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CLIENT BULLETIN

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Dumping, CVD Petition Targets Magnesia Carbon Bricks – China, Mexico

Special Duties Requested

Resco Products, Inc., a United States producer of magnesia carbon refractory bricks, has filed a petition seeking the imposition of antidumping duties and countervailing duties on imports of magnesia Carbon Bricks from the People's Republic of China and Mexico. The petition alleges that imports of such refractory bricks from China and Mexico are being sold for export to the United States at less-than-fair-value ("LTFV") prices, and are being subsidized by the Chinese government, and that the imports are causing or threatening material injury to the industry producing such bricks in the United States.

The petition requests that special antidumping and countervailing duties be imposed on future imports of these goods to offset the effect of the alleged dumping and subsidization.

This Memorandum provides some information concerning the petition, and discusses how importers can protect their interests.

Which Products are Targeted?

The petition seeks the imposition of special duties on "resin or pitch bonded refractory bricks typically containing at least 70 percent magnesia with carbon levels ranging from trace amounts to 30 percent". The magnesia grain may be in the form of fired

magnesia made from natural magnesite, sea-water magnesia made by firing magnesium hydroxide extracted from seawater, and brick magnesia made by firing magnesium hydroxide extracted from seawater, and brine magnesia produced from high-salt concentration water deep wells.

The carbon source can include hydrocarbons such as coal tar pitch, petroleum or other pitches, waxes, synthetic resins, carbon blacks, coal or amorphous or flake graphites. Natural-flake graphite in crystalline form is most commonly used, as it limits slag penetration into the brick structure.

Magnesia carbon bricks (MCB) can also be enhanced with other treatments, including pitch or resin impregnation, high temperature heat treatments and metal casing.

MCB are refractories used to provide thermal and corrosion resistance in various industrial applications, primarily iron and steel production. MCB contain from 0 to 15% of various metals, metal alloys and metal carbides, added to enhance strength.

MCB are typically classified in Harmonized Tariff Schedule (HTS) subheadings 6902.10.10.00 (magnesite bricks), 6902.10.50.00 (refractory bricks . . . containing more than 50% by weight of the elements magnesium, calcium or chromium), 6815.91.00 (Articles of stone or other mineral substances) or 6815.99.10 (also covering articles of stone or other mineral substances).

Petition Allegations

The petition claims that imports from China and Mexico have increased substantially in recent years, causing injury to United States producers of MCB. The petition's main focus is on China, from which imports have increased by 4% from 2006 to 2008 (from 65,4128 tons to 67,882 tons) and the value of which have increased by nearly 30% over that time, from \$38.0 million in 2006 to \$50.8 million in 2008.

The petition claims that less than fair value (LTFV) margins for MCB range from 96% to 396%, with a weighted average of 199%.

The petition cites expansion of production capacity by ORIND, a leading Chinese producer, and Refmex, the major Mexican producer, claiming that those countries already had excess production capacity, so that the new capacity is being devoted to exports to the United States. The petition cites a threat of future injury by reason of increased imports.

The petition also asserts that Chinese and Mexican MCB are undercutting United States prices, costing US producers market share, and forcing reductions in US employment in MCB manufacture.

However, the petition also notes that a drop-off in US steel demand and manufacturing has triggered increased inventory levels in the MCB industry.

How Are Antidumping and Countervailing Duties Assessed?

Antidumping duties are imposed on a class or kind of merchandise whenever goods are sold for export to the United States at prices which, adjusted back to an "ex factory" basis, are less than the prices at which such or similar merchandise is sold in the country of exportation. Where such "dumping" ("less than fair value") sales occur, and where the dumped

goods are causing material injury to a domestic industry producing a "like product", United States Customs and Border Protection will be instructed to assess special duties – in addition to any other applicable duties – in an amount equal to offset the unfair pricing level.

Thus, for example if a brick is sold for export to the United States for a price of \$1.25, adjusted back to an ex works basis, and an identical Mexican brick is sold in Mexico at a price of \$1.75 (again, adjusted back to an ex works basis), a duty equal to the difference would be assessed, i.e. $\$1.75 - 1.25 = \0.50 .

Countervailing duties are imposed to offset the effects of unfair foreign production and export subsidies. If a given brick from China receives subsidies valued at \$0.75, then a countervailing duty (CVD) will be assessed in the amount.

Who Pays Antidumping Duties and CVDs?

Antidumping and countervailing duties, like other duties, are the personal obligation of the importer of record. Furthermore, it is important to note that antidumping and countervailing duties, unlike other duties, are not eligible for duty drawback.

Companies which continue to act as importer of record for goods involved in an antidumping investigation run the risk of becoming liable for payment of these special duties.

Antidumping and CVD Investigation Procedures

In order for antidumping duties to be imposed on a class or kind of imported merchandise, two findings must be made

1. The United States Department of Commerce, International Trade Administration ("Commerce") must find that the goods are being sold for export to

the United States at “less than fair value”; prices, or are receiving unfair subsidies; and

2. The United States International Trade Commission (ITC) must find that domestic producers of a like product are being materially injured, or threatened with material injury, by reason of the dumped and/or subsidized imports.

What Are The Timelines for AD and CVD Investigations?

The statute sets forth short deadlines for the agencies to conduct their investigations. Both agencies conduct preliminary and final investigations. The statutory schedule for antidumping investigations is summarized below: The schedule for CVD investigations is substantially similar and where, as in the case of magnesia carbon bricks, both dumping and subsidization are alleged, the agencies usually try to harmonize the investigative timetables.

Commerce determination of sufficiency of petition: within 20 days of the date the petition was filed. **May be extended** to 40 days if Commerce must determine whether the domestic industry supports the petition. If the petition is **sufficient**, the investigation is **initiated**. If the petition is **insufficient**, Commerce will not initiate an investigation and the proceeding is **terminated**.

ITC preliminary determination of material injury: within 45 days of the date on which the petition was filed. If Commerce's initiation determination was extended, the ITC is provided with a **similar extension** for its preliminary determination. If the ITC reaches an **affirmative preliminary** determination, the investigation **proceeds**. If the ITC reaches a **negative** determination, the investigation is **terminated**.

All that is needed for an affirmative determination is for the ITC to find a “reasonable

indication” of injury to the domestic industry – a finding made in over 90% of all cases.

Commerce preliminary determination of LTFV sales/dumping: within 140 days after the investigation was initiated (in most cases, 160 days from the date on which the petition was filed). **May be extended** by up to 50 days if Commerce determines the case is “extraordinarily complicated”. If Commerce reaches an **affirmative** determination, “**provisional**” duties are imposed for the duration of the investigation. If Commerce reaches a **negative** determination, **no “provisional” duties** are imposed. In **either event**, the investigation **proceeds**.

Commerce final determination of dumping: within 75 days of the Commerce preliminary determination. **May be extended** by up to 60 days upon the request of participating exporters. If Commerce reaches an **affirmative** final determination, the investigation **proceeds** to an ITC final injury investigation. If Commerce reaches a **negative** determination, the investigation is **terminated**.

ITC final determination of material injury: if the **Commerce** preliminary determination was **affirmative**, by the **later** of (a) 120 days after the Commerce preliminary determination, or (b) 45 days after the Commerce final determination; if the **Commerce** preliminary determination was **negative**, within 75 days after the Commerce final affirmative determination.

The minimum time for an antidumping investigation that proceeds through an ITC final determination is 280 days; the maximum time is 410 days.

Who Can Participate in an Antidumping or CVD Investigation?

Firms with standing to participate in an antidumping investigation include domestic producers of a “like product” (i.e., a product which is “like” the imported merchandise involved in the investigation); trade associations, a majority of whose members produce a like product; foreign manufacturers and exporters; and importers.

In order to be able to protect their rights, an “interested party” must also become a “party to the proceeding”, i.e., the investigation before Commerce and the ITC. Such a party must submit information or answer agency questionnaires, and may submit briefs and data to the agency for use in the investigation.

Judicial review of antidumping and countervailing duty matters occurs prior to the final assessment of duties, and the liquidation of Customs entries. An interested party who fails to become a “party to the investigation” effectively forfeits its right to challenge antidumping determinations. Unlike regular Customs duties, antidumping and countervailing duties cannot be challenged by filing a protest against Customs’ liquidation of an import entry. Administrative and judicial review must be sought before Customs liquidates the entry?

When Do Entries Become Subject to Special Duties?

As noted above, if Commerce makes a preliminary affirmative determination of less than fair value sales, it will direct Customs to collect estimated antidumping duties on entries made after that date. The earliest date this can occur is 160 days after the petition is filed, in the case of antidumping duties. Thus, MCBs from early January, 2010 might become subject to antidumping duties or CVDs.

In certain cases – where imports surge after an antidumping or countervailing duty petition is filed – Commerce can determine that “critical circumstances” exist. In such cases, Customs can withhold liquidation of entries made up to 90 days before the date the preliminary LTFV or subsidy determination is made, making those entries potentially subject to special duties. However, “critical circumstances” findings are the exception, rather than the norm.

What Special Rules Apply in AD Investigations of Chinese Goods?

Because China is considered to have a non-market economy, Commerce uses a different “surrogate value” methodology in deciding whether Chinese goods are dumped in the United States. In these cases, the price at which goods are sold for export to the United States is compared with a “surrogate value”. The “surrogate value” is determined by identifying the various “factors of production” used to make a particular product (materials, energy, labor costs, transportation, etc.) and then valuing those factors using prices in a market economy country considered to have a comparable level of economic development to China. India and Indonesia are the most commonly used surrogate countries. The MCB petition asks that India be used as the surrogate.

Obviously, the use of the “surrogate” methodology makes it more difficult to accurately predict whether Chinese-origin goods will be sold for export to the United States at “dumped” prices. The Commerce Department’s decision to use one country or another as the surrogate, or to pick one material rather than another in conducting its surrogate value analysis, can make a substantial difference in whether margins of dumping are found.

In most cases where Chinese goods have been investigated, the surrogate analysis has yielded margins of dumping.

China AD Investigations: “Section A” Respondents

Because China is a non-market economy country, Commerce assumes that all Chinese producers are part of a single “China wide” entity, controlled by the Chinese government. Commerce establishes a “China-wide” antidumping duty rate applicable to all sales from the Chinese state enterprise.

However, individual Chinese manufacturers or exporters may obtain their own antidumping rates if they establish, to Commerce’s satisfaction, that they are free from Chinese state control. [Nowadays, most Chinese producers and exporters are able to make that showing]. In an antidumping investigation of Chinese goods, Commerce will select about 3 or 4 of the largest producers/exporters as “mandatory respondents”. These companies must submit extensive data concerning their sales, costs and factors of production. If they establish that they are independent from China state control, they qualify for their own individual antidumping duty rate.

In addition to mandatory respondents, Chinese producers and exporters who are free from Chinese state control can ask Commerce to establish a separate antidumping rate to cover them. These “Section A” respondents, submit to Commerce information corresponding to that sought on Section A of the Commerce antidumping questionnaire, showing their independence from state control. They do not submit their individual cost or pricing data. If Commerce finds them to be free from Chinese state control, these “Section A respondents” receive an antidumping margin equal to the average margin of the mandatory respondents who proved their independence.

Thus, assuming that Chinese producers X, Y and Z are selected as “mandatory respondents” in an antidumping investigation, and all of them prove their freedom from Chinese state control. The final results of a Commerce LTFV

investigation might establish LTFV margins as follows:

Respondent X	3.0%
Respondent Y.....	12.0%
Respondent Z	15.0%
Section A Respondents	10.0%
China Wide Rate	60%

A “Section A” respondent would receive an LTFV margin based on the weighted average margin of respondent firms – this is usually much lower than the default “China wide” rate.

Importers who purchase MCB from smaller Chinese producers should work with their suppliers to have the suppliers submit the data necessary for designation as “Section A” respondents.

Agency Questionnaires

Importers of MCB from China and Mexico can expect to receive questionnaires from the ITC shortly. These questionnaires will seek extensive business information concerning the volume and value of the company’s MCB imports, and information concerning the products imported. The ITC will impose a tight deadline on answering these questionnaires, which have the force and effect of subpoenas.

The ITC will issue similar questionnaires when it conducts its final injury investigation early next year.

Questionnaire responses will be treated as confidential. Importers should endeavor to provide responses which are as detailed and accurate as possible.

Our firm stands ready to assist companies in responding to ITC and Commerce questionnaires.

What Should MCB Importers Be Doing Now?

Importers of MCB from China and Taiwan, targeted in the antidumping/CVD petition, should consider undertaking various actions. These include the following:

- > Determining whether to become a “party to the proceeding” to oppose the antidumping petition before Commerce and the ITC;
- > Deciding whether to continue acting as importer of record of goods covered by the petition;
- > Assisting Chinese producers/suppliers in securing “Section A” respondent status;
- > Forming industry alliances or ad hoc coalitions to participate in the antidumping and countervailing duty determinations; and
- > Preparing timely and complete answers to ITC questionnaires.

Court of International Trade, the Court of Appeals for the Federal Circuit, Federal District Courts as well as foreign tribunals.

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About Neville Peterson LLP

For over two decades, Neville Peterson LLP has been one of the United States’ leading specialty law firms concentrating exclusively in international trade and Customs matters. With offices in New York City and Washington, D.C., and affiliated offices abroad, the firm has provided counseling and representation to clients before Customs authorities, administrative tribunals and courts around the world.

The firm also has extensive experience in antidumping, countervailing duty and trade relief proceedings, as well as a full-range export controls practice.

In recent years, Neville Peterson LLP has also represented clients on the forefront of international intellectual property issues.

The firm has an extensive litigation practice, and regularly appears before the United States