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Australian Government
Department of Industry, Science and Resources

Anti-Dumping Commission

Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601

Member Leora Blumberg
Anti-Dumping Review Panel
c/o- ADRP Secretariat

By email: ADRP@industry.gov.au

Dear Member Blumberg

ADRP Review No. 166: Steel Reinforcing Bar exported to Australia from the Hellenic Republic, the Republic of Indonesia, the Kingdom of Spain (by Nervacero S.A.), Taiwan (by Power Steel Co. Ltd) and the Kingdom of Thailand

I write regarding the notice under section 269ZZI of the *Customs Act 1901* (Cth) (the Act) published by the Anti-Dumping Review Panel on 3 May 2023.

The notice advised of your intention to review the decision of the Minister for Industry and Science to publish a notice under section 269ZHG of the Act in respect of the inquiry by the Anti-Dumping Commission (commission) into whether the continuation of anti-dumping measures applying to Steel Reinforcing Bar exported from the Hellenic Republic, the Republic of Indonesia, the Kingdom of Spain (by Nervacero S.A.), Taiwan (by Power Steel Co. Ltd) and the Kingdom of Thailand (the reviewable decision) is justified.

The commission has considered the applications submitted by InfraBuild (Newcastle) Pty Ltd and Nervacero S.A. for a review of the reviewable decision and makes submissions, pursuant to section 269ZZJ(aa) of the Act, at **Attachment A**, on my behalf.

Please let us know if we can assist you further in this matter.

Yours sincerely

Dr Bradley Armstrong PSM
Commissioner
Anti-Dumping Commission

2 June 2023

Australian Government
Department of Industry, Science and Resources

Anti-Dumping Commission

Introduction

1. The Anti-Dumping Commission (commission), on behalf of the Commissioner, makes this submission in response to applications for review by InfraBuild (Newcastle) Pty Ltd (InfraBuild) and Nervacero S.A. (Nervacero). The applications challenge aspects of the Minister for Industry and Science's (Minister) decision to publish a notice under section 269ZHG of the *Customs Act 1901* (Cth) (the Act)[1] in respect of the inquiry by the commission into whether the continuation of anti-dumping measures applying to Steel Reinforcing Bar exported from the Hellenic Republic, the Republic of Indonesia, the Kingdom of Spain (by Nervacero), Taiwan (by Power Steel Co. Ltd) and the Kingdom of Thailand (the reviewable decision) is justified. In making his decision, the Minister considered and accepted the recommendations and reasons for recommendations, including all material findings of fact and law, of the Commissioner in *Anti-Dumping Commission Report No. 601* (REP 601).

2. The commission makes submissions in response to InfraBuild's application in **Part A** and submissions in response to Nervacero's application in **Part B**.

3. In Part A, the commission begins in section 1 by highlighting that its submission has been informed by scope of the review which, as articulated in InfraBuild's application and set by the Anti-Dumping Review Panel's (ADRP) notice under section 269ZZI (section 269ZZI notice), is confined to the form of the Minister's determination under section 269ZHG(4)(a)(ii).

4. In sections 2 and 3, the commission presents its view that the determination made by the Minister under section 269ZHG(4)(a)(ii) was the correct or preferable decision. The commission's view is that InfraBuild has not demonstrated that the Minister's decision was legally incorrect. Further, the alternative decisions suggested by InfraBuild would not give effect to the Commissioner's finding in REP 601 that he was not satisfied that the expiry of measures as they relate to exporters from Thailand would, or would likely, lead to a continuation or recurrence of dumping and injury, with which the Minister has agreed and which InfraBuild's application did not substantively challenge.

5. In Part B, the commission begins in section 1 by considering the applicable legal standard in a continuation inquiry. While agreeing with Nervacero that an assessment of 'likely' under section 269ZHF(2) requires the Commissioner to consider whether the expiry of the measures would more probably than not lead to the continuation or recurrence of dumping and material injury, the commission explains (contrary to Nervacero's claim) that if the measures are having a remedial effect, one potential outcome of the removal of the measures is a return of the situation that prevailed prior to their application.

6. In section 2, the commission responds to Nervacero's claims that the Commissioner failed to establish "probable" recurrence of material injury from expiry of the measures with respect to Nervacero. The commission demonstrates how the evidence before it supported its finding that, contrary to Nervacero's claims, there has not been a fundamental change to conditions of competition in the steel reinforcing bar (rebar) market since the imposition of the measures. Additionally, the commission explains why a general improvement to the condition of the

[1] All legislative references in this submission are to the *Customs Act 1901*, unless otherwise specified.

Australian industry since the imposition of anti-dumping measures is not dispositive of whether future injury is likely in the context of a continuation inquiry.

7. In section 3, the commission addresses Nervacero's arguments that the Commissioner incorrectly found that there would be a probable continuation of dumped exports resulting from expiry of the measures with respect to Nervacero. The commission outlines that the significant decrease in Nervacero's exports is directly linked to the existence of anti-dumping measures on Nervacero's exports and explains that the other reasons Nervacero sets out for its "absence" of exports to Australia do not detract from a finding that dumped exports will continue if the measures expire.

8. In doing so, the commission presents its view that the reviewable decision was the correct and preferable decision.

Part A: Submissions in response to InfraBuild's application

Section 1 – The scope of the review

9. InfraBuild's application contends that the Minister's decision was not the correct or preferable decision because the determination made by the Minister under section 269ZHG(4)(a)(ii) was not legally open. Specifically, InfraBuild submits that section 269ZHG(4)(a)(ii) does not permit the Minister to make a determination that a dumping duty notice cease to apply to all exporters from a particular country, as the Minister did in this case. InfraBuild contends that a determination under section 269ZHG(4)(a)(ii) that anti-dumping measures cease to apply can only be made in relation to a "particular exporter"[2], which according to InfraBuild means a "named" exporter or exporters.[3]

10. In limiting its grounds for review to the form of the Minister's determination, the commission observes that InfraBuild's application did not challenge the substance of the Commissioner's findings that led to his overall recommendation and the Minister's decision.

11. The section 269ZZI notice, which sets the parameters of the review, similarly reflects the narrow basis of InfraBuild's application. As required by section 269ZZI(2)(b), relevantly to InfraBuild the notice identifies the following as the grounds that the ADRP was satisfied are reasonable grounds for the Minister's decision not being the correct or preferable decision:

    InfraBuild

    1) The Minister erred in his purported determination under s.269ZHG(4)(a)(ii) that the dumping duty notice "ceases to apply to exporters of the goods from Thailand" since s.269ZHG(4)(a)(ii) only permits the Minister to determine that the dumping duty notice "ceases to apply in relation to a particular exporter or to a particular kind of goods", and not to "exporters generally".

12. The section 269ZZI notice subsequently confirms that "*[t]he Review Panel proposes to conduct a review of the Reviewable Decision* <u>*in relation to the above grounds*</u>" (emphasis added).

13. In light of these circumstances, the commission's submission is informed by consideration of the remarks of Wigney J in the recent Federal Court judgment of *Yara AB v Minister for Industry, Science and Technology* [2022] FCA 847 ('*Yara*'). Justice Wigney affirmed that a review to the ADRP is "*confined and constrained in certain respects*" because "*the review is not a* de novo *review or a merits review which is entirely at large. The Review Panel must*

[2] Or a "particular kind of goods"; the commission notes it is not necessary for the purpose of this review to consider this aspect of the provision.

[3] InfraBuild's application, pp. 7, 9.

restrict itself to a consideration of the grounds that it accepted were reasonable grounds for the reviewable decision not being the correct or preferable decision".[45]

14. The commission notes that the ADRP held a conference with InfraBuild on 16 May 2023 to obtain further information in relation to InfraBuild's application. The further information provided by InfraBuild in the conference does not all appear to relate to the grounds for review articulated in its application and specified in the section 269ZZI notice. Instead, much of the information provided by InfraBuild relates to substantive issues regarding the calculation of variable factors for multiple exporters.[6] These claims did not form part of the grounds for review specified in InfraBuild's application and accepted by the ADRP as being reasonable grounds for the Minister's decision not being the correct or preferable decision.

15. Following Wigney J's reasoning in *Yara*,[7], as the scope of the ADRP's review is confined to the form of the Minister's determination, rather than the substantive question of whether the expiry of measures as they relate to exporters from Thailand would, or would likely, lead to a continuation or recurrence of dumping and injury, the commission has similarly confined its submission to the precise claims made by InfraBuild regarding the appropriateness of the Minister relying on section 269ZHG(4)(a)(ii) to make his determination.

Section 2 – The appropriateness of the Minister's determination under section 269ZHG(4)(a)(ii)

16. In its application, InfraBuild contends that section 269ZHG(4)(a)(ii) only permits the Minister to determine that the dumping duty notice ceases to apply to a particular exporter (an exporter which is "named") and not to exporters generally (unnamed "all other exporters") – and by determining that the dumping duty notice ceases to apply to exporters of the goods from Thailand, the Minister has incorrectly determined that the dumping duty notice cease to apply to exporters generally.[8] The commission's view is that InfraBuild's argument incorrectly interprets both the term "particular exporter" and the term "exporters generally".

17. The commission does not agree that the term "particular exporter" means a "named exporter". As a starting point, the commission notes that, like all Commonwealth legislation, section 269ZHG(4)(a)(ii) must be read in light of the *Acts Interpretation Act 1901* (Cth) (AIA). Section 23(b) of the AIA relevantly provides that *"[i]n any Act…words in the singular*

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[4] *Yara* at [172]-[182]. See also section 269ZZG(5)(a), (b) and (c).

[5] According to Wigney J, the nature of the ADRP review "*is essentially to determine whether the reviewable decision is not the correct or preferable decision for any of the reasons articulated in the reviewable grounds*" (*Yara* at [183]). The ADRP "*is not required – indeed, is not permitted – to look beyond the reviewable grounds in order to satisfy itself that there is no other reason for finding that the Minister's decision was not the correct or preferable decision*" (emphasis added) (*Yara* at [184]).

[6] Conference Summary - InfraBuild (Newcastle) Pty Ltd (16 May 2023), Addendum 1, pp.1-10 (specifically responses to the ADRP's information request in para. 2(a) of the conference summary for all three proposed decisions and para. 2(b), dot point 1 of the conference summary for proposed decisions 1 and 2) and Attachment A. The commission notes InfraBuild's responses to the ADRP's information request in para. 2(b), dot point 1 of the conference summary for proposed decision 3 and para. 2(b) dot points 2 and 3 of the conference summary appear to relate to the form of the Minister's determination (see. pp. 10-12 of Addendum 1).

[7] The commission also observes that there would be practical issues with responding to the matters raised in the ADRP's conference with InfraBuild. The section 269ZZI notice, as referred to in paras. 11 and 12, sets the parameters of the review and invites submissions from interested parties including the Commissioner based on the scope of the review as set out in that notice. A change in the scope of the review post-publication of the section 269ZZI notice would limit the ability of interested parties to properly respond to the claims the subject of a review. In light of the 30-day timeframe for submissions, and within the broader context of reviews under Division 9 of Part XVB being completed within 60 days – according to Wigney J, *"on just about any view, a relatively short time frame for the review given the potential complexities that may be involved in decisions concerning dumping duty notices"* (*Yara* at [176]) – the commission considers the statutory framework for reviews does not contemplate changes to scope post-initiation.

[8] InfraBuild's application, pp. 7, 9.

number include the plural and words in the plural include the singular".[9] The term "particular exporter" could therefore be read as "particular exporters". The commission considers the term "particular exporters" is not limited to named exporters but can also be applied to a class or group of exporters, including unnamed exporters, as long as such exporters can be adequately identified and reasonably confined[10] – such as "exporters of the goods from Thailand".

18. Notably, the legislative scheme and the interpretation of the term "exporters generally" advance the commission's interpretation of "particular exporter". The commission rejects InfraBuild's interpretation that the term "exporters generally" means "all other [unnamed] exporters". Rather, the commission submits that the term "exporters generally" has universal operation to <u>all exporters subject to the measure</u> (whether named or unnamed) rather than particular or confined classes or groups of exporters. As such, "exporters of the goods from Thailand" are not "exporters generally". The following supports this interpretation:

    a. The test in a revocation review under Division 5 of Part XVB is equivalent to that set out in section 269ZHF(2).[11] Following a revocation review, the Minister can declare that "the notice is taken to be…revoked either in relation to a particular exporter or to exporters generally…".[12] This is unlike section 269ZHG(4)(a)(ii), which does not refer to the term "exporters generally". The commission submits that the reason for this difference is because "exporters generally" refers to all exporters subject to measures, and, following a continuation inquiry, the Minister would have already achieved this outcome (that is, ceased the application of the measures to all exporters subject to the measure) by making a declaration under section 269ZHG(1)(a) not to secure the continuation of the measures. This first step under section 269ZHG therefore removes the need to refer to "exporters generally" in section 269ZHG(4)(a)(ii).

    b. The inclusion of "exporters generally" in section 269ZHG(4)(a)(iii) allows the Minister to fix different variable factors for all exporters subject to measures and does not, as InfraBuild contends, mean that section 269ZHG(4)(a)(ii) is limited only to named exporters.

19. In its written response following its conference with the ADRP on 16 May 2023, InfraBuild stated that once the Minister declares, under section 269ZHG(1)(b), that he has decided to secure the continuation of the anti-dumping measures, then the Minister could not exclude "exporters generally" from the notice so secured.[13] For the reasons set out in para. 18, above, the commission agrees that the Minister could not exclude "exporters generally" but reiterates that by ceasing the dumping duty notice in relation to "exporters of the goods from Thailand" the Minister has not, in fact, excluded "exporters generally" from the notice but rather excluded particular exporters, being exporters from Thailand.

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[9] The application of the provisions of the AIA are subject to a contrary intention in the Act (section 2(2) of the AIA). The commission submits that no such contrary intention exists in the Act regarding the application of section 23(b) of the AIA to the term "particular exporter".

[10] The commission notes that the ordinary meaning of the word 'particular' is "relating to some one person, thing, group, class, occasion, etc., rather than to others or all" (Macquarie Dictionary, Seventh Edition). See also, for instance, *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331, per Dawson J (at 341) where the term "particular social group" was considered: "The word "particular"…merely indicates that there must be an <u>identifiable</u> social group…a collection of persons who share a <u>certain characteristic</u> or element which <u>unites them</u> and <u>enables them to be set apart</u> from society at large" (emphasis added).

[11] Section 269ZDA(1A)(b) provides that the Commissioner "otherwise must make a revocation recommendation in relation to the measures, unless the Commissioner is satisfied as a result of the review that revoking the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping and subsidisation and the material injury that the measures are intended to prevent".

[12] Section 269ZDB(1)(a)(ii).

[13] Conference Summary - InfraBuild (Newcastle) Pty Ltd (16 May 2023), Addendum 1, p. 11.

20. In addition, interpreting the provision as suggested by InfraBuild would mean the Minister would not be giving effect to the Commissioner's findings and overall recommendation in REP 601. The commission discusses this point further in section 3 below, where the commission explains why the alternative determinations suggested by InfraBuild are not "correct or preferable" decisions in this case.

21. For completeness, the commission notes that InfraBuild's statements about whether Tata Steel Manufacturing (Thailand) Public Company Limited (TSMT) is a "successor" exporter or a "new" exporter are not relevant to the question of the appropriateness of the Minister's determination under section 269ZHG(4)(a)(ii). This is because, irrespective of TSMT's precise classification, it falls within the category of "exporters of the goods from Thailand".

Section 3 – The determinations suggested by InfraBuild would not give effect to the Commissioner's findings and recommendations

22. In its application, InfraBuild provides three alternative "correct or preferable" decisions it contends ought to have been the determination made by the Minister. The commission submits that, while all these determinations are legally permissible in a continuation inquiry, they cannot be said to be a "correct and preferable" decision for this inquiry as they would not give effect to the Commissioner's findings and recommendations in REP 601, with which the Minister has agreed. The commission considers each of these proposed decisions below.

23. InfraBuild contends that the Minister should have determined, under section 269ZHG(4)(a)(ii), that the dumping duty notice continue in force after 7 March 2023 but that, after that day, the notice ceases to apply in relation to Millcon Steel Public Company Limited only.[14] This proposed determination is not "correct or preferable" as it only ceases the application of the measures in relation to one exporter from Thailand, and therefore does not give effect to the Commissioner's finding that he was not satisfied the expiry of the measures as they related to <u>all exporters from Thailand</u> would, or would likely, lead to a continuation or recurrence of dumping and material injury.[15]

24. The second alternative decision set out by InfraBuild is that the Minister should have determined, under section 269ZHG(4)(a)(i), that the dumping duty notice continue in force after the specified expiry day.[16] This proposed determination fails to refer to Thai exporters at all, and places Thai exporters in the same category as exporters from Greece, Indonesia, Spain (Nervacero) and Taiwan (Power Steel) – which is in direct contradiction to the Commissioner's findings and recommendations.[17]

25. The third alternative decision set out by InfraBuild is that the Minister should have determined, under section 269ZHG(4)(a)(iii), that the dumping duty notice continue in force after the specified expiry day but that, after that day, the notice has effect, in relation to "a particular exporter" or to "exporters generally" as if the Minister had fixed different specified variable factors relevant to the determination of duty.[18] This proposed determination focuses on fixing different variable factors, which not only does not give effect to the Commissioner's findings and recommendations referred to above, but is also wholly inconsistent with the Commissioner's recommendation to not change the variable factors in this continuation inquiry.[19]

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[14] InfraBuild's application, p. 7.
[15] See section 8.5.2 of REP 601, pages 71 – 73, section 8.8.2 of REP 601, page 91.
[16] InfraBuild's application, p. 8.
[17] See section 8.8.1 of REP 601, page 90, section 8.8.2 of REP 601, page 91.
[18] InfraBuild's application, p. 8.
[19] See Chapter 9 of REP 601, p. 92.

Conclusion

26. Noting the scope of the review (as confined by InfraBuild's application and the section 269ZZI notice), the commission has confined its submissions in response to InfraBuild's application to the form of the Minister's determination, rather than the substantive question of whether the expiry of the measures as they relate to exporters from Thailand would, or would likely, lead to a continuation or recurrence of dumping and material injury.

27. For the reasons outlined, the determination made by the Minister under section 269ZHG(4)(a)(ii) is not only legally accurate but is also necessary to give effect to the Commissioner's findings and recommendations in REP 601, to which the Minister has agreed. As such, the commission's view is that InfraBuild has not demonstrated that the Minister's decision to make a determination under section 269ZHG(4)(a)(ii) that relates to "all exporters of the goods from Thailand" was not the "correct or preferable" one. As a result, InfraBuild's application should be dismissed.

Part B: Submissions in response to Nervacero's application

Section 1 – Applicable legal standard

28. The commission agrees with Nervacero that an assessment of 'likely' under section 269ZHF(2) requires the Commissioner to consider whether the expiry of the measures would more probably than not[20] lead to the continuation or recurrence of dumping and material injury. In particular, section 269ZHF(2) requires the Commissioner to ascertain whether there is a relationship between the expiry of the measures, 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.[21] The Act does not set out any particular methodology for undertaking this assessment, consistent with the position under Article 11.3 of the ADA, but the Commissioner must arrive at reasoned conclusions on the basis of positive evidence.[22]

29. Nervacero contends that it would be "*contrary to the requirement under both Australian law and international jurisprudence, for an investigating authority to approach its tasks in the continuation inquiry with an assumption that if the lack of dumping and injury was the result*

[20] In its application, Nervacero suggests that the commission referring to what it would 'expect' (see, for example, p. 7 of Nervacero's application) "*betrays that the conclusion reached by [REP] 601 was based entirely on assumptions, presumptions, slight possibility, and low plausibility*". The commission notes that the ordinary meaning of the word 'expect' is "regard as likely to happen" (Macquarie Dictionary, Seventh Edition) – which is consistent with the test in section 269ZHF(2).

[21] Panel Report, *Pakistan – BOPP Film*, para. 7.546. See also Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 108 and 124. Section 269ZHF(2) was, according to its explanatory memorandum, intended to implement Article 11.3 of the Anti-Dumping Agreement (ADA) and Article 21.3 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Accordingly, the text of section 269ZHF(2) largely mirrors those provisions. As explained by Rares J in Siam Polyethylene Co Ltd v Minister of State for Home Affairs [2009] FCA 837 at 66, "*…although decisions of the WTO Appellate Body are not binding on Australian courts, ordinarily, they should be given substantial weight in selecting the appropriate construction to be given to the provisions of Pt XVB where the language chosen by the Parliament permits*."

[22] See, for example, Appellate Body Report, US – Oil Country Tubular Goods Sunset Reviews, para. 281. See, Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("*US – Oil Country Tubular Goods Sunset Reviews*"), WT/DS268/AB/R, adopted 17 December 2004, para. 234. Also see Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("*US – Corrosion-Resistant Steel Sunset Review*"), WT/DS244/AB/R, adopted 9 January 2004, paras. 111-115, including the citation with approval of the panel report, para. 7.271.

of the measure, then 'this suggests that dumping will resume if the Measures are not continued.'"[23]

30. The commission agrees that the Commissioner cannot establish the necessary nexus of connection that dumping and material injury would likely continue or recur after the measures expired solely on the basis of an assumption that the opposite of what happened when the measures were imposed would happen upon removal of the measures.[24] The Commissioner cannot act on this assumption without a reasoned or adequate explanation for the likelihood assessment under section 269ZHF(2).

31. However, in the context of a continuation inquiry, the commission's view is that it is consistent with the task under section 269ZHF(2) to consider that if the measures are having a remedial effect, one potential outcome of the removal of the measures is a return of the situation that prevailed prior to their application.[25] The Commissioner must nonetheless closely analyse the record evidence in order to determine whether this is the *likely* outcome, rather than merely a possible one. In other words, the Commissioner's approach must have a factual basis and properly account for evidence and arguments to the contrary.

32. This is the approach taken by the commission in REP 601. We recall the remarks of the Appellate Body that in the context of continuation inquiries such analysis *"may inevitably entail assumptions about or projections into the future. Unavoidably, therefore, the inferences drawn from the evidence on record will be, to a certain extent, speculative. In our view, that some of the inferences drawn from the evidence are projections into the future does not necessarily suggest that such inferences are not based on "positive evidence"*.[26] In sections 2 and 3 that follow, the commission will explain how the Commissioner's approach to the likelihood assessment meets the applicable legal standard.

Section 2 – The analysis in REP 601 supports the Commissioner's finding that recurrence or continuation of material injury would likely result from expiry of the measure with respect to Nervacero

33. Nervacero claims that the Commissioner incorrectly found that there would be a probable continuation or recurrence of material injury resulting from expiry of the measures with respect to Nervacero.[27] Nervacero submits that InfraBuild's improved economic indicators during the inquiry period "*tell against the proposition that material injury caused by exports from Nervacero and other exporters subject to the measures would be likely to continue or recur, as a matter of probability*".[28] Further, Nervacero argues that the commission's analysis failed to take into account that "*the Australian market for rebar has fundamentally changed since the imposition of the anti-dumping measure in 2018*".[29]

34. The commission addresses these arguments below by demonstrating that, contrary to Nervacero's contention, the fundamental conditions of competition in the rebar market have

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[23] Nervacero's application, p. 4.
[24] Panel Report, *Pakistan – BOPP Film*, para. 7.608.
[25] The ADRP has previously set out that if an exporter has not dumped goods during the relevant period as a result of the measures, this suggests that dumping will resume if the measures are not continued; ADRP Report No. 130, paras. 120 – 121. The commission notes that Nervacero's reference to these findings (on page 4 of its application) seems to incorrectly summarise what the ADRP had stated in this review.
[26] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 341. The ADRP has also similarly set out that while it is necessary for the Commissioner to act on the basis of 'positive' evidence, "*conclusions about what is likely to happen in the future is a matter of inference, rather than direct evidence*" and that "*[b]ehaviour in the past is some guide to what is likely to happen in the future*"; see ADRP Report No. 130, para. 119.
[27] Nervacero's application, p. 12.
[28] Nervacero's application, p. 5.
[29] Nervacero's application, p. 6, 11-12.

remained constant since the imposition of measures[30] and explaining that a general improvement to the Australian industry's economic condition in a continuation inquiry is not dispositive of whether future injury is likely.

35. We emphasise that the commission's analysis in REP 601 must be read in the context of the task of the Commissioner under section 269ZHF(2), which is to review an anti-dumping measure that has already been established, for the purpose of determining whether that measure should be continued or expire.[31] We recall the prerequisite findings of dumping and material injury, and a causal link between them, are presumed to have been made in an original investigation for the purpose of imposing measures. Accordingly, the Commissioner need not necessarily establish afresh a causal link between dumping and injury in a continuation inquiry.[32] However, the Commissioner may nonetheless re-examine aspects of causation as part of the continuation test when faced with evidence or submissions that rebut the continued existence of this causal link. This is the approach taken by the Commissioner in the present case.

No change to fundamental conditions of competition in the Australian rebar market since the imposition of measures

36. The key changes to the rebar market that Nervacero refers to are changes in import sources away from countries subject to measures and InfraBuild's customer loyalty scheme, introduced following GFG Alliance's acquisition of Arrium OneSteel and subsequent transition to InfraBuild, which Nervacero submits "*has had a significant impact on the competition dynamics in the Australian market*".[33]

37. The commission found that changes in import sources since the imposition of measures have been the result of goods from non-subject countries entering the market *"as the imposition of measures at various times over the past decade has impacted the price competitiveness of exporters who exported at dumped prices"*.[34] Rather than indicating a change in the conditions of competition in the market, the commission found this affirmed that the Australian market for rebar remains highly price sensitive, such that if the measures were to expire the presence of dumped goods from Greece, Indonesia, Taiwan (Power Steel) and Nervacero would likely result in pressure on prices across the entire market, to the material detriment of all participants, including Australian industry.[35]

38. The commission examined Nervacero's submissions regarding InfraBuild's implementation of a customer loyalty scheme (the Advantage Program) but similarly concluded that this had not fundamentally changed the conditions of competition in the Australian rebar market. The Advantage Program commenced on 1 January 2020 and applied to some product specifications, while other product specifications continued to be based on Import Parity Pricing (IPP). While the Advantage Program seeks to incentivise customers to purchase additional volumes from InfraBuild by way of volume rebates, the commission found in this inquiry[36] and in Continuation 546[37] that the final price negotiated with customers under the Advantage Program continues to be influenced by import pricing.

[30] REP 601, pp. 86-87.
[31] See Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 279.
[32] Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 121 - 125; see also Panel Report, *EU – Footwear (China)*, para. 7.157; and Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 106-107.
[33] Nervacero's application, 6, 10-11.
[34] REP 601, p. 87.
[35] REP 601, pp. 87, 90.
[36] Australian industry verification report, Confidential Attachment 1 – Verification work program, pp. 32-35.
[37] REP 546, pp. 65-66.

39. The commission's pattern of trade analysis in REP 601 evidenced that, despite the introduction of the Advantage Program in 2020, InfraBuild has seen a deterioration in its market share.[38] Further, REP 601 explained that exports from Celsa Huta Ostrowiec (CELSA Poland), Nervacero's related producer, increased following the initiation of INV 418, which included exports from Nervacero.[39] Following the imposition of measures on Nervacero, the importer of goods from Nervacero immediately switched its purchases to CELSA Poland.[40] In fact, CELSA Poland's volume of exports increased during the inquiry period (and therefore when the Advantage Program was operational). The commission considers this shows (contrary to Nervacero's contention) that the Advantage Program has not insulated InfraBuild against competition from lower priced imports, and that the fundamental conditions of competition in the Australian market have not changed as a result of InfraBuild introducing its Advantage Program.

40. Overall, the commission found in REP 601 that there has not been a fundamental change to the conditions of competition in the Australian market for rebar since the imposition of the anti-dumping measures in 2018. Put another way, the key changes referred to by Nervacero have not severed the causal relationship between the expiry of the measures and continuation or recurrence of dumping and injury – and, as such, do not indicate that recurrence of material injury caused by Nervacero and other exporters subject to the measure is improbable and unlikely.[41]

Improved economic condition of the Australian industry not dispositive of whether future injury is likely

41. The commission rejects Nervacero's argument that an improvement in the economic condition of the Australian industry during the continuation inquiry period suggests that material injury, which the measures are intended to prevent, would not continue, or recur if the measures expire. As a general proposition, the commission considers the presence or absence of current material injury is not conclusive in a continuation inquiry. As the ADRP has stated previously, what is required in a continuation inquiry is to consider "*what hypothetically may happen, including any material injury which may occur if the measures are not continued*" and "*[i]t is not sufficient simply to consider what occurred during the inquiry period*".[42]

42. In this case, the commission found that the general improvement to the Australian industry's economic condition[43] was in part attributable to the impact of the measure as well as temporary changes to market conditions arising from the COVID-19 pandemic which the commission found would not persist into the future.

43. The imposition of the measures in 2018 had the effect of largely ceasing exports from the subject countries, including from Nervacero.[44] InfraBuild's sales volumes received a

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[38] REP 601, pp. 76-77.
[39] The commission also discusses the CELSA Group and the switching behaviour between Nervacero and its related producers in paras. 51-52 of this submission.
[40] REP 601, Confidential Attachment 1 – Australian market ("Importers 601" tab).
[41] As explained in REP 601, the commission considered it appropriate to consider Nervacero's circumstances together with exporters from other subject countries (except Thailand) in its forward-looking assessment noting that in INV 418, the commission cumulated the effects of the goods from all subject countries as the requirements of section 269TAE(2C) were met; see REP 601, p. 89.
[42] ADRP Report No. 144, para. 94.
[43] REP 601, p.35 states that: "*[f]ollowing the measures in 2018, the Australian industry demonstrated improved performance in terms of increased selling prices, profit and profitability. Despite these improvements, the Australian industry nevertheless saw a reduction in production and sales volumes, as well as market share, relative to the peaks it achieved in 2019*".
[44] REP 601, pp. 76-77, p. 80 (Figure 11).

substantial boost in 2019 following the imposition of the measures in 2018.[45] Additionally, the margin between InfraBuild's unit selling price and unit CTMS became positive in 2019, and while InfraBuild was loss making until 2020, its profitability improved in 2019 (as compared to 2018).[46]

44. In addition, the COVID-19 pandemic affected both supply and demand in the Australian rebar market. In particular, "*the COVID-19 pandemic impacted international supply into the Australian market during the inquiry period*"[47] and the commission considered that demand for rebar increased because of an "*increase in activity in the building and construction industry*" as a "*result of significant direct and indirect government stimulus initiatives…during the uncertainty caused by the COVID-19 pandemic*".[48] This resulted in increased prices and a stronger margin between selling prices and CTMS, leading to increased profit and profitability during the inquiry period.[49]

45. The commission considered that as the impacts of the COVID-19 pandemic recede, the Australian market will return to more normalised conditions (gradual growth over the long term with business cycle variability), with the anomalous growth in the Australian market unlikely to be replicated on an ongoing basis.[50]

46. This return to normalised conditions is not, as Nervacero contends, a suggestion that "*the Australian industry is likely to be weakened by other events in the future for the most part unrelated to dumping*".[51] Rather, the temporary impacts of the COVID-19 pandemic that were favourable to the Australian industry further highlight its susceptibility to injury from lower priced imports. For example, while the economic condition of the Australian industry generally improved since the imposition of the measures, Australian industry's market share nonetheless reduced in the inquiry period because exports were able to capture around 90% of the expanding Australian rebar market.[52] Going forward, Australian industry's susceptibility to injury from lower priced imports will only increase given that:

    a. exporters were able to capture significant market share despite the challenges they faced during the inquiry period (particularly longer shipping times and significantly increased shipping costs caused by the COVID-19 pandemic).[53] The Australian industry did not face these same challenges. As these challenges moderate for exporters, export supply will likely be more cost effective and timely for exporters, as was the case prior to the COVID-19 pandemic, removing any temporary advantage Australian industry enjoyed during the inquiry period, and

    b. as the fiscal stimulus that applied during the COVID-19 pandemic has dissipated and monetary policy settings have been tightened, the Australian rebar market will likely contract – which will intensify price competition.[54]

47. In its application, Nervacero claims that the commission has equated "competition" and "susceptibility to competition" to material injury and, in particular, that "*susceptibility to competition is not what the anti-dumping measure is intended to prevent*".[55] The commission agrees that anti-dumping measures are not put in place to address competition generally but

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[45] REP 601, p. 37.
[46] REP 601, pp. 38-39.
[47] REP 601, p. 30
[48] REP 601, pp.32-33.
[49] REP 601, pp.38-39.
[50] REP 601, p. 33.
[51] Nervacero's application, p. 5.
[52] REP 601, p. 78.
[53] REP 601, p. 78.
[54] REP 601, pp. 65, 87.
[55] Nervacero's application, pp. 5-7.

rejects Nervacero's argument that the commission has conducted its analysis in this way. The commission notes that, if the measures expire, Nervacero and other exporters subject to the measure would be at a price advantage. Irrespective of whether Nervacero is the price leader because of this price advantage, this will alter the competitive dynamic in the market and put pricing pressure on InfraBuild. As such, InfraBuild would be susceptible to being outcompeted by exports from Nervacero and other exporters currently subject to the measure which, for the reasons explained by the commission in REP 601 and section 3 below, are likely to be at dumped prices. In these circumstances, InfraBuild would either need to reduce its prices to compete with dumped imports or lose market share[56] – and this, contrary to Nervacero's contention, is exactly the material injury that the measures are intended to prevent.

48. Nervacero also states that the Commissioner has failed to consider part of the *Ministerial Direction on Material Injury 2012* (the Direction) which "*the Minister has expressly directed must be taken into account with respect to what is quite obviously a healthy industry*".[57] The commission observes that section 269ZHF(2) does not require a reconsideration of current material injury in the manner prescribed by section 269TAE and, therefore, the Direction does not expressly direct the Commissioner in a continuation inquiry. Further, to the extent that the concepts set out in the Direction apply to a continuation inquiry, the extract set out by Nervacero[58] focuses on the impacts of dumped products on an industry weakened by other events, rather than providing any direction about relevant considerations for an industry whose economic condition has generally improved since the measures were imposed – and is, therefore, not applicable in any case.

Section 3 – The analysis in REP 601 supports the Commissioner's finding that recurrence or continuation of dumping would likely result from expiry of the measure with respect to Nervacero

49. The commission rejects Nervacero's claim that the Commissioner incorrectly found that there would be a probable continuation of dumped exports resulting from expiry of the measures with respect to Nervacero.[59] While Nervacero's application sets out a range of reasons for why its exports to Australia have "diminished" and "practically ceased" (which the commission addresses in paras. 50-53 below), one reason Nervacero specifically refers to is "*the competitive advantage of sources of exports not subject to measures*".[60] The commission notes that this reason is directly linked to the existence of anti-dumping measures on Nervacero's exports. This reason therefore supports a finding that dumped exports have reduced because of the measures. As such, the commission reiterates (as set out in section 1 of Part B of this submission) that if the measures are exerting a remedial effect and dumped exports reduce or stop because of the measures, it is reasonable to consider that the removal of the measures would likely lead to a return of the situation that prevailed prior to their application (that is, an increase in dumped exports from Nervacero), unless there are other reasons that detract from this. In this context, the commission submits that the other reasons Nervacero sets out for its "absence" of exports to Australia – namely the high price and strong demand in Nervacero's main European Union (EU) markets, higher cost of production and freight as a Spanish exporter and higher import tariffs[61] – do not detract from a finding that dumped exports will continue and increase if the measures expire.

[56] REP 601, pp. 78-79.
[57] Nervacero's application, p. 5.
[58] Nervacero's application, p. 6.
[59] Nervacero's application, p. 12.
[60] Nervacero's application, p. 12.
[61] Nervacero's application, p. 12.

50. As set out in REP 601, "*[t]he commission accepts that Nervacero's sales mix shifted toward the European markets since the imposition of measures*" and "*considers this shift occurred both as a result of the measures and the favourable trading conditions in the Spanish and European markets during 2021 and the early stages of 2022*".[62] However, based on economic forecasts for the Spanish and European markets, there is a projected slowdown in the European rebar market and an already evident decline in European rebar prices.[63] The high price and strong demand in Nervacero's main EU markets is therefore unlikely to continue into the future and "*[b]ased on Nervacero's willingness to export to Australia at dumped prices in previous periods of economic slowdown in its domestic market, the commission considers it is likely that in the absence of measures Nervacero would likely export goods to Australia at dumped prices*".[64]

51. In REP 601, the commission considered Nervacero's argument that the higher costs of production and freight that it faces as a Spanish exporter (when compared to other suppliers to the Australian market) is a reason for its lack of exports to the Australian market following the imposition of measures. The commission ultimately rejected this contention because it considered the record evidence did not support it.[65] Nervacero is a member of the CELSA Group, which owns or controls a number of steel mills in several countries, including three mills – CELSA Barcelona, CELSA Poland and Nervacero – which maintain ACRS accreditation for supply of rebar coils and straights to Australia.[66] REP 601 outlines the pattern of exports to Australia from these three entities (from 2012 to 2022) and explains that this pattern indicates that increases in exports from one entity in the group often coincided with the imposition of measures or initiation of an investigation on another entity in the group.[67] This not only reiterates the point in para. 49 that the decrease in exports from Nervacero is because of the measures, but also refutes the argument that higher costs of production and freight that Nervacero faces as a Spanish exporter to the Australian market are a reason for this decrease. As set out in REP 601, "*even with a favourable European market (and the allegedly higher costs of transport from Europe as opposed to Turkey and Asia), Australia was an attractive market for the CELSA Group*".[68] While Nervacero's volumes decreased following the imposition of measures, this was not the case for the CELSA Group more broadly and "*the combined volume of goods exported by these CELSA Group entities during the inquiry period has only been surpassed by the volume of exports in 2012*".[69]

52. Nervacero's application goes on to claim that "*the established exports from Poland would point against the proposition that it would be likely for exports to be shifted back to Nervacero simply because of expiry of the measure*". The commission rejects this argument. The analysis set out in the previous paragraph highlights switching behaviour between the CELSA Group entities in response to changed conditions, and in particular the ease with which this switching occurs. This pattern of behaviour from 2012 to 2022, and particularly the switching from Nervacero to CELSA Poland after the initiation of the commission's investigation that covered Nervacero, make it likely that, should the measures applying to Nervacero expire, the CELSA group would decide to, once again, begin exporting to Australia from Nervacero. The commission notes that exports to Australia from Nervacero would not preclude the CELSA Group from also continuing to export from Poland.

53. The commission understands that Nervacero's reference to "higher import tariffs" as a reason for its diminished exports to Australia is a reference to its import tariffs being higher than that

[62] REP 601, p. 86.
[63] REP 601, pp. 81-86.
[64] REP 601, p. 86.
[65] REP 601, p. 81.
[66] REP 601, p. 80.
[67] REP 601, p. 80-81.
[68] REP 601, p. 81.
[69] REP 601, p. 81.

of other exporting countries. The commission notes that the same (or similar) general import tariffs apply to imports from Spain, Poland and Turkey, and that imports from Poland and Turkey were prevalent during the inquiry period. Further, prior to the imposition of measures, Nervacero had exported larger volumes at injurious prices despite being subject to a general import tariff. As such, the commission contends that import tariffs are not a genuine reason for Nervacero's "absence" of exports to Australia.

54. The commission acknowledges that Nervacero could only increase exports to Australia if it has the capacity to supply the Australian market. In its application, Nervacero states that its █% capacity utilisation is practically full capacity utilisation by "common industry standards" and is not excess capacity that is indicative of likely dumping.[70] The commission does not dispute that Nervacero's capacity utilisation was high, but notes that it was not fully exhausted.[71] However, Nervacero's excess capacity in the future must be understood in the context of the projected slowdown in the European rebar market (discussed in para. 50). As Nervacero's high capacity utilisation coincided with favourable trading conditions in the Spanish and European markets, a decline in these conditions will likely lead to an increase in excess capacity – and Nervacero would need to seek out export markets for its goods. In this context, Nervacero states that there is no evidence that Nervacero's spare capacity would likely be taken up by exporting to Australia.[72] In response to this point, the commission reiterates its reasoning above about why the commission considers that, in the absence of measures, Nervacero would likely export goods to Australia.

55. Nervacero also questions the "distribution links" to the Australian market that REP 601 refers to as a reason for exports from Nervacero being likely to continue.[73] As set out in para. 51, Nervacero and the CELSA Group have maintained ACRS accreditation for the supply of rebar coils and straights to Australia, and the CELSA Group has maintained distribution links to the Australian market primarily through CELSA Poland. Noting this, the commission considers that distribution links do not appear to have been severed, as Nervacero claims, by InfraBuild's customer loyalty program. As discussed in section 2, this customer loyalty program has not insulated InfraBuild against competition from exports, including exports from Nervacero.

56. In relation to Nervacero's future exports to Australia being at dumped prices, the commission notes that past dumping behaviour is one indicator that dumping is likely to continue if the measures expire. In REP 601, the commission set out that it had assessed dumping for two separate 12-month periods following the measures and found a positive dumping margin for both.[74] Further, "*[t]here have been no periods following the measures where the commission has assessed Nervacero to not have dumped the goods*".[75] Particularly in the context of the preceding paragraphs of this submission, the commission rejects Nervacero's claims that the commission's analysis of why Nervacero would export goods to Australia at dumped prices in the absence of measures is "nothing more than an assertion".[76]

57. The commission further submits that its reference to third party paid subscription data (provided by InfraBuild), which supports that domestic prices in Spain, and therefore by extension the normal value for Spain have recently increased more than export prices,[77] is evidence of why goods exported by Nervacero are likely to be dumped and not, as Nervacero claims, confirmation of Nervacero's advice that Spanish and European markets have

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[70] Nervacero's application, p. 15.
[71] REP 601, p. 81.
[72] Nervacero's application, p. 15.
[73] Nervacero's application, p. 14.
[74] REP 601, pp. 70-71.
[75] REP 601, p. 71.
[76] Nervacero's application, p. 17.
[77] REP 601, p. 71.

experienced strong growth.[78] This is because this data shows the relativity and trends between the export price and domestic prices for Spanish rebar, rather than directly commenting on the price that Nervacero can achieve in its domestic market.

Conclusion

58. The Commissioner's overall conclusion that the expiration of the measures applying to Nervacero would likely lead to a continuation or recurrence of dumping and material injury was based on a holistic assessment of the evidence before the commission, having regard to the character of the Australian market for rebar, the conditions of competition found to ordinarily prevail in that market and the likely conditions Nervacero would face in its domestic market. The commission conducted a rigorous examination of the evidence and drew inferences from that evidence to make projections about what would likely occur were the measures to expire.

59. For the reasons outlined, the commission's view is that Nervacero has not demonstrated that the Minister has incorrectly determined the likelihood of dumping and material injury if the measures applying to Nervacero were to expire and, accordingly, has not demonstrated that the Minister's decision to continue the anti-dumping measure applying to Nervacero was not the "correct or preferable" one. As a result, Nervacero's application should be dismissed.

[78] Nervacero's application, pp. 17-18.