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4 December 2017

The Director
Anti Dumping Commission
Investigations 2
Industry House
10 Binara Street
Canberra
Australian Capital Territory 2601

By email

Dear Director

Nervacero S.A. - alleged dumping of steel reinforcing bar Comments with respect to dumping margin calculation

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

In this submission we provide Nervacero's comments concerning certain of the approaches used by the Anti-Dumping Commission ("the Commission") in its calculation of the dumping margin with respect to Nervacero's exports of the goods under consideration ("the GUC"), such dumping margin having been worked out on a preliminary basis for the purposes of Statement of Essential Facts No. 418 ("the SEF").

A Incorrect understanding and determination concerning date of sale

1 The date of sale is the date on which the material terms of sale are established

Nervacero advised the Commission that the operative date for its export sales of the GUC is the date on which it issues a pro forma invoice, and that the operative date for its domestic sales is the date of domestic order confirmation.

Nervacero understands that date of sale should reflect the date which best establishes the material terms of sale. This reflects the definition provided in footnote 8 of the WTO *Anti-Dumping Agreement* ("the Anti-Dumping Agreement"):

> *8. Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.*

As acknowledged in the SEF, this also reflects the Commission's established position, as shown in its *Dumping and Subsidy Manual*:

> *In establishing the date of sale, the Commission will normally use the date of invoice as it best reflects the material terms of sale. For the goods exported, the date of invoice also usually approximates the shipment date.*
>
> *Where a claim is made that a date other than the date of invoice better reflects the date of sale, the Commission will examine the evidence provided.*
>
> *For such a claim to succeed it would first be necessary to demonstrate that the material terms of sale were, in fact, established by this other date. In doing so, the evidence would have to address whether price and quantity were subject to any continuing negotiation between the buyer and the seller after the claimed contract date.*
>
> *This arises because there can be circumstances where an exporter and importer agree on price and quantity and make a sales agreement to that effect, but this may not establish the date on which terms were finally agreed upon because an element of informality continues, and conditions can be changed.*

During the verification, Nervacero explained to the verification team, including through interviews with responsible persons from the domestic and export sales department, that the issuance of the pro forma invoice for export sales, and the issuance of an order confirmation for domestic sales, represented the point in time by which and at which all material terms of the sales contact are established. The issuance of such documents and the details they contain are recorded in Nervacero's sales/financial system. The material terms of the sales to which those documents relate are not changed after the documents are issued.

As the SEF notes, the only difference between the order confirmation/pro forma invoice and the final commercial invoice for payment collection would be the actual weight of the goods. However as already explained during the verification, this is the expected commercial outcome based on the sales terms agreed between Nervacero and its customers. This is because the arrangement between Nervacero and its Australian and domestic customers is that the goods will be sold based on the ordered quantity, and that the final invoice for payment will be based on the actual weight of production. Given the nature of the product, it is not commercially practicable to know or predict the final actual weight of the product until it is produced and weighed, and it will inevitably vary from the weight stated in the order. This outcome (that the final actual weight to be delivered and invoiced will be different to the weight stated in the sales order) is part of the agreed sales terms established at the time of issuance of the order confirmation and pro forma invoice.

To further demonstrate this point, we refer the Commission to the sample *pro forma* invoices for Australian sales as verified during the on-site visit, which provide details of the sales terms for each order, including that the total contracted/ordered volume is governed by a *"Tolerance"* clause. The tolerance provision refers to a range of weight tolerance agreed with the customer, such as [CONFIDENTIAL TEXT DELETED – tolerance clause]. Most *pro forma* invoices also separately provide an "*Invoicing*" clause, which states *"Actual Mills Weight"*.

That is to say, all material terms of the sales agreement are established by the *pro forma* invoice. Nothing is changed or further negotiated between the parties to the agreement after that point. The material terms of the agreement include an agreement between the seller and the buyer that delivered weight may vary from the ordered weight within a tolerance range, and that final invoicing and delivery will be based on the actual weight of production. This reflects the parties' understanding and agreement of the nature of the product and the "in bulk" nature of the sales. Likewise, the same arrangement is also part of the material terms of the sales agreed between Nervacero and its

domestic customers, based on the long-established commercial relationships in place between them, and are confirmed each time an order confirmation is issued.

Nervacero and its customers do not further negotiate their already settled transaction at the time of product despatch. Final production and invoicing weight may differ from ordered weight, within the agreed reasonable tolerance. This sales term has already been agreed between the parties, at the time of issuing the *pro forma* invoice or order confirmation.

For these reasons, we ask the Commission to revise its determination concerning the date of Nervacero's respective export and domestic sales for the purposes of the margin calculation. The correct date of sale to use is the date of the pro forma invoice for Australian sales, and the date of the order confirmation for domestic sales.

2 Response to other criteria referred to in the SEF

Having established the correct criteria to use for working out the date of sales, we now address some of the concerns raised in the SEF:

SEF comment	**Nervacero's response**
the actual weight and therefore the final invoice price is not known until the invoice date (because the weight is based on the weight of the truck departing the mill);	Please see our explanation above. The fact that the precise actual product weight is unknown until the goods are produced is within the terms of the contract agreed between Nervacero and its customers. The agreed term at the time of issuance of the *pro forma* invoice or the order confirmation is that final invoice is to be based on actual weight, which may differ from the ordered weight within a tolerance range.
transactions are recognised as sales in the accounting system on invoice date;	As advised, sales data is *also* entered into the sales accounting system once the *pro forma* invoice or order confirmation is issued. The accounting practice of finalising/concluding a sale in the financial system once the commercial invoice is issued does not detract from the fact that all material terms of the sales agreement with the customer are established at the earlier point, and not at the time of issuing the final commercial invoice. Indeed, huge disruption would be caused on both side of the commercial transaction if the sales terms were not established until the invoice date. One implication would be that neither party would be bound by the sales terms until the very last minute – after the seller has incurred all the costs of production and is ready to ship the product. From the customer's perspective, after the customer has received its *pro forma* invoice or order confirmation, it knows it has a binding contract in place and will proceed to make all arrangements for receipt of the goods it has ordered at the expected price, volume and delivery time. It is counterintuitive to use internal accounting practices as the basis to determine the date of an external sale, which takes place under a sales agreement that clearly establishes the terms of the sale and is followed by the parties to the transaction.

in its CTMS data Nervacero allocated quarterly SG&A costs using sales volumes determined based on invoice date;	As above, the reporting method for the purposes of the Exporter Questionnaire response simply followed the way the accounting data was arranged. This says nothing about the point in time at which the material terms of sales are established with customers.
invoice date was recognised as date of sale in Investigation 264 and Nervacero stated that its practices had not changed since that time;	As advised during the verification visit, Nervacero accepts that it did not put forward its view regarding the date of its sales, and that it simply followed the Commission's "default" position in Investigation 264. However nothing turned on that distinction at the time, because on the basis of the company's calculations it was not engaged in dumping no matter which date of sale was used for comparison purposes. Whether Nervacero did or did not make the same submission as it is making now in a previous case does not detract from the legal position arrived at on the basis of a proper examination of the facts in the present case. The *pro forma* invoice date and the order confirmation date best establish the material terms of sales, and that should be enough to conclude the matter.
Nervacero claimed it has an enforceable contract at order confirmation, however it did not provide any evidence that the contract had to be enforced in the past (in fact there is evidence that the risk of non-payment of an order is managed by Nervacero through different means); and	Nervacero disagrees that it needs to provide evidence of having commenced legal proceedings or other forms of contractual "enforcement" to show that the contracts it has entered into with customers by way of issuing *pro forma* invoices or order confirmations are enforceable contracts. Nervacero submits that the facts that it has successfully sold the goods to Australian and domestic customers based on the agreed terms as established in the *pro forma* invoices and order confirmations, that it has received payments accordingly, without the need to further negotiate or enforce each and every one of them before issuing commercial invoices, and that it has not had to commence proceedings to enforce those contracts, show that those agreements were enforceable, and were "enforced" by Nervacero and its customers through the delivery of the goods ordered and payment therefor.
the Manual requires any claim for a date of sale other than invoice date to address whether the materials cost differs between the time of the pro forma invoice / order confirmation and the invoice, and whether contracts were entered into for the materials purchases, which Nervacero hasn't addressed, and in relation to which the Commission found no evidence that Nervacero's pricing considerations support its claim	These requirements are not to be found in the domestic legislation nor the Anti-Dumping Agreement. Frankly, we do not understand what the SEF is driving at. Once the material terms of a sale to a customer are agreed, the cost of the sale is a matter for the seller. As the Manual provides, the considerations to which the SEF refers appear under a preamble which states *"[a]ny claim for an adjustment would need to substantively address…"*. Accordingly, these considerations would appear to relate to *adjustments* to the normal value for time differences under Section 269TAC(8)(a) of the *Customs Act 1901* ("the Act"). This is a separate and anterior question to the initial task of determining the date of sale of a transaction. Before the date of sales are correctly established, there is no basis to examine whether any adjustment is required to account for "*sales occurring at different times*".

In conclusion, we respectfully submit that the SEF's determination of the date of sale of Nervacero's Australian sales and domestic sales is incorrect, and has ultimately affected the correctness of the dumping margin calculation. We ask that this error be addressed, by correctly establishing the date of sales for Australian and domestic sales as the dates of issuance of the *pro forma* invoice and the

order confirmation respectively, and to apply the correct matching for normal value and dumping margin calculation purposes accordingly.

B Adjustment is required to address specification differences

In this regard, we recall that Nervacero provided a detailed presentation and technical materials to show the differences in physical characteristics between the rebar coil exported to Australia, conforming with the Australian 500N grade, and the rebar coil sold in the Spanish domestic market, conforming with the Spanish 500SD grade. This included comparison of the mechanical properties and chemical composition requirements under the relevant Spanish and Australian standards. The Spanish standard imposes stricter and higher value requirements on the 500SD products in various aspects, including:

- higher and stricter ductility ratio (the Rm /Re ratio) requirement;
- higher uniform elongation requirement; and
- higher requirement for chemical composition, particularly the higher requirement for manganese.

The chemical composition requirement comparison table used at Nervacero's factory, as provided during the visit, is attached here again for your reference.

Further, to quantify the adjustment required, Nervacero provided the visit team with a cost of production analysis. The analysis demonstrated that, [CONFIDENTIAL TEXT DELETED – production details], there were consistent cost differences between rebar coil produced to the Australian 500N grade, and that which was produced to the Spanish 500SD grade, of the same diameter, as shown in the below table:

[CONFIDENTIAL TABLE DELETED – cost comparison]

[CONFIDENTIAL TEXT DELETED – production detail].

We request that the weighted average cost differences (being EUR[CONFIDENTIAL TEXT DELETED] per tonne, as demonstrated in the above table) be used as the basis to adjust the physical differences between the goods exported to Australia, and those sold in the Spanish domestic market used for normal value purposes. The Spanish grade product is a superior product, in performance and cost terms, as compared to the goods exported to Australia. Adjustment is required under Section 269TAC(8)(b) of the Act.

Accordingly, and in light of the explanation provided again in this submission, we respectfully disagree with the SEF's comment that:

> *there appears to be no relationship between the evidence provided and the claimed reason for the cost difference, i.e. the greater volume of ferroalloy materials required to produce rebar to the Spanish standard*

We submit that the opposite has been established and presented to the Commission.

Further, in relation to the Commission's comments regarding the OCOT test, we submit that the adjustment for the physical differences between the products is a requirement under Section 269TAC(8). This requirement should not be bypassed for reasons or technical difficulties unrelated to that section.

C Financial expenses based adjustment

As noted by the SEF, Nervacero also requested an adjustment to the normal value based on the differences between financial expenses associated with Australian sales of the GUC and those associated with domestic sales of like goods.

The SEF proposes to reject this claim on the basis that:

- *the financial expenses allocation to domestic and export sales was only calculated for the purposes of responding to the exporter questionnaire;*
- *the chief financial officer for Nervacero was the only person present at the verification who was able to explain what each account represented and which class of sales it was relevant to; and*
- *the amount of the cost is extremely small.*

In relation to the first point, we advise that this is not remarkable at all. Nervacero, like most other steel companies, records financial expenses for the company as a whole based on the generally accepted accounting principles of Spain. There is no requirement for Nervacero to allocate financial expenses to domestic and export sales as part of its ordinary corporate accounting. On the other hand, we wish to clarify that, as demonstrated to the verification team, the "allocation" of the financial expenses was not an arbitrary and *ad hoc* process. The allocation was largely an "identification" process, based on the description of each of the separate accounting sub-ledgers. Based on the sub-ledger's description, or the specific coding, Nervacero then identified the nature of the expenses by its corresponding market, such as for domestic sales, or export sales, or all sales. Where the sub-ledger referred to a kind of expense which cannot be differentiated by market, such expenses were identified as benefitting "all" sales, and its amount was allocated to all sales.

For example, Nervacero was able to identify that the expenses sub-ledger for *"Bill of Exchange"* was related to domestic sales, because bills of exchange are financial instruments used only for Nervacero's domestic market purposes. Therefore, whilst such market based differentiation, or "allocation", was not readily shown in the financial records, Nervacero was able to identify the certain market-specific costs, and to differentiate the expenses as they were recorded under different sub-ledgers.

Further, we reject the suggestion that there was only one person at Nervacero who could explain the nature of the accounts, and what they relate to, and that this can somehow justify the rejection of Nervacero's claim. The Chief Financial Officer is the responsible person at Nervacero for understanding and administering the company's financial affairs and is best suited to give an explanation about the financial expenses accounts, and to do so in an efficient and helpful manner. Whether or not other employees of Nervacero attending the verification at that time were able to explain the content of those accounting sub-ledgers is irrelevant, and does not change the fact that in the case of certain kinds of financial expenses it is possible to identify whether they were incurred for sales into the domestic market as opposed to the Australian market. Such differences in expenses underpinned and influenced the circumstances and terms of Nervacero's sales to those different markets.

We acknowledge that the amount of adjustment being requested is small. However given it is not negligible, we ask the small adjustment to be made.

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We respectfully request the Commission to make the necessary corrections and adjustments to Nervacero's margin calculations as demonstrated during the verification and as explained again in this letter.

Yours sincerely

Charles Zhan
Senior Associate