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4 December 2017

The Director
Anti Dumping Commission
Investigations 2
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10 Binara Street
Canberra
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By email

Dear Director

Nervacero S.A. - alleged dumping of steel reinforcing bar
Comments with respect to Statement of Essential Facts 418

As you know we represent Nervacero S.A. ("Nervacero") in this investigation.

In this submission we provide Nervacero's comments concerning the material injury and causation findings reached by the Anti-Dumping Commission ("the Commission") on a preliminary basis in Statement of Essential Facts No. 418 ("the SEF").

FOR PUBLIC RECORD

A Injury assessment is incomplete and one-sided

1 The analysis is one-sided, it only considers "injury" and not "improvement".

We would like to start by noting that Section 7 of the SEF is entitled *"Economic Condition of the Industry"*. Such an analysis is required because the Minister must examine the Australian industry's overall economic condition in order to make an assessment as to whether the industry as a whole suffered material injury. A range of relevant economic factors requiring consideration is provided for in Section 269TAE(3) of the *Customs Act 1901* ("*the Act*"). The Minister's responsibility is to consider all these factors and to evaluate whether the Australian industry overall can be said to have suffered material injury. This is not merely about "declines" or "reductions". That would be simplistic and wrong. It is also about "improvements" and "increases". Finding that the Australian industry suffered material injury because there were "declines" or "reductions" is not sufficient to establish that it suffered material injury if, at the same time, it enjoyed "improvements" and "increases".

In our view the SEF's injury analysis has been devoted towards the identification of alleged "injurious conditions". No attention, or insufficient attention, has been paid to economic factors pointing the other way. This has resulted in an unbalanced analysis and a one-sided outcome.

2 Volume-based injury is not present, whereas volume-based improvement is.

The SEF has preliminarily determined that the Australian industry suffered volume-based material injury, in the form of "loss of market share". We take issue with the SEF's approach in this regard. The SEF's volume analysis includes this observation:

> *Figure 3 below shows OneSteel's total domestic sales volume for rebar in the Australian market since 2013 relative to the overall size of the market. It can be seen that OneSteel's sales volumes have shown a steady increase over the injury analysis period. OneSteel's sales volume in 2016 showed an approximately 45 per cent increase as compared to its sales volumes in 2013.*
>
> …

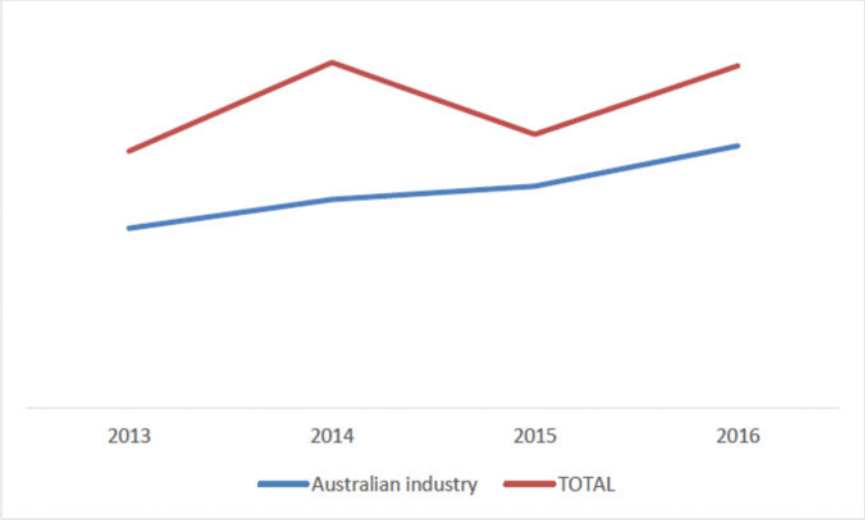

Figure 3: OneSteel's total domestic sales volume for rebar relative to the size of the market.

Figure 2 in the SEF provides a more detailed breakdown of volume and market share:

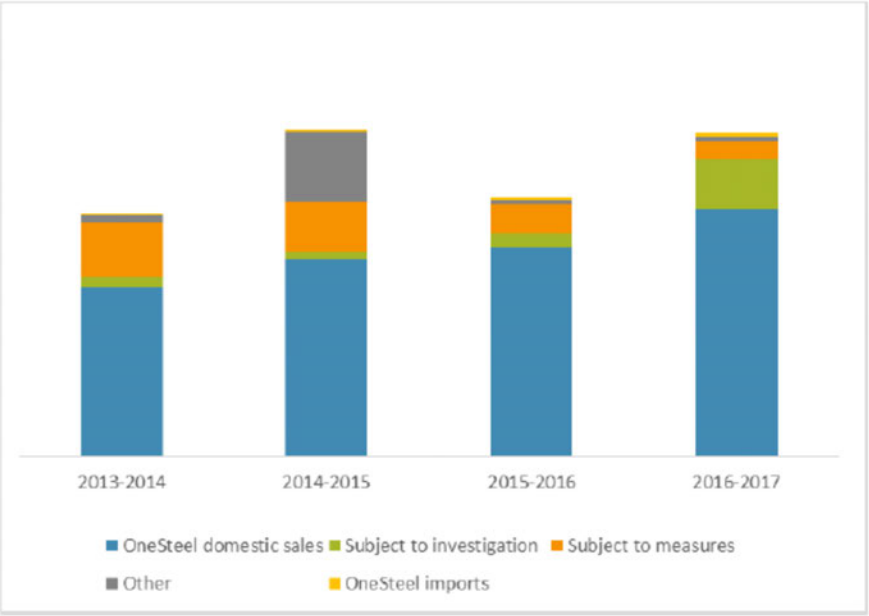

Figure 2: Australian market for rebar (tonnes)

These charts show that, during the investigation period (or "POI"):

- OneSteel increased its sales volume at an average rate of 13%, *every* year over the four year period since 2013;
- OneSteel's sales volume was at its highest level since FY2010/2011;[1]
- OneSteel's market share was over 76%, being 6% higher than 2013, and 17% higher than 2014;
- OneSteel's market share was the second highest historically since FY2010/11;
- the total market share of imported goods was amongst the lowest in recent times, with the 2015-2016 period being the only clear exception – when the volume requirements of the whole market dipped suddenly.

The SEF notes that OneSteel's market share for the POI was 4% lower than the previous year. However, we would expect the actual difference to be much smaller once the market share of OneSteel's imported products is taken into account. Indeed, the Commission is in possession of this information – is there any dip in OneSteel's market share at all when OneSteel's imports are included in the analysis where they should be, as OneSteel's own market share? Even if there was a slight market share decline, this must considered in the context of OneSteel's historically high sales volume during the POI, as well as its high import volume, and in the context also of numerous testimonies on the public record from independent distributors and fabricators who simply could not get product from OneSteel because, we expect, it had reached its production capacity.

Against this background, we are surprised at the SEF's conclusion that:

[1] See Report 264.

> *The Commissioner is satisfied that the evidence outlined above supports OneSteel's claim that while it did not lose sales volume in trend terms, it has experienced injury in the form of reduced market share for rebar in the Australian market over the investigation period.*

Quite simply, a scenario in which OneSteel enjoyed its second highest market share over an eight year period, in an expanded market, at a time when reportedly OneSteel could not supply additional product into the market, is not one in which it is possible to conclude that OneSteel was injured in a volume sense, on any measure. OneSteel's sales volume was at its highest in the investigation period than at any time in the previous eight years. OneSteel's sales volume of its own imported products was also at its highest level –supporting the proposition that OneSteel could not satisfy market demand in the POI based on its own production.

Further, we note the SEF's comments that:

> *The Commissioner notes that the Manual specifies, in part, that:*
>
> > *"…Anti-dumping or countervailing action is possible in cases where an industry has been expanding its market share, and the dumped or subsidised imports have slowed the rate of growth – a decline in growth may be as relevant as the movement from growth to decline".*

The reality is that there was not a decline in growth for OneSteel in light of the substantial growth it enjoyed during the POI in both its market share and sales volumes. None of this suggests a volume "decline: or volume "injury".

We respectfully submit that the SEF appears to have focused only at the superficial market share drop between 2015 and 2016, and considered this to have contributed to the Australian industry's material injury. This cannot be further from reality.

Further, we draw the Commission's attention to the fact that, for the rebar *coil* product in particular, based on OneSteel's Application:

- OneSteel's domestic sales quantity for the POI was 85% higher than calendar year 2013, and 35% higher than calendar year 2015;
- OneSteel's export sales quantity for the POI was 741% higher than calendar year 2013, and 17% higher than calendar year 2015.

These indicators point to the opposite of any volume-based material injury.

3 Price suppression and profitability analyses raise questions of motivation and profit shifting.

The SEF considers that OneSteel suffered material injury in the form of price suppression:[2]

> *Price suppression occurs when price increases, which otherwise would have occurred, have been prevented. An indicator of price suppression may be the margin between revenues and costs.*
>
> *…*
>
> *The Commissioner considers that OneSteel is a profit seeking entity that in the ordinary course would strive to remain profitable. The Commissioner considers that the analysis*

[2] SEF, at pages 49 and 50.

discussed above indicates that OneSteel has experienced price suppression during the investigation period.

The margin between revenue and costs may be a generally accepted indicator for such an analysis. However we are of the opinion that this is not the case for OneSteel's rebar operations. The SEF's comment that "*OneSteel is a profit seeking entity that in the ordinary course would strive to remain profitable*" also requires further consideration.

For instance, OneSteel's rebar operation has been consistently loss-making every year since FY2010/11, with FY2015/16 perhaps being the only exception. This raises questions as to whether a price increase would indeed have occurred, and to what degree.

The following chart in fact shows that OneSteel was profitable in only one quarter of the POI, as contrasted to most of the previous periods:

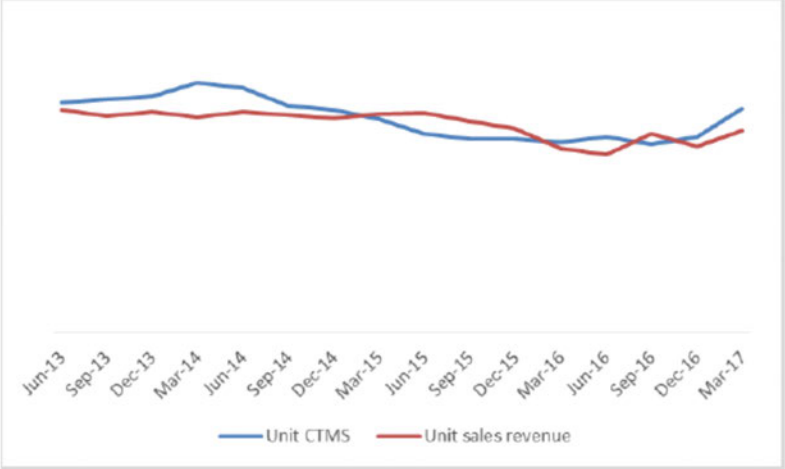

Figure 5: Unit CTMS and unit revenue

The profitability chart from Report 264 is as follows:

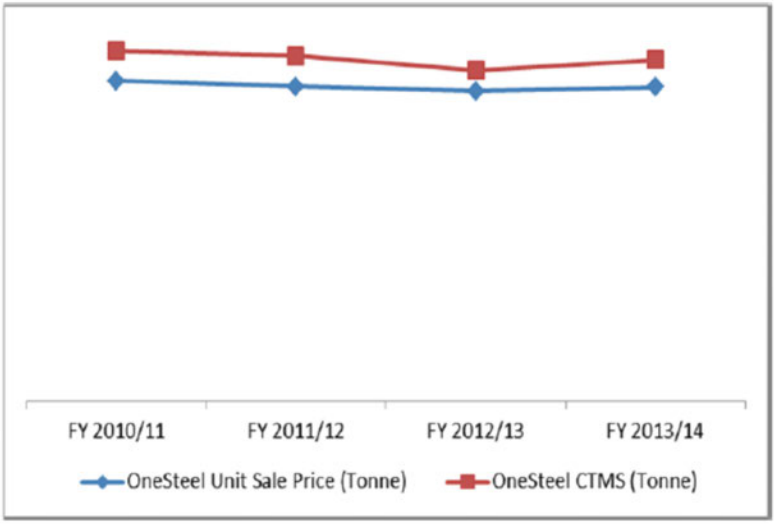

Figure 6 – OneSteel's Unit Revenue v Unit CTMS

The SEF's analysis of OneSteel's price behaviour raises a number of serious questions.

Firstly, the SEF does not seem to have considered the question of whether price increases during the POI *"otherwise would have occurred*". In this regard, the Commission must bear in mind OneSteel's significant increase in sales volume. If OneSteel intended to focus on increasing sales volume, and maintaining its market share, then it is reasonable to expect that it needed to reduce or withhold price increases in order to achieve that intention, rather than to achieve greater profit,. In such circumstances, price increases *would not have occurred* – because of OneSteel's own commercial and market strategy.

Secondly, and most importantly, the SEF notes that a significant proportion of OneSteel's sales are to its related entities, and that these entities source rebar *only* from OneSteel.

We submit that it is essential for the Commission to examine the performance of those related entities in order to form a comprehensive view as to OneSteel's performance with respect to the goods under consideration. This is especially the case given those related party sales are not subject to any competition from imported sources, that is, the price is decided by OneSteel. Given the lack of negotiation, and if OneSteel is a profit seeking entity as the Commission surmises it must be – then OneSteel must be seeking a profit on those sales at some point in the sales route to end-users. If OneSteel *Manufacturing* cannot make a profit in selling to its own related entities, these questions must be asked:

- Why not?
- What is the cause of the so called "price suppression" – is it correct or reasonable to blame such unprofitability on the exports under investigation when OneSteel Manufacturing cannot, or chooses not to, seek a profit in making sales which are not subject to any direct competition?
- What if OneSteel is actually choosing to make a loss at the manufacturing level, or at least is not focussed on making a profit, so long as the price "support" it gives to its related entities delivers a profit to OneSteel as a group at a downstream level?

Given that a significant proportion of OneSteel Manufacturing's sales are made to related entities, and are not subject to any direct competition, the Commission must question the reason for OneSteel Manufacturing's inability to increase its prices to a profitable or even breakeven level. Given that a significant proportion of OneSteel's sales are made to related parties it should at least have the ability to sell to its related customers at breakeven price points. The significance of these related party sales throws doubt on any appearance of unprofitability shown within the OneSteel group at the rebar level.

In any case, we observe that during the POI, OneSteel *did increase* its prices, with the prices increasing in two quarters, and decreasing in the other two quarters, but trending upwards overall.

We submit that the Commission cannot conclusively determine that price suppression occurred during the POI. More importantly, the questions raised from the price analysis, as we mentioned above, must be carefully explored for the purpose of making findings regarding whether material injury has occurred and whether it was "genuinely" caused by any of the dumped imports that are subject to this investigation.

Our criticisms with respect to the price suppression findings in the SEF are the same with respect to the profit and profitability findings.

4 There is insufficient consideration of other economic factors.

We note that the SEF finds OneSteel to have also suffered material injury in the forms of reduced capital investment and reduced return on investment.

In terms of reduced capital investment, the Commission is of course aware of the fact that the whole Arrium group went into voluntary administration at the beginning of the POI. Naturally, all capital investment in Arrium would have been severely curtailed during the period it was under administration. In defiance of the proposition that dumping caused the Arrium group to be less attractive for investment purposes, Arrium instead attracted strong interest from investors and, soon after the POI, was successfully sold to become Liberty OneSteel. The injurious impacts of the voluntary administration which was underway throughout the POI must not be attributed to the allegedly dumped imports during the POI.

In relation to return on investment, we note the SEF's finding that the deterioration in OneSteel's return on investment was only a deterioration as compared to the *"second half of the calendar year 2015*". Such a limited analysis falls short of being comprehensive or conclusive, given that the injury analysis period is a four year period. The SEF omitted to mention that, based on data provided in OneSteel's application, OneSteel's return on investment index during calendar year 2016 was 83% higher than FY2013 and 300% higher than FY2014.

Further, we take note that the return on investment data was demonstrated in relation to "like goods" only. Such data provides only a very limited picture, given that OneSteel uses the same production facility to produce both like goods and non-like goods. The data concerning return on investment regarding the "like goods" also does not inform the Commission about the full reality of OneSteel's rebar operation, given that by far the majority proportion of sales are made by OneSteel to its related entities. The OneSteel group has full control over the transfer pricing involved in these transactions. OneSteel's constant policy of undercutting imports, subject to its "premium", which it has employed for as long as we can remember, is predatory. It is not the conduct of exporters that causes material injury to OneSteel. Rather, it is the behaviour of OneSteel itself that causes injury to exporters, and is injurious to the rebar market.

The Commission is required to consider the Australian industry's economic performance as a whole, and must not just focus on any area which appears to show a decline or deterioration. The Commission must form a holistic view regarding the Australian industry in considering whether it suffered material injury as a whole. In this regard, the SEF omitted to note that, during the POI, OneSteel:

- increased its capacity;
- increased its capacity utilisation rate for both like goods and non-like goods;
- increased wages;
- increased revenue;
- doubled research and development expenditure;
- increased production; and
- hugely increased export volume and values, especially in relation to coil product.

All of these factors counteract and at least offset the factors on which the SEF relies to show injury.

5 Overall comments regarding material injury analysis

In conclusion, we submit that the preliminary material injury analysis in the SEF needs to be reappraised so that it is conclusive, complete, and supported by evidence. Our analysis establishes that, amongst the five forms of injury determined by the SEF:

- the "loss of market share" cannot be a form of injury given OneSteel's comparatively high market share during the POI, and very high production and sales volume;

- there is insufficient evidence or analysis to show that OneSteel suffered material injury in the form of "price suppression";

- the consideration of OneSteel Manufacturing's unprofitability during the POI is is incomplete without considering the performances of OneSteel's related entities who purchase rebar as an input from OneSteel at prices that exist within the OneSteel group;

- the analysis concerning capital investment was affected by extraordinary events covering the whole POI, being the Arrium group's voluntary administration, which was in the course of being resolved in the POI and was resolved after the POI by way of the acquisition of Arrium by a new investor;

- the return on investment analysis appears to be incomplete both in terms of the use of a very recent comparative benchmark, and in terms of the scope and depth of the analysis.

Our analysis highlights the need for the Commission to consider the whole range of factors involved, the majority of which are indicative of an improvement in OneSteel's financial performance, and which are not suggestive of an industry suffering "material injury". We urge the Commission to fully consider these factors and to form a holistic view regarding the Australian industry's economic performance during the POI.

In the next part of this submission, we will further demonstrate, even if the Australian industry can be said to have suffered material injury, that such injury were not materially caused by exports from Nervacero, or the allegedly dumped coil product under investigation.

B Nervacero's exports did not cause material injury to OneSteel

In order to work out whether the goods under consideration ("GUC") exported by Nervacero caused material injury to OneSteel, the very first issue the Commission must consider is how the various export sources and types of rebar subject to the investigation should be treated. This is important because the allegedly dumped goods are not all the same, and they have different routes to end-users in the market. The effects and impacts on OneSteel's performance will depend upon the nature of the competition that took place in the Australian rebar market during the POI.

It is not a "given" that as long as the goods are imported at dumped prices they must be the cause of OneSteel's injury. These are obvious issues the Commission is required to consider under the Act and the Anti-Dumping Agreement. We raise these questions here because, in the main, the SEF fails to consider them. Rather, the SEF gives the "answer" to the question of whether dumping caused material injury to the Australian industry, by pointing towards dumping, without asking all of the questions necessary to provide that answer. This is not a criticism of the SEF, in that the very purpose of such a document is to elicit the comments and responses of interested parties for the purpose of ensuring that the answer ultimately provided to the Minister, in the form of the Commission's recommendations, is the correct and preferable one.

1 Nervacero's spooler coil exports must be separated from the other exports.

Before we start, we respectfully refer the Commission to our submission to the Commission, dated two weeks prior to the publication of the SEF ("pre-SEF submission"). Part A of our pre-SEF submission explains:

- the key physical factors that differentiate Nervacero's rebar coil sold to Australia to the other types of rebar subject to the investigation;

- the market differences between Nervacero's rebar coil and the other goods under investigation; and

- the special circumstances surrounding Nervacero's rebar coil exports to Australia, in particular the fact that one of Nervacero's major Australian customers is OneSteel itself.

These factors require the Commission to treat Nervacero's Australian sales differently and separately from other types of goods and sources of exports subject to the investigation when assessing their impact on the Australian industry.

The SEF does not appear to have considered these issues of "difference" in its injury causation analysis. Section 269TAE of the Act provides that the Minister may consider whether the effects of different sources of exports are to be cumulated *"only if*" the necessary criteria are met. In particular, Section 269TAE(2C)(e) provides that the Minister must consider

> *(i) the conditions of competition between those goods; and*
>
> *(ii) the conditions of competition between those goods and like goods that are domestically produced.*

The SEF addressed these requirement as follows:

> *8.4.3 Conditions of competition*
>
> *The Commission's analysis of the verified weighted average selling price of rebar sold by OneSteel, and the exporters and importers of goods from the subject countries during the investigation period indicates that there was close price competition between imported goods and also between the imported goods and the like goods produced domestically.*
>
> *The Commissioner considers that rebar is a commodity product and due to the degree of price sensitivity in the rebar market, price competition is a major condition of competition between the imported goods from each country and the domestically produced goods.*
>
> *As noted in chapter 3 of this report, the Commissioner has found that domestically produced rebar and imported rebar are directly substitutable. The goods produced by all exporters subject to this investigation and the Australian industry are alike, have similar specifications and common end-uses. As noted previously, the Commissioner considers that rebar straights and coils of a similar diameter are substitutable, and rebar processors or service centres can use either depending on the equipment available in their processing facility*
>
> *Data collected during the importer and exporter verification visits established that some importers were importing rebar from multiple countries (and exporters) that are subject to this investigation, and that customers were purchasing rebar from Australian industry, from the importers and also directly from exporters subject to this investigation. Importers (traders/distributors), some exporters and OneSteel were selling rebar predominantly into the same construction market segments during the investigation period.*

With respect, the above comments represent a broad-brush and unrealistically generalised approach towards all rebar, of different forms, different diameters and different quality. They are at odds with the Australian industry's own claims regarding its competition with the two different types of imported products. And they are inconsistent with the Commission's own approach in assessing the competitive status of the Australian rebar market, which is also conducted separately for rebar coil and straight separately.

We note the comments that *"some importers buy from multiple sources"*, that customers may buy from both the Australian industry and importers, and that *"some exporters"* and OneSteel sold rebar to the same construction market segments. It is not clear whether there has been any consideration of the market for rebar coil, especially Nervacero's spooler coil, and it would seem that there has not been. OneSteel's application was presented on the basis that at least rebar straights and rebar coil should be separately assessed. The application clearly indicates OneSteel's view that the two product types have different market patterns, which we would say relate to quality, use and price. The comments about rebar being sold into the same "construction market segment" are broad and, we think, unhelpful. Clearly all rebar products are used predominantly in the construction sector – so is rod in coil, structural steel, or cement. This does not make them all "like goods" or all "indistinguishable".

Rebar coil and rebar straights must not be cumulated for injury and causative effect analysis purpose. In OneSteel's application, rebar coil and rebar straights are clearly differentiated. Separate industry and market data was provided for rebar coil and rebar straights, on the basis that different market considerations apply to each of them.

The injury and Australian market analysis in the SEF is also conducted on the basis that rebar coil and rebar straights are two different products and have their own distinct pattern and circumstances.

Despite the *ultimate* similarity between the two products, in that both rebar coil and rebar straights are reinforcing bars, and yes, they are commodity products, they are still different due to their different physical characteristics, production processes, production costs, price levels, target markets, industry uses, etc. This is especially the case with Nervacero's spooler coils, which are also distinct to normal "wild" or "loose" coils. No one in the rebar industry would seriously suggest that straights and coils are the same product, competing in the same market, and completely substitutable with each other. Simply labelling rebar a "commodity" product subject to "price sensitivity" cannot take away the distinctions between rebar coils and rebar straights.

There are many indications of their lack of substitutability and different markets:

- OneSteel does not produce rebar coil of 20mm and over, but does produce rebar straights in those sizes;
- OneSteel imports rebar coil, [CONFIDENTIAL TEXT DELETED – comments regarding OneSteel's imports];
- rebar coil and rebar straights are priced at different levels;
- rebar straights and rebar coils cannot be grouped together as the one price sensitive "commodity" product when customers buy rebar coil and pay a higher price;
- Australian customers buy rebar coil imported from Nervacero and Greece at higher prices than the rebar straights from other countries;

Rebar coil and rebar straights are different products, competing in different parts of the market, sourced from different suppliers, and providing different commercial solutions to customers.

We take issue with the SEF's response to the submission from the Government of Spain on this issue, where it says:

> *The Commissioner notes that end users who have purchased rebar coils manufactured by Nervacero have also purchased rebar coils from other import sources either directly or through traders during the investigation period. The Commissioner therefore considers that it*

is appropriate to consider the cumulative effect of the dumped imports from all the subject countries, including Nervacero.

It is conceivable that the fact that end users may have purchased Nervacero's spooler coil, as well as other rebar coil, suggests that Nervacero's spooler coil was regarded to be similar to the other rebar coil the end users imported. However before reaching the conclusion that cumulation of Nervacero's spooler coil with other rebar coil is permitted, further inquiry is required. For example:

- What kind of rebar coil do those end users purchase from other imported sources – is it different to Nervacero's or the same?

- Was the rebar coil purchased from other import sources for the exact same usage as Nervacero's spooler coil?

Even if the outcome of such inquiries is that Nervacero's spooler coil can be cumulated with the other imported rebar coil as purchased by those same end users, such outcome would only support considering the cumulative effect of dumped imports, from the countries under investigation, of *all spooler coil or rebar coil*. It does not support any proposed cumulation of dumped imports of rebar coils and rebar straights *from all the subject countries*, and if that is what is meant by the above extract we reject it outright.

Product based differentiation must be considered where the goods under consideration cover a broad range of products with different characteristics and markets. In the current investigation:

- all goods under investigation from Spain are Nervacero's spooler coil;

- all goods under investigation from Greece are rebar coil, and may be spooler coil similar to Nervacero's; and

- the goods under investigation from Spain and Greece are only rebar coil, and rebar coil is not exported to Australia from any other country under investigation.

This means, to determine the appropriateness of cumulating *different products*, ie, between spooler coil, coil, and straight, by separating exports from Spain or exports from Spain and Greece and exports from the other exports, is to determine the appropriateness of cumulating exports from *different countries*.

Once again, we submit that it is inappropriate for the Commission to recommend to the Minister to cumulate the effect of Nervacero's exports with the exports from all other countries subject to investigation.

We submit that, due to the reasons provided in our pre-SEF submission, and here, that the effect of exports from Nervacero must be considered separately, and must not cumulated with any other export sources.

At the very least, we ask the Commission to separate the exports from Spain and Greece from the other exports under investigation, thereby separating the effect of exported rebar coil from rebar straights for the purposes of any injury causation determination.

Rebar coil has different conditions of competition than rebar straights. Cumulating Nervacero's spooler coil exports with all other exports under investigation would be wrong. If the Commission were to make that mistake it would also need to behave consistently in other aspects of its analysis:

- the Commission must consider the price effect of dumped goods indifferently to their product type – which is likely to show that Nervacero's prices were much higher than most other export sources; and

- the Commission must undertake a non-injurious price determination for all types of rebar indifferently to their type – which is likely to show that the non-injurious price of rebar product as a whole is much lower than both Nervacero's ascertained normal value and its ascertained export price.

2 Injury causation analysis concerning Nervacero is questionable.

(a) Flawed "market based pricing" assessment raises critical questions.

We submit that the SEF's approach towards goods not subject to the investigation betrays a fundamental misunderstanding of the injury causation analysis required under the Act.

The SEF's explanation of the relevance of the price effect of dumped imports states as follows:

> *In testing OneSteel's market based pricing model, the Commission looked at the relationship between the FIS import offer evidence provided by OneSteel and OneSteel's actual realised weighted average domestic selling prices to related and unrelated customers for each month of the investigation period. For the purposes of the analysis, offers from countries not subject to this investigation, and those that related to undumped goods from countries subject to this investigation were excluded as they cannot be considered to be causative in relation to injury due to the dumped goods*. [underlining supplied]

It is most strange for an injury causation analysis to claim that the effect of undumped goods, being goods not subject to the investigation, should be excluded *"as they cannot be considered to be causative in relation to injury due to the dumped goods"*. Quite to the opposite, Section 269TAE(2A) specifically directs the Minister to consider the effect of such imports so as not to attribute any injurious effect of such goods to the alleged dumping subject to investigation. This is a positive obligation that the Minister and the Commission must discharge, and must not ignore.

The database used for the SEF's "market based pricing" analysis, and the inferences drawn from such analysis, are also questionable.

We understand that the analysis was used in order to establish any price effect of dumped imports. The concluding paragraph of the analysis states:

> *The Commission's analysis as depicted in figures 9 and 10 above indicates that the final price realised by OneSteel in each month of the investigation period for rebar straights and rebar coils correlates with the FIS import offers that it claims were influencing its pricing decisions. The Commissioner notes that the lowest import offer may not always be the price that is matched because the market intelligence that OneSteel relies on is not complete and it is reasonable for OneSteel to make a judgement regarding the threat posed by an import price offer in making its own offer*.

It is not clear what the FIS import price basis is, or whether the FIS import prices used truly reflect the price point in the Australian market at which OneSteel faces competition. Do they reflect the prices charged by the importers, being the product cost, the full cost of importation, the importer's selling costs and the importers' profit? In short - do they reflect the actual price competition from the exports subject to investigation at all? For example, imports from Spain and Greece are subject to a 5% import tariff, as opposed to the tariff free treatment for all the other countries under investigation. If this import tariff burden has not been built into the FIS price, then the comparisons are significantly distorted.

The accuracy of the FIS price offers have profound implications for the claim that "market based pricing" has caused injury to OneSteel. If the price offers OneSteel claims to have been trying to match are lower than the actual FIS price level of the exports, then the attempt by OneSteel to claim that Nervacero's exports were the cause of its price suppression must fail. The fact that OneSteel might have "got it wrong", and priced its rebar at a point that it considers to have been injurious, is not Nervacero's fault. It cannot be said to be injury due to allegedly dumped imports.

In this regard it is worth noting that the "market based pricing" chart in the SEF is vastly different to the one provided in OneSteel's own Application, which presumably better reflects the information relied on by OneSteel in making its pricing decisions.

The market based pricing chart in the SEF shows the following:

Figure 10: Pricing over investigation period – Rebar coils

OneSteel's application presents a different picture:

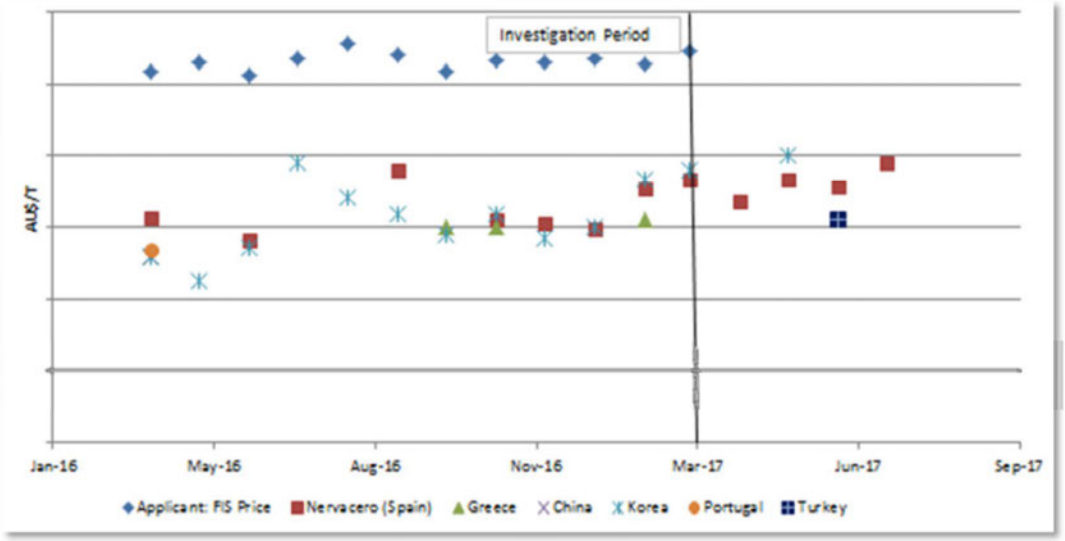

Figure A-9.7.1(b) Rebar in coils: price undercutting analysis in terms of the applicant's average FIS selling price at the time of delivery (during investigation period) compared to FIS import price offers based on month of delivery (until 30 June 2017) (Sources: CONFIDENTIAL ATTACHMENT A-9.5.1 and appendix A4) (x-intercept:y ≠ 0)

The chart provided by OneSteel in its application shows that for the vast majority of the POI the prices from Nervacero and Greece were not the lowest prices on the market. The price offers from Korea were the lowest for at least eight out of the 12 months. This suggests that the price intelligence OneSteel obtained in relation to Nervacero and Greece is likely to be inaccurate. The sharp differences between OneSteel's Figure A-9.7.1(b) in the application and Figure 10 in the SEF bear this out. The FIS price offers used in Figure 10 show that the prices from Nervacero and Greece were much closer to OneSteel's own prices.

A closer examination of Figure 10 shows that, in all actuality, there is no close correlation between the lowest price offers from Nervacero and Greece, and OneSteel's price pattern. OneSteel's price fluctuated, but the lowest offer price levels from Spain and Greece remained relatively steady. This suggests that OneSteel's pricing decisions are influenced by other factors.

A major feature, in fact the critical aspect of this case, is the allegation that the dumped price from Nervacero caused OneSteel material injury because it was unable to raise its prices and to be more profitable thereby. However this injurious effect cannot be established, and that linkage cannot be established, if:

- in truth it was another significant source of rebar coil imports, namely those from Korea, that were the lowest priced for most of the POI, based on the pricing intelligence used by OneSteel to set its own price; and

- the Nervacero price that OneSteel claims to have taken into account was wrong, not being the actual, higher prices of Nervacero's rebar coil.

That is, Nervacero exports could not and did not have the effect on OneSteel's pricing as it alleges. Any price suppression effect caused to OneSteel must be attributed to the lower price on the market and, as suggested by the SEF, OneSteel's inaccurate market intelligence.

The fact that OneSteel does not always try to "match" the lowest import offer, and would only match import offers based on its *"judgement regarding threat posed"*, shows that price is not the most determinative factor, and that the alleged dumped exports under investigation may have no or little impact on OneSteel's prices and sales. This is especially the case given that, apparently, OneSteel could choose in the POI not to match the lowest price, when at the same time it was increasing its sales volume to a historically high level and maintaining its dominant market share. There can be little connection between dumped prices and OneSteel's claimed injury if the "low prices" are not taking away OneSteel's sales, and are not forcing OneSteel to match prices in order to secure sales. It is almost as if OneSteel practises a moderate level of self-harm simply as a way of supporting anti-dumping actions against new entrants to the market. These new entrants came into the market in circumstances where supply from OneSteel was not guaranteed. Whether that came about by reason of its full capacity or preference for its related entities is not important. What is important is that the Commission not be led into error by OneSteel's unmeritorious application.

(b) Price undercutting analysis exposes critical issues.

As noted above, the SEF undertook its price undercutting analysis on a "sectoral" basis, ie, the SEF has separated the analysis between rebar coil and rebar straights. If the price undercutting analysis was conducted by "sector" or by type of product, as it was, then it makes no sense to cumulate exports from all countries in making an injury causation determination.

We draw the Commission's attention again to the issue regarding the meaning and content of the expression "converted FIS price". The Commission is correct to conduct its price undercutting analyses at the point of competition. Therefore, where exports competed with OneSteel via importer sales, the FIS prices should reflect the importers' prices, and not be simply a "conversion" of export prices. In this regard we respectfully reiterate that it is not clear to the reader of the SEF exactly what "adjustments" were made. If an export price to FIS price conversion approach must be adopted, for exports from Spain and Greece, the Commission is reminded to include import tariff payable, together with any importer premium.

Even if the "converted FIS price" analysis has been done properly, the "sectoral analysis – rebar coils" clearly shows that neither Nervacero nor Greece imposed the most price pressure on OneSteel. The price leader was imports from *"an exporter not subject to this investigation"* which we understand to be a Korean exporter, Daehan Steel Co., Ltd ("Daehan"):

> *In relation to rebar coils, the Commission's analysis indicates that Australian industry's prices were undercut by:*
>
> - *between 1 to 10 per cent by exports from Greece. There was no undercutting by Greece for 8 out of 12 months of the investigation period. This includes the months where there were no imports from Greece.*
> - *between 4 to 15 per cent by exports from Spain by Nervacero. Nervacero undercut OneSteel's prices in 8 out of the 12 months of the investigation period.*
> - *between 3 to 17 per cent by exports from an exporter not subject to this investigation. This exporter undercut OneSteel's prices in 10 out of the 12 months of the investigation period.*
>
> [underlining supplied]

Despite some conflicting information, and complexity in the way it is reported, the SEF then simply concludes that:

> *The Commission's price undercutting analysis however clearly indicates a correlation between OneSteel's price and the prices of dumped goods.*

With due respect, in addition to OneSteel's apparent misunderstanding/misinformation regarding the price competition between itself and the goods imported from Nervacero, the SEF falls short in actually examining *the effect* of any price undercutting by the goods imported from Nervacero and Greece.

The mere appearance that Nervacero's price were sometimes lower than those of OneSteel – which is itself questionable – does not automatically mean that OneSteel suffered injury because of the price undercutting from Nervacero. This is especially the case as OneSteel, despite the alleged price undercutting from Nervacero, not only did not lose sales, but greatly *increased* its sales volume, and apparently did so at *higher* prices. There is also no evidence that OneSteel actually lost any of *its* sales volume or market share to Nervacero's exports.

We submit that the SEF appears to have glossed over the effect of exports not subject to the investigation. A "correlation" between OneSteel's prices and the prices of dumped goods is not enough to establish that they caused material injury when an exporter not subject to the investigation more extensively undercut OneSteel's prices during the POI.

3 Flawed and insufficient consideration of non-attribution requirement.

(a) Effect of imports from other countries not subject to investigation not addressed.

The SEF's comments on this issue are as follows:

> *The Commissioner has found in relation to rebar coils, for five months of the investigation period, an exporter not subject to this investigation had the lowest prices that undercut OneSteel's prices. The volume of imports from this exporter amounted to approximately 10 per cent of overall imports of rebar into Australia over the investigation period. The Commission notes that for six months of the investigation period, countries and exporters subject to this investigation had the lowest prices that undercut OneSteel's prices.*

An exporter of such volume – 10% of overall imports - and with such low prices clearly would have had a substantial impact on OneSteel in the POI. It seems that the rebar coil exported by Daehan was the lowest priced in most months during the POI, and that Daehan undercut OneSteel's prices in 10 months during the POI. That is, Daehan's prices were the key factor impacting on OneSteel's prices, and imports from Nervacero and Greece were not.

The SEF attempts to dismiss the effect of the rebar coil exports not subject to investigation on the basis that:

> *Noting that the Commissioner must assess injury caused by other factors to the Australian rebar market and the Australian industry as a whole, the Commissioner considers that the exports of rebar coils from the source not subject to this investigation are unlikely to have influenced the overall rebar market prices to a significant degree during the investigation period.*

With respect this makes no sense to us in the context of the non-attribution requirements of the WTO Anti-Dumping Agreement and of the Act. And, if that is the case, then the same can be said about the rebar coil from Nervacero and Greece.

OneSteel has requested an anti-circumvention inquiry against goods imported from Daehan. The Commission has agreed to initiate the inquiry, noting:

> *…there appear to be reasonable grounds for asserting that a circumvention activity in relation to the original notice has occurred, that is the avoidance of the intended effect of duty, in relation to the original notice has occurred in relation to goods exported from Korea.*

The alleged circumvention period is identical to the POI of this investigation. This is as good an admission that the exports of rebar coil from Korea were the cause of OneSteel's "injury" in the POI as you are likely to find. The undercutting percentages quoted in the SEF, and OneSteel's data in Figure A-9.7.1(b) of its Application, bear this out.

Lastly in this regard, we note that apart from this one "other exporter", the SEF does not address rebar coil exports from other sources, for example exports from Singapore also appear (from OneSteel's application) to represent a substantial source of imports.

We urge the Commission to review its analysis concerning rebar coil exports from Daehan, and to ensure that the injurious effects of the low price benchmark of Daehan's rebar coil exports are not attributed to Nervacero's exports.

(b) Effect of exports not subject to investigation or un-dumped is unduly dismissed.

As mentioned above, the SEF dismissed the effect of Daehan's rebar coil exports as insignificant, despite Daehan's exports of rebar coil accounting for 10% of total imports, and despite their undercutting of OneSteel's prices for the vast majority of the POI.

The SEF also decided to dismiss the effect of exports from *"countries not currently subject to measures"* and the un-dumped Indonesian exports. These two sources each account for about 5% and 10% of total imports. The SEF suggests that the un-dumped exports from Indonesia were also undercutting OneSteel's price for at least 9 months of the POI:

> *In its price undercutting analysis, the Commission found no evidence of undercutting by exporter Putra Baja Deli in three months of the investigation period and no evidence of undercutting by exporter Ispat in seven months of the investigation period.*

That is, exports that account for at least 25% of total rebar imports, which is more than those from Nervacero, and that were also undercutting OneSteel's prices at various times, were dismissed as unlikely to have had a significant impact on OneSteel. As noted above, it would appear that there are other exports not subject to this investigation that are not mentioned in the Commission's analysis. This means that the total "other exports" the Commission must consider in order to ensure non-attribution are much higher than 25% of total imports.

We ask the Commission to apply the same consideration to Nervacero's exports, and to conclude that Nervacero's exports are unlikely to have had significance influence, so as to cause material injury.

(c) Injurious effect of factors other than dumping must be genuinely considered.

We urge the Commission to genuinely consider the injurious effect of other factors unrelated to dumping. In this regard, we refer the Commission to the submissions made by the various interested parties, including those raised by Sanwa and Nervacero in their meeting with the Commission, and in our pre-SEF submission, which draw attention to OneSteel's own inefficiencies.

In addition to the questions we raised concerning OneSteel's cost surge in the December quarter of 2016, we draw the Commission's attention to the widely reported power blackout in South Australia during that period which clearly affected Arrium's operations and operational costs in Whyalla.[3] It is alarming that event of such significance, which is clearly not dumping-related, has not been raised for the Commission's consideration by OneSteel, either in the application or in the record of the

[3] As an example, see http://www.afr.com/business/energy/electricity/power-blackout-a-30m-blow-for-whyalla-steelworks-sale-20160929-grriuw; http://www.abc.net.au/news/2016-10-01/homes-still-without-power-in-sa-arrium-counts-cost-of-blackout/7895354; and http://www.abc.net.au/news/2017-02-01/arrium-warned-government-of-power-price-spikes/8233266

Commission's visit to OneSteel, as an injurious factor unrelated to the alleged dumping under investigation.

In response to the European Commission's very legitimate question concerning OneSteel's efficiency, and the Government of Spain's observation that OneSteel has been consistently unprofitable in the past, the SEF states:

> *As noted previously, the Commissioner has found that the Australian rebar market has been affected by dumping during parts of the injury analysis period and the previous Investigations 264 and 300 have had an effect on the market. The volume of dumped imports from the subject countries were lower in calendar year 2015 and began to sharply increase in 2016. The Commissioner notes that the Australian industry was able to achieve profitability in calendar year 2015. The Commissioner also notes that while OneSteel's CTMS shows a downwards trend during the injury analysis period, it was unable to raise its prices above its CTMS during the investigation period. On the basis of these circumstances the Commissioner considers that it was dumped rebar from the subject countries that caused OneSteel's lack of profitability.*

And:

> *The Commission has based its assessment on verified data and has no evidence that indicates that the difference between OneSteel's prices and costs could be due to a lack of competitiveness or cost control. On the other hand, the Commission has found a correlation between the volume of dumped imports from the subject countries in the market and OneSteel's ability to charge over its CTMS.*

These statements appear to amount to a refusal on the Commission's part to investigate the issues identified by those interested parties on the basis that the Commission has found that dumping was the cause of injury. We think the point that those interested parties were trying to make was that the circumstances they mentioned could themselves have caused injury, rendering the injury said to be caused by dumping immaterial. We sincerely request that the Commission discharge its obligation to positively investigate other cause of injury; to properly attribute the injurious effect of factors not related to the dumping under investigation; and to make sure that the injurious effect of those other factors is not attributed to the dumped goods under investigation.

The SEF also provides what we think is a wholly insufficient response to some of the issues raised by other interested parties. In response to Plascorp's submission that OneSteel is either unable to supply, or refuses to supply, the demand in the market, the SEF replies as follows:

> *The Commissioner accepts that as OneSteel prefers not to supply smaller end users, some portion of the market may need to source rebar from overseas or purchase rebar from a distributor (including from OneSteel's related entities). However, the Commissioner has found that there is a high level of price sensitivity in the rebar market and the imported rebar from the subject countries is at dumped prices and it is these dumped goods that are causing injury to the Australian industry.*

A high level of price sensitivity in the market is not an excuse to find that Nervacero's exports caused material injury – it is a condition and not a cause. Far less, any such sensitivity would not even come to play if OneSteel either refuses or is unable to supply.

The issue of OneSteel's ability to supply the market is also particularly relevant for Nervacero's spooler coil exports. As explained in our pre-SEF submission, in some detail, Nervacero's spooler coil is a distinct and specialised product. It is provided to the Australian market because it is a product that OneSteel cannot supply. [CONFIDENTIAL TEXT DELETED – comments regarding OneSteel's imports]. This substantial volume of imports by OneSteel itself indicates the degree and extent to

which OneSteel cannot fully supply the Australian rebar coil market. The SEF indicates that OneSteel's imports accounted for at least 5% of total rebar imports. [CONFIDENTIAL TEXT DELETED – comments regarding OneSteel's imports]. This goes to indicate that at least a substantial proportion of Nervacero's rebar coil exports to its Australian customers were not in competition with OneSteel, as they could not have been supplied by OneSteel, and could not have caused any injury to OneSteel. This must be recognised and taken into account in the Commission's injury causation analysis.

Once again, we urge the Commission to review its consideration of factors unrelated to the alleged dumping of the exports under investigation, and to ensure their effects are not attributed to the exports under investigation. If the injury and causation analysis are properly carried out, we believe that the Commission will objectively come to the view that Nervacero's exports did not cause material injury to the Australian industry.

C Non-injurious price determination is wrong.

In this regard, we are concerned to note that the SEF not only failed to ensure non-attribution of any injurious effect of un-dumped exports and of exports not subject to investigation, it also deemed that dumping by the countries under investigation caused all those other exports to be unsuitable for determining a non-injurious price level. The SEF states:

> *The Commission also cannot determine that the price of rebar imported into the Australian market from other countries is a suitable basis for the USP as it cannot determine if the prices of the goods from those countries have been unaffected by the selling price of dumped rebar from the subject countries.*

This comment essentially claims that the prices of un-dumped exports, and of exports not under investigation, are somehow themselves "distorted" and "affected" by the dumped exports under investigation. Such a characterisation is extraordinary and unprincipled – it amounts to rendering competition from un-dumped import prices as being competition from dumped imports. An un-dumped price naturally reflects a non-injurious price, as a price unaffected by dumping.

We also take issue of the following comments in the SEF:

> *The Commissioner is of the view that in a market unaffected by dumping, it is reasonable to expect that OneSteel would continue to set its prices with regard to benchmarked import prices. In this case, as the price of imports would be higher at least by the dumping margins found, it would be expected that OneSteel's prices would also be higher by at least the percentage of the dumping margins found. The Commissioner notes that this approach is consistent with the approach taken in Investigations 264 and 300.*
>
> *Accordingly, the Commission considers that the NIP for each exporter is a price equal to the respective normal value. This redresses the effects of dumping without redressing the effects of any other factors influencing price.* [underlining supplied]

With respect, the underlined comments have no rational basis, for a number of reasons:

- The comments fail to recognise that there are other sources of imports, some already subject to dumping duty, some not so subject but not under investigation, which compete with OneSteel.
- OneSteel does not only set its prices with regard to import prices subject to this investigation.

- In so far as rebar coil is concerned, exports not under investigation undercut OneSteel's prices to a far greater extent than Nervacero's exports, and almost continually during the POI.

Accordingly, it is incorrect and unreasonable to determine the NIP for each exporter based on its corresponding dumping margins (or normal value). Indeed, if such logic was applied in every case, there would be no need for the Minister to consider non-injurious prices at all.

The Commission is reminded that the NIP is defined in Section 269TACA as *"the minimum price necessary… to prevent the injury, or a recurrence of the injury caused by the dumped or subsidised goods the subject of a dumping duty notice or a countervailing duty notice*." The Commission must not dismiss other market prices as being the true and valid benchmark of non-injurious price.

Furthermore, the purpose of a NIP is to find the price point at which the Australian industry can be said not to be materially injured by dumping. The focus of a NIP is on the Australian industry, not the exporters. To set the NIP at a different level for each exporter would generate distorted outcomes which do not collectively satisfy the purpose of a "non-injurious price". For instance, if exporter A's normal value is $100 and exporter B's normal value is $90, and these were the NIPs for each respectively, then exporter A would be prevented from competing with the Australian industry at the non-injurious level of $90 established for exporter B.

Accordingly, if the NIP is to be worked out at the level of normal value, it must be worked out at the level of the lowest of all the normal values, and not at the levels of the individual normal values for each of the individual exporters.

Further, in this investigation, the Commission has also established that:

- there are significant volumes of imports other than the dumped imports under investigation;
- a substantial proportion of imports from Indonesia were not dumped;
- rebar coil revealed, we think, by the anti-circumvention inquiry to have been exported by Daehan and imported and sold by Stemcor Australia was responsible for undercutting OneSteel's prices for the majority of the period, and was already subject to dumping duty;
- even if the Commission has now set out on a trek to establish whether exports already subject to dumping duty were actually being dumped at greater levels, in the anti-circumvention inquiry, this does not change the fact that those export prices were at those levels nor does it affect their relevance to the non-attribution analysis; and
- the non-attribution wording in the chapeau to Section 269TAE(2A) of the Act clearly refers to factors other than the exportation of *"those goods"*, being the goods under investigation, meaning that injury caused by the prices of the goods subject to the anti-circumvention inquiry is, legally, a relevant causal factor that must be taken into account, regardless of the Commission's pre-judgement as to whether they were exported at dumped prices.

Accordingly, we submit that the Commission must work out the NIP applicable to Nervacero based the lower of:

- the lowest ascertained normal value of any of the exporters; and
- the lowest export prices from any exporter not found to be dumping or not subject to the investigation; and

- OneSteel's import price as a buyer of rebar coils [CONFIDENTIAL TEXT DELETED – comments regarding OneSteel's imports].

In relation to the OneSteel import price based non-injurious price, as we note above:

> [CONFIDENTIAL TEXT DELETED – comments regarding OneSteel's imports]. *This goes to indicate that at least a substantial proportion of Nervacero's rebar coil exports to its Australian customers were not in competition with OneSteel, as they could not have been supplied by OneSteel, and could not have caused any injury to OneSteel. This must be recognised and taken into account in the Commission's injury causation analysis.*

[CONFIDENTIAL TEXT DELETED – detailed comments and analyses regarding non-injurious price]. These comparisons clearly show that Nervacero's exports were not injurious to OneSteel.

Further, if the Commission insists on cumulating Nervacero's exports together with all other exports under investigation, and maintains its position with respect to the interchangeability of rebar coil and rebar straights, then the NIP would need to be worked out based on the lower-priced rebar straights.

In any case, the correct application of a NIP should show that Nervacero's export price is higher than or at the same level as the NIP.

The foregoing comments with respect to non-injurious price are without prejudice to our client's insistence that its rebar coils have not caused material injury to the Australian industry and that the investigation should be terminated accordingly.

***

We respectfully bring these serious concerns to the Commission's attention. We trust the Commission will appreciate Nervacero's investment of its resources and its attention in this matter. Our client fully understands that it is also the Commission's desire, and in the Commission's interest, to thoroughly and objectively investigate the relevant issues as provided for under Australian law and in compliance with the Anti-Dumping Agreement.

We submit that the Commission should find that the correct and preferable decision in this investigation is that Nervacero's exports of rebar coil did not cause material injury to the Australian industry, and should terminate the investigation in that regard as soon as it is in a position to do so.

Yours sincerely

Charles Zhan
Senior Associate