferred no benefit, and, thus, the program is not countervailable, it is unnecessary for us to address arguments regarding specificity.

Comment 17: Whether Commerce Should Revise the Uncreditworthy Benchmark Interest Rate

OCP's Case Brief:[470]

- If Commerce continues to find OCP uncreditworthy, Commerce should use the Moody's report published in 2020,[471] which is more contemporaneous and relevant than the 2013 Moody's report used by Commerce in the *Preliminary Determination*.
- Commerce should incorporate default rates in the uncreditworthy benchmark interest rate that more closely correspond to OCP's credit rating. Commerce's regulation does not require it to use the average of Caa to C- companies in every instance.
- Fitch and S&P both rated OCP at BBB- which is the equivalent of a Baa3 rating from Moody's.[472] Commerce should incorporate only the risk of default for companies with a Baa credit ratings into its formula, which is the risk of default in the Moody's report that most closely aligns with OCP's Baa3 rating. This will ensure Commerce is fulfilling its duty to calculate CVD margins as accurately as possible.[473]

Petitioner's Rebuttal Brief:[474]

- Commerce correctly calculated uncreditworthy benchmark interest rates using the formula set forth in 19 CFR 351.505(a)(3)(iii) of its regulations.
- Commerce rejected arguments that it should revise the matching default rate in the formula provided in its regulations.[475]

Commerce's Position:

As noted above, because we are no longer applying an uncreditworthy interest rate to OCP's 2016 bonds and we are finding that OCP's 2016 and 2018 bond issuances conferred no benefit, it is unnecessary for us to address the arguments made by the interested parties regarding this issue.

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[469] *Id.* at 46.
[470] *See* OCP's Case Brief at 82-86.
[471] *Id.* at 84 (citing OCP's Letter, "Submission of Factual Information to Rebut, Clarify, or Correct Information Placed on the Record by the Department," dated December 21, 2020, at Exhibit 1 at 40).
[472] *Id*. at 85 (citing OCP IQR at CRED-16, 22, 26, and 27).
[473] *Id*. at 85-86 ((citing *POSCO v. United States*, 296 F. Supp. 3d 1320, 1340 n.31 (CIT 2018) (acknowledging the Commerce's "statutory mandate to determine margins 'as accurately as possible' under the antidumping and countervailing duty statutes"); and *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)).
[474] *See* Petitioner's Rebuttal Brief at 52-54.
[475] *Id.* at 53 (citing *Aircraft from Canada* IDM at 16).

Loans

Comment 18: Whether Direct Loans From AWB, BCP, and CAM Are Countervailable

Petitioner's Case Brief:[476]

- Although in the *Preliminary Determination* Commerce did not make any findings with respect to whether OCP's loans constituted financial contributions that were specific, the record evidence demonstrates that these loans are countervailable.
- Under section 771(5)(D) of the Act, loans are financial contributions by definition.
- Record evidence demonstrates that the loans provided by CAM are *de facto* specific under section 771(5A)(D)(iii) of the Act.
- According to the GOM's initial questionnaire response, CAM's predecessor bank was created by statute in 1961 "with a public service mission to provide financing in the agricultural sector."[477] Furthermore, GOM reported in a supplemental questionnaire response that the agroindustry is the predominant user of this program.[478]
- The record evidence also shows that the actual recipients when considered on an industry basis are limited in number.[479]
- With respect to loans provided BCP and AWB, the GOM did not provide Commerce with the information needed to assess whether these loans are specific. Therefore, Commerce should rely on the facts available to find that loans from BCP and AWB were *de facto* specific under section 771(5A)(D)(iii) of the Act.

OCP's Rebuttal Brief:[480]

- BCP and AWB are not "authorities" within the meaning of section 771(5)(B) of the Act. Therefore, Commerce should not countervail the outstanding OCP's loans in the final determination.
- The loans at issue are not *de jure* specific, because there is no express limitation to an enterprise or industry.
- The petitioner claims that the loans are *de facto* specific because "the agroindustry is the predominant user of this program."[481] However, pursuant to 19 CFR 351.502(e), agricultural subsidies are not specific simply because a subsidy is limited to the agricultural sector.
- The petitioner fails to consider the diversification of the Moroccan economy. The Moroccan economy is relatively concentrated with the phosphate industry accounting for a large portion of the economic activity. Even if OCP received a large portion of the loans, it also accounts for a large portion of the economy, and as such, did not receive a disproportionate share of the lending.
- There is no basis to rely on facts available to find specificity because OCP and the GOM both fully cooperated with all requests for information.

[476] *See* Petitioner's Case Brief at 54-56.
[477] *Id*. at 55 (citing GOM IQR at III-3).
[478] *Id*. (citing GOM 11/4/20 SQR at Exhibits SII-2 and SII-11).
[479] *Id*. (citing GOM 11/4/20 SQR at II-11).
[480] *See* OCP's Rebuttal Brief at 78-82.
[481] *Id*. at 80 (citing Petitioner's Case Brief at 55).

Commerce's Position:

As addressed in Comments 13 and 14 above, for this final determination, we are finding that AWB and BCP are not authorities and, therefore, did not provide a financial contribution. Therefore, we need not address the specificity of the loans provided by these entities. Regardless of whether these loans were specific, Commerce does not find them to be countervailable on the basis that there is no financial contribution.

Furthermore, because Commerce did not find that the loans provided by CAM at issue provided a measurable benefit during the POI,[482] we need not address the petitioner's arguments regarding the specificity of these loans at this time.

Comment 19: Whether the Provision of Loan Guarantees Is Countervailable

GOM's Case Brief:[483]

- Commerce should determine that the provision of loan guarantees is not countervailable because the GOM routinely provided loan guarantees pursuant to the requirements of foreign development banks.
- Commerce determined that the loan guarantees were specific because "only four government-owned entities received government loan guarantees."[484] However, this determination was based on a sample of loan guarantee announcements that the GOM provided.[485]
- The GOM explained that these sample announcements were the only contemporaneous announcements it was able to recover from its paper archives, given the age of the documents.[486] However, the sample announcements do not represent the only loan guarantees granted.
- Therefore, the record does not support Commerce's finding that the loan guarantees were provided to only four entities, thus making the program specific. Instead, the loan guarantees were routinely provided to entities like OCP because they were required by foreign development banks.
- Furthermore, the loan guarantees are not countervailable under 19 CFR 351.527, which prohibits Commerce from countervailing a subsidy funded by "a government of a country other than the country in which the recipient firm is located" or by "an international lending or development institution."[487]
- Also, record evidence demonstrates that the lending institutions at issue do not limit their loans to a specific enterprise or industry and that they have "general authority as a universal financial institution to grant loans to borrowers in any sector of the Moroccan

[482] *See Preliminary Determination* PDM at 94.
[483] *See* GOM's Case Brief at 13-14.
[484] *Id*. at 13 (citing the *Preliminary Determination* PDM at 10).
[485] *Id*. (citing GOM 11/4/20 SQR at SIII-4).
[486] *Id*.
[487] *Id*. at 14 (citing *Welded Line Pipe from the Republic of Turkey: Final Affirmative Countervailing Duty Determination*, 80 FR 61371 (October 13, 2015) (*WLP from Turkey*), and accompanying IDM at 28).

economy."[488] Record evidence demonstrates that these loans are provided generally across many sectors within the Moroccan economy.[489]

OCP's Case Brief:[490]

- Commerce erred in finding the provision of government loans to OCP countervailable because these loans were not specific.
- Commerce's conclusion that the loan guarantees were *de facto* specific because they applied to a limited number of recipients was based on a misreading of the record evidence which demonstrates that loan guarantees from the GOM were widely available during the relevant period.
- The record evidence demonstrates that the loan guarantees provided by the GOM during the 1990s were broadly available to Moroccan companies in light of the lack of hard currency that affected the whole Moroccan economy.
- The evidence to which Commerce cites for its *de facto* specificity finding does not demonstrate that the GOM provided loan guarantees to *only* four government-owned entities; instead, the GOM provided examples of entities that received these loan guarantees.
- The GOM explained that such guarantees were "routinely granted" by the GOM. Record evidence shows that GOM's loan guarantees were broadly available to all Moroccan companies in response to foreign lenders' requiring such guarantees.
- The Petition alleged that the provision of loans from the GOM were specific because they funded OCP's CapEx plan.[491] However, OCP's CapEx plan is not a governmental project or plan.
- Commerce failed to recognize that these loan guarantees are not considered a subsidy under the transnational subsidies regulation because the funding at issue came from a government of a country other than Morocco or from international development banks.
- The evidence demonstrates that while the loan guarantees were provided by the GOM, the *funding* to which the loan guarantees applied was provided by a foreign government and development banks. Therefore, Commerce's transnational subsidy rule is applicable.
- The regulations focus is on whether the funding was provided as part of program or project funded by a foreign government or development bank. Here, there can be no question that the funding associated with the loan guarantees was "supplied in accordance with, and as part of, {} program{s} or project{s} funded" by a foreign government or development bank in accordance with the transnational subsidy rule.

Petitioner's Rebuttal Brief:[492]

- Commerce properly found that this program is specific pursuant to section 771(5A)(D)(iii)(I) of the Act "because the users of the government loan guarantees are limited in number."

[488] *Id*. at 98 (citing GOM IQR at III-15, III-20–III-21 and at Exhibit III-7).
[489] *Id*. at 98 (citing OCP's Letter, "Submission of Factual Information to Rebut, Clarify, or Correct Petitioner's Factual Information," dated October 19, 2020, at Exhibit 3).
[490] *See* OCP's Case Brief at 94-95.
[491] *Id*. at 94 (citing Petition at II-32).
[492] *See* Petitioner's Rebuttal Brief at 55-61.

- The GOM stated explicitly that it provided the guarantees "to GOM entities" and to "GOM agencies like OCP," not to "all Moroccan companies."[493] Thus, this program is also specific because the GOM exercised discretion in providing the guarantees in a way that favored an enterprise or industry over others.
- The GOM was only able to identify four occasions on which it provided such guarantees, including to OCP, and the assertions to the contrary are wholly unsupported by the record.
- As stated in the *Preliminary Determination*, "there is no evidence that it was normal Moroccan commercial practice for private shareholders to provide loan guarantees under similar circumstances during that time."[494]
- The idea that the GOM provided the loan guarantees at the insistence of the relevant lending institutions, allegedly due to concerns about OCP's access to hard currency, is not supported by record evidence.
- There is substantial record evidence that the GOM provided the guarantees to OCP as a state-backed entity; therefore, its CapEx plan is, by definition, a "governmental project or plan," contrary to OCP's assertions.
- The argument that the loan guarantees are not countervailable because they were allegedly provided as part of a program or project funded by a foreign government or a development bank is based on a misinterpretation of 19 CFR 351.527, as Commerce initiated on loan guarantees, not the underlying loan.
- There is no record evidence that the GOM provided the guarantees "in accordance with" a program or project funded by a foreign government or international lending or development institution, as 19 CFR 351.527(b) requires.
- The *CVD Preamble* states that common examples of 19 CFR 351.527 include large infrastructure projects.[495] Furthermore, there is no precedent for treating national governments as international lending or development institutions.

Commerce's Position:

We agree with the petitioner that the GOM and OCP have misinterpreted Commerce's regulations regarding transnational subsidies. According to 19 CFR 351.527, a subsidy does not exist if Commerce determines that the *funding* for the subsidy is supplied in accordance with, and as part of, a program or project funded by: (1) a government of a country other than the country in which the recipient firm is located; or (2) an international lending or development institution.

The subsidy at issue is loan guarantees provided by the GOM, which is the government of the country where the recipient is located, and not the loans provided by the foreign banks. As described in the *Preliminary Determination*, the benefit of the subsidy program is the difference between the total amount OCP paid for the loan and the total amount OCP would have paid for a comparable commercial loan that OCP could actually obtain absent the government-provided guarantee.[496] Further, the record evidence does not demonstrate that the funding for the subsidy

[493] *Id*. at 57 (citing GOM 11/4/20 SQR at SIII-4).
[494] *Id*. at 58 (citing *Preliminary Determination* PDM at 10).
[495] *Id*. at 61 (citing *CVD Preamble*, 63 FR at 65405).
[496] *See Preliminary Determination* PDM at 10.

is supplied *in accordance with, and as part of a program or project funded* by a foreign government or an international lending or development institution. The GOM explained that the purpose of the guarantee was to comply with the request by the foreign banks concerned to allow OCP access to foreign currency.[497] This was a precautionary and mandatory measure by those foreign development banks for lending in Morocco, intended to ensure the servicing of loans in spite of the acute foreign exchange shortages that Morocco experienced at the time.[498]

The GOM cites to *WLP from Turkey* to support its argument that Commerce should treat these loan guarantees as transnational subsidies. However, the transnational subsidies analysis in *WLP from Turkey* involved the provision of loans from an international development bank, not loan guarantees from a national government. In *WLP from Turkey*, Commerce did not find the Export Finance Intermediation Loans program countervailable because this loan program was established by the Fourth Export Finance Intermediation Loan Agreement 7539-TU between the Turk Eximbank and the International Bank for Reconstruction and Development (World Bank).[499] Because the actual funding for these loans was provided by an international development institution, Commerce did not countervail these loans in accordance with 19 CFR 351.527(b).[500]

We also disagree with the GOM's and OCP's arguments that the record does not support Commerce's finding that the loan guarantees were provided to only four entities, making them *de facto* specific under section 771(5A)(D)(iii)(I) of the Act.

As an initial matter, the GOM had ample opportunity to provide more data on the number of loan guarantees approved during the AUL period, if such existed. Commerce normally requests such information for the purposes of conducting a *de facto* specificity analysis. Specifically, in its Standard Questionnaire Appendix of the initial questionnaire, Commerce requested a table that contained the following information to determine the number of recipient companies and industries and the amount of assistance approved under this program for each year in which OCP received approval for this assistance: 1) the total amount of assistance approved for all companies under the program; 2) the total amount of assistance approved for each of the largest 50 recipients under the program, including the industry designation for each of these recipients; 3) the total number of companies that were approved for assistance under this program; 4) the total number of companies operating or established in the jurisdiction of the granting authority; and 5) the total number of corporate/business income tax filers within the jurisdiction of the granting authority.[501] In response to this question, the GOM stated that "there was no GOM program to provide guarantees to OCP" and that "the requested table is not applicable."[502] When Commerce once again requested this usage information, the GOM once again stated that there was no program and that it did not have the data required to complete the table, as requested.[503] Instead of providing the data requested, the GOM provided contemporaneous information

[497] *See* GOM IQR at IV-1, IV-2.
[498] *Id.* at IV-8.
[499] *See WLP from Turkey* IDM at 28.
[500] *Id*. at 28.
[501] *See* Commerce's Letter, "Countervailing Duty Questionnaire," dated July 28, 2020, at 7 and at Standard Questions Appendix.
[502] *See* GOM IQR at IV-16.
[503] *See* GOM 11/4/20 SQR at SIII-4.

regarding four similar loan guarantees provided to GOM entities like OCP.[504] Given the GOM's statement that it could not recover more data on the amount of assistance and the number of recipients of these loan guarantees, it is unclear how the GOM can support its argument that the announcements provided are just a sample of the total amount of assistance and the total number of recipients. Commerce repeatedly asked the GOM to provide it with information regarding the total number of companies approved for assistance under this program and the only information that GOM provided was the information about these four recipients of the program. If other companies were indeed approved for assistance, GOM should have provided the information regarding the number of such companies in response to Commerce's questionnaire, but it did not. Accordingly, the only information regarding the number of recipients of this program on the record is the information regarding these four companies. Further, in its questionnaire response, the GOM indicated that because foreign banks required loan guarantees, "the GOM provided such guarantees at the time to several entities like OCP."[505]

Regarding OCP's argument that its CapEx plan is not a governmental project or plan, we consider this argument to be moot. In our *Preliminary Determination*, we found the provision of loan guarantees program to be *de facto* specific because the recipients of the loan guarantees are limited in number.[506] OCP's argument has no impact on this finding.

Furthermore, Commerce finds the GOM's and OCP's arguments regarding specificity to be unsupported by the record evidence. Regardless of OCP's claims that these loan guarantees were broadly available, we have no record evidence (*e.g.*, charts, summary data, reports) that more than four entities actually received these guarantees during the relevant period, and, as described above, Commerce provided the GOM sufficient opportunity to provide such information. Therefore, we continue to find that the recipients of the government loan guarantees are limited in number and that this program is specific pursuant to section 771(5A)(D)(iii)(I) of the Act.

Tax Programs

Comment 20: Whether Commerce Overstated Taxable Income for the Tax Incentives for Export Operations Program

OCP's Case Brief:[507]

- Commerce significantly overstated JFC II's taxable income and, thus, also overstated the benefit for this program.
- Rather than using JFC II's taxable income reported in the tax return filed with the Moroccan tax authority, Commerce calculated its own taxable income for JFC II.
- JFC II's taxable income on the tax return was calculated by summing total company revenues in 2018, *including all export revenues*, and deducting total expenses from those revenues.

[504] *Id*. at Exhibit IV-1.
[505] *See* GOM IQR at IV-2.
[506] *See Preliminary Determination* PDM at 10.
[507] *See* OCP's Case Brief at 43-48.

- The premise that JFC II's taxable income did not include export revenues is wrong, and Commerce had no basis to add export revenues to the tax savings calculation for JFC II.
- Commerce also attempted to calculate JFC II's taxable income by starting with JFC II's total revenue and subtracting JFC II's tax losses from the prior year. However, JFC II's taxable income is accurate because taxes in Morocco are assessed on revenues net of expenses.
- The exemption for newly exporting companies is taken *after* the taxable income is determined.
- For the final determination, Commerce should use in its benefit calculation the JFC II taxable income reported on its official tax return.

Commerce's Position:

We agree with OCP that we erroneously determined that JFC II's taxable income excluded both export revenue and expenses. After reviewing the chart that OCP provided in its case brief and comparing it with the explanation for calculating taxable income provided in the tax return, we agree that the taxable income calculated in the *Preliminary Determination* is overstated.[508] Therefore, for the final determination, we are using the taxable income reported in JFC II's tax return to calculate OCP's benefit under this program.

Comment 21: Whether Commerce Should Adjust OCP's Cash Deposit Rate

OCP's Case Brief:[509]

- Commerce should take a program-wide change into account in establishing the estimated countervailing duty cash deposit rate for OCP's alleged corporate income tax program. The changes in this alleged program satisfy all of the criteria established by Commerce that constitute a program-wide change.[510]
- The GOM's enactment of the Finance Law of 2020 in December 2019 increased the corporate income tax rate applicable to net export profits from 17.5 percent to 20 percent, thus changing the progressivity of the Moroccan tax system.[511] This change occurred after the POI but before Commerce's *Preliminary Determination*.
- Commerce can easily measure the change in the amount of the countervailable subsidy because it is the difference between the previous 17.5 percent tax rate and the new 20 percent tax rate.[512] Instead of subtracting the income tax that each company actually paid, Commerce should subtract what each company would have paid under a 20 percent

[508] *Id*. at 44-46; *see also* OCP IQR at Exhibit GEN-4.
[509] *See* OCP's Case Brief at 48-51.
[510] *Id*. at 48-49 (citing 19 CFR 351.526).
[511] *Id*. at 49 (citing OCP IQR at 129, Article 19-I-A, and Article 6-I at Exhibit CIT-6; and GOM IQR at VIII-8).
[512] *Id*. (citing *Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from India: Final Countervailing Duty Determination*, 67 FR 34905 and 34906 (May 16, 2002) (*PET Film from India*), and accompanying IDM at Comment 7 (finding the change in the amount of countervailable subsidies measurable using the new rate under a program-wide change); *Honey from Argentina: Final Affirmative Countervailing Duty Determination*, 66 FR 50613 (October 4, 2001) (*Honey from Argentina*), and accompanying IDM at II(A)(i) (using an increased rate to calculate the cash deposit rate under a program-wide change analysis)).

tax rate in order to account for this program-wide change.[513] OCP has provided calculations that show how Commerce can apply the new tax rate.[514]
- The Finance Law of 2020 was an official act of the GOM and applies to all entities that pay corporate income tax.[515]

GOM's Case Brief:[516]
- In its *Preliminary Determination*, Commerce found that OCP and JFC V paid a 17.5 percent rate on net profit over MAD 1 million in export revenue instead of the 31 percent rate paid on all revenues.[517] Commerce calculated the benefit based on the difference in these rates.[518]
- Commerce recognized that in 2020 the GOM repealed the 17.5 percent tax rate.[519] However, Commerce failed to take this repeal into consideration when determining OCP's cash deposit rate under 19 CFR 351.526, even though the tax program satisfied all criteria under this regulation. Commerce should take into account the repeal of the old 17.5 percent tax rate and its replacement by a 20 percent tax rate to determine OCP's cash deposit rate.[520]

Petitioner's Rebuttal Brief:[521]
- Commerce correctly determined that OCP received a countervailable subsidy from the Tax Incentives for Export Operations program. Commerce should reject the respondents' arguments that Commerce should adjust the cash deposit rate for this tax program because of a program-wide change.
- The respondents are wrong that the increase in the corporate income tax rate that the GOM applies to certain export income constitutes a program-wide change because Commerce does not have the necessary information to measure the change in the amount of countervailable subsidies provided by this program. The subsidy relies on the amount of corporate income tax that OCP pays in any given year and its amount of taxable income for that year.[522]
- OCP's proposed calculation methodology does not meet the requirements of 19 CFR 351.526 because it fails to consider OCP's cross-owned affiliates that did not pay corporate income tax during the POI such that they did not use the exemption for corporate income tax but they may receive subsidies when they pay income tax that relate to exports in the future.[523]

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[513] *Id*. (citing OCP Prelim Calc Memo at 6).
[514] *Id*. at 50 and Exhibit 4.
[515] *Id*. at 51 (citing OCP IQR at Article 19-I-A at Exhibit CIT-6).
[516] *See* GOM's Case Brief at 17-18.
[517] *Id*. at 17 (citing *Preliminary Determination* PDM at 13-14).
[518] *Id*. (citing OCP Prelim Calc Memo at 6).
[519] *Id*. at 18 (citing *Preliminary Determination* PDM at 13).
[520] *Id*.
[521] *See* Petitioner's Rebuttal Brief at 25-29.
[522] *Id*. at 26 ("In reality, it is not possible for the Department to determine today the amount of the subsidy that OCP will receive from this program in the future, because it will depend on the amount of OCP's export sales and taxable income in future years.").
[523] *Id*. at 27.

- The facts of this case are similar to those *Carbazole Violet Pigment from India*, where Commerce rejected respondents' requests to make a program-wide change with respect to India's Section 80HHC program because it found that the effect of the change in the rate of Section 80HHC deductions on the countervailable subsidy rate was not measurable, because the basis for receipt of the Section 80HHC benefit was the realization of a company's export profits, which Commerce could not estimate.[524]
- However, the facts of the cases that OCP cites for support are very different than the facts of this proceeding. In *PET Film from India*, Commerce treated the entire amount of import duty exemption from India's Duty Entitlement Passbook Scheme (DEPS) as the benefit because the Government of India (GOI) did not have a system in place that satisfied the requirements of 19 CFR 351.519(a)(4).[525] When the GOI later lowered the rate from 15 percent to 14 percent, Commerce just lowered the cash deposit rate by 1 percent.[526] Commerce reversed its approach to this program two years later when it discovered that India could retroactively change the import duty exemption rate after its publication.[527]
- In *Honey from Argentina*, Commerce determined that an Argentine internal tax reimbursement/rebate program did not meet the requirements of 19 CFR 351.518(a)(4)(ii), and therefore treated the rebated percentage as the subsidy rate.[528] When Argentina later raised the rates for processed and bulk honey, Commerce weight-averaged the two rates and raised the cash deposit rate applicable to the program by an equivalent amount.[529] However, in this case, Commerce cannot modify the cash deposit rate by just increasing it by 2.5 percent.

Commerce's Position:

For the reasons explained below, we disagree with OCP's and the GOM's arguments that we should adjust the cash deposit rate for the Tax Incentives for Export Operations program to account for a program-wide change.

First, under 19 CFR 351.526(a), one of the prerequisites for making a program-wide change in establishing the estimated CVD cash deposit rate is that Commerce is able to measure the change in the amount of countervailable subsidies provided under the program in question. In this case, we are unable to measure the change in the amount of countervailable subsidies. We cannot estimate the appropriate taxable incomes as well as the sales denominators corresponding with the new tax rates. Further, while the GOM and OCP claim that the 2020 law repealed the reduction of tax rates for export enterprises, the GOM and the OCP did not clarify or provide

[524] *See Final Affirmative Countervailing Duty Determination: Carbazole Violet Pigment 23 from India*, 69 FR 67321 (November 17, 2004) (*Carbazole Violet Pigment from India*), and accompanying IDM at Comment 8 at 21-22.
[525] *Id*. at 27-28 (citing *PET Film from India* IDM at II.A.2 (description of the DEPS program), Comment 1 (explaining Commerce's determination that the entire amount of the exemption is countervailable), and Comment 7 (explaining the program wide change)).
[526] *Id*.
[527] *Id*. at 28 (citing *Carbazole Violet Pigment from India* IDM at Comment 8).
[528] *Id*. (citing *Honey from Argentina* IDM at II.A (describing the program and the program-wide change) and Comment 3 (explaining its treatment of the entire "Reintegro" as a countervailable benefit)).
[529] *Id.*

evidence showing the new applicable tax rates for the relevant export enterprises. Taking into consideration that OCP continued to receive tax deductions under the 2020 Moroccan General Tax Code which appears to provide various other reductions,[530] we cannot estimate the new applicable tax rates for the export enterprises without thorough explanations from the GOM and OCP. Commerce has rejected arguments requesting program-wide changes due to a lack of measurability in past proceedings.[531]

Second, we find that there is not sufficient evidence on the record to corroborate the respondents' claims that a change in this tax program actually occurred. Although OCP submitted the Finance Law of 2020[532] and the GOM provided the 2020 Moroccan General Tax Code,[533] it is unclear how the GOM applies and implements these changes in the tax code. We also cannot use Article 6-I-B-1 of the 2020 Moroccan General Tax Code to confirm that the GOM actually repealed the five-year exemption of corporate income for newly exporting entities because this article states "(repealed)" without providing any additional information.

Third, we do not have sufficient information to determine that the repealed tax program has not been replaced by a substitute program. This information is critical to our ability to determine a program-wide change.[534] Accordingly, we have not adjusted OCP's CVD cash deposit rate calculated for the relevant tax program.

Comment 22: Whether the Reductions in Tax Fines and Penalties is Specific

OCP's Case Brief:[535]

- Commerce's finding that the GOM's reductions of tax fines and penalties imposed on taxpayers, including OCP, is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act is flawed because it relies on an inflated denominator that overestimates the limits of these reductions.
- Commerce should not have placed the total number of corporations subject to corporate income tax in Morocco in the denominator because this allegation relates to reductions in fines and penalties, not reductions in taxes. The appropriate denominator for this program is all taxpayers who were subject to fines and penalties during the POI.[536]
- In its Post-Preliminary Determination, Commerce found that in granting reductions in fines and penalties, "the GOM is forgoing or not collecting revenue that is otherwise due, and provides a benefit to the recipient in the amount of savings," but the forgone revenue is reductions in fines and penalties, not a reduction in taxes owed.[537] There is no revenue forgone for corporations that do not owe fines and penalties.
- Commerce's use of an inflated denominator, in this case the larger universe of all corporate taxpayers without regard to their penalty status, made the use of Article 236 to obtain tax fine and penalty reductions seem more limited.

[530] *See* GOM IQR at Exhibit VIII-2.
[531] *See Carbazole Violet Pigment from India* IDM at Comment 8 at 21-22.
[532] *See* OCP IQR at Exhibit CIT-6.
[533] *See* GOM IQR at Exhibit VIII-2.
[534] *See* 19 CFR 351.526(d).
[535] *See* OCP's Case Brief at 96-98.
[536] *Id*. at 96.
[537] *Id*. at 97 (citing Post-Preliminary Decision Memorandum at 4).

- Commerce's failure to compare the number of corporations that received reductions in tax fines and penalties during the POI to the subgroup of corporations that had tax fines and penalties assessed against them results in an erroneous specificity finding.
- The GOM reported that approximately 3.3 percent of corporate taxpayers in Morocco applied for and received reductions in tax fines and penalties during the POI.[538] These reductions applied to taxpayers across a broad spectrum of the Moroccan economy, with the extraction industry (including OCP) receiving only a small portion of the total reductions.[539]
- This percentage is greater than the percentage of taxpayers in other cases where Commerce determined tax programs to be *de facto* specific under section 771(5A)(D)(iii)(I) of the Act. In *Softwood Lumber from Canada*, Commerce found that a tax credit claimed between 0.48 percent and 1 percent of total taxpayers was specific.[540] In *Fabricated Structural Steel from Mexico* and *Cut-to-Length Plate from Korea*, Commerce treated tax credits as specific where they were used by approximately 0.0004 percent and 0.6 percent of taxpayers.[541]
- Therefore, Commerce should determine that the tax fine and penalty reductions under Article 236 of the Moroccan Tax Code are broadly available and used by taxpayers across the Moroccan economy, such that they do not result in a specific subsidy.

Petitioner's Rebuttal Brief:[542]

- Commerce properly found that the GOM's reductions in OCP's tax fines and penalties were specific.
- Commerce's *de facto* specificity finding for this program complies with its regulations.[543]
- There is no basis in the statute, regulations, or Commerce's practice to analyze *de facto* specificity by referring only to the number of companies that are eligible for a subsidy.
- Commerce could not have even adopted OCP's approach of assessing *de facto* specificity in a limited way if it wanted to because of missing information from the GOM.[544]
- Commerce should reject OCP's argument that the use of this tax program by 3.3 percent of total taxpayers means the program is broadly available.[545]

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[538] *Id*. at 97-98 (citing GOM 11/11/20 SQR at S-IX-13).
[539] *Id*. (citing GOM 11/11/20 SQR at S-IX-14).
[540] *Id*. at 98 (citing *Softwood Lumber from Canada* IDM at Comment 64).
[541] *Id*. at 98 (citing *Certain Fabricated Structural Steel from Mexico: Final Affirmative Countervailing Duty Determination*, 85 FR 5381 (January 30, 2020), and accompanying IDM at Comment 2, Item 5; *Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea: Preliminary Countervailing Duty Administrative Review, 2017*, 84 FR 34123 (July 17, 2019), and accompanying PDM at IX.A.7, unchanged in *Certain Carbon and Alloy Steel Cut-toLength Plate From the Republic of Korea: Final Results and Partial Rescission of Countervailing Duty Administrative Review, 2017*, 85 FR 2710 (January 16, 2020)).
[542] *See* Petitioner's Rebuttal Brief at 67-70.
[543] *Id*. at 68 ("In assessing whether the actual recipients of a subsidy on an enterprise basis are limited in number under section 771(5A)(D)(iii)(I) of the Act, the Department takes into account the number of enterprises in the economy as a whole. With respect to tax programs in particular, the Department properly uses the total number of tax filers for this purpose, as it did in this case.").
[544] *Id*. at 69, FN 285 ("In addition, as far as Mosaic is able to determine, the GOM did not submit information regarding the number of taxpayers who were potentially subject to fines and penalties during the POI. Thus, because the GOM did not provide the necessary information, the Department could not have adopted OCP's approach in any event.").
[545] *Id*. at 69-70.

Commerce's Position:

We agree with the petitioner and continue to find that the GOM's reductions in OCP's tax fines and penalties are *de facto* specific under section 771(5A)(D)(iii)(I) of the Act. The SAA states that the specificity test should be applied "in light of its original purpose, which is to function as an initial screening mechanism to winnow out only those subsidies which truly are broadly available and widely used throughout an economy."[546] When analyzing *de facto* specificity for tax programs in prior cases, Commerce has compared the number of companies that used the program with the total numbers of tax filers.[547] In addition, Commerce has rejected OCP's argument that *de facto* specificity should be assessed by including only the number of companies eligible for a subsidy program in past cases.[548]

We disagree with OCP's claim that because 3.3 percent of Moroccan corporate taxpayers applied for and received reductions in tax fines and penalties, this program is broadly available.[549] Commerce makes its *de facto* specificity determinations on an individual case basis and it is not required to abide by numerical thresholds that determine whether something is "limited" or not.[550] Moreover, we preliminarily found this program to be *de facto* specific pursuant to 771(5A)(D)(iii)(I) of the Act because evidence on the record shows that 8,761 companies obtained reductions in tax fines and penalties under Article 236(2) of the CGI[551] out of a total of 262,165 corporate income taxpayers during the POI.[552] For this final determination, we continue to find that this program is *de facto* specific, because the number of recipients of the subsidy is limited within the meaning of section 771(5A)(D)(iii)(I) of the Act.

Value-Added Tax (VAT)

Comment 23: Whether the MAD 20.5 Billion VAT Refund Is Countervailable

Petitioner's Case Brief:

- Commerce erred when it found the GOM's MAD 20.5 billion VAT payment not countervailable. The record demonstrates that this payment was an extraordinary, one-off decision by the GOM to enter into the repayment agreements although Morocco's tax law provides no authority for the GOM to make lump-sum payments of accumulated VAT credits and OCP had no legal right to obtain one.[553]
- This is similar to the situation in *Melamine from Trinidad and Tobago* where Commerce found a countervailable subsidy because the respondents were unable to indicate the

[546] *See* Statement of Administrative Action accompanying H.R. 5110, H.R. Doc. No. 316, 103d Cong., 2d Sess. 911, 929 (1994) (SAA).
[547] *See, e.g., Certain Uncoated Groundwood Paper from Canada* IDM at 198.
[548] *See, e.g., Supercalendered Paper from Canada: Final Results of Countervailing Duty Expedited Review*, 82 FR 18896 (April 24, 2017), and accompanying IDM at 102.
[549] *See* OCP's Case Brief at 97-98.
[550] *See Royal Thai Gov't v. United States*, 341 F. Supp. 2d 1315, 1335-1336 (Fed. Cir. 2004).
[551] Code General des Impôts (CGI) or General Tax Code.
[552] *See* Post-Preliminary Determination at 4 (citing GOM 11/11/20 SQR at S-IX-13).
[553] *See* Petitioner's Case Brief at 57 (citing 19 CFR 351.510(a)(1)).

specific section of the relevant VAT law that would have provided for the VAT rebate in question.[554]

- The GOM was acting in an *ultra vires* manner when it entered into repayment agreements and made payments to OCP. Specifically, the GOM expressly rejected the applicability of the provision added in the Finance Law of 2014, which appears to be the only provision of Morocco's tax law that provides authority for the GOM to refund VAT credits accumulated in prior years. Additionally, it explicitly confirmed that there is *no remedy* under Moroccan law if refunds are not liquidated within six months from the date of filing of an application, which was plainly the case here.[555] Evidence submitted by OCP supports this conclusion.[556]
- While the GOM and OCP assert hundreds of Moroccan companies benefited from this new strategy to repay VAT credits, the record evidence demonstrates that OCP is the focus of the repayment program,[557] and is therefore *de facto* specific to OCP.
- OCP failed to demonstrate the it was entitled to a refund of MAD 20.5 billion.
- The record demonstrates that Commerce's statement that "{u}nder Morocco's VAT regime, companies pay VAT (input VAT) on their purchases and collect VAT on the goods they sell (output VAT)"[558] is not true with respect to OCP's sales of phosphate fertilizers, because the GOM subsidizes OCP's sales of fertilizer in Morocco's domestic market by exempting them from VAT.
- Because the GOM allows OCP to obtain refunds of VAT in connection with its export sales, even though it does not levy VAT on domestic sales of fertilizers, it subsidizes OCP's export sales as well.
- Commerce failed to recognize the implications of OCP's exemption from collecting VAT on domestic sales of fertilizer when considering Commerce's regulation at 19 CFR 351.517(a). The *CVD Preamble* explains that section 351.517 provides that the remission or rebate of VAT taxes on export constitutes an export subsidy "only if the amount of the remittance or rebate is excessive; *i.e.*, if it exceeds the amount of indirect taxes levied on like products sold for domestic consumption."[559]
- Although the GOM imposes no tax on the phosphate fertilizer that OCP sells for domestic consumption, it provided a 20 percent rebate when OCP exported the same type of phosphate fertilizer.
- Under 19 CFR 351.517(a) and item (g) of the SCM Agreement illustrative list, to the extent that *any* of the MAD 20.5 billion related to credits earned on export sales, the GOM provided an export subsidy on OCP's sales of phosphate fertilizer to the United States.[560]

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[554] *Id.* ((citing *Melamine from Trinidad and Tobago: Final Affirmative Countervailing Duty Determination*, 80 FR 68849 (November 6, 2015) (*Melamine from Trinidad and Tobago*), and accompanying IDM at Comment 6 (finding a countervailable subsidy where respondents were unable to indicate the specific section of the relevant VAT law that would have provided for the VAT rebate in question)).
[555] *Id.* at 58 (citing GOM 11/19/20 SQR at 1-2; and GOM 11/4/20 SQR at SVI-4–5).
[556] *Id.*
[557] *Id.*
[558] *See* Petitioner's Case Brief at 60 (citing *Preliminary Determination* PDM at 14).
[559] *Id.* at 61-62 (citing *CVD Preamble*, 63 FR at 65383).
[560] *Id*. at 62 (citing *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 72 FR 63875, 63884 (November 13, 2007).

GOM's Rebuttal Brief:

- Commerce correctly did not countervail the GOM's reimbursements of VAT credits it owed to OCP.
- The petitioner does not dispute that OCP reported its VAT payments and collections correctly, nor do they dispute that the GOM owed OCP reimbursements under Moroccan law. Instead, the petitioner contends the reimbursements are countervailable because the GOM borrowed funds to pay the reimbursements from various banks.
- The petitioner fails to identify *any* evidence that there is a legal limitation on the method through which the GOM may pay its debts or that there is any law prohibiting it from borrowing money from financial institutions to pay its debts. This is because there are no such laws.
- The petitioner's reliance upon *Melamine from Trinidad and Tobago* is wrong. There, the issue was that there was no legal provision allowing for the underlying rebate at issue.[561] Here, there is no dispute that VAT credits and VAT reimbursements are permitted under Moroccan law.
- The petitioner is incorrect that the GOM confirmed that there is no remedy under Moroccan law if refunds are not liquidated within six months from the date of filing of an application. Rather, Moroccan law does not prohibit future payment of accumulated VAT reimbursement debt, and because the GOM could not pay reimbursements to over 700 companies does not erase the GOM's obligation to do so.
- Commerce verified the GOM's VAT reconciliation and reimbursement system, and the petitioner does not claim that verification showed any reporting errors.[562] As Commerce verified, OCP reports to the GOM thousands of invoices to support each of its reimbursement claims. Further, the petitioner has in no way demonstrated or explained how the GOM's administrative VAT repayment procedures create a countervailable subsidy.[563]
- OCP is an enormous company in Morocco that, by the nature of its business, is entitled to large VAT reimbursements. There is no record evidence that OCP's VAT reimbursements were not commensurate with OCP's position in Morocco's economy, and thus, no evidence of *de facto* specificity in this regard.[564]
- The petitioner's arguments are wrong because OCP does not obtain any rebate on domestic or export fertilizer sales. Under Moroccan law, OCP does not have to collect any VAT when selling fertilizers domestically or when selling to foreign buyers.
- The petitioner's argument is that the GOM provided a countervailable subsidy by *not* collecting VAT on export sales, which contradicts the basic principle of "border tax adjustment," enshrined in Article II:2(b) and Article VI:4 of the General Agreement on Tariffs and Trade 1994. If Morocco had charged VAT on fertilizer exports, those products would become liable to a double layer of consumption taxes.

[561] *See* GOM's Rebuttal Brief at 16 (citing *Melamine from Trinidad and Tobago* IDM at Comment 6).
[562] *Id.* at 17 (citing GOM ILOV SQR at VER-1-VER-4 and Exhibits. VER1-4 and VER-6).
[563] *Id*. at 18.
[564] *Id.* at 20 (citing GOM IQR at V-15 and Exhibit V-11-V-14; and section 771(5A)(D)(iii) of the Act).

OCP's Rebuttal Brief:

- Commerce correctly found that OCP's VAT refund is not countervailable because Morocco's VAT system is tax neutral.[565] Consistent with 19 CFR 351.510, Commerce considers only whether the producer is better off with the program under consideration than it otherwise would be (*i.e.*, whether the producer is left more than tax neutral).
- OCP and JFCs I to IV systematically generate VAT credits because many of their sales transactions are VAT-exempt. Moroccan law allows companies like OCP to apply for reimbursement of these credits, which OCP and JFCs I to IV duly filed within the timeframe prescribed by law.[566]
- The petitioner fails to appreciate that refunds are explicitly authorized under Article 103 of the Moroccan Tax Code. The petitioner selectively omits part of the GOM's response which states "tax laws also do not extinguish the debt if the reimbursement is not made timely."[567]
- All the reimbursement claims that served as the basis for the MAD 20.5 billion in refunds are on the record of the investigation, and OCP provided a detailed chart in its first supplemental questionnaire response showing exactly how those numbers reconciled to the total refunds under the factoring agreements.[568]
- The petitioner's interpretation of 19 CFR 351.517(a) is incorrect as a matter of law and Commerce practice. The amount exempted on exportation is identical to the amount levied insofar as OCP owes no VAT at all because OCP's domestic and export sales of fertilizers are exempted from VAT collection.[569]
- In *Silicon Metal from Brazil*, Commerce reached exactly this conclusion when considering a tax program that operated similarly to a standard VAT regime in Brazil.[570]

Commerce's Position:

As explained in the *Preliminary Determination*, the VAT refunds received by OCP and its cross-owned affiliates do not confer a benefit because, under Moroccan law when a company has paid more in VAT on its input purchases than it collects in VAT on its sales of final product, the company is due the difference.[571]

Commerce's regulation, 19 CFR 351.510, provides that, for an indirect tax, a benefit exists to the extent that that the taxes paid by a firm as a result of the program are less than the taxes the firm would have paid in the absence of the program. As noted by OCP and the GOM, Commerce has

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[565] *See* OCP's Rebuttal Brief at 82-84 (citing *Frozen Warmwater Shrimp from the Republic of Indonesia: Final Negative Countervailing Duty Determination*, 78 FR 50383 (August 19, 2013) (*Shrimp from Indonesia*), and accompanying IDM at Comment 14; *Silicon Metal from Brazil: Final Affirmative Countervailing Duty Determination*, 83 FR 9838 (March 8, 2018) (*Silicon Metal from Brazil*), and accompanying IDM at Comment 1; and *Certain Quartz Surface Products from the Republic of Turkey: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, In Part*, 85 FR 25400 (May 1, 2020) (*Quartz from Turkey*), and accompanying IDM at Comment 2)).
[566] *Id.* at 84-85 (citing OCP 11/3/20 SQR at 25-27 and VAT2-1; and OCP ILOV SQR at App. VE-VAT-1 (Tab 10)).
[567] *Id.* at 86 (citing GOM 11/4/20 SQR at SVI-5).
[568] *Id* at 88 (citing OCP 11/3/20 SQR at 26-27 and App. VAT2-1).
[569] *See* OCP's Rebuttal Brief at 90-91.
[570] *Id.* at 91 (citing *Silicon Metal from Brazil* IDM at Comment 1).
[571] *See Preliminary Determination* PDM at 16.

a well-established practice with respect to VAT regimes which operate normally.[572] We explained in the *Preliminary Determination* that under Morocco's VAT regime, companies pay VAT (input VAT) on their purchases and collect VAT (output VAT) on the goods they sell.[573] To determine a company's overall VAT due, the amount of input VAT that the company paid is deducted from the amount of output VAT that it collected, which results in either VAT due to the state or, if the company pays a greater amount of input VAT than the amount of output VAT it collects, it accumulates credits that can be used the following month or collected as a refund.[574] Morocco maintains an electronic system for tracking VAT, in which, before the end of the month or quarter, VAT payers must declare the relevant amounts over the course of the preceding month or quarter, depending on the filing criteria,[575] and pay the corresponding tax or request a VAT credit reimbursement (or refund).[576] Under the Moroccan VAT regime, there are a number of specific situations where VAT paid is not deductible.[577] Additionally, the CGI identifies goods that are exempt from VAT but with the right of deduction of input VAT.[578] Under Article 92 of the CGI, goods for export and fertilizers, among other items, are exempt from VAT with the benefit of the right to deduct input VAT.[579]

We disagree with the petitioner's contention that this situation is analogous to *Melamine from Trinidad and Tobago*. In that case, there was no legal provision allowing for the rebate at issue.[580] Here, VAT credits and VAT reimbursements are permitted under Moroccan law,[581] which the petitioner does not dispute.

We disagree with the petitioner's argument that the GOM was acting in an *ultra vires* manner because Morocco's tax law provided no authority for the GOM to make lump sum payments of accumulated VAT credits, and OCP had no legal right to obtain one.[582] The petitioner does not deny that the GOM owed OCP reimbursement under Moroccan law. As explained in the *Preliminary Determination*, the GOM borrowed money to refund outstanding VAT credits, with the loan proceeds being transferred to the companies involved to settle the GOM's VAT debt.[583] The petitioner does not identify any evidence that there is a legal limitation on the method through which the GOM may pay its debts or that there is any law prohibiting it from borrowing money from financial institutions to pay its debts.

Additionally, we disagree with the petitioner's contention that there is no remedy under Moroccan law if VAT refunds are not liquidated within six months of filing and application. As explained by the GOM:

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[572] *See, e.g., Silicon Metal from Brazil* IDM at Comment 1; and *Certain Frozen Warmwater Shrimp from Thailand: Final Negative Countervailing Duty Determination*, 78 FR 50379 (August 13, 2013) (*Thai Shrimp*), and accompanying IDM at 54-55.
[573] *See* GOM IQR at VII-2 and Exhibit VII-1.
[574] *Id.*
[575] *Id.* at VII-4 and Exhibit VII-1.
[576] *Id* at VII-6 and Exhibit VII-1.
[577] *Id* at VII-5-6, and Exhibit VII-1.
[578] *See* GOM IQR at Exhibit VII-1.
[579] *Id.*
[580] *See Melamine from Trinidad and Tobago* IDM at Comment 6.
[581] *See* GOM IQR at VII-4 and Exhibit VII-1.
[582] *See* Petitioner's Case Brief at 57.
[583] *See* GOM IQR at Exhibit VII-10.

> The Moroccan tax laws are silent regarding any remedy available when the GOM fails to timely liquidate its debt. The tax laws also do not extinguish that debt if the reimbursement is not made timely. The reason the GOM did not timely liquidate its debt to OCP and the other Moroccan companies was because it did not have the funds available to do so. Thus, the only remedy available to a Moroccan company in this situation was to wait until the GOM raised the funds necessary to make the payments concerned. This was exactly what occurred under the alleged "program" at issue.[584]

Rather, the GOM owed a debt to hundreds of companies and borrowed money to pay that debt.[585]

We disagree that OCP failed to demonstrate that it was entitled to a VAT refund of MAD 20.5 billion. The record contains all the reimbursement claims that served as the basis for the MAD 20.5 billion in refunds and OCP provided a detailed chart demonstrating how those numbers reconciled to the total refunds under the factoring agreements.[586] Further, because OCP is paying the interest to the banks from which the GOM received the loans to pay OCP's VAT refund, the total amount of VAT credits which were due to OCP under Morocco's VAT regime is effectively reduced.[587]

Finally, we find the petitioner's contention that a benefit exists under 19 CFR 351.517(a) unconvincing. Under 19 CFR 351.517, which addresses the exemption or remission upon export of indirect taxes, a benefit exists to the extent that the amount remitted or exempted exceeds the amount levied with respect to the production and distribution of like products when sold for domestic consumption. For OCP, the record demonstrates, and the results of verification confirm,[588] that the credits accumulated under Morocco's VAT regime are based on the actual amount of VAT paid by OCP on its input purchases, and there are no additional credits granted upon export. While the petitioner contends that OCP receives a 20 percent rebate upon export of fertilizers, the petitioner does not cite to any record evidence to support this claim. Thus, there is no benefit to OCP under 19 CFR 351.517(a), which defines a benefit as the amount by which the credit upon export exceeds the taxes levied on the production and distribution of like products sold for domestic consumption. In OCP's case, the tax liability due to the GOM for exports is zero both with and without the program. For the domestic market, OCP is not required to collect VAT on domestic sales of fertilizers. Therefore, in OCP's case, it does not receive a benefit under 19 CFR 351.517(a).

[584] *See* GOM 11/4/20 SQR at SVI-5.
[585] *See* GOM IQR at VII-7-9.
[586] *See* OCP 11/3/20 SQR at 25-27 and VAT2-1.
[587] *See* OCP IQR at Exhibits VAT-6(a)-(n); *see also* GOM IQR at VII-8-9.
[588] *See* GOM ILOV SQR at VER-1-VER-4 and Exhibits VER1-4 and VER-6S.

Comment 24: Whether VAT Exemptions for Capital Goods, Machinery and Equipment is Countervailable

Petitioner's Case Brief:

- Commerce erred when it determined that VAT exemptions under Morocco's VAT regime are not countervailable because it was contrary to Commerce's established practice for VAT programs, which provide contingent benefits to their recipients.
- The record evidence demonstrates that OCP and its affiliate, JFCs I-V, received VAT exemptions on purchases of capital goods, machinery, and equipment; and that the VAT exemptions for capital goods, machinery, and equipment are contingent, such that the exempted VAT comes due if certain conditions related to investment projects are not met pursuant to Moroccan law.
- As in *Rebar from Turkey*, the GOM's provision of VAT exemptions under this program pursuant to investment agreements is contingent. This program effectively provides contingent-liability interest-free loans that convert into grants in the amount of the VAT exemption once the contingencies no longer apply.[589]
- This program provides a financial contribution in the form of "the foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income," within the meaning of section 771(5)(D)(ii) of the Act.[590]
- The program is specific under section 771(5A)(D)(iii) of the Act. It is likely that the actual recipients of the subsidy are limited in number, OCP and its cross-owned affiliates are predominant users of the subsidy, and/or OCP and its cross-owned affiliates received a disproportionate amount of the subsidy.

OCP's Rebuttal Arguments:

- The petitioner's reliance on *Rebar from Turkey* is misplaced. Commerce has found in subsequent Turkish cases that that VAT exemptions under the Investment Encouragement Plan are not countervailable.[591] Commerce found that Turkey (as in Morocco) maintain a "normal VAT system, which under our practice does not confer a benefit."[592]

Commerce's Position:

We disagree with the petitioner's contention that OCP's VAT exemptions under the VAT Exemptions for Capital Goods, Machinery, and Equipment program are countervailable. As explained above and in the Post-Preliminary Determination, because Morocco operates a normal VAT regime, VAT exemptions with respect to OCP and its cross-owned affiliates reduce the amount of input VAT paid, thereby reducing the amount of VAT credits OCP and its cross-owned affiliates accumulate. Therefore, as in the *Preliminary Determination* and based on the evidence on the record, the VAT exemptions obtained by OCP on its input purchases reduce the

[589] *See* Petitioner's Case Brief at 66-67 (citing *Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2016*, 84 FR 36051 (July 26, 2019) (*Rebar from Turkey*), and accompanying IDM at Comment 6).
[590] *Id.* at 68 (citing *Rebar from Turkey* IDM at Comment 6).
[591] *See* OCP's Rebuttal Brief at 95 (citing *Quartz from Turkey* IDM at Comment 2).
[592] *Id.*

credits it accumulated, and there are no additional credits granted; therefore, it does not receive a benefit under 19 CFR 351.510(a).

We disagree with the petitioner that *Rebar from Turkey* is informative here. As previously explained, a VAT exemption does not provide a benefit under a normal VAT system.[593] Further, *Rebar from Turkey*'s findings regarding the Turkish VAT system are outdated because we reexamined the Turkish VAT system in more recent cases, the facts of which are more analogous to the fact pattern in this investigation. In *Quartz from Turkey*, Commerce re-examined the VAT program in Turkey and found that VAT paid is offset in the same month or in the coming months, which supports a finding that this is a normal VAT system, which under our practice does not confer a benefit.[594] In *Prestressed Concrete Steel Wire from Turkey*, we continued our finding that the VAT system in Turkey does not confer a benefit.[595] Here, VAT exemptions received by OCP and its cross-owned affiliates on its input purchases reduce the credits they accumulated, and there are no additional credits granted; therefore, they do not receive a benefit under 19 CFR 351.510(a). We, therefore, find that the GOM's VAT regime did not confer a benefit to OCP, or its cross-owned producers, during the POI. Additionally, because the GOM reimburses VAT credits which were owed to OCP, we preliminarily find there is no revenue forgone pursuant to section 771(5)(D) of the Act. Accordingly, for the final determination, we determine that VAT exemptions under Morocco's VAT regime are not countervailable, as there is not a financial contribution or benefit provided to OCP.

Other Subsidies

Comment 25: Whether the Provision of Phosphogypsum Waste Disposal Is Countervailable

Petitioner's Case Brief:[596]

- Commerce erroneously did not countervail this subsidy program in the *Preliminary Determination*, stating that neither OCP nor its cross-owned affiliates used this program during the POI.
- Contrary to OCP's statement of non-use, the GOM and OCP both confirmed that OCP dumps phosphogypsum waste in Moroccan coastal waters and that the GOM is not enforcing the provisions of Moroccan law that prohibit such dumping.
- Law 81-12 prohibits all discharges that cause pollution of the coastline, except where authorized by the government.[597] This policy also requires industrial entities to set up a permanent system for the treatment of discharges.
- Record evidence demonstrates that the GOM is allowing OCP to dump its phosphogypsum wastes in Morocco's coastal waters in contradiction to Law 81-12.[598]

[593] *See Thai Shrimp* IDM at Comment 9.
[594] *See Quartz from Turkey* IDM at Comment 2.
[595] *See Prestressed Concrete Steel Wire Strand from the Republic of Turkey: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 85 FR 80005 (December 11, 2020) (*Prestressed Concrete Steel Wire from Turkey*), and accompanying IDM at 18.
[596] *See* Petitioner's Case Brief at 69-72.
[597] *Id*. at 70 (citing GOM IQR at IX-2 and Exhibit IX-1, Art. 37).
[598] *Id*. (citing GOM 11/4/20 SQR at SVIII-).

- By relieving OCP of the need to construct and maintain its own waste storage and disposal facilities, or to contract with a private third party, the GOM is providing a valuable waste disposal service to OCP, which constitutes a financial contribution within the meaning of section 771(5)(D)(iii) of the Act.
- The GOM has also confirmed that it is not assessing fines from OCP for violating Law 81-12, as is required by provisions under the law.[599] This constitutes a financial contribution within the meaning of section 771(5)(D)(ii) of the Act.
- The GOM's provision of phosphogypsum waste disposal services confers a benefit both as a provision of a service for LTAR within the meaning of section 771(5)(E)(iv) of the Act and as revenue foregone within the meaning of section 771(5)(E) of the Act.
- As OCP is the sole phosphate fertilizer producer in Morocco and, thus, the only entity dumping phosphogypsum waste, this program is *de facto* specific within the meaning of section 771(5A)(D)(iii) of the Act because OCP is a predominant user of the subsidy and because the GOM provides an exception to OCP with regard to the enforcement of waste disposal laws.
- Commerce also should find the program to be specific because the GOM has failed to provide the information necessary to reach a determination on this issue.

GOM's Rebuttal Brief:[600]

- Commerce correctly rejected the petitioner's allegation of a countervailable subsidy involving phosphogypsum waste disposal.
- The petitioner fails to demonstrate that any GOM authority performs a service or directs private parties to provide this service, or that any law requires a specific method of phosphogypsum waste disposal.
- Certain aspects of Law 81-12 have not yet come into effect. Specifically, Article 37 of Law 81-12 also requires supplemental legislation to create the administrative process to grant authorizations and set the fees.[601] However, GOM has not completed the administrative process foreseen by Law 81-12.
- Law 81-12 has not yet set the disposal limits or the specific method of disposal contemplated, nor does it specify the amount of penalties due for violations of such limits. Thus, the law currently has no authority to impose penalties on the disposal of phosphogypsum waste.
- The record establishes that there were no specific prohibitions or penalties in effect during the POI under Law 81-12. Therefore, no financial contribution or benefit was conferred upon OCP either in the form of provision of service for LTAR or revenue forgone.

OCP's Rebuttal Brief:[602]

- Commerce correctly found that the alleged Provision of Phosphogypsum Waste Disposal "program" was not used during the POI.

[599] *Id*. at 71 (citing GOM IQR at Exhibit IX-1, Art. 37).
[600] *See* GOM's Rebuttal Brief at 3-5.
[601] Id.at 4 (citing GOM IQR at IX-2).
[602] *See* OCP's Rebuttal Brief at 96-103.

- Law 81-12 imposes no disposal limits on which to predicate fees without the adoption of corresponding implementing legislation.
- The law specifies that after consultation with scientific research organizations, the relevant administration will issue a supplemental decree that will further define what constitutes pollution and establish the limits under which no penalties are incurred.[603] No such decree has been issued.
- The petitioner's argument that the GOM provided disposal services to OCP for LTAR by not requiring OCP to dispose of its phosphogypsum through stacking is nonsensical, procedurally improper, and unsupported by the record. There is no evidence that the GOM provided "waste disposal services" to OCP.
- Commerce declined to initiate on the petitioner's LTAR allegation regarding phosphogypsum by-product disposal and, instead, initiated only on the alternative allegation of revenue forgone. Thus, the petitioner's request that Commerce reconsider its decision regarding an LTAR inquiry is meritless, untimely, and improper.
- GOM has not forgone any revenue under Law 81-12, because any revenue theoretically owed under the statute would be based on the implementing legislation that has not yet been passed.
- The petitioner has failed to allege any plausible argument demonstrating specificity.
- The benchmark information that petitioners submitted to establish a benefit for this program as a provision of services for LTAR was untimely and procedurally improper. Furthermore, the benchmark information did not pertain to any allegation under investigation.
- Commerce did not request, and OCP did not have an opportunity to submit, information about the adequacy of remuneration for phosphogypsum waste disposal services.
- The petitioner's benchmark incorrectly assumes that OCP is unique in its decision to dispose of phosphogypsum into the sea and that phosphogypsum stacking is the only appropriate method of disposal.

Commerce's Position:

Commerce disagrees with the petitioner's argument that the GOM has provided waste disposal services for LTAR or forgone revenue for waste disposal penalties.

As an initial matter, Commerce initiated an investigation of this program under the revenue forgone provisions of the statute only.[604] We did state that, if we were to discover that this program should be also considered as services performed for LTAR pursuant to sections 771(5)(D)(iii) and 771(5)(E)(iv) of the Act, we would examine such a practice.[605] However, there is no record evidence that demonstrates that the GOM is providing waste disposal services to OCP at preferential rates. Furthermore, there is no record evidence supporting the petitioner's claim that the GOM is waiving a requirement that OCP construct and maintain its own waste storage and disposal facilities. Article 43 of Law 181-12 states that the authority "may" require

[603] *Id*. at 98 (citing OCP IQR at 138-39, Law 81-12 on the Coastline (2015), Art. 37 (App. PG-1); and GOM IQR at IX-2).
[604] *See* Initiation Checklist at 16.
[605] *Id*.

industrial facilities "to set up a permanent system for the treatment of discharges."[606] This does not indicate that such a requirement is routinely implemented or enforced. Thus, there is no support for a finding of financial contribution within the meaning of section 771(5)(D)(iii) of the Act. For this reason, we continue to examine this program as a potential subsidy in terms of revenue forgone.

In its questionnaire response, the GOM explains that Article 37 of Law 181-12 prohibits any "discharge causing pollution of the coastline" but under certain conditions allows for "the discharge of liquid discharges not exceeding specific limit values."[607] This special authorization is subject to "payment of a fee by the beneficiary of such authorization where the said discharges exceed general limit values."[608] Article 37 also states that the "general limit values and specific limit values for the discharge of liquid discharges" and "the methods for calculating the amount of the fee" will be established in a separate decree. The GOM explains that it has not yet issued the decree to establish laws, regulations, or policies to enforce the limits on liquid discharges because the process of conducting technical studies and consultations with all relevant ministries and with the private sector has not yet concluded.[609] Therefore, for this POI, we find that OCP did not use this program.

For the reasons discussed above, we continue to find for purposes of the final determination that OCP did not use this program.

Comment 26: Whether the Provision of Phosphogypsum Waste Disposal Was Properly Initiated

OCP's Case Brief:[610]

- Commerce should not have investigated phosphogypsum by-product disposal because the Petition failed to plausibly allege the existence of each element necessary to impose countervailing duties.
- While Commerce did not countervail the alleged program on the basis that OCP did not use this service during the POI, Commerce never should have initiated an investigation or sought information from OCP into this alleged program.
- For financial contribution, the Petition alleged that the GOM did not collect fees or fines to which it was entitled under Moroccan environmental laws.[611] However, the Petition did not provide any evidence that such fees had actually been established or what those fees might be, thus failing to plausibly allege revenue forgone.
- Because the Petition does not include any evidence of fees established for the violation of Moroccan environmental laws, there is no evidentiary basis for a benefit allegation.
- Petitioner alleged that the program is *de facto* specific because OCP is the "only entity dumping phosphate gypsum."[612] However, the Moroccan laws, which the petitioner

[606] *See* GOM IQR at Exhibit IX-1 at Article 43.
[607] *Id*., Exhibit IX-1 at Article 37.
[608] *Id*.
[609] *See* GOM 11/4/20 SQR at SVIII-2.
[610] *See* OCP's Case Brief at 11-14.
[611] *Id*. at 13 (citing Petition at II-17).
[612] *Id*. at 14 (citing Petition at II-18).

cites, prohibit improper waste disposal by any company and cover all by-products.[613] Thus, the petitioner failed to plausibly allege specificity.

Petitioner's Rebuttal Brief:[614]

- Pursuant to sections 702(b)(1) and 771 of the Act, Commerce commences a CVD proceeding with respect to an alleged subsidy program if the petition alleges the three elements of a countervailable subsidy based on information that is "reasonably available to the petitioner."
- In *RZBC Grp. Shareholding Co. v. United States*, the CIT maintained that the threshold for initiation is "easygoing" and that most petitions are granted, "unless the allegations are clearly frivolous, not reasonably supported by the facts alleged or . . . omit important facts which are reasonably available to the petitioner."
- To support its allegation regarding this program, the petitioner relied on information that was reasonably available: Moroccan statutes, industry reports, publicly available OCP documents, and scientific studies. In similar situations, Commerce has previously found that the threshold for initiation had been met.[615]
- OCP vastly overstates the information that could have been reasonably available to the petitioner, including evidence on the amount of fees and revenue forgone. OCP misleadingly relies on the current record to suggest that Commerce erred in investigating these programs.

Commerce's Position:

We agree with the petitioner that OCP's argument is over reliant on information that has been provided throughout this investigation.[616] The petitioner correctly pointed out that, under sections 702(b)(1) and 771 of the Act, Commerce must initiate a CVD proceeding with respect to an alleged subsidy program if the petition alleges the three elements of a countervailable subsidy— financial contribution by an authority, conferral of a benefit, and specificity of the subsidy — and the allegations are "accompanied by information reasonably available to the petitioner" that supports the allegations.[617] In our Initiation Checklist, we analyzed the petitioner's allegations with respect to each of these three elements, and explained where within the Petition there was support for those allegations.[618]

OCP argues that the financial contribution and benefit allegations were insufficient because punitive fees referenced in Morocco's environmental laws had not yet been established by a separate decree. However, this information was not apparent until after we initiated on this program, when the GOM provided sufficient explanations on how the GOM administers the relevant laws and regulations in response to Commerce's questionnaire.[619] Furthermore, without examining the GOM's policy regarding pollutant discharge and its enforcement of these policies,

[613] *Id*. (citing Petition at II-18 and Exhibits II-31–II-32).
[614] *See* Petitioner's Rebuttal Brief at 8-11.
[615] *Id*. at 10 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 FR 15539 (April 2, 2002), and accompanying IDM at 6–7).
[616] *See* Initiation Checklist at 15-16.
[617] *See* sections 702(b)(1) and 771 of the Act.
[618] *See* Initiation Checklist at 15–16.
[619] *See* GOM IQR at Exhibit IX-1.

Commerce was unable to reasonably determine how industries are affected by the restrictions on waste disposal.

Commerce has already determined that the petitioner provided sufficient evidence to initiate an investigation to determine whether a countervailable subsidy is being provided in accordance with section 702 of the Act. OCP has not provided any reason to justify a reversal of this decision. Therefore, we continue to find that the investigation of this program was properly initiated.

Comment 27: Whether the Provision of Rail Service for LTAR is Specific

OCP's Case Brief:[620]

- ONCF's provision of rail service to OCP was not specific.
- Commerce reasoned that OCP's share of ONCF's freight business made it the "predominant user" of rail transport services under section 771(5A)(D)(iii)(II) of the Act.[621] However, Commerce's analysis omitted any consideration of the diversification of the Moroccan economy, as required by the statute.
- The Moroccan economy is relatively concentrated with the phosphate industry accounting for a large portion of the economic activity within Morocco.[622] As OCP is the only Moroccan entity with phosphate mining rights and comprises essentially the entire phosphate industry in Morocco,[623] OCP's heavy use of ONCF's rail transport services is a natural consequence of OCP's substantial role in the Moroccan economy.
- The CAFC has warned that focusing solely on a respondent's share of a subsidy without considering the broader economic context "could produce an untenable result, *i.e.*, that a benefit conferred on a large company might be disproportionate merely because of the size of the company."[624]
- Commerce should take the economic diversification of the Moroccan economy into account in any *de facto* specificity analysis. With this consideration, record evidence demonstrates that the provision of rail was not *de facto* specific.

Commerce's Position:

Because Commerce has already determined that the provision of rail service does not provide a benefit during this POI and, thus, the program is not countervailable, we need not address OCP's arguments regarding *de facto* specificity.[625] Regardless of whether the provision of rail service constituted a financial contribution and was specific, Commerce does not find the program to be countervailable during the POI on the basis that there is no benefit.

[620] *See* OCP's Case Brief at 99-101.
[621] *Id*. at 99 (citing Post-Preliminary Decision Memorandum at 14).
[622] *Id*. at 100 (citing GOM IQR at V-15).
[623] *Id*. (citing GOM IQR at V-15 and Exhibit V-12).
[624] *Id*. at 101 (citing *AK Steel Corp. v. United States*, 192 F.3d 1367, 1385 (Fed. Cir. 1999)).
[625] *See* Post-Preliminary Determination at 9-14.

VII. RECOMMENDATION

We recommend approving all of the above positions. If these positions are accepted, we will publish the final determination in the *Federal Register* and will notify the U.S. International Trade Commission of our determination.

☒	☐
Agree	Disagree

2/8/2021

X 

Signed by: CHRISTIAN MARSH

Christian Marsh
Acting Assistant Secretary
for Enforcement and Compliance