Australian Government
Anti-Dumping Review Panel

Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

Use this form[1] to apply for review of a reviewable decision of the Minister (or his or her Parliamentary Secretary) made on or after 2 November 2015.

Any interested party[2] may lodge an application for review to the ADRP of a review of a ministerial decision.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Fees
Your application must be accompanied by the application fee. Please provide a copy of your proof of payment with the application. Information about fees and refunds is on the ADRP website.

Time
Applications must be made within 30 days after public notice of the reviewable decision is first published.

Conferences
You or your representative may be asked to attend a conference with the Panel Member appointed to consider your application before the Panel gives public notice of its intention to conduct a review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. The Panel may also call a conference after public notice of an intention to conduct a review is given on the ADRP website. Conferences are held between 10.00am and 4.00pm (AEST) on Tuesdays or Thursdays. You will be given seven (7) business days' notice of the conference date and time. See the ADRP website for more information.

[1] Form approved by the Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.
[2] As defined in section 269ZX *Customs Act 1901*.

Further application information

You or your representative may be asked by the Panel Member to provide further information to the Panel Member in relation to your answers provided to questions 10, 11 and/or 12 of this application form (s269ZZG(1)). See the ADRP website for more information.

Withdrawal

You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

In certain circumstances some or all of your application fee may be refunded if you withdraw your application. See the ADRP website for more information.

If you have any questions about what is required in an application refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name:	**Nervacero S.A.**
Address:	**Barrio de Ballonti** **Valle de Trapaga-Trapagaran** **48510, Vizcaya** **Spain**
Type of entity (trade union, corporation, government etc.):	**Corporation**

2. Contact person for applicant

Full name:	**Francesc Cardona**
Position:	**Global Support Director – Public Affairs**
Email address:	**fcardona@gcelsa.com**
Telephone number:	**+34 937 730500**

3. Set out the basis on which the applicant considers it is an interested party

Nervacero S.A. is a corporate entity which is directly concerned with the manufacture and exportation to Australia of the goods to which this application relates.

4. Is the applicant represented?

Yes ☑

No

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.*

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under:

☒ Subsection 269TG(1) or (2) – decision of the Minister to publish a dumping duty notice

☐ Subsection 269TH(1) or (2) – decision of the Minister to publish a third country dumping duty notice

☐ Subsection 269TJ(1) or (2) – decision of the Minister to publish a countervailing duty notice

☐ Subsection 269TK(1) or (2) decision of the Minister to publish a third country countervailing duty notice

☐ Subsection 269TL(1) – decision of the Minister not to publish duty notice

☐ Subsection 269ZDB(1) – decision of the Minister following a review of anti-dumping measures

☐ Subsection 269ZDBH(1) – decision of the Minister following an anti-circumvention enquiry

☐ Subsection 269ZHG(1) – decision of the Minister in relation to the continuation of anti-dumping measures

6. Provide a full description of the goods which were the subject of the reviewable decision

The goods which are the subject of the reviewable decision are hot-rolled deformed steel reinforcing bar whether or not in coil form, commonly identified as rebar or debar, in various diameters up to and including 50 millimetres, containing indentations, ribs, grooves or other deformations produced during the rolling process.

All steel reinforcing bar meeting the above description of the goods regardless of the particular grade or alloy content or coating, are Included in the description of the goods.

Plain round bar, stainless steel and reinforcing mesh are excluded from the description of the goods.

7. Provide the tariff classifications/statistical codes of the imported goods

At the time the original investigation was initiated by the Anti-Dumping Commission, the tariff classifications/statistical codes of the imported goods under Schedule 3 to the *Customs Tariff Act* 1995 were as follows:

- **7214.20.00 (statistical code 47);**
- **7228.30.90 (statistical code 49);**
- **7213.10.00 (statistical code 42);**
- **7227.90.90 (statistical code 42).**

The statistical codes applying to some of these tariff classifications changed after the original investigation was initiated, as follows:

- **as of 1 July, 20157228.30.90 (statistical code 49) became 7228.30.90 (statistical code 40);**
- **as of 1 January 2015, 7227.90.90 (statistical code 42) became 7227.90.90 (statistical codes 02 and 04);**

As of 1 January 2015, a new tariff classification and statistical code became applicable to some of the goods, namely 7227.90.10 (statistical code 69).

8. Provide the Anti-Dumping Notice (ADN) number of the reviewable decision

If your application relates to only part of a decision made in an ADN, this must be made clear in Part C of this form.

2015/133

9. **Provide the date the notice of the reviewable decision was published**

19 November 2015

Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application

See Attachments A(1) and A(2)

PART C: GROUNDS FOR THE APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the grounds that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so: ☒

10. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision.

See Attachment B (submitted in clearly marked confidential and non-confidential versions)

11. Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10.

See Attachment B (submitted in clearly marked confidential and non-confidential versions)

12. Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.

See Attachment B (submitted in clearly marked confidential and non-confidential versions)

Do not answer question 12 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.

PART D: DECLARATION

The ~~applicant/~~the applicant's authorised representative *[delete inapplicable]* declares that:

- The applicant has paid the application fee and attached a copy of proof of payment to this application;
- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* it gives public notice of its intention to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected;
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature: 

Name: **Daniel Moulis**

Position: **Principal Partner**

Organisation: **Moulis Legal**

Date: **21 December 2015**

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question 4.

Provide details of the applicant's authorised representative

Full name of representative:	**Daniel Moulis**
Organisation:	**Moulis Legal**
Address:	**6/2 Brindabella Circuit** **Brindabella Business Park** **Canberra International Airport** **Australian Capital Territory** **Australia 2609**
Email address:	**daniel.moulis@moulislegal.com**
Telephone number:	**+61 2 61631000**

Representative's authority to act

A separate letter of authority may be attached in lieu of the applicant signing this section

See Attachment C

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature: .....

(Applicant's authorised officer)

Name:

Position:

Organisation:

Date: / /

A copy of proof of payment of the application fee is at Attachment D

ATTACHMENT B

NON-CONFIDENTIAL

21 December 2015

In the Anti-Dumping Review Panel

Application for review
Steel reinforcing bar exported from the Republic of Korea, Singapore, Spain and Taiwan

Nervacero S.A.

Introduction

By way of an application to the Anti-Dumping Commission ("the Commission") dated 4 August 2014, OneSteel Manufacturing Pty Limited ("OneSteel") applied for a dumping investigation into imports of certain steel reinforcing bar ("rebar") from the Republic of Korea, Malaysia, Singapore, Spain, Taiwan, the Kingdom of Thailand and the Republic of Turkey.

In response to that application, the Commission initiated the subject anti-dumping investigation in respect of rebar exported from the subject countries on 17 October 2014.

On 11 November 2015, at the conclusion of the investigation, the Parliamentary Secretary to the Minister for Industry, Innovation and Science ("the Parliamentary Secretary") decided to impose dumping duties on rebar exported to Australia from Korea, Singapore, Spain and Taiwan (except, in the case of Taiwan, from Power Steel Co., Ltd).[1]

Specifically, the Parliamentary Secretary decided to publish notices in relation to rebar exported from those countries under Sections 269TG(1) and (2) of the *Customs Act 1901* ("the Act").[2] These notices had the effect of imposing dumping duties on exports from the exporters to which they applied.

Nervacero S.A. is a manufacturer and exporter of rebar operating from the town of Valle de Trapaga-Trapagaran in the province of Vizcaya (also referred to as "Biscay") in the Basque region of Spain.

Nervacero S.A. seeks review by the Anti-Dumping Review Panel ("the ADRP"), under Sections 269ZZA(1)(a) and 269ZZC, of the decision (or decisions) made by the Parliamentary Secretary to impose dumping measures against its exports of rebar to Australia, in two respects.

The following table summarises Nervacero S.A.'s application for review:

Grounds	**Correct/preferable decision**	**Material difference**
That the question of whether rebar exported by	Nervacero S.A.'s level of dumping to be determined	Using Nervacero S.A.'s export prices and normal values, Nervacero S.A.'s level of

[1] Based on the recommendations contained in *Report No. 264 – Alleged Dumping of Steel Reinforcing Bar Exported From the Republic of Korea, Malaysia, Singapore, Spain, Taiwan, the Kingdom of Thailand and the Republic of Turkey*, 19 October 2015 ("Report 264").

[2] A reference in this Application to "the Act", or to a "Section", "Subsection" or "Subparagraph" is a reference to a Section, Subsection or Subparagraph of the Act, unless otherwise specified.

Nervacero S.A. had been dumped and, if so, the level of any dumping, should have been determined using export prices and normal values determined for Nervacero S.A.	using export prices and normal values determined for Nervacero S.A.	dumping was **[CONFIDENTIAL TEXT DELETED – number]**% (which is negligible). On that basis, instead of imposing dumping duties on Nervacero S.A.'s exports, the investigation as against Nervacero S.A. should have been terminated. The decision that should have been made is materially different to the reviewable decision.
That, in the alternative to the first ground, the exportation of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar by Nervacero S.A. – **[CONFIDENTIAL TEXT DELETED – commercial arrangement]** – cannot be found to have caused injury to OneSteel.	The exportation of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar by Nervacero S.A. did not cause injury to OneSteel.	If the exportation of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar by Nervacero S.A. did not cause injury to the Australian industry producing like goods, then instead of imposing dumping duties on Nervacero S.A.'s exports of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar those imports should have been excluded from the imposition of dumping duties. The decision that should have been made is materially different to the reviewable decision.

We now address the requirements of both the form of application that has been approved by the Senior Member of the Review Panel under Section 269ZY, and of Section 269ZZE(2)(b) in relation to each such ground, being those requirements not already addressed within the text of the approved form itself, separately.

A First ground – working out Nervacero S.A.'s level of dumping

We draw attention to the following relevant facts for the purposes of presenting this ground of review, and without limiting the facts which may be relevant:

(1) The Commission calculated a dumping margin in respect of Nervacero S.A.'s exports of rebar to Australia during the period of investigation ("POI") of 1**[CONFIDENTIAL TEXT DELETED – number]**%.[3]

(2) The Commission calculated a dumping margin in respect of Compania Espanola de Laminacion, S.L.'s exports of rebar to Australia during the POI of **[CONFIDENTIAL TEXT DELETED – number]**%.[4]

(3) The Commission calculated a "collapsed" dumping margin in respect of both Nervacero S.A.'s and Compania Espanola de Laminacion, S.L.'s exports of rebar to Australia of 3.0%;[5]

(4) As per *Exporter Visit Report – Compania Espanola de Laminacion, S.L. & Nervacero S.A. S.A.* ("the Exporter Visit Report"):

> *Celsa Barcelona and Celsa Nervacero are both separate legal entities* **[CONFIDENTIAL TEXT DELETED – non-public company corporate structure]***and form part of the Celsa group of companies. The Celsa group is privately owned.*
>
> *In addition to Celsa Barcelona and Celsa Nervacero, the Celsa group owns companies operating other steel plants in Spain, Poland, the United Kingdom, France and Norway. Each facility operates as a separate legal entity.* [6]

(5) Nervacero S.A. manufactures rebar in its own production facility at Valle de Trapaga-Trapagaran, which is in the province of Biscay. Valle de Trapaga-Trapagaran is on the Atlantic coast of Spain.

(6) Compania Espanola de Laminacion, S.L. manufactures rebar 600 kilometres away in its own production facility at Castellbisbal, which is on the outskirts of Barcelona and immediately proximate to the Mediterranean coast of Spain.

(7) Nervacero S.A.'s rebar is exported from Spain by Nervacero S.A.'s freight companies to Australia via French ports and/or Algiers. Compania Espanola de Laminacion, S.L. exported rebar from Spain to Australia via Italian ports.

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3 See Exporter Visit Report, Confidential Appendix 5.2.

4 See Exporter Visit Report, Confidential Appendix 5.1.

5 See Exporter Visit Report, Confidential Appendix 6.

6 See Exporter Visit Report, page 9.

(8) **[CONFIDENTIAL TEXT DELETED – provision of services]** services are provided **[CONFIDENTIAL TEXT DELETED – provision of services]**, on a fee for service basis.

(9) Nervacero S.A. and Compania Espanola de Laminacion, S.L. have separate costs, separate factory and corporate management, different suppliers and other service providers (some common, and some non-common), and different product mixes in terms of their respective production and sales.

10 Grounds

Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision[7]

The level of dumping that the Commission determined in respect of Nervacero S.A. was 3.0%. However, that level of dumping was determined by Commission using the normal value and export price information derived not only from Nervacero S.A., but also from another exporter, Compañía Española de Laminación, S.L. If Nervacero S.A.'s level of dumping had been determined by the Commission only in respect of the information derived from Nervacero S.A., its level of dumping would have been **[CONFIDENTIAL TEXT DELETED - number]**%. Pursuant to Section 269TDA(1), this is considered to be "negligible" (less than 2%). We submit that Nervacero S.A. was not the exporter of goods manufactured by Compañía Española de Laminación, S.L, and *vice versa*. On that basis the dumping margin worked out for Nervacero S.A. should have been **[CONFIDENTIAL TEXT DELETED - number]**%, and not 3.0%. Accordingly, the investigation should have been terminated as against Nervacero S.A., and the Parliamentary Secretary would not have been empowered to impose dumping duties on Nervacero S.A.'s exports.

The ultimate basis for the combining of the data derived from the two companies as explained in Report 264 was the following:

> *The Commission remains satisfied that Celsa Barcelona and Celsa Nervacero S.A. should be treated as associates, and therefore has determined a single dumping margin for both.*[8]

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[7] As per the requirement of Section 269ZZE(2)(b) of the Act, and question 10 of the form approved under Section 269ZY of the Act.

[8] See Report 264, page 46.

There can be no doubt that Nervacero S.A. and Compania Espanola de Laminacion, S.L. are "associates" as defined by Section 269TAA. This much is plain from the Exporter Questionnaire that was lodged by Nervacero S.A. with the Commission. It indicates that Nervacero S.A. and Compania Espanola de Laminacion, S.L. are each **[CONFIDENTIAL TEXT DELETED – details of corporate group]** member companies of a group of companies known as the Celsa group.[9]

However, there is nothing in the Act which includes an "associate" within the definition of "exporter". The purpose of the definition of the word "associate" in the Section to which the Commission refers[10] is for the purpose of considering the relevance of that relationship – ie the relationship of "associates" - on transactions that take place between the bodies corporate (or persons) that are "associates".

It is to be noted that the definition of "associate" in Section 269TAA(4)(b) applies to the entirety of Part XVB. Nonetheless, in the other places in which it is used it does not relate to the identification of an entity as an exporter or to the determination of levels of dumping by an exporter. Those other instances are as follows:

- Section 269TAB(1)(b) – in which the word "associate" is used in the context of transactions by an importer of goods under consideration with an exporter;
- Sections 269TAB(5), 269ZDBB, 269W and 269X – in which the word "associate" is used in the context of transactions by an importer with a party to whom the importer sells the goods; and
- Section 269ZE(4) in which the word "associate" is used for the purposes of defining when entities are to be considered as related parties for the purposes of an accelerated review of a dumping notice in respect of one of them (and only for the purposes of that Section).

None of these Sections relate to the concept of an exporter being an "associate" of another exporter, such as might thereby constitute the two exporters as "the exporter" for the purposes of working out the level of dumping for an exporter.

Accordingly we do not think that the Commission's stated basis for its determination of a single dumping

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9 See Nervacero S.A.'s *Exporter Questionnaire*, Attachment 1 (confidential attachment).

10 The Section to which the Commission refers is Section 269TAA(4)(b):

The Commission is therefore of the view that in accordance with subsection 269TAA(4)(b) Celsa Barcelona and Celsa Nervacero S.A. could be considered to be associates of each other. (Report 264, page 45)

margin for both Nervacero S.A. and Compania Espanola de Laminacion, S.L. – ie that they are "associates" – can be considered to be a legal justification for such an approach in and of itself. The proper exercise at law is to consider Section 269TACB, which has as its object the task of *"[w]orking out whether dumping has occurred and levels of dumping"*, and the other Sections that are necessarily involved in that same task. It is to this exercise that we now turn.

Section 269TACB(1) provides as follows:

> *If:*
>
> *(a) application is made for a dumping duty notice; and*
>
> *(b) export prices in respect of goods the subject of the application exported to Australia during the investigation period have been established in accordance with section 269TAB; and*
>
> *(c) corresponding normal values in respect of like goods during that period have been established in accordance with section 269TAC;*
>
> *the Minister must determine, by comparison of those export prices with those normal values, whether dumping has occurred.*

Section 269TAB defines "export price". In Nervacero S.A.'s case, the Commission ruled as follows:

> *Export prices for exports of rebar to Australia by Celsa Barcelona and Celsa Nervacero were determined under paragraph 269TAB(1)(a) as the price paid by the importer to the exporter less transport and other costs arising after exportation.* [11]

This statement of the Commission's position in relation to export price demonstrates an illogicality in the way that the Commission has approached the task. Section 269TACB refers to the establishment of export prices in accordance with Section 269TAB. Thus, in order to work out what these export prices are, and to which entity they apply, Section 269TAB must be considered. In Report 264 the Commission does not even refer to Section 269TAB for the purposes of defining "the exporter".

We submit that it is neither correct nor appropriate to define "exporter" by relying on a disconnected definition of "associate" (as to which we refer to our observations concerning the usage of the word "associate" in the Act) or by relying on an open-ended discretion which the Commission admits is not tied to any definite wording in the Act:

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[11] Report 264, page 47.

> *As outlined above, although the Act does not specifically address the collapsing of associated entities the Commission will do so where circumstances warrant. The main purpose of collapsing is to protect the integrity of any anti-dumping measures. This practice accords with international practice and with WTO jurisprudence which is relevant to the application of Australia's anti-dumping laws.*[12]

As a matter of law it is the words of the Act which need to be interpreted and implemented.

The Commission relied on Section 269TAB(1)(a) to determine "export price" in relation to Nervacero S.A. and Compania Espanola de Laminacion, S.L. individually.[13] That Section provides as follows:

> *For the purposes of this Part, the export price of any goods exported to Australia is:*
>
> *(a) where:*
>
> *(i) the goods have been exported to Australia otherwise than by the importer and have been purchased by the importer from the exporter (whether before or after exportation); and*
>
> *(ii) the purchase of the goods by the importer was an arms length transaction;*
>
> *the price paid or payable for the goods by the importer, other than any part of that price that represents a charge in respect of the transport of the goods after exportation or in respect of any other matter arising after exportation…*

The export price is the price paid (or payable) by the importer in the purchase by the importer from "the exporter". The bills of lading submitted by Nervacero S.A. – for example, at Attachments 9 and 10 of Nervacero S.A.'s Exporter Questionnaire – state the "shipper" to be Nervacero S.A. The commercial invoices that are to be found in the same Attachments are issued in the name of Nervacero S.A., with the origin specified as being "Nervacero S.A., Celsa Group". The quality specification for those exports bears Nervacero S.A.'s seal. The certificate of origin attests to the fact that Nervacero S.A. was the consignor. The beneficiary under the letter of credit is Nervacero S.A.

All of this may seem to be self-evident. However, we feel that it is necessary to emphasise that the exporter of those goods was Nervacero S.A. It was not Nervacero S.A. *and* Compania Espanola de Laminacion, S.L. The purchase by the importer was made from Nervacero S.A. It was not made from

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[12] Report 264, page 46.

[13] Nervacero S.A. does not contest the proposition that Section 269TAB(1)(a) applies to it in its own capacity. It is not related to any of the importers that purchased its rebar, and there does not appear to have been a finding of sales at a loss by any of those parties.

Compania Espanola de Laminacion, S.L., nor from Nervacero S.A. *and* Compania Espanola de Laminacion, S.L. The exporter of the goods was Nervacero S.A. The legal foundation for the concept that the export price for Nervacero S.A. can be the export price in transactions by Nervacero S.A. as the exporter *and also* the export price in transactions by another exporter, Compania Espanola de Laminacion, S.L., as the exporter (collectively, which the Commission refers to as "collapsing") is not apparent to us.

Section 269TACB(1) also requires "normal value" to be determined for the purposes of working out the level of dumping. The rules set out in Section 269TAC(1) for the determination of normal value are detailed. In relation to Nervacero S.A., or in the Commission's terminology in relation to both Nervacero S.A. and Compania Espanola de Laminacion, S.L.:

> *Normal values for all exported models were determined under subsection 269TAC(1) based on domestic sales of comparable models in the ordinary course of trade.*[14]

Section 269TAC(1) provides as follows:

> *Subject to this section, for the purposes of this Part, the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.*

We submit that the words "the exporter" in this Section must take their meaning from Section 269TAB(1), which defines "the exporter" in terms of the transaction or transactions which are the purchases of the goods concerned "by the importer from the exporter". The exporter here could not be a different exporter, nor could it be two exporters, because that would not be "the exporter" for the purposes of ascertaining the "corresponding normal values in respect of like goods" that are called for under Section 269TACB(1)(c).

Section 269TAC is also important for the purposes of understanding the relevance of cost to the determination of normal values. Section 269TAC(1) refers to sales "in the ordinary course of trade". Section 269TAAD describes the conditions under which sales are not considered to be in the ordinary course of trade. It specifies that:

- loss-making sales;

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[14] Report 264, page 47.

- that take place in substantial quantities;
- during an extended period of time,

are not taken to have been made in the ordinary course of trade. This occurs where the volume of loss-making sales of such goods at a price below the cost of such goods exceeds 20% of the total volume of sales over the period concerned. Pursuant to Section 269TAAD, these "costs" are the costs worked out as the regulations provide.

For that purpose Regulation 43(2) of the *Customs (International Obligations) Regulation* 2015 provides:

> *If:*
>
> *(a) an exporter or producer of like goods keeps records relating to the like goods; and*
>
> *(b) the records*
>
> *(i) are in accordance with generally accepted accounting principles in the country of export; and*
>
> *(ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods;*
>
> *the Minister must work out the amount by using the information set out in the records.*

Nervacero S.A., as the exporter of the goods, keeps such records, and provided them to the Commission.[15] The Commission accepted that the audited reports of the companies (Nervacero S.A. and Compania Espanola de Laminacion, S.L.) would support the accuracy, completeness and relevance of their respective questionnaire responses.[16] This is significant in that it signifies an acceptance on the part of the Commission (as certified by the auditors **[CONFIDENTIAL TEXT DELETED – name of auditors]**) that each company had recorded their costs and their revenues separately, correctly and legitimately for accounting purposes. In dumping terms, therefore, the relative costs, efficiencies, and revenues of Nervacero S.A. – being a separate corporate entity from Compania Espanola de Laminacion, S.L., operating a different factory, with different production processes and layouts, situated in different locations, and with different distances from relevant markets, customers and ports – were made available to and accepted by, the Commission for the purposes of working out its

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15 See, for example, Attachment 5 to the Exporter Questionnaire lodged by Nervacero S.A.

16 See Exporter Visit Report, at page 14.

normal value.

An integral part of that exercise involved consideration of the costs of Nervacero S.A., as required by Section 269TAC and Section 269TAAD. Again, it is not apparent why the relative differences in costs between the two separate entities would not be a relevant factor in working out whether exports from one or other of them had been dumped. Or, to put it another way, if the consideration of the prices – domestic and export – of the goods manufactured by Nervacero S.A. *and* of Nervacero S.A.'s own costs of manufacture of those goods established that those goods were not dumped, on what basis was it seen to be open to the Commission to ascribe an actionable dumping margin to Nervacero S.A.?

To emphasise the difference that costs make to the exercise of working out the normal value and, ultimately, the level of dumping, we wish to draw the Commission's attention to the way in which Section 269TAAD impacted upon Nervacero S.A.'s normal value. One of the worksheets in the Exporter Visit Report sets out the degree to which Nervacero S.A's domestic sales were in the ordinary course of trade for the purposes of that Section, and how that degree affected the use of those domestic sales for normal value purposes, as follows:[17]

[CONFIDENTIAL TABLE DELETED – aspect of Commission's OCOT calculations]

The information in the table indicates that for **[CONFIDENTIAL TEXT DELETED – type/s of rebar]** rebar (being the relevant diameters exported to Australian by Nervacero S.A.) not all of the domestic sales were used for normal value purposes. The words "All Sales" in the column headed "Application" shows that for **[CONFIDENTIAL TEXT DELETED – type/s of rebar]** rebar all domestic sales in the universe of domestic sales were able to be used for normal value purposes. However, in the case of the other diameters, the words in that same column are "Profit & Recoverable Only", meaning that only those sales that were:

- profitable; or
- unprofitable, but not by so much as to not recover their weighted average cost over the POI,

were able to be used for normal value purposes.

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[17] See Exporter Visit Report, Confidential Appendix 3.2, "OCOT" worksheet.

The point of explaining this is to emphasise that the legislation is constructed in such a way as to require that each exporter, as a separate corporate entity, is to be treated based on its own financial merits. The scheme of the anti-dumping provisions of the Act is to use the audited and/or verified financial accounts of a company in the position of an exporter to work out its level of dumping. Costs and prices – *that company's costs and prices* – are the relevant factors for that determination.

Nervacero S.A. made its views clear with regard to its separate position and identity as an exporter for the purposes of the investigation in submissions dated 8 April 2015:

> *In a document headed "Exporter Briefing" that has been placed on the public record, OneSteel states:*
>
> > *OneSteel would like to understand the reasoning behind different PAD interim dumping margins nominated for the 2 Spanish operations given that both are part of the Celsa group.*
>
> *If that is a suggestion that the margins of the two companies ought to be combined in some way, then it is not agreed to by Celsa.*
>
> *The fact that there is* **[CONFIDENTIAL TEXT DELETED – provision of services]***is no reason for combining the two entities in the context of this investigation.*
>
> *Clearly, this is not a case of a trading or sales company being integrated into a production platform. The two companies are not shell companies using the same production assets in the same location. They are different entities operating in two different places with their own productive assets. They have their own individual costs, they are subject to separate accounting, and they report separately.*
>
> *Although we would not have thought it to be necessary to make further submissions on the point, we do note the following:*
>
> *(a)* *The two companies source their feedstock – scrap steel – from different suppliers.* **[CONFIDENTIAL TEXT DELETED – commercial details concerning supply of scrap steel]**
>
> *(b)* *The two companies do not coordinate or consolidate their shipping. Celsa Barcelona ships to Australia via Italian ports. The Celsa Nervacero product is routed by Celsa Nervacero's freight companies via French ports and/or Algiers, and has* **[CONFIDENTIAL TEXT DELETED – commercial details concerning costs]**
>
> *(c)* *The energy costs of the two companies* **[CONFIDENTIAL TEXT DELETED – commercial details concerning electricity costs]**.

and 13 April 2015:

> *We have noticed in some questioning that the Commission has shown interest in the question of* **[CONFIDENTIAL TEXT DELETED – Commission questioning concerning customer requirements]**. *If this is considered to be related to the question of whether the two companies*

> *are "combined" in the margin analysis, we again submit that the companies are separate entities in separate locations with separate production facilities and costs. The fact that they have* **[CONFIDENTIAL TEXT DELETED – provision of services]** *is not reason to "combine" them. The contrary view would require the combination of unrelated companies on the same basis.*
>
> *In case it is relevant, neither Celsa Barcelona nor Celsa Nervacero "request" to be combined. They wish to be treated as separate exporters – because they are separate exporters legally and factually – on their own individual merits.*

Report 264 refers to the report of a panel of the Dispute Settlement Body of the World Trade Organisation in *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia* ("the Indonesia paper panel report") in support of the ability to "collapse" separate corporate entities under Australian law.[18]

In the Indonesia paper panel report, the panel ruled on the question of considering a group of related companies as a single "exporter" as follows:

> *7.165 We consider the commonality of management among these three companies, coupled with the fact that they were all owned by the same parent company, to be indications of a close legal and commercial relationship between these three companies. Given these similarities, one might, in our view, expect that commercial decisions for the three companies could be made in substantial part by the same closely interlocked group of individuals, and the management of all three companies could ultimately be answerable to their majority shareholder Ekapersada. We note that the record also indicates that one of these companies, Pindo Deli, sold the subject product to the other two during the POI. This also indicates that these companies could harmonize their commercial activities to fulfil common corporate objectives. The ability and willingness of the three companies to shift products among themselves is, in our view, of some importance to the consideration of whether the three companies should be treated as a single exporter and subject to a single margin determination.*
>
> *7.166 In addition to these factors specifically referred to by the KTC in the above-quoted part of the Final Dumping Report, the record also shows that CMI acted practically as the sole channel through which all three companies made their domestic sales in Indonesia.*

We are not aware of all of the pertinent facts of the situation that the Indonesia paper panel report addressed (not all of the facts are reported). However considering only those available we can find relevant distinctions from those pertaining to Nervacero S.A. in this case. Certainly:

(1) there is no evidence of an "ability and willingness" of Nervacero S.A. and Compania Espanola de Laminacion, S.L. "to shift products among themselves", and this is not cited by the

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[18] *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia* WT/DS312/R, 28 October 2005.

Commission in Report 264;[19]

(2) Nervacero S.A.'s domestic sales did not take place **[CONFIDENTIAL TEXT DELETED – provision of services]**.

We recommend consideration of these differences by the Review Panel.

At the same time, we forcefully submit that distinguishing the Indonesian paper panel report is not necessary because we do not think it is properly representative of the approach to be adopted to establishing export prices and normal values, and of ultimately working out the level of dumping of an exporter, under Australian anti-dumping law. Separate corporate entities cannot and should not be thought of as collectively being "the exporter" under Australian law. We make this submission on the basis that Australian law, and Australian anti-dumping law, depart from and are not beholden to the conclusions of the Indonesia paper panel report.

In addition to the direct and contextual interpretation of the Australian legislation that we have presented above, we make the following further comments in support of Nervacero S.A.'s position in this regard.

First, we note that Indonesia was supported in its complaint that Korea had overstepped its WTO rights in combining related companies as a single exporter by Japan, in its capacity as a third party. We find Japan's third party submission to be more compelling than the position expounded by the position. Japan argued cogently as follows:

> *5.95 Indonesia argues that the KTC's decision not to calculate separate dumping margins for Indah Kiat, Pindo Deli, and Tjiwi Kimia and instead to "collapse" these three companies into a single entity with a dumping margin is inconsistent with Korea's obligations under Article 6.10 of the Agreement. Korea states that when legally-separate corporations in fact operate as a single economic entity with respect to sales of a subject merchandise, nothing in the Agreement precludes the investigating authorities from applying a functional definition and treating them as*

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[19] The domestic sales worksheets for Nervacero S.A. and Compania Espanola de Laminacion, S.L. - which are in the respective worksheets submitted by the companies in Attachment 7 of their individual Exporter Questionnaires - indicate that **[CONFIDENTIAL TEXT DELETED – number]**% of Compania Espanola de Laminacion, S.L's sales were to Nervacero S.A., and that **[CONFIDENTIAL TEXT DELETED – number]**% of Nervacero S.A.'s sales were to Compania Espanola de Laminacion, S.L. However, as confirmed in the Exporter Visit Report, *"these transactions related to sales of rebar to external customers"* and *"prices on these transactions were at the value invoiced to external customers"* (page 44). There is no evidence of goods manufactured by Compania Espanola de Laminacion, S.L. being exported to Australia by Nervacero S.A., or *vice versa*, because the standards of the goods sold from one to the other are not the relevant Australian Standard (as per the Australian sales and domestic sales worksheets lodged by the respective companies with the Commission).

a single "exporter."

5.96 On this issue, Japan would not disagree to all of Korea's argument. It is worth arguing to permit investigating authorities to treat certain companies as a single "exporter or producer" under Article 6.10 of the Agreement in very rare cases. Japan, however, notes that Article 6.10 does not permit unlimited "collapsing." Investigating Authorities are prohibited from treating several legal entities as one "exporter or producer" arbitrarily.

5.97 The first sentence of Article 6.10 of the Agreement provides as follows:

> *The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. (emphasis added)*

5.98 Article 6.10 thus requires investigating authorities to determine an individual margin of dumping for "each" exporter or producer concerned as a rule. The purpose of this general obligation on investigating authorities is not to allow these authorities to calculate margins of dumping arbitrarily. Without this provision, investigating authorities could deliberately find a positive margin of dumping for a company, applying a single margin for two or more separated entities, even though the company was not found to be dumping standing alone.

5.99 The only permissible exception to this general obligation is for a special situation, i.e. "sampling" in the second sentence of Article 6.10 of the Agreement, where the number of exporters, producers, importers or types of products involved is so large as to calculate an individual margin impracticable. Article 6.10 makes the general obligation of its first sentence all the more rigid by permitting only one exception.

5.100 If, however, it is permissible for investigating authorities to treat two or more separated entities as a single "exporter or producer" under the first sentence of the Article 6.10 freely, that would open up in Article 6.10 a vast loophole on this fundamental obligation of calculating an individual margin of dumping. It would make results of this rigid obligation effectively worthless. If so, Members could easily jump over this obligation, just by explaining these entities are "one exporter" in an economical viewpoint. Accordingly, there is a certain margin or limit to treat separated entities as a single "exporter or producer." At least, investigating authorities are not entitled to treat this kind of "collapsing" arbitrarily. [footnotes omitted]

The position advanced by Japan indicates that, despite the panel's ruling, there are important voices at the WTO level which have a contrary view to that arrived at in the Indonesian paper panel report. Indeed, the Indonesian paper panel report was not appealed to the Appellate Body, is not part of Australian law, and could only be called upon by an Australian court, if at all, to determine the meaning of the relevant provisions of the Act in so far as they proved to be ambiguous or obscure.[20] Frankly speaking, we do not see any ambiguity in the use of the expression "the exporter" in the Act. It does not say "the exporters".

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[20] *Acts Interpretation Act* 1901, Section 15AB(1)(b).

It does not override the normal and longstanding precept that acts are performed by a legal person (whether a natural person or corporate body). There are no grouping provisions in the Act relevant to the determination of who the exporter is for dumping margin purposes. Where the Act does intend to focus on a corporate relationship, and to "collapse" entities[21] or to create some other implication by reason of that relationship,[22] it does so expressly (by using the concept of an "associate").

Secondly, and continuing on from the last-mentioned point, Australian corporate and tax law is much more sharply defined in its treatment of entities as natural persons, companies or company groups. Australian law is not ambiguous about the manner and form of tax imposition. Thus, Australian law (not necessarily only Commonwealth law) will ordinarily specify a taxpayer or otherwise subject entity as either an individual, a corporate entity or a group of entities, in a way which is clear on the face of the legislation. For example, companies can be grouped for payroll tax and land tax purposes, and consolidated as a single entity for income tax purposes, and when this is meant to be achieved or allowed the grouping conditions or mechanisms are spelt out in the legislation. Indeed, one of these ways is by use of the expression "associates", such that related companies that are "associates" can be grouped or considered as one entity or as having combined revenues or costs. As we have already observed, in Report 264 the Commission attempts to call in aid the definition of "associate" to support its view that Nervacero S.A. and Compania Espanola de Laminacion, S.L. can be combined as the exporter, but as we have previously indicated that attempt fails because there is no statutory link between an "exporter" and its "associates" for that purpose.

Thirdly, the Indonesia paper report and the references in Report 264 to the "collapsing" of entities such that they can be considered as a single exporter adopt a "behavioural" view of dumping which is inconsistent with the way that anti-dumping law has developed in Australia. In that regard Report 264 states:

> *As outlined above, although the Act does not specifically address the collapsing of associated entities the Commission will do so where circumstances warrant. The main purpose of collapsing is to protect the integrity of any anti-dumping measures. This practice accords with international practice and with WTO jurisprudence which is relevant to the application of Australia's anti-dumping laws.*
>
> *Where entities are 'collapsed' the actions of one member of the entity are taken to represent the*

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21 For example, Section 269TAB(1)(b).

22 For example, Section 269ZE(4).

> *actions of the whole. The issue of considering multiple entities as a single entity for the purpose of calculating dumping margins was considered by a World Trade Organization (WTO) dispute settlement panel dealing with the case of Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia.*
>
> *…*
>
> *The panel considered that common management and ownership are indications of a close legal and commercial relationship and such companies "could harmonize their commercial activities to fulfil common corporate objectives."*[23]

We submit that each of these sentiments do not reflect the objectivity of Australian anti-dumping law and practice.[24] Instead, they suggest that the decision to consider separate entities as being a single exporter revolves around a subjective desire to protect Australian industry in the future from some kind of underhanded behaviour by companies within a group of related companies. However, working out whether dumping has occurred is not a subjective exercise, and future behaviour directed towards either flouting or subverting dumping measures – or which is plainly illegal – is dealt with by the anti-dumping system that Australia has itself implemented in other ways.

The Commission states that *"[t]he main purpose of collapsing is to protect the integrity of any anti-dumping measures"*. Frankly, we do not see the relevance of this statement, and we do not accept it. With the greatest respect, the effectiveness of dumping measures in the future cannot be a relevant consideration in determining whether or not there was any dumping in the first place. Nervacero S.A. was found by the Commission – considered as "the exporter" - not to have engaged in actionable dumping. This finding was based on its own audited reports, and its own costs and prices. Compania

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[23] Report 264, page 46.

[24] The policy is suggestive of an intention to protect Australian industry against some future transgressions, based on the view that companies within a corporate group may have the desire and ability to commit such transgressions. In the text that follows we have explained how transgressions are simply not possible, or are not a reasonable expectation, or are otherwise already defended against by the anti-dumping system. Further, the implication that an unfavourable interpretation of the law should be applied against an exporter, to protect Australian industry, is not supported by the Federal Court:

> *Further, I do not agree with [the Australian industry] that the purpose of Part XVB of the Act is "to protect Australian industry". The purpose of Part XVB is far more complicated. It is apparent from the scheme of Part XVB that the legislature has sought to strike a balance, as the relevant international agreements no doubt seek to do, between various interests including not only those of Australian industries but also other WTO members and their own domestic industries, Australian consumers (in the broadest sense of that word) who may have an interest in acquiring imported goods at the lowest available prices and Australian exporters that supply their goods to other countries that are also members of the WTO.*

Nicholas J in *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870 (30 August 2013) at para 148.

Espanola de Laminacion, S.L. was found by the Commission – again, considered as the exporter - to have engaged in actionable dumping. This finding was based on Compania Espanola de Laminacion, S.L.'s own audited reports, and its own costs and prices.

Accordingly, Nervacero S.A. had the benefit of a more efficient production facility and/or less costly materials and/or more favourable sales prices within its own product mix than did Compania Espanola de Laminacion, S.L. In the matrix of Section 269TAC(1) and 269TAAD(4), these facts had the effect of avoiding a finding of actionable dumping being made against Nervacero S.A. It is our very strong submission that this was the relevant end point of the Commission's determination. It was here that the question of whether the investigation should have been terminated as against Nervacero S.A., as the exporter of rebar that it manufactured and sold to Australia, should have been decided. Obviously, had this occurred, the investigation would have been so terminated.

In the above-quoted extract from Report 264 the Commission also states that *"[w]here entities are 'collapsed' the actions of one member of the entity are taken to represent the actions of the whole"*.[25] In our opinion this simply creates more confusion. In the Exporter Visit Report the Commission correctly states that:

> **[CONFIDENTIAL TEXT DELETED – provision of services]** *services to Celsa Barcelona and Celsa Nervacero.*[26]

and that:

> *[Nervacero S.A. and Compania Espanola de Laminacion, S.L., referred to as "Celsa"] explained that its* **[CONFIDENTIAL TEXT DELETED – provision of services]***, which charges Celsa for these costs (based on* **[CONFIDENTIAL TEXT DELETED – cost of provision of services]**.[27]

Accordingly, **[CONFIDENTIAL TEXT DELETED – name of service provider]** services were provided with respect to certain operational activities, were documented (and audited), and were not risk-based. **[CONFIDENTIAL TEXT DELETED – name of service provider]** did not produce the goods, did not operate the factories, did not make material purchasing decisions, did not physically handle the goods or take physical or legal possession of them at any time, and did not receive payment for the goods into

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25 Report 264, page 46.

26 Exporter Visit Report, page 10.

27 Ibid., page 39.

its own accounts. The Commission's opinion that it has the ability to decide that the actions of one member of what it calls "the entity" can be taken to represent the actions of the whole ignores the fact that the selected member (and the Commission does not even make clear who that "member" is) did not undertake the actions of the whole.

The Commission's eagerness (and that of the panel in the Indonesia paper panel report) to capture separate parties within the one dumping margin appears to be driven, in the panel's words, by a concern that related companies *"could harmonize their commercial activities to fulfil common corporate objectives"*. We submit that this is another subjective and speculative consideration that is quite inappropriate and unnecessary given the way in which Australian anti-dumping law applies to exporters and the way in which they may conduct their affairs. The concern implies that without "collapsing" related party companies, such that they can all be found to have been engaged in dumping and therefore can have dumping measures imposed against all of them, a related party group could carry out a common corporate objective in the future to dump products into Australia and to thereby cause material injury to an Australian industry. With respect, we find this to be both far-fetched and nonsensical.

In the first place, if a company has not engaged in any dumping – as is the case with Nervacero S.A. – then there are no grounds to impose dumping duties on that company. Nervacero S.A.'s selling prices and costs were carefully considered by the Commission and were found to be in order. If it had been unrelated to Compania Espanola de Laminacion, S.L., it could not have had dumping duties imposed against its exports. Why the situation should be any different simply because it is related to another entity that was found to have engaged in actionable dumping, at a level which when "averaged" led to the determination of an actionable dumping margin for both, completely escapes us.

Additionally, the idea that companies have a corporate intent to engage in dumping and to materially injure their competitors through that practice is often stated but rarely proven. Companies are in business to make money. Market prices and costs move up and down, and companies do their best to compete at the levels that are established by those trends. That said, it is not necessary for the Review Panel to agree with these observations. However, what the Review Panel should agree with is that a policy directed towards an illusory concern about the future (referred to in Report 264 as a need to *"protect the integrity of any anti-dumping measures"*) is not a relevant consideration for working out the levels of dumping by an exporter in the past.

Further, we wonder whether the Commission has given any consideration as to how this "harmonization" and "common corporate objective" would be carried out. At its simplest, and as applied to the

circumstances of this case, it could be thought that product manufactured by Compania Espanola de Laminacion, S.L. would be exported to Australia as if it had been manufactured by Nervacero S.A. But this would be fraudulent, and would also prevent the auditing of the financial records of both companies without a relevant qualification being made. Another "scheme" that the Commission might be concerned about is the internal transfer of product manufactured by Compania Espanola de Laminacion, S.L. to Nervacero S.A. for export to Australia. But that product would be exported by Compania Espanola de Laminacion, S.L., not Nervacero S.A., because Compania Espanola de Laminacion, S.L. will have manufactured it and will no doubt be aware of its export destination (both facts going to the proposition, as routinely enforced by the Commission, that the manufacturer is the exporter). Moreover, Australia has a suite of anti-circumvention laws that seek to capture collusive practices between exporters of this type.

All things considered, we would think that the more likely corporate reaction towards the exclusion of Nervacero S.A. from the scope of the present dumping duties would be for it to jealously protect that status.[28]

11 Correct or preferable decision

Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 0[29]

Simply put, the correct decision ought to have been that Nervacero S.A. had not engaged in actionable dumping, meaning that the investigation should have been terminated by the Commissioner as against Nervacero S.A.

In any event, on acceptance of our submissions that Nervacero S.A. was relevantly the exporter for the purposes of working out its levels of dumping, the Parliamentary Secretary did not have the power to publish notices under Sections 269TG(1) and (2) against Nervacero S.A.

The Review Panel is therefore requested to recommend to the Parliamentary Secretary that the reviewable decision (being the decision to publish notices under Sections 269TG)(1) and (2) be revoked insofar as the Parliamentary Secretary decided to publish a dumping duty notice in relation to rebar

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[28] We would reiterate that we make these comments without detracting from the proposition, as stated above, that working out levels of dumping based on what might transpire in the future is legally flawed and impermissible.

[29] As per the requirement of Section 269ZZE(2)(c) and (d) of the Act, and question 11 of the form approved under Section 269ZY of the Act.

exported by Nervacero S.A., and that the Parliamentary Secretary substitute a specified decision, namely a decision to publish notices under those Sections in the terms of the notices published on 19 November 2015 without including Nervacero S.A. in them, with effect from that date.

12 Material difference between decisions

Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision[30]

Presently, pursuant to the reviewable decision, Nervacero S.A.'s exports of rebar are subject to the notices concerned. Importers are presently required to pay interim dumping duty on rebar exported to Australia by Nervacero S.A. This makes imports of Nervacero S.A.'s rebar a less attractive commercial proposition for importers than applies to rebar from other exporters who are not so affected by the reviewable decision.

Pursuant to the proposed decision referred to in question 11, Nervacero S.A.'s exports of rebar will not be subject to the notices concerned, and importers will not be required to pay interim dumping duty on rebar exported to Australia by Nervacero S.A.

We submit that the difference between the outcomes of these two decisions is material.

B Second ground – Nervacero S.A.'s [CONFIDENTIAL TEXT DELETED – number]mm rebar cannot have caused injury

We draw attention to the following relevant facts for the purposes of presenting this ground of review, and without limiting the facts which may be relevant:

(1) During the POI, Nervacero S.A. exported rebar in coil to Australia in the diameters of **[CONFIDENTIAL TEXT DELETED – type/s of rebar]**.[31] Nervacero S.A. did not export rebar to Australia **[CONFIDENTIAL TEXT DELETED – type/s of rebar]**.

(2) Nervacero S.A. exports of **[CONFIDENTIAL TEXT DELETED – type/s of rebar]**mm rebar were

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[30] As per the requirement of Section 269ZZE(2)(e) of the Act, and question 12 of the form approved under Section 269ZY of the Act.

[31] See Exporter Visit Report, Confidential Appendix 5.2.

made **[CONFIDENTIAL TEXT DELETED – commercial arrangement]**.[32]

(3) Given that this second ground of review need only be considered if the Review Panel rules against Nervacero S.A. on the first ground, Nervacero S.A. confirms that Compania Espanola de Laminacion, S.L. did not export rebar in coil to Australia other than in diameters of **[CONFIDENTIAL TEXT DELETED – type/s of rebar]**. Compania Espanola de Laminacion, S.L. did not export rebar to Australia **[CONFIDENTIAL TEXT DELETED – type/s of rebar]**.

(4) Nervacero S.A. is unaware of exports from Spain other than from Nervacero S.A. and Compania Espanola de Laminacion, S.L., and Report 264 does not identify any other exporters from Spain.

10 Grounds

Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision[33]

The goods under consideration in the original investigation, and which ultimately were made subject to the notices published by the Parliamentary Secretary, encompassed rebar whether or not in coil form in diameters up to and including 50mm. In Nervacero S.A.'s case, and indeed in the case of Nervacero S.A. and Compania Espanola de Laminacion, S.L. if considered as "the exporter" (a proposition with which Nervacero S.A. disagrees, as explained in relation to the first ground of review in A above), **[CONFIDENTIAL TEXT DELETED – number]** type of **[CONFIDENTIAL TEXT DELETED – type/s of rebar]** product offering – namely **[CONFIDENTIAL TEXT DELETED – number]**mm rebar – was sold **[CONFIDENTIAL TEXT DELETED – commercial arrangement]**. In this circumstance we submit that a positive finding that Nervacero S.A.'s **[CONFIDENTIAL TEXT DELETED – number]**mm rebar coil caused material injury to the Australian industry cannot be reached. On the basis that it was exported to Australia during the POI and cannot be found to have caused material injury to an Australian industry, it is respectfully submitted that it must be excluded from the scope of the goods subject to the notices

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[32] This took place pursuant to **[CONFIDENTIAL TEXT DELETED – commercial arrangement]**. A copy of the agreement was provided to the Commission and is of course "relevant information" for the purposes of this review.

[33] As per the requirements of Section 269ZZE(2)(b) of the Act, and question 10 of the form approved under Section 269ZY of the Act.

concerned.[34]

Sections 269TG(1) and (2) require a link to be established between goods found to have been dumped and material injury to an Australian industry producing like goods. Section 269TG(2) provides:

> *Where the Minister is satisfied, as to goods of any kind, that:*
>
> *(a) the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, and the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods; and*
>
> *(b) because of that, material injury to an Australian industry producing like goods has been or is being caused or is threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered;*
>
> *the Minister may, by public notice (whether or not he or she has made, or proposes to make, a declaration under subsection (1) in respect of like goods that have been exported to Australia), declare that section 8 of the Dumping Duty Act applies to like goods that are exported to Australia after the date of publication of the notice or such later date as is specified in the notice.* [underlining supplied]

Obviously, **[CONFIDENTIAL TEXT DELETED – number]**mm rebar exported to Australia by Nervacero S.A. had no competitive interaction with the applicant's sales of its own manufacture of rebar. There was no price effect of Nervacero S.A.'s exports of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar on the applicant. The applicant did not have to lower its price of rebar to compete with Nervacero S.A.'s exports of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar, because Nervacero S.A. **[CONFIDENTIAL TEXT DELETED – commercial arrangement]**. **[CONFIDENTIAL TEXT DELETED – commercial arrangement]** purchased Nervacero S.A.'s **[CONFIDENTIAL TEXT DELETED – number]**mm rebar. Moreover, Nervacero S.A. in its capacity (in the Commission's view) as a combined exporter with Compania Espanola de Laminacion, S.L., was **[CONFIDENTIAL TEXT DELETED – commercial arrangement]**. Nor can Nervacero S.A.'s exports of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar be said to have had a volume effect on the applicant, because Nervacero S.A. did not sell its **[CONFIDENTIAL TEXT DELETED – number]**mm rebar **[CONFIDENTIAL TEXT DELETED –**

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[34] For the avoidance of doubt, the request for the exclusion of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar on the basis that it did not cause injury to the like goods manufactured by the Australian industry extends to **[CONFIDENTIAL TEXT DELETED – number]**mm rebar *from Spain*, in the same way that the exclusion for unchromated aluminium zinc coated steel (in the case referred to in the text, below) related to aluminium zinc coated steel *from Korea*.

commercial arrangement]. The applicant was not deprived of any sales of its rebar because of sales by Nervacero S.A. of its **[CONFIDENTIAL TEXT DELETED – number]**mm rebar, because **[CONFIDENTIAL TEXT DELETED – commercial arrangement]** of its **[CONFIDENTIAL TEXT DELETED – number]**mm rebar to any other party

In circumstances where exports of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar by Nervacero S.A. took place during the period of investigation but **[CONFIDENTIAL TEXT DELETED – commercial arrangement]**, and without having any actual or potential price or volume effect on the applicant, the question that must be asked is how can a notice under Section 269TG(1) or (2) include them?

In deference to the confidentiality of the arrangement between Nervacero S.A. **[CONFIDENTIAL TEXT DELETED – commercial arrangement]**which underpinned the exports concerned, the Commission adequately summarised Nervacero S.A.'s argument in Report 264 as follows:

> *Celsa Barcelona and Celsa Nervacero S.A. (collectively referred to in sections of this report as Celsa) submitted that it supplied a particular type of imported rebar to OneSteel which it did not sell to any other Australian customer.*
>
> *On this basis, Celsa considers that those sales could not have caused injury to OneSteel and similar to a past investigation into aluminium zinc coated steel, should be excluded from the scope of any notice.*[35]

The Commission responded to Nervacero S.A.'s submissions in the following way:

> *Through verified data, the Commission has established that the product specified by Celsa was exported to Australia by at least one other exporter during the investigation period. Further, the Commission notes that rebar can be used in a variety of shapes (i.e. coil or straight) and diameters to provide the same required reinforcing solution.*
>
> *On this basis, the Commission considers that imported rebar of the type specified in Celsa's submission competes with OneSteel's sales of rebar and should not be excluded from the scope of the notice.*[36]

There are two defensive arguments offered by the Commission in these paragraphs. The first seems to be that Nervacero S.A.'s submission that exports of its **[CONFIDENTIAL TEXT DELETED – number]**mm rebar cannot have caused injury to the Australian industry should be rejected because in the POI the

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35 Report 264, page 18.

36 *Ibid.*, page 19.

applicant faced competition for sales of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar against "at least one other exporter". With respect, we submit that merely stating the Commission's argument highlights its inadequacy. Competition for sales of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar between the applicant and another exporter or other exporters does not mean that there was therefore competition for sales of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar between the applicant and Nervacero S.A. The evidence is that there was no such competition. The fact that there were exports of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar from some other country cannot overcome that fact.

The second argument about the potential uses of rebar or its forms, and that different diameters can be used for the same end use, also does not address the question of whether Nervacero S.A.'s exports of **[CONFIDENTIAL TEXT DELETED – number]**mm caused material injury to the Australian industry. If exports of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar did not cause injury to the Australian industry's sales of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar, the Commission might still find that those exports did cause injury to the Australian industry's sales of (say) **[CONFIDENTIAL TEXT DELETED – number]**mm rebar, due to the ability to use **[CONFIDENTIAL TEXT DELETED – number]**mm rebar in **[CONFIDENTIAL TEXT DELETED – number]**mm rebar applications. However it would still be necessary for the Commission to establish the competitive interaction between the **[CONFIDENTIAL TEXT DELETED – number]**mm rebar and the **[CONFIDENTIAL TEXT DELETED – number]**mm rebar. Again, we note that Nervacero S.A.'s exports of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar had no competitive interaction with any sales made by the applicant, of any diameter, because Nervacero S.A. did not sell **[CONFIDENTIAL TEXT DELETED – number]**mm rebar **[CONFIDENTIAL TEXT DELETED – commercial arrangement]**.

The facts are indeed unusual. Indeed we are not aware of such a situation arising in our own experience of having represented clients in matters like this over a great many years.

Despite the possible uniqueness of the facts, one thing that is not unique, and for which there is available precedent, is the exclusion of specific goods that were not or could not have been found to have been injurious from the scope of a notice. In this regard we refer to the measures that presently apply to aluminium zinc coated steel, the coverage of which is described in the Dumping Commodities Register as follows:

> *The types of aluminium zinc coated steel subject to measures reflect the "description of goods" as referred to in the dumping and countervailing duty notices. The "description of goods" subject to measures is:*

Aluminium zinc coated steel, that is:

- *a flat rolled product of iron and non-alloy steel;*
- *plated or coated with aluminium-zinc alloys;*
- *whether or not surface treated including combinations of surface treatments;*
- *whether or not including resin coating; and*
- *in widths equal to or greater than 600mm.*

Excluded from the goods subject to the measures (exemption type "GOODS" applies) are:

- *Aluminium zinc coated steel that is painted or pre-painted (including colorbond).*
- *Unchromated products of aluminium zinc coated steel exported from Korea only*. [underlining supplied][37]

The latter exclusion came about as a result of the acceptance by the Minister of the recommendations of the Review Panel in its report *Review of Decision to Impose Dumping Duties on Aluminium Zinc Coated Steel Exported from the Republic of Korea*.[38] In the original investigation, the scope of the goods under consideration, broadly described as aluminium zinc coated steel, included both "chromated" and "unchromated" types:

> *The aluminium zinc coated steel application covers aluminium zinc coated steel whether or not including any (combination of) surface treatment, for instance; whether passivated or not passivated, (often referred to as chromated or unchromated), resin coated or not resin coated (often referred to as Anti Finger Print (AFP) or not AFP), oiled or not oiled, skin passed or not skin passed.* [39]

The Commission explained the difference between "chromated" and "unchromated" aluminium zinc coated steel in its final Report as follows:

> *Unchromated coated steel is like to commonly produced aluminium zinc coated steel, however it does not have a protective surface treatment, making it more suitable for painting.*
>
> *Unchromated product is a raw material input for painted aluminium zinc coated steel and is used as feed for a continuous coating line.*[40]

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[37] See http://www.adcommission.gov.au/measures/Documents/Aluminium%20Zinc%20Coated%20Steel/DCR%20-%20aluminium%20Zinc%20Coated%20Steel%20-%20151126.pdf

[38] See http://www.adreviewpanel.gov.au/PastReviews/Documents/ADRPReviewReportOneSteelCoilCoaters-November2013.pdf.

[39] *Report 190 – Dumping of Zinc Coated (Galvanised) Steel and Aluminium Zinc Coated Steel Exported from the People's Republic of China, the Republic of Korea and Taiwan* (30 April 2013), page 20.

[40] *Ibid.*, page 35.

An importer of unchromated aluminium zinc coated steel[41] applied to the Review Panel for review of the decision to impose dumping duties against the unchromated product from Korea on the basis that the Commission had not adequately concluded that that product had caused injury to the Australian industry.

The Review Panel agreed with the proposition that exports of unchromated product could not have caused injury to the Australian because the Australian industry did not sell unchromated steel during the investigation period. The competitive interaction between the products was lacking – this is the same competitive interaction which is lacking in this case, in relation to **[CONFIDENTIAL TEXT DELETED – number]**mm rebar from Spain.

The Review Panel said that it was important to its findings that the Commission had not made a finding that unchromated steel was" like goods" to chromated steel, but rather that unchromated steel produced by the Australian industry was "like goods" to imported unchromated steel. In our understanding that was significant to the Review Panel's conclusions that material injury had not been caused to the Australian industry, because a finding that unchromated goods were like goods to chromated goods would have permitted the conclusion that exports of unchromated steel may have caused injury to the Australian industry's production and sales of chromated steel. That would have been due to competitive interaction between the applicant and the exporters in the market for chromated/unchromated steel ("the competitive condition"). In the present rebar case, it is not argued that **[CONFIDENTIAL TEXT DELETED – number]**mm rebar is not like goods to other nearby diameters of rebar, nor did the Commission find that to be the case, That, however, is a distinction that makes no difference to the application of the principle arising from the aluminium zinc case to the present rebar case. Our submission in the present rebar case is that Nervacero S.A.'s **[CONFIDENTIAL TEXT DELETED – number]**mm rebar cannot have caused injury because **[CONFIDENTIAL TEXT DELETED – commercial arrangement]**. Thus, the competitive condition still does not exist, even if **[CONFIDENTIAL TEXT DELETED – number]**mm rebar is "like goods" to other diameters of rebar.

Ultimately, the Review Panel recommended to the Minister that:

> *…the decision to include the unchromated steel product in the goods the subject of the notice*

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[41] The applicant for review was OneSteel Coil Coaters Pty Limited which, according to Arrium Limited's 2015 Annual Report, is a member of the same corporate group as the applicant in the present matter, OneSteel Manufacturing Pty Limited.

> *under subsections 269TG (1) and (2) was not the correct or preferable decision,*

and that:

> *the Minister revoke the reviewable decision and substitute a decision which excludes unchromated steel from the description of the goods that are the subject of the notice under subsections 269TG (1) and (2) of the Act such that section 8 of the Dumping Duty Act does not apply to exports of unchromated steel…*

The Parliamentary Secretary agreed with the Review Panel's recommendation, and "unchromated products of aluminium zinc coated steel exported from Korea only" were excluded from the scope of the Section 269TG(1) and (2) notices as a result.

11 Correct or preferable decision

Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 0[42]

The correct decision ought to have been that exports of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar from Spain had not caused injury to the Australian industry producing like goods.

The Review Panel is therefore requested to recommend to the Parliamentary Secretary that the reviewable decision (being the decision to publish notices under Sections 269TG)(1) and (2) be revoked insofar as the Parliamentary Secretary decided to publish a dumping duty notice in relation to **[CONFIDENTIAL TEXT DELETED – number]**mm rebar exported from Spain, and that the Parliamentary Secretary substitute a specified decision, namely a decision to publish notices under those Sections in the terms of the notices published on 19 November 2015 with the express exclusion of to **[CONFIDENTIAL TEXT DELETED – number]**mm rebar exported from Spain, with effect from that date.

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[42] As per the requirements of Section 269ZZE(2)(c) and (d) of the Act, and question 11 of the form approved under Section 269ZY of the Act.

12 Material difference between decisions

Set out the reasons why the proposed decision provided in response to question 0 is materially different from the reviewable decision[43]

Presently, pursuant to the reviewable decision, exports of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar exported by Nervacero S.A. are subject to the notices concerned. The importer **[CONFIDENTIAL TEXT DELETED – commercial arrangement]**, is required to pay interim dumping duty on that rebar if and when it is imported.

Pursuant to the proposed decision referred to in question 11, those exports of rebar will not be subject to the notices concerned, and the importer will not be required to pay interim dumping duty on that rebar.

We submit that the difference between the outcomes of these two decisions is material.

Conclusion and request

The decisions to which this application refers are reviewable decisions under Section 269ZZA of the Act. Where references are made to the Commission and its recommendations, it is those recommendations which were accepted by the Parliamentary Secretary and form part of the reviewable decision that Nervacero S.A. seeks to have reviewed.

Nervacero S.A. is an interested party in relation to the reviewable decision.

Nervacero S.A.'s application is in the approved form and has otherwise been lodged as required by the Act.

Nervacero S.A. has paid the fee prescribed under Section 269ZZE(3).

We submit that Nervacero S.A.'s application is a sufficient statement setting out its reasons for believing that the reviewable decisions are not the correct or preferable decisions, and that there are reasonable grounds for that belief for the purposes of acceptance of its application for review.

This application contains confidential and commercially sensitive information. An additional non-confidential version, containing sufficient detail to give other interested parties a clear and reasonable understanding of the information is included as an Attachment to the application.

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[43] As per the requirements of Section 269ZZE(2)(e) of the Act, and question 12 of the form approved under Section 269ZY of the Act.

The correct or preferable decisions that should result from the grounds that Nervacero S.A. has raised in the application are dealt with in the foregoing.

Accordingly, being fully compliant with the requirements of the Act, Nervacero S.A. requests the Review Panel to undertake the review of the reviewable decision, as requested by this application, under Section 269ZZK of the Act.

To summarise, Nervacero S.A. submits that it was incorrect for the Commission to recommend to the Parliamentary Secretary, and for the Parliamentary Secretary to decide, that its exports were dumped. The correct decision should have been that Nervacero S.A.'s exports were not dumped, meaning that the Parliamentary Secretary did not have the power to publish notices under Sections 269TG(1) and (2) in respect of those exports.

The Review Panel is requested to recommend to the Parliamentary Secretary that the reviewable decision (being the decision to publish notices under Sections 269TG)(1) and (2)) be revoked insofar as the Parliamentary Secretary decided to publish a dumping duty notice in relation to rebar exported by Nervacero S.A., and that the Parliamentary Secretary substitute a specified decision, namely a decision to publish notices under those Sections in the terms of the notices published on 19 November 2015, with effect from that date, without including Nervacero S.A.'s exports of rebar in them.

In the alternative, Nervacero S.A. respectfully submits that it was incorrect for the Commission to recommend to the Parliamentary Secretary, and for the Parliamentary Secretary to decide, that its exports of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar caused injury to the Australian industry producing like goods. The correct decision should have been that exports of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar from Spain did not and cannot be found to have caused such injury, meaning that the Parliamentary Secretary did not have the power to publish notices under Sections 269TG(1) and (2) in respect of those exports.

If this alternative applies, the Review Panel is requested to recommend to the Parliamentary Secretary that the reviewable decision (being the decision to publish notices under Sections 269TG)(1) and (2)) be revoked insofar as the Parliamentary Secretary decided to publish dumping duty notices in relation to exports of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar exported from Spain, and that the Parliamentary Secretary substitute a specified decision, namely a decision to publish notices under those Sections in the terms of the notices published on 19 November 2015, with effect from that date, without including exports of **[CONFIDENTIAL TEXT DELETED – number]**mm rebar exported from Spain in them.

Lodged for and on behalf of Nervacero S.A.

Daniel Moulis
Principal

Moulis Legal