

# In the Anti-Dumping Review Panel



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## ADRP Review 2023/166 – interested party submission

### Nervacero S.A.

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### A Introduction

We make this submission on behalf of our client Nervacero S.A. (“Nervacero”) in accordance with s269ZZJ of the *Customs Act 1901* (“the Act”). Our client’s submissions relate to the grounds and elaborate upon the submission raised for consideration by its own application to the Anti-Dumping Review Panel (“ADRP”).

The reviewable decision that is subject to this review was based on the recommendation and the reasons for the recommendations, included in Report 601.<sup>1</sup> That recommendation was made by the Commissioner of the Anti-Dumping Commission under s 269ZHF(2) of the Act.

For the reasons stated in Nervacero’s application, the Commissioner’s recommendation was premised on a flawed determination that it was probable that there would be a continuation or recurrence of

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<sup>1</sup> Anti-Dumping Notice No. 2023/004.

dumping and of material injury. These flaws were adopted by the Minister in making the reviewable decision and so the reviewable decision is neither correct nor preferable.

This submission deals with the matter in the following order:

- incorrect application of legal standard in s 269ZHF;
- mere assumption that exports will continue;
- dumping is not a likely consequence of the expiry of the measures;
- injury is not a likely consequence of the expiry of the measures,

Ultimately, the Commissioner could not have been satisfied of the things he was required to be satisfied under s 269ZHF(2). As such, no recommendation should have been made to the Minister to the effect of continuing measures against steel reinforcing bar exported from Nervacero.

## **B Incorrect application of legal standard s269ZHF**

Nervacero's application sets out the requirements of s 269ZHF(2) of the Act. We do consider it helpful to look at the terms of that section, as it is complex. The Act provides that the Commissioner may only recommend the measures continue where he is:

*satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent.*<sup>2</sup> [underlining supplied]

Based on its terms, s 269ZHF(2) is concerned with what is likely to occur as a *consequence* of the expiration of the measures.<sup>3</sup> It is uncontroversial, that the term "likely" means "more probable than not", and that the Commissioner's satisfaction must be based on positive evidence. The Commission itself notes that its conclusions must be based on facts.<sup>4</sup>

A distinction needs to be drawn between exports and dumped exports. A likelihood of the continuation or recurrence of exports does not justify the continuation of the measures. One cannot, for example, make a factual finding that a continuation of exports is likely, and assume that such exports would likely be dumped. Section 269ZHF(2) is not meant to be an easy bar to pass. Continuation of measures is not something that happens in due course; it is an exception to the general rule that measures expire after five years.<sup>5</sup> Any decision to continue measures must be based on credible evidence that the expiry of the measures is likely to result in the continuation or recurrence of injurious dumping. For the reasons discussed in Nervacero's application and this submission, the Minister's satisfaction was incorrect and not preferable.

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<sup>2</sup> Section 269ZHF of the Act.

<sup>3</sup> Panel Report, Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars, para 7.54, notes: *The assessment under Article 11.3 is not about whether dumping is causing injury, but is instead about whether the expiry of anti-dumping duties would be likely to lead to the continuation or recurrence of injury.*

<sup>4</sup> Report 601, page 60.

<sup>5</sup> Appellate Body, *US – Corrosion -Resistant Steel Sunset Review*, para 104.

## C Report 601 merely assumes that exports will continue

The first step in the logic of Report 601 is the finding that Nervacero would likely “*continue exporting if the measures expire*”.<sup>6</sup> This appears to be based on its finding that during the inquiry period Nervacero’s exports “continued”.<sup>7</sup> This conclusion is divorced from the underlying facts regarding those exports. Those exports were of a single stand-alone container and was made under special circumstances. They were the only exports made by Nervacero during the inquiry period, and indeed the only exports made by Nervacero since 2019.

As explained again in Nervacero’s application, this export was **[CONFIDENTIAL TEXT DELETED – transaction information]**.<sup>8</sup> This is also reflected in the Report 601’s decision not to alter the variable factors that dictate the duty rate of the measure that was continued. This one-off shipment has little relevance to what may happen if the measures expire. What is relevant is the fact that there are no ongoing exports of rebar from Nervacero to Australia, and there have not been for some years.

Report 601 posits that Nervacero’s exports will continue, based on one export consignment to Australia since 2019. Even if this one container of export was to repeat, at **[CONFIDENTIAL TEXT DELETED – export volume]** tonnes or approximately **[CONFIDENTIAL TEXT DELETED – export volume]** % of the 1.35 million tonne Australian market,<sup>9</sup> we would suggest with confidence that such export is more than probably “negligible” in terms of its possible impact on the Australian industry, and incapable of causing any continuation or recurrence of “material injury” in s Section 269ZHF(2) sense.

We do not contend that Nervacero will definitely not export the goods to Australia in the future. It has the ability and certification to do so, and may seek to do so if the terms of a sale were acceptable and beneficial to both Nervacero and the Australian customer. However, that latent ability does not make exports likely to continue or recur as a result of the measure’s expiry. Report 601’s satisfaction that the continuation of exports by Nervacero is likely if the measures expire does not have a proper evidentiary basis. The consequent appraisal of the likelihood that such exports would be dumped is built on unsafe foundations.

## D Dumping is not a likely consequence of the expiry of the measures

In addition to the detailed submission in Nervacero’s application to the ADRP, we provide further comments on the incorrect and unreasonable nature of Report 601’s finding with respect to the likelihood of continued dumping.

Report 601’s finding that “dumping would likely continue” was based on the following factors:

- a supposed pattern of dumping that supports the likelihood of a continuation of dumping;<sup>10</sup>
- “past dumping behaviour”;<sup>11</sup>

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<sup>6</sup> Report 601, Page 63.

<sup>7</sup> Ibid.

<sup>8</sup> Nervacero ADRP Application Attachment 2, page 12.

<sup>9</sup> Report 601, page 29.

<sup>10</sup> Report 601, page 11.

<sup>11</sup> Report 601, page 71.

- third party evidence provided by InfraBuild that shows increased normal values relative to export prices;
- an assumed desire to seek a price advantage; and<sup>12</sup>
- exports from other members of the Celsa Group.<sup>13</sup>

We address each of these factors below. As that discussion will show, Report 601 markedly fails to actively engage with the facts before it. While the Act does not consider it necessary for an exporter to establish that dumping is unlikely to continue or recur, the facts that pertain to Nervacero do indicate this to be the case. Fundamentally, Report 601 is more concerned with trying to negate these facts, than with explaining why it considers a continuation or recurrence of dumping is likely.

## 1 The supposed pattern of dumping

The references in Report 601 to a “pattern of dumping” is a reference to the finding that dumping was found to have occurred in Investigation 418 and in the current inquiry period. We submit that the reliance on a “pattern of dumping” bypasses significant factual nuance and has not properly informed the Commissioner’s satisfaction under s 269ZHF(2).

As noted above, the circumstances relating to the single container exported to Australia in the inquiry period were aberrant and of little relevance to the objectives of this inquiry. If anything, that single shipment of ex-stock products was consistent with Nervacero’s overall pattern of trade with respect to the Australian market – being mostly absent. As noted in Nervacero’s ADRP Application:<sup>14</sup>

*This single container export was a stand-alone and one-off stock and production management activity. It was not inconsistent with the overall pattern of Nervacero’s approach to the Australian market, namely an absence of exports to Australia due to:*

- *the high price and strong demand in Nervacero’s main EU markets;*
- *higher cost of production and freight as a Spanish exporter;*
- *higher import tariffs; and*
- *the competitive advantage of sources of exports not subject to measures.*

This one-off container of old product is not representative of an ongoing commercial practice. As such the resultant dumping margin determined on the basis of that export price has limited probative value in assessing what is likely to happen if the measures expire. This one container of rebar, and the dumping margin associated with such container, is incapable of establishing a “pattern of dumping” – there is no such pattern.

Report 601 itself notes that *dumping during the inquiry may be indicative of future behaviour, however this factor alone is not determinative.*<sup>15</sup> The use of the term “may” indicates an awareness that a dumping margin will not, in all circumstances, indicate future behaviour. Yet Report 601, fully aware of the unique circumstances surrounding the single export since 2019, does not seek to justify why it considers this

<sup>12</sup> Report 601, page 71.

<sup>13</sup> Ibid, page 80.

<sup>14</sup> Nervacero’s ADRP Application, Attachment 2, page 12.

<sup>15</sup> Report 601, page 73.

margin to be indicative of future behaviour.<sup>16</sup> In this regard, Report 601 fails to constructively engage with the facts in the record, and has not adequately considered whether the dumping finding could satisfy the Commissioner of Nervacero's behaviour if the measures were revoked.

By focussing on the supposed "pattern of dumping" Report 601 does not properly contend with the facts related to Nervacero's export during the inquiry period. By failing to actively engage with those facts, Report 601 has not properly considered whether they support the conclusion that the expiry of the measures would likely result in a continuation of dumping.

## 2 "Past dumping behaviour"

Report 601 refers to "past dumping behaviour" as a "potential indicator that dumping is likely to continue if the measures expire".<sup>17</sup> Apart from the single container discussed above, the only other "past dumping" would be the one from the original investigation, Investigation 418, which led to the imposition of the measure that is the subject of the continuation inquiry. This is neither novel, nor particularly telling. If that were sufficient, in and of itself, to justify the continuation of measures, there would be no requirement for a continuation inquiry, and anti-dumping measures would never expire. Indeed, unsurprisingly, the Thai exporter Millcon, against whom the measures have been allowed to expire – was found to have dumped by a margin of 9.3% in that same investigation and have since continued to export to Australia.

Report 601 mentions, but does not seem to evaluate or give weight to, the fact that Nervacero was also subject to an investigation in 2015 which did not result in the imposition of measures on its exports. This was precisely because Nervacero's margin in that case was *de minimis* and so, in the parlance of section 269ZHF(2), was not "dumping" that the measure "intended to prevent". We see no reason why this finding is any less relevant to the determination regarding the likelihood of future injurious dumping. At best, the sum of the prior findings is agnostic as to whether the expiry of the measures would likely result in actionable dumping that measures are necessary to prevent.

## 3 Infrabuild's evidence illustrates Nervacero is not likely to engage in dumping

In concluding dumping is likely to continue, Report 601 notes as follows:

*Additionally, InfraBuild provided evidence available to it in the form of third party paid subscription data to support that the normal value for Spain has recently increased more than the export price. This was demonstrated by the commission's dumping assessment for the inquiry period. The Government of Spain's submission also referred to significant steel price inflation in Spain and Europe, which could have increased the normal value for Spain.*<sup>18</sup>

As already explained in Nervacero's ADRP Application:<sup>19</sup>

*This conclusion is wrong and problematic. High prices and high costs are disincentives to export, and are evidence of the "unlikeliness" of Nervacero exporting the goods to Australia, due to lack of competitiveness. The Commission's conclusion is made on an assumption that exports from Spain will actually "continue" and that "if exports continue" then they are likely to be dumped. Infrabuild's so-called "evidence" confirms nothing more than Nervacero's advice that the domestic and key regional market prices in Spain and Europe have experienced strong growth*

<sup>16</sup> Moreover, Nervacero's exports to Australia have diminished after 2018 due to a range of factors; see Nervacero ADRP Application, Attachment 2, pages 13 and 14.

<sup>17</sup> Report 601, page 71.

<sup>18</sup> Ibid.

<sup>19</sup> Nervacero ADRP Application, Attachment 2, page 18.

*and that the high price and high cost in the region is likely to continue. These factors have contributed and will likely continue to contribute to Nervacero's decision not to export to Australia, even if the measure expires. The higher cost, higher prices, higher import tariffs, and supply chain disruption from the Russian invasion, combined with the dominance of the Australian industry itself through its "Advantage Program", and the existing lower priced imports from the Asian region and Turkiye, all point against the likelihood of Nervacero re-entering the Australian market.*

Nervacero is at a disadvantage in addressing this information, as the information has not been provided to Nervacero (even in summary form) and is not cited in Report 601. We think it is likely that the "evidence" was a reference to the following from Infrabuild's submission of 21 December 2022:

*we observe that the domestic sales prices in Spain in November 2022 (€xxxx /tonne) remains above the average domestic sales price in Spain across the inquiry period (€xxxx /tonne), a proxy for the ascertained normal value.<sup>20</sup>*

It is unclear how this is said to relate to likely export prices of Nervacero. As Nervacero has pointed out in both its ADRP application and in submissions to the Commission during the inquiry, pricing conditions in Spain and its key markets in Europe more generally have been favourable – this is a key reason why Nervacero is unlikely to seek exporting the goods at lower prices to the Australian market. As noted, Nervacero was operating at close to full capacity without making any sales to Australia. The fact that higher domestic prices persisted following the end of the inquiry period supports Nervacero's submission that it has no inclination or incentive to seek to compete with the lower prices in the Australian market. Once again, higher domestic prices in markets to which Nervacero is already selling the majority of its products does not make injurious dumping more likely to occur - it makes exports to Australia at lower prices less likely.

#### 4 Assumed desire for "price advantage"

In assessing the likelihood of dumping, Report 601 states "*if the measures were to expire, the subject country exports would gain a price advantage from dumping currently prevented by the measures*"<sup>21</sup> and concludes that import volumes from subject countries would increase if the measures expired. The Report also states that the "*measures have removed the price advantage from dumping previously enjoyed by these exporters, which has coincided with export volumes reducing*".<sup>22</sup>

As already pointed out in Nervacero ADRP application,<sup>23</sup> the likelihood and nexus determination must not be based on an assumption that:

*...because dumped imports had decreased and the market share of the domestic industry had increased following the introduction of the anti-dumping duties, the opposite would happen upon removal of the duties.<sup>24</sup>*

Report 601 includes no explanation as to why expiry of the measures would lead to an influx of Nervacero imports. It just assumes that would be the case. That assumption does not grapple with the fact that in order for Nervacero to export to Australia, it would need to have customers shifting their

<sup>20</sup> Infrabuild response to Nervacero Submission, response dated 3 January 2023, EPR 601-29, page 9.

<sup>21</sup> Report 601, page 63.

<sup>22</sup> Ibid, page 8.

<sup>23</sup> Nervacero ADRP Application, Attachment 2, pages 3 and 4.

<sup>24</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para 7.608.

supply from existing sources to Nervacero. Report 601's assessment completely ignores the fact that over 99% of the market is captured by Australian industry, import volumes from countries not subject to measures and from sources that Report 601 considers that the measure should be allowed to expire.<sup>25</sup> Report 601 ignores the fact that even if the measures are allowed to expire with respect to Nervacero, the 94.7% of imports that are not subject to measures will remain not subject to measures.<sup>26</sup> Those importers can continue to import rebar from existing sources whether or not the measures are allowed to expire; Report 601 has not articulated any logic to explain why it considers that removal of the measure itself will indeed give Nervacero a "price advantage" over those existing sources of supply, and why those importers would likely to switch to import from Nervacero.<sup>27</sup>

The second assumption is that Nervacero would seek a "price advantage" by way of dumping. Again, it is not clear on what basis Report 601 considers this would be the case. Nervacero has done well not exporting to Australia. On the Commission's own calculations, during the inquiry period over **[CONFIDENTIAL TEXT DELETED – percentage]** % of Nervacero's domestic sales were profitable, with an average margin of **[CONFIDENTIAL TEXT DELETED – percentage]** %.<sup>28</sup> This is while Nervacero was operating at **[CONFIDENTIAL TEXT DELETED – percentage]** % capacity utilisation which, as discussed in the application, is practically operating at full capacity.

Report 601 acknowledges these facts to some degree, but sidesteps them via citing studies that predicted that "advanced economies as a whole will see their economies come to a standstill in 2023"<sup>29</sup>. We have some concerns about this. Firstly, economic forecasting is frequently wrong (as was the economic forecast last relied by the Commission in Report 546, which the Commission considered to suggest a market decline in Australia in 2021,<sup>30</sup> which is wrong, as the rebar market in 2021 reached record high level<sup>31</sup>). Deciding that the very pertinent facts supporting discontinuation of the measures with respect to a single Spanish exporter, can be discounted on the basis of a third-party economic prediction that is broad and unspecific falls short of the probability and positive evidence standard required. More importantly, however, section 269ZHF(2) is concerned with what is likely to occur as a *consequence* of the expiry of measures.<sup>32</sup> It is not concerned with what may happen in the future if there is an economic downturn in an exporter's home market following the expiry of those measures. Any conclusion drawn from some hypothetical downturn in Spanish economy in the future is neither based on facts nor a sound basis for continuing the measures for another five years.

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<sup>25</sup> Report 601, page 77.

<sup>26</sup> Ibid, page 63.

<sup>27</sup> Report 601 on page 69 considers that importers could "easily reinstate previous distribution links with exporters" but does not explain how, nor consider whether this is likely. This is not an instance where existing commercial relationships are interrupted by anti-dumping measures. A possibility it not a probability.

<sup>28</sup> Confidential Appendix 4 to Nervacero's verification report **[CONFIDENTIAL TEXT DELETED – domestic sales information]**.

<sup>29</sup> Report 601, page 86.

<sup>30</sup> Report 546, page 28, "Based on the forecasts noted above, it is probable that the construction sector will experience subdued activity until at least until the middle of 2021. This in turn will have a direct impact on the future demand for rebar. Furthermore, it is reasonable to assume that a continued contraction in construction activity will likely intensify competition among contractors bidding for fewer projects in turn placing price pressure on inputs such as materials, including rebar, and labour."

<sup>31</sup> Report 601, page 34.

<sup>32</sup> As noted by the Panel in *Pakistan – BOPP Film (UAE)* at para 7.546, the investigating authority is required to requires the authority to "ascertain whether there is a relationship (or 'nexus') between the expiry of a duty, on the one hand, and continuation or recurrence of dumping and injury, on the other, such that the former 'would be likely to lead to' the latter".



Report 601 does not explain why it considers Nervacero would change course as a result of the expiry of the measures in order to make less profit by exporting to the Australian market. A profit-making business like Nervacero has little to no incentive to export to Australia when 99% of the market is captured by non-subject countries and the Australian industry, with the lowest priced and competitive exports offered by non-subject countries.<sup>33</sup> Nervacero has no need or desire to seek a pricing advantage that would allow it to buy-up market share in the Australian market. There is no evidence suggest otherwise. Any assumption that they would is non-factual and speculative.

## 5 Exports from other members of the Celsa Group

Nervacero noted in its ADRP Application that Report 601 refers exports from Celsa Poland to Australia in considering whether dumping is likely to continue or recur, from Nervacero.<sup>34</sup> Nervacero wishes to re-emphasise its comments in this regard:<sup>35</sup>

*This does not make it more likely than not for Nervacero to export to Australia at dumped prices resulting from expiry of the measure. Indeed, this says nothing at all about the goods from Spain – which is specifically about goods exported from Nervacero, being the subject of the inquiry. As stated in Nervacero’s submission dated 16 January 2023:*

*Infrabuild repeats its assertion that Celsa Huta Ostrowiec’s membership of the Celsa Group is a basis for the Commissioner to decide to secure the continuation of the current measure. We recall that the Commissioner is required, under Section 269ZHF of the Act, to consider whether the Minister should take steps to secure the continuation of the measure with respect to Nervacero, an exporter from Spain, Celsa Huta Ostrowiec is a Polish-domiciled exporter and manufacturer. The subject of this inquiry is not exports from Poland, or exports by Celsa Huta Ostrowiec, or exports by the entire Celsa Group. Infrabuild’s assertion that the measure should be continued as against Nervacero because there have been exports from countries not subject to the measure is plainly wrong and without any legal basis.<sup>36</sup>*

*If anything, the established exports from Poland would point against the proposition that it would be likely for the exports to be shifted back to Nervacero simply because of expiry of the measure. There is no evidence to suggest this would probably occur.*

Report 601’s reference to Australia being an “attractive market for the CELSA Group” appears to suggest that, all of the factors as cited by Nervacero, about Nervacero, that explain the commercial realities and reasons behind its lack of export to Australia and the lack of incentives for it to export to Australia, can all be discounted, simply because there are exports of rebar from Poland by an entity that is part of the Celsa Group.

Once again, Nervacero and Celsa Huta Ostrowiec are different corporate entities, that operate in different countries. They have different domestic markets, different management, separate financial accounts, costs and operations. This is not a case of two entities occupying a single facility and dividing up its production for sales purposes, or sharing the same raw material supplies, pricing products at the exact same level. Nor is it a case where two companies are vertically involved in the sale of the same

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<sup>33</sup> Report 601, pages 34 and 77.

<sup>34</sup> Nervacero ADRP Application, Attachment 2, page 16.

<sup>35</sup> Ibid.

<sup>36</sup> Nervacero submission in response to Infrabuild’s late submission, dated 16 January 2023, EPR 601-31, pages 1 and 2.



goods, such as in the case of a manufacturer and a trading company. The only relevance seems to be that they are part of the same corporate group.

Report 601 takes these exports as evidence that the “Celsa Group” considers Australia to be an attractive market, and some adverse implication appears to be drawn from that. This is problematic. Nervacero is not the Celsa Group – the measures subject to consideration in Report 601 do not relate to the Celsa Group. The Celsa Group also include rebar manufacturing operations in Norway, France and the United Kingdom, none of whom are subject to anti-dumping measures in Australia, nor responsible for any substantial exports of rebar to Australia. Even if they are, on what basis would it justify securing continuation of the dumping measure as against Nervacero from Spain? Just so that everyone else other than Nervacero can export to Australia? The reasoning adopted by Report 601 is incoherent, and not based on facts or law.

The focus of the inquiry is on measures that pertain specifically and uniquely to Nervacero. Exports from Poland are not pertinent to whether the measures imposed on Nervacero should expire. Exports from Poland do not suggest it is probable that the expiry of those measures would lead to the continuation or recurrence of dumping.

It is also worth noting that Celsa Huta Ostrowiec has been exporting to the Australian customers since 2018, and has never been subject to any allegations, or any findings, that the rebar it exports to Australia is dumped. To the degree any analogy can be drawn, we would say these facts clearly indicate that dumping is unlikely to continue or recur following the expiry of the measures.

## **E Material injury is not a likely consequence of the expiry of measures**

Nervacero has already advanced the key flaws in Report 601’s determination concerning the “injury” aspects in its ADRP application, and would like to reiterate its compelling positions – that there is no material injury,<sup>37</sup> no probable injury associated with Nervacero,<sup>38</sup> and that the Australian industry’s significantly changed and improved conditions have been incorrectly disregarded.<sup>39</sup>

Indeed, the facts established in Report 601 clearly indicate that the Australian industry/Infrabuild has experienced some of its best financial performance in recent history.<sup>40</sup> Without repeating the comprehensive analysis already included in Nervacero’s ADRP Application, we would like to add the following comments for the Review Panel’s consideration.

Firstly, Report 601 repeatedly suggests that the Australian market is highly price sensitive. However it fails to reason why this would mean expiry of the measure would likely lead to Nervacero to dump exports and cause material injury to the Australian industry. The fact that existing imports are priced similarly says nothing more than that the conditions of competition in Australia has resulted in a particular market price level. This has little probative value to the question that the Commissioner is required to consider with respect to the likely effect of the expiry of the measure on Nervacero. If the market price is at a level that is not commercially viable or attractive to Nervacero, then it is more likely that Nervacero will continue to stay away from the Australian market, regardless of the expiry or continuation of the

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<sup>37</sup> Nervacero ADRP Application, Attachment 2, pages 4-6.

<sup>38</sup> Ibid, pages 6-10.

<sup>39</sup> Ibid, pages 10-12.

<sup>40</sup> Please see Report 601’s assessment of Infrabuild’s best-ever financial performance as set out on pages 4-5 of Nervacero ADRP Application, Attachment 2 submission. Infrabuild’s economic performance includes overall increase and/or improvement in ROI, productivity, capital investment, revenue, inventory turnover and capacity utilization. No reduced production or sales volumes, no price suppression or depression, and no reduction in profit or profitability.

measure. There is no evidence whatsoever that Nervacero would replace either some or all of those over 95% current source of imports as a result of expiry of the measure. There is no evidence that, if the measures expire, hypothetical exports from Nervacero are likely to be responsible for causing material injury to the Australian industry, more so than over 95% of the import market that is not subject to any measures.<sup>41</sup> On the contrary, there is evidence that Nervacero's product is at a higher cost, predominantly offered to higher priced markets, farther away from Australia than those other sources of imports, and even without the measure would still be subject to higher tariffs than those existing sources of imports.<sup>42</sup>

Secondly, Report 601 relies on a consideration of the "pattern of trade" to suggest that measures are likely to influence subject countries' trading behaviour. However, Report 601 speculates about this "pattern of trade" on the basis that "*if measures were to expire, subject countries would have no barrier against re-entering the Australian market*".<sup>43</sup> We would like to reiterate, the legal test is whether dumping and material injury is likely to occur as a consequence of the expiration of the measures and that the measures are intended to prevent. The legal test is not whether expiry of the measure would lead to a removal of barriers to trade; nor can a decision to continue the measures be made on the assumption that dumping or injury would resume if the measures are not continued.

Report 601's assessment of the pattern of trade acknowledges that the Australian market prices are influenced by price competition from importers. However, it failed to acknowledge that the increased price competition from goods not subject to measures would also affect the probability of exports from Nervacero. For instance, in the case of Thailand, the Commission correctly recognises that Millcon has become "*increasingly uncompetitive on price relative to other exporters and that export volumes had reduced significantly due primarily to the emergence of lower priced exports from sources such as Turkey*".<sup>44</sup> The same would have been applicable to Nervacero and the likely patterns of trade of Nervacero. If the measure can be allowed to expire with respect to an active exporter such as Millcon – which Infrabuild does not appear to take any issue with,<sup>45</sup> there is no reason why it should not be allowed to expire with an inactive and high-cost exporter such as Nervacero.

Thirdly, Report 601 does not identify any deterioration in Infrabuild's economic performance in the form of reduced production or sales volume, or price depression or suppression during the inquiry period.<sup>46</sup> There is no evidence that expiry of the measure would likely to lead to a surge in exports from Nervacero, at dumped prices that undercut the Australian industry, and at such a volumes that would likely to reverse the strong economic performances of the Australian industry to a degree that would give rise to material injury.<sup>47</sup>

Report 601 asserts that the potential increased presence of dumped goods would possibly exert downward pressure on prices in the Australian market and considers this justifies continuation of the measures, because the Australian industry may experience a "*material erosion in the improvements*

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<sup>41</sup> Moreover, susceptibility of competition is not a form of injury; please see Nervacero ADRP Application, Attachment 2, pages 5 and 6.

<sup>42</sup> Nervacero ADRP Application, Attachment 2, pages 12 and 18.

<sup>43</sup> Report 601, page 76.

<sup>44</sup> Ibid, page 11.

<sup>45</sup> Infrabuild ADRP Application dated 17 March 2023, page 7.

<sup>46</sup> Report 601, pages 37 and 38.

<sup>47</sup> Further see the unsubstantiated and conclusory statements re Australian industry's possible economic performance on pages 8 and 9 of Nervacero ADRP Application, Attachment 2.

*made since the measures*".<sup>48</sup> This proposition is also based on several layers of unsafe assumptions unsupported by evidence, including:

- an assumption that "material erosion" would occur and would be attributable to expiry of the measure – even though Infrabuild's market share has during the inquiry period shrunk without any competition from Nervacero;
- an assumption that expiry of the measure will lead to Nervacero selling the goods to Australia at a price lower than other incumbent source of imports, which will have a preventative effect on Infrabuild to continue the kind of improvements "made since the measure";
- an assumption that expiry of the measure would allow Nervacero to replace market share enjoyed by 94.7% of the imports not subject to measure, and that somehow only when Nervacero joins the rank of other imports, and only the imports from Nervacero could cause such erosion.

There is no adequate reasons or factual evidence to support any of these assumptions. With respect, Report 601 has failed to engage with the legal standard required by Section 269ZHF(2) of the Act. Instead, it reversed the burden of proof ensuring the continuation of measure against any possible competition from the goods subject to the measures, no matter how remote such possibility might be.

## **F Conclusion**

Nervacero respectfully submits that Report 601 fails to meet the legal standard required by Section 269ZHF(2) for the assessment of likely effect of the expiry of the measure, and failed to conduct an objective and balanced assessment of the positive evidence on the record.

Assessing whether the measure should be allowed to expire requires the Commissioner and ultimately the Minister to be satisfied of the probable effects of the expiry of the measures. Such a decision does not hinge on Nervacero establishing that dumping and injury are unlikely to continue or recur. However, when the facts before the Commission are considered and actively engaged with, it is more unlikely than not, and certainly not more likely, that expiry of the measure would have the effect of a recurrence of dumped exports from Nervacero and a recurrence of material injury caused by the same.

The measure as applicable to Nervacero should expire.

Lodged for and on behalf of Nervacero S.A.

**Charles Zhan**  
Partner

**Anjali Goyal**  
Associate

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<sup>48</sup> Report 601, page 79.