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5 February 2016

Ms Joan Fitzhenry
Acting Senior Member
Anti-Dumping Review Panel
c/- Legal Audit and Assurance Branch
Department of Industry, Innovation and Science
10 Binara Street
Canberra
Australian Capital Territory 2601

By email

Dear Member

Nervacero S.A. – interested party submission
ADRP review concerning steel reinforcing bar from the Republic of Korea, Singapore, Spain and Taiwan

We refer to the Notice under section 269ZZI of the *Customs Act* 1901 ("the Act") issued by the Anti-Dumping Review Panel ("the ADRP") in this matter and published on 6 January 2016.

On behalf of our client Nervacero S.A. ("Nervacero"), we now provide the ADRP with its interested party submission under Section 269ZZJ of the Act. Our client's submissions relate to the grounds and elaborate upon the submissions raised for consideration by its own application to the ADRP, summarised by the ADRP in the Notice as follows:

> *(a) Whether Rebar exported by Nervacero S.A. had been dumped and, if so, whether the level of any dumping, should have been determined using export prices and normal values determined for Nervacero S.A.*
>
> *(b) The exportation of Rebar by Nervacero S.A cannot be found to have caused injury to OneSteel.*

This submission deals with the following matters:

ABN 56 231 964 609

A Commission policy on the question of "the exporter"

Nervacero submits that the policy of the Anti-Dumping Commission ("the Commission") – so far as it might be considered by the Panel to be relevant - contradicts the "combining" or "collapsing" of Nervacero with another exporter, such has been practised against Nervacero by the Commission in determining Nervacero's dumping margin.

In the Commission's *Dumping and Subsidy Manual*, the following guidance is provided regarding the meaning that the Commission will adopt in the determination of the party who is to be considered as an "exporter" in an anti-dumping investigation:

> *The Commission will identify the exporter as:*
>
> - *a principal in the transaction located in the country of export from where the goods were shipped and who knowingly placed the goods in the hands of a carrier, courier, forwarding company, or their own vehicle for delivery to Australia; or*
>
> - *a principal will be a person in the country of export who owns, or who has previously owned, the goods but need not be the owner at the time the goods were shipped.*[1]

Applying this definition to Nervacero S.A. and to Compañía Española de Laminación, S.L. leads to the conclusion that they are each exporters. Taking each phrase of the definition in turn:

1 *"The Commission will identify the exporter as: a principal in the transaction…"* - Nervacero and Compañía Española de Laminación, S.L. are separate principals, and conduct separate transactions. As outlined in Nervacero's application to the ADRP, the bills of lading submitted by Nervacero – for example, at Attachments 9 and 10 of Nervacero's Exporter Questionnaire – state the "shipper" to be Nervacero. The commercial invoices that are to be found in the same attachments are issued in the name of Nervacero, with the origin specified as being "Nervacero S.A., Celsa Group". The quality specification for those exports bears Nervacero's seal. The certificate of origin attests to the fact that Nervacero was the consignor. The beneficiary under the letter of credit is Nervacero.[2]

2 *"…located in the country of export from where the goods were shipped"* - both Nervacero and Compañía Española de Laminación, S.L. are located in the country of export from where the goods were shipped. However the simple fact that both companies reside in the same country alone is not evidence to suggest that they should be conflated as the same principal. The point is obviously not to conflate all principals within a given country. The two companies are located in separate regions of Spain. Nervacero ships from the Atlantic coast of Spain in the Basque Autonomous Community, and Compañía Española de Laminación, S.L. ships from the Mediterranean coast of Spain. Each company exports from separate locations and each company ships via different international routes to Australia.

3 "…*who knowingly placed the goods in the hands of a carrier, courier, forwarding company, or their own vehicle for delivery to Australia"* - each of the companies concerned handled the placement of the goods for export separately. Nervacero actually places the goods (coils) in the containers for shipping. As stated in Nervacero's Exporter Questionnaire:

> *The goods are packed into* ***[CONFIDENTIAL TEXT DELETED – number]****ft containers at the factory. The containers are then taken to the port (a distance of about 15km) by truck. At the port they are loaded onto container ships for the voyage*

[1] Department of Industry, Innovation and Science: Anti-Dumping Commission, *Dumping and Subsidy Manual* (November 2015), p. 27.

[2] Exporter Questionnaire: Celsa Group – Nervacero, Attachment 9 ("Australian sales sample document 1"); Attachment 10 ("Australian sales sample document 2").

to Australia.[3]

An independent shipping company is used to transport the goods to Australia. As stated above, the bills of lading, commercial invoices, quality specification for export and certificate of origin in respect of Nervacero's exports are all under the name of Nervacero in its own right, and it was Nervacero and Nervacero alone that passed the goods to the independent shipper for carriage to Australia on a **[CONFIDENTIAL TEXT DELETED – trading terms]** basis.

The bills of lading provided in the Australian sales sample documents during the investigation illustrate this. On Nervacero's first Australian sales sample document, the Bill of Lading of 13 June 2013 identifies the independent shipping company as **[CONFIDENTIAL TEXT DELETED – name of service provider]**, the shipper to be Nervacero and the Port of Loading as Bilbao European Port (nearby Nervacero S.A.'s manufacturing facilities).[4] On Nervacero S.A.'s second Australian sales sample document, the Bill of Lading of 9 September 2014 identifies the independent shipping company to be **[CONFIDENTIAL TEXT DELETED – name of service provider]**, the shipper to be Nervacero S.A. and the Port of Loading to be Bilbao Port in Europe.[5] On Compañía Española de Laminación, S.L.'s first Australian sales sample document, on the other hand, the Bill of Lading of 18 April 2014 identifies the independent shipping company as **[CONFIDENTIAL TEXT DELETED – name of service provider]**, the shipper as Compañía Española de Laminación, S.L. and the Port of Loading as Barcelona European Port.[6]

4 "…*or [the Commission will identify the exporter as] [a] principal will be a person in the country of export who owns, or who has previously owned, the goods but need not be the owner at the time the goods were shipped.*" - each of Nervacero and Compañía Española de Laminación, S.L. owned their own goods, respectively, until the transfer of that ownership to the Australian buyer took place. Nervacero S.A. manufactures rebar in its own production facility at Valle de Trapaga-Trapagaran on the Atlantic coast of Spain. Compañía Española de Laminación, S.L. manufactures rebar in its own production facility at Castellbisbal, on the outskirts of Barcelona and on the Mediterranean coast of Spain. The separate locations and attendant distances from the respective port facilities and markets of the two companies are

3 *Ibid*, Section B, B-2(a), p. 14.
4 *Ibid*, Attachment 9.
5 *Ibid*, Attachment 10.
6 Exporter Questionnaire: Celsa Barcelona, Attachment 9 ("Australian sales sample document 1").

shown by the above map extract:[7]

Neither operation is a "tolling" operation for the other company. The two companies 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. The two companies are separate entities with separate accounts. They separately manufacture their own goods. The raw materials for the manufacture of the goods are purchased and therefore "owned" by each company separately. Nervacero owns its own goods as it manufactures them, and owns its own goods at the time it exports them. Nervacero's Exporter Questionnaire response affirms that [CONFIDENTIAL TEXT DELETED – trading terms] under the letter of credit.[8] The [CONFIDENTIAL TEXT DELETED – trading terms] contract outlines the contractual responsibilities of Nervacero in relation to the goods for their export to Australia. As further stated in Nervacero's Exporter Questionnaire:

> *Pursuant to the Incoterm* ***[CONFIDENTIAL TEXT DELETED – trading terms]***.[9]

Compañía Española de Laminación, S.L. bears none of these costs for Nervacero, nor at any time owns any of the goods that Nervacero manufactures.

B Legal consideration of the term "the exporter"

The definition of "export" in the Macquarie Dictionary is given as:

> *to send (commodities) to other countries or places for sale, exchange, etc.*

In our submission this definition turns on the sending of commodities. Each of the companies – Nervacero S.A. and Compañía Española de Laminación, S.L. - sends its own commodities separately to other countries, in this case to Australia. The "sending" must of necessity be carried out by an "actor", which is clearly Nervacero S.A. in respect of the products it manufactures. Compañía Española de Laminación, S.L. is not the "actor" that exports Nervacero's goods, or *vice versa*.

The question of identifying the "exporter" was considered by the Federal Court in *Companhia Votorantum de Celluse e Papel v Anti-Dumping Authority*[10] ("the Celpav case"). The question in the Celpav case was whether a Brazilian manufacturer ("Celpav") or a Japanese trading company ("Dai Ei") that was involved in the transaction should be considered the "exporter" of goods by the Anti-Dumping Authority.

The headnote to the reportage of the judgement in the Australian Law Reports summarises the facts as follows:

> *An Australian company (Edwards Dunlop) imported Celpav paper. It placed orders with a Japanese trading company (Dai Ei), with whom Celpav had an arrangement. Dai Ei ordered the paper from Celpav who shipped the paper to Australia. Celpav invoiced Dai Ei and Dai Ei paid Celpav for the paper. Dai Ei in turn invoiced Edwards Dunlop and Edwards Dunlop paid Dai Ei. Edwards Dunlop did not deal directly with Celpav.*[11]

At both instances the Federal Court found that the Brazilian manufacturer, rather than the Japanese

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7 Ezilon Maps, *Spain Map – Political Map of Spain* (http://www.ezilon.com/maps/europe/spain-maps.html).
8 Exporter Questionnaire: Nervacero, *op. cit.*, Section B, B-2(c), p. 14-15.
9 *Ibid.*
10 Before a single judge of the Federal Court: *Companhia Votorantim de Cellulose e Papel v Anti-Dumping Authority and others* - (1996) 42 ALD 7; before the Full Court of the Federal Court: *Companhia Votorantim de Celluse e Papel v Anti-Dumping Authority and others* (1996) 141 ALR 297 ("Celpav case").
11 Peter Brereton, Australian Law Reports Summary*, Companhia Votorantim de Celluse e Papel v Anti-Dumping Authority And Others* (1996) 141 ALR 297.

trading company, was the exporter.

In the decision of the Full Court, Wilcox and Nicholson JJ jointly stated that:

> *It is not the passing of property which identifies the exporter (although it may be critical to identification of the importer) but rather the identification of which party satisfies the requirements of truly being the exporter.*[12]

In their judgement they note that the term "exporter" is not defined in the Act, but that its meaning has been judicially considered elsewhere, referring to *Henty v Bainbridge-Hawker*[13] ("the Henty case"). In that case Owen J addressed the definition of "exporter" in determining whether the defendant was the exporter of certain prohibited goods. The relevant passage of the Henty case quoted by Wilcox and Nicholson JJ is the following:

> *Another general submission was made that neither the defendant nor the companies which he directed and managed could be found to have been the exporter of prohibited exports because whatever goods were in fact exported were sold f.o.b. Sydney to an overseas buyer. The seller's obligations therefore ceased when the goods were placed on board the ship at the Port of Sydney and it was the overseas buyer who thereupon became the exporter of them. For the purposes of this case it is sufficient to say that if, in the case of an f.o.b. contract with an overseas buyer, the seller places the goods sold on board a ship bound for foreign parts and engages with the shipowner to carry them to the overseas buyer and the goods are carried overseas, the seller has, in my opinion, exported the goods within the meaning of the Customs Act.*[14] (underlining supplied)

Wilcox and Nicholson JJ applied this definition to the cost and freight ("CNF") contract that was under consideration in the facts of the Celpav case. A CNF contract is a substantially similar kind of contract to a [CONFIDENTIAL TEXT DELETED – trading terms] contract, being the kind of contract entered into by Nervacero S.A. for its exports to Australia in the instant case.

This understanding of an "exporter" applies to Nervacero as an exporter separate from Compañía Española de Laminación, S.L., for all of the reasons we have already explained. The purchase by the importer was made from Nervacero. All of the contractual documentation reflects the fact that the seller was Nervacero. Repeating what we said in the application, the sales by Nervacero were not made from Compañía Española de Laminación, S.L., nor from Nervacero S.A. *and* Compañía Española de Laminación, S.L.

Indeed, we would submit that the situation applying to Nervacero points even more clearly to the proposition that it and it alone was the exporter of the goods manufactured by it than was the case in respect of the Celpav case. Whereas Edwards Dunlop (the importer) paid Dai Ei (the trader), and whereas Dai Ei took title to the goods in question in the Celpav case, thereby possibly suggesting that Dai Ei was the exporter, the purchases by the Australian importers in the instant case were made from Nervacero S.A. Whereas Dai Ei issued invoices to Edwards Dunlop, the commercial invoices in the instant case are issued in Nervacero's own name.

We submit that Nervacero and Compañía Española de Laminación, S.L. are separate "exporters" in their own right. They both separately meet the requirements of *"the identification of which party satisfies the requirements of truly being the exporter"*, as was stated to be the relevant exercise in the Celpav case. Tracing the ordering of the goods illustrates this point. First, [CONFIDENTIAL TEXT DELETED – intercompany arrangement] itself is clearly not the exporter. That is obvious from the Celpav case, and has not been suggested at any stage by the Commission. Secondly, [CONFIDENTIAL TEXT DELETED – intercompany arrangement] is not the exporter, then any link

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12 *Celpav case*, *op. cit.*, p. 308.
13 *Henty v Bainbridge-Hawker* (1963) 36 ALJR 354.
14 *Ibid,* p. 356.

that would allow a connection between Nervacero and Compañía Española de Laminación for the purpose of exporting no longer exists, and Nervacero S.A. and Compañía Española de Laminación cannot be grouped. So, if the ordering of goods are to be traced to an exporter, they cannot be traced to **[CONFIDENTIAL TEXT DELETED – intercompany arrangement]**, nor to *both* Nervacero S.A. *and* Compañía Española de Laminación, S.L. They must be traced *either* to Nervacero S.A. *or* to Compañía Española de Laminación, S.L.

Tracing the purchase of the goods also leads to the conclusion that Nervacero is an exporter in its own right. As stated above, the purchase from the importer was made from Nervacero.

"Export" as the sending of goods is also considered jointly by Wilcox and Nicholson JJ.[15] Together they explore the definition of "export" by referring to *Australian Trade Commission v Goodman Fielder Industries Ltd*,[16] in which the Full Court of the Federal Court considered the definition of the term in the context of the *Export Market Development Grants Act 1974* (Cth). In that case, Beaumont, Gummow and Einfeld JJ stated:

> *The ordinary mean of "export" is to send commodities from one country to another using the verb "send" as indicating that which occasioned or brought about the carriage of the commodity from one country to another.*[17]

"That which occasioned" the "carriage of the commodity" from Spain to Australia was a purchase by the importer from Nervacero. A purchase is made with Nervacero and Nervacero *sends commodities* by an independent party to Australia, with the bill of lading identifying Nervacero as the "shipper".

C "Collapsing" causes incorrect dumping margins

Quite apart from the legal obstacles to considering Nervacero S.A. and Compañía Española de Laminación, S.L. together as "the exporter", the manner of the calculation of the dumping margin in a "collapsed" context is also problematic. These problems imply that "collapsing" was not intended by the legislation.

In the application, we point out that the scheme of the legislation is to work out export prices and normal values for a specific company according to its financial accounts. Distortions are created by rudimentarily "collapsing" the normal values and export prices of two companies to work out a dumping margin.[18] We make these further observations:

- We would imagine that in a "collapsed" entity, the OCOT (or "ordinary course of trade") test would need to be performed across all domestic sales of the collapsed entity. For some Nervacero models, only the "Profit & Recoverable Only" domestic sales were used for normal value purposes. However, "collapsing" Nervacero S.A, and Compañía Española de Laminación, S.L. could alter this conclusion, if the sales of the same models sold by Compañía Española de Laminación, S.L. were to have the effect of allowing "All Sales" to be used for normal value purposes. To further explain, if the volume of Nervacero S.A. OCOT sales of any particular model was 79%, thereby failing the 80% test referred to in Section 269TAAD(2) of the Act, but the volume of Compañía Española de Laminación, S.L. sales of the same model was 85% (and assuming equal sales volumes for the purposes of the exercise), then *all* the sales of the collapsed entity would be eligible for inclusion in the universe of domestic sales to be used for normal value purposes. The Commission's practice in arriving at the "collapsed" dumping margin for Nervacero and Compañía Española de Laminación, S.L. of simply calculating "Aggregated Normal Value" and comparing that to an "Aggregated Export Price" did not involve any intermediate OCOT test and therefore flouts

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15 *Celpav case, op. cit*., p. 301.
16 *Australia Trade Commission v Goodman Fielder Industries Ltd* (1992) 36 FCR at 517.
17 *Ibid*, p. 523.
18 Application, pages 10-12.

that test.

- In the present case, the Commission verified that the [CONFIDENTIAL TEXT DELETED – intercompany arrangement] to Nervacero was based on [CONFIDENTIAL TEXT DELETED – intercompany arrangement]. If the rough "theory" underpinning "collapsing" is that "associates" are together one "exporter", then the inclusion of this "group" *profit* as a *cost* within Nervacero S.A. has overstated Nervacero S.A.'s costs (as well as those of Compañía Española de Laminación, S.L.) by the amount of that profit. Again, to attempt a rudimentary example, if [CONFIDENTIAL TEXT DELETED – intercompany arrangement] included a profit [CONFIDENTIAL TEXT DELETED – intercompany arrangement] of 10%, and that 10% constituted 1% of Nervacero S.A.'s costs, then those costs would be overstated by 1% in a "collapsed" context. That 1% would again alter the ratio of OCOT to non-OCOT sales, allowing more domestic sales to enter the universe of domestic sales able to be used for normal value purposes.

We believe that these examples lay bare the emptiness of "collapsing" in the circumstances of a case such as this, where there are two separate exporters. It is an uninstructed practice which is devoid of discipline and which has no anchor in the Act.

D Cost, product and price differ as between the two companies

At the risk of overstating the point, we again point out that this is not a case of two companies occupying a single facility and dividing up its production for sales purposes, or sharing the same raw material supplies, or making exactly the same product, or pricing products at the exact same level. Nor is it a case where two companies are vertically involved in the sale of the same goods as were produced by one of them, such as in the case of a manufacturer and a related (or even unrelated) trading company.

In the application we drew attention to the fact that Nervacero and Compañía Española de Laminación, S.L had different costs and different production processes. In augmentation of those submissions, we note the following passage from Nervacero's Exporter Questionnaire response:

> *Celsa's "spooler" technology allows Celsa Nervacero to produce rebar in coils in larger sizes and at lower costs than its competitors. It is a very much more efficient method of producing this steel product.*[19] (underlining supplied)

This is another relevant and we think important example of difference. Nervacero's large spools – larger than those that can be produced by Compañía Española de Laminación, S.L. - have different costs and, at the same time, a different attraction for buyers. Large spools increase the efficiency of downstream fabrication ("cutting and bending").

Prices are not the same regardless of the company that produces them. There is no overall "take it or leave it" price list. Price negotiation by [CONFIDENTIAL TEXT DELETED – intercompany arrangement] (in its role as the contracted sales services provider for both companies) is not "lockstep" as between the products from the two companies. For example, [CONFIDENTIAL TEXT DELETED – intercompany arrangement] will take into account the preference of some customers for larger spools in price negotiation.[20]

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19 Nervacero S.A. Exporter Questionnaire response, at page 42.

20 We are mindful of the need to ensure that the ADRP only considers "relevant information" in conducting its review. In terms of both cost and price differences between the two companies, we think the underlying data verified and collated by the Commission makes it absolutely plain that strong differences exist. For the ADRP's further consideration, we also refer to *Information note for exporter verification visit - Certain matters arising during first three days of verification* as was presented to the Commission officials during the verification and dated 13 April 2015. In Section A, there is a graphical representation of the prices of Nervacero and of Compania Espanola de Laminacion, S.L. of different diameters of rebar to different categories of customers. The prices and price trends shown are not the same.

"Collapsing" does not recognise such differences and does not allow each exporter to be treated on its own merits.

E Grouping separate corporate entities under Australian law

Nervacero's application makes reference to the fact that where Australian legislation seeks to require or allow the grouping of different corporate entities, for the purposes of benefit or liability, the applicable legislation will deal with that in specific terms:

> *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.*[21]

At this point, we would like to provide further examples of the express grouping of companies under Australian law. These examples demonstrate that "consolidation" will be clearly spelled out in legislation, such that where a government body or entity wants to consolidate, or collapse, it will be guided and constrained by the legislative scheme in doing so. We submit that the collapsing of Nervacero and Compañía Española de Laminación, S.L. runs counter to this general principle of Australian law.

1 The *Income Tax Assessment Act 1997* (Cth) ("the ITAA Act") offers companies the option of consolidation for Commonwealth income tax purposes. Companies operate as separate entities for tax purposes unless and until they declare that they want to consolidate. The ordinary course of events is for separate legal entities to be taxed separately.

Section 703.5(1)(a) of the ITAA Act provides:

> *A consolidated group comes into existence… on the day specified in a choice by a company under section 703-50 as the day on and after which a consolidatable group is taken to be consolidated.*

In turn, Section 703-50(1) states that

> *A company may make a choice in writing that a consolidatable group is taken to be consolidated on and after a day that is specified in the choice and is after 30 June 2002, if the company was the head company of the group on the day specified.*

Under Australian law, subsidiary companies cease to exist for tax purposes on consolidation. The option to consolidate is governed by legislation, and precludes the government from declaring businesses grouped without their consent under the legislation.

2 Payroll tax systems also specify the circumstances in which companies are to be grouped together for tax purposes. In Queensland, businesses that are grouped are treated as one unit for payroll tax purposes under the *Payroll Tax Act 1971* (Qld) ("the PT Act"). The criteria for determining whether businesses constitute a group for the purposes of the PT Act are clearly stated:

(a) Section 68:

> *A group is constituted by all the persons forming a group that is not part of a larger group.*

(b) Section 69:

[21] Application, page 16.

Corporations constitute a group if they are related bodies corporate.

(c) Section 72:

(1) A relevant entity and a corporation constitute a group if the entity has a controlling interest in the corporation.

Note—Section 74 allows the commissioner to exclude, for payroll tax purposes, persons from a group constituted under this section in some circumstances.

(2) For this section, a relevant entity has a controlling interest in a corporation if—

(a) the corporation has share capital; and

(b) the entity has an interest in the corporation; and

(c) the value of the interest is more than 50%.

(3) In this section—

interest means a direct interest, indirect interest or aggregate interest under section 74B.

relevant entity see section 74B.

Further criteria are set out under headings dealing with "Constitution of groups", "Groups arising from the use of common employees", "Groups of commonly controlled businesses", "Smaller groups subsumed into larger groups" and "Exclusion of persons from groups".

In NSW, the *Payroll Tax Act 2007* (NSW) deals somewhat similarly with the grouping of companies for payroll tax.[22]

3 Land tax laws also contain express grouping provisions. In Victoria, the *Land Tax Act 2005* (Vic) sets out detailed provisions regarding the grouping of related corporations for the purposes of land tax.[23] The headings of relevant Sections indicate the importance attaching to a clear explanation of the conditions for grouping companies together, in order to overcome the normal expectation that a corporate entity is separate from any other corporate entity – *"What are related corporations?"*, *"What is a controlling interest in a corporation?"* and *"Further provisions for determining whether corporations are related corporations"*.

For example, Section 50 provides as follows:

(1) The Commissioner may treat related corporations as a single corporation for the purposes of this Act.

(2) If the Commissioner does so—

(a) the Commissioner must assess the related corporations jointly for land tax; and

[22] See Part 5 "Grouping of employers", esp. Sections 67–81, which set out the grouping provisions for the purposes of payroll tax in NSW. All related companies are grouped for payroll tax, and business groups are taxed as a group.

[23] See Part 3 "Assessment of land tax", Division 3 "Grouping of related corporations".

(b) the related corporations are jointly and severally liable for the land tax; and

(c) section 46 of the Taxation Administration Act 1997 applies accordingly. [underlining supplied)]

We note the clearly stated permission for the Commissioner to consolidate, in a rules-based manner.

4 These same principles apply to corporate group liability under statutory environmental regimes. Increasingly, Australian environmental legislation specifically extends liability for environmental harm caused by a company to other companies in a corporate group. This has been done in light of the failure to capture related (frequently parent) companies in terms such as "occupier" or "person". Thus, under Section 62A(1AA) of the *Environment Protection Act 1970* (Vic), the Environment Protection Authority:

> *…may by notice in writing direct a corporation to take the clean up and on-going management measures as specified in the notice if –*
>
> *(a) a person referred to in subsection (1)(b) or (1)(c) was a subsidiary, related entity or associated entity over which the corporation had control at the time that the conduct referred to in that subsection occurred.*

Persons referred to in *"subsection (1)(a) or (1)(c)"* are the occupier of the premises in issue or the person who has abandoned or dumped industrial waste or a potentially hazardous substance, respectively. Such a notice is also conditioned on the corporation or its directors being aware, or being reasonably expected to be aware, of the conduct of the subsidiary, related entity or associated entity and the Authority not being reasonably satisfied that the corporation or directors took reasonable steps to prevent the conduct. "Associated" and "related" entities have the same meaning as under the *Corporations Act*.

Similar examples of the need to specifically expand the scope of words such as "company", "occupier" or "person" to include separate but related companies are also to be found in the legislation of other Australian jurisdictions.[24]

5 Another example of the need to expressly extend liability to a related corporation under Commonwealth legislation is presented by insolvent trading rules. Under Section 588V the *Corporations Act 2001* (Cth), a holding company can be held liable for the insolvent trading of a subsidiary. Section 588V of the *Corporations Act* contains multiple conditions before liability can be so extended, including conditions as to awareness, suspicion and reasonableness of the directors of the holding company.

The numerous examples outlined above demonstrate the principle that, under Australian law, the extension of any liability or benefit to third parties – parties other than the "company", "occupier" or "person" - will be clearly spelt out in legislation, such that where a government body or an entity wants to consolidate an entity with, or "collapse" it into, other entities, it will either be constrained or guided by the legislative scheme in doing so.

We submit that the "collapsing" of Nervacero S.A. and Compañía Española de Laminación, S.L for the purposes of determining a dumping margin – where one did not exist for Nervacero S.A. in the

[24] Eg, Section 492 of the *Environmental Protection Act 1994* (Qld), in which a parent company can be held liable for acts or omissions of a subsidiary by which it is represented; (s 492(2)), and Section 66 of the *Environmental Management and Pollution Control Act 1994* (Tas), under which related bodies corporate can be held jointly and severally liable for the actions of the other(s) in making a payment for contravention under the Act, or stemming from an order of a court made under the Act. Again, these provisions from Queensland and Tasmania demonstrate the requirement of a statutory regime in order to hold a corporation responsible for the actions of a related corporation.

first place, purportedly under the expression "the exporter" - runs counter to this principle.

The above examples demonstrates that where a corporation is to be held responsible for the actions of a related entity or an associated entity, there will be a strict statutory regime in place for doing so, outside of which the corporation will not ordinarily be responsible.

F This case compared to that in the Indonesian paper WTO panel report

Report 264[25] 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")[26] in support of the ability to "collapse" separate corporate entities under Australian law.

There appear to have been three main issues of concern for the Panel in relation to the Indonesian companies that were "collapsed" in that case:

- first, the overlap of directors and commissioners between the companies;
- secondly, the use of a common domestic sales channel; and
- thirdly, the *"ability and willingness"* of the companies to *"shift products among themselves."*[27]

These will be considered in turn.

1 The demonstration of any overlap of directors as between the Boards of Nervacero S.A. and Compañía Española de Laminación, S.L is not evident on the Commission's record. We have not been able to find details on the directors of the relevant companies and therefore would have to consider that information not to be "relevant information" for the ADRP's purposes. It would appear that these details were neither requested by the Commission nor volunteered by our client. However, as it is not "relevant information", it is also not available to the Commission in support of its reliance on the Indonesia paper panel report.

Further, as is clearly apparent on the Commission's record, Nervacero S.A. and Compañía Española de Laminación, S.L have separate factory and corporate management, separate costs, different suppliers and other service providers (some common, some non-common), and different product mixes in terms of their respective production and sales. This is not indicative of a close legal and commercial relationship between the companies.

2 Nervacero S.A. and Compañía Española de Laminación, S.L did not adopt a "common sales channel". It is the case that **[CONFIDENTIAL TEXT DELETED – intercompany arrangement]** was not itself a "sales channel". Thus, Nervacero S.A.'s domestic sales did not take place "through" a dedicated related-party sales channel. The reference to a common domestic sales channel appears to have been an important consideration in the Indonesia paper panel report, and led the Panel to extrapolate this situation to the international export context.[28]

3 We see no evidence of an *"ability and willingness"* of Nervacero S.A. and Compañía Española de Laminación, S.L *"to shift products among themselves"*, and this is not cited by

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25 *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").

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

27 Report of the Panel, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia* WT/DS312/R ("Panel Report, *Korea*"), 28 October 2005, 7.165.

28 The coordination of a common sales channel domestically led the Panel to conclude that there was the *possibility* of centralised coordination with the intent to skirt around Korea's anti-dumping laws. Not only is this exercise highly speculative, and therefore not of a properly legal nature, it is an exercise that cannot be begun in the case of Nervacero S.A., because there is no domestic sales channel other than that from Nervacero S.A. to its independent customers.

the Commission in Report 264. Nervacero's application outlines[29] that as stated in Attachment 7 of the individual companies' Exporter Questionnaires, the companies sell to each other in small quantities.[30] However, the Exporter Visit Report confirms that *"these transactions related to sales of rebar to external customers"* and that *"prices on these transactions were at the value invoiced to external customers*.[31] [32]

Accordingly, we restate that the situation of Nervacero S.A. is not the same as that faced by the Panel in the Indonesia paper panel report. At the same time, we submit that Australian law is not permissive of a result whereby companies like Nervacero S.A. and Compañía Española de Laminación, S.L can be collapsed as the one "exporter".

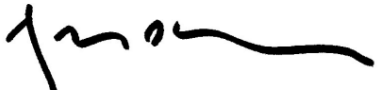
G Nervacero's [CONFIDENTIAL TEXT DELETED – number]mm rebar cannot have caused injury

As per Nervacero S.A.'s application to the ADRP, if the ADRP does not accept the position we have advanced on its behalf in relation to the impermissible "collapsing" of it with Compañía Española de Laminación, S.L, the ADPR is then requested to consider the finding that exports of Nervacero's [CONFIDENTIAL TEXT DELETED – number]mm rebar caused injury to the Australian industry, and to find that that was not the case.

In this regard we have very little to add to what has already been advanced in the application, except to say that our client's position is compelling.

The entire lack of competitive interaction of that product with the Australian industry's sales – [CONFIDENTIAL TEXT DELETED – contractual arrangements] – makes this an exceptional case. The Commission's defence of its position – to the effect that rebar "of the type" specified in our client's submission ([CONFIDENTIAL TEXT DELETED – number]mm rebar) was imported by other exporters – does not justify its position. The relevant question is whether injury has been caused to the Australian industry and not whether there is completion between importers. Contrary to the Commission's response to Nervacero's submission on this matter, Nervacero's [CONFIDENTIAL TEXT DELETED – number]mm rebar did not compete with Onesteel's sales of rebar, and therefore should be excluded from the scope of the notices.

Yours sincerely



Daniel Moulis
Principal Partner

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29 *Application for review: Steel reinforcing bar exported from the Republic of Korea, Singapore, Spain and Taiwan: Nervacero S.A.*, Attachment B (Confidential), 21 October 2015, fn 19.

30 Attachment 7 of the individual Exporter Questionnaires for the two companies indicate that [redacted] of Compania Espanola de Laminacion, S.L's sales were to Nervacero S.A., and that [redacted] of Nervacero S.A.'s sales were to Compania Espanola de Laminacion, S.L.

31 *Exporter Visit Report – Compania Espanola de Laminacion, S.L. & Nervacero S.A.*, p. 44.

32 In the Indonesia paper pane report, the language of *"ability and willingness… to shift products among themselves"* is also used by the Panel to speculate that there is the *possibility* of a centralised intent to skirt around Korea's anti-dumping laws, despite the fact that the language appears nowhere else in the Panel Report (see Panel Report, *Korea, op. cit.,* 7.165). We know of no evidence of this possibility in the case of Nervacero S.A., and the Commission does not make such a claim in Report 264. The companies openly acknowledged that they sell to each other in small quantities for the purposes of making some domestic sales.