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commercial + international

13 September 2023

The Director  
Investigations 3  
Anti-Dumping Commission  
GPO Box 2013  
Canberra  
Australian Capital Territory 2601

By email

Dear Director

## **Nervacero S.A.**

### **Comments on InfraBuild submission in Reinvestigation 2023/166**

As you know, we act for Nervacero S.A. (“Nervacero”), being one of the applicants for the review initiated by the Anti-Dumping Review Panel (“the ADRP”) on 3 May 2023 (ADRP Review 2023/166). Nervacero’s grounds of review are the basis of the reinvestigation requested by the ADRP on 5 July 2023 (the Reinvestigation Request).

In this submission, Nervacero provides its response and comments on some of the remarks made by InfraBuild (Newcastle) Pty Ltd (“InfraBuild”) dated 22 August 2023 in this reinvestigation (“the InfraBuild Submission”).<sup>1</sup>

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<sup>1</sup> EPR 601-35, InfraBuild Submission.

## A InfraBuild's comments on the ADRP's legal analysis is misguided

The InfraBuild Submission started with a criticism on the ADRP's analysis as to the applicable legal requirements and criteria with respect to the continuation inquiry/expiry review under the Australian law and the WTO Anti-Dumping Agreement.<sup>2</sup> Such criticism is incorrect, unwarranted, and irrelevant.

First of all, we note that the legal basis of the Reinvestigation Request is found in Section 269ZZL(1) of the *Customs Act 1901* ("the Act"), which provides the ADRP with power to "*require the Commissioner to ...reinvestigate a specific finding or findings that formed the basis of the reviewable decision*". Section 269ZZL(2) requires that the "*Commissioner must conduct a reinvestigation in accordance with the Review Panel's requirements under subsection (1)*". Accordingly, InfraBuild's attempt to dispute the ADRP's legal interpretation and its basis of the Reinvestigation Request must be dismissed as inappropriate and out of the scope of this reinvestigation.

Secondly, InfraBuild's claims are without merits. The InfraBuild Submission's targeted the ADRP's analysis of the ADC's finding that "*there would be a probable continuation of dumped exports resulting from expiry of the measures with respect to Nervacero*".<sup>3</sup> Specifically, with respect to assessing the likelihood of continuing or recurring dumping, the Reinvestigation Request considered that the reviewable decision had unduly relied on assumptions and was without sufficient evidence and reasoned and adequate explanation:

*It appears to me that the ADC may have misapplied the evidentiary burden that it correctly articulated in Part B Section 1 of its s.269ZZJ submission, referred to above. In my view the articulation in Section 1 Part B is not the same as stating that 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. It is not sufficient for the ADC to merely rebut Nervacero's reasons for its exports to Australia having "diminished" and "practically ceased" and to act on this assumption without a reasoned or adequate explanation for the likelihood assessment under section 269ZHF(2), with a positive factual basis.*

*The ADC's reasoning would appear to be inconsistent with the requirement under Article 11.3 as articulated in the WTO case referred to in Footnote 8 above. [underlining supplied]*

The reference to "Footnote 8" and the context of the analysis is detailed in paragraphs 4 and 5 of the Reinvestigation Request, which read:

4. *In its application for review, Nervacero points to recent WTO jurisprudence where a WTO Panel considered that an investigating authority may not rely solely on assumption or speculation when conducting a likelihood analysis, and that the authority should establish the relationship or nexus between expiry of the measure and the continuation or recurrence of dumping and injury, "such that the former 'would be likely to lead to' the latter". Further, it submitted that Panel Report also found that a determination would be inconsistent with the requirement under Article 11.3 of the Anti-Dumping Agreement if the investigating authority made the likelihood and nexus determination based on an assumption that:*

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<sup>2</sup> InfraBuild Submission, page 2.

<sup>3</sup> Reinvestigation Request para 12.

*“...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>8</sup>*

5. *Nervacero submitted that it would therefore 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 of the measure, then “this suggests that dumping will resume if the Measures are not continued”. The ADC in its s.269ZZJ submission was generally in agreement with Nervacero’s analysis of the applicable legal standard in continuation reviews...*

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fn 8 *Panel Report, Pakistan – BOPP Film (UAE), para 7.608. [footnote in original]*

Given the contexts, the particular paragraph of the Panel Report in *Pakistan – BOPP Film (UAE)* as quoted by Nervacero, and re-cited by the Reinvestigation Request, was clearly intended to articulate a legal position that apply to the kind of determination required by Section 269ZHF(2) of the Act and Article 11.3 of the Anti-Dumping Agreement generally. This is not, as the InfraBuild Submission suggests, limited to the likelihood assessment of injury.<sup>4</sup> Indeed, as Nervacero pointed out, and cited by the Reinvestigation Request at Footnote 6, paragraph 7.543 of the Panel Report cautioned against reliance on “assumption” as one of the key “*applicable requirements of Articles 11.1 and 11.3*”<sup>5</sup> generally:

*Together, these terms indicate that a Member may not rely solely on assumption or speculation when conducting a likelihood analysis during a sunset proceeding but must, instead, conduct its examination on the basis of positive evidence so as to arrive at a reasoned determination, resting on a sufficient factual basis, that dumping and injury are “likely” – i.e. probable and not merely possible – to continue or recur.<sup>6</sup> [underlining supplied]*

Evidently, InfraBuild’s comments concerning the legal position stated in the Reinvestigation Request is misguided and misleading.

The InfraBuild Submission then went on to argue that the reviewable decision has, contrary to the ADRP’s view, met the legal requirement and should not be reinvestigated.<sup>7</sup> Effectively, InfraBuild argues that the Reinvestigation Request has somehow misapplied the legal test or has not correctly identified the issues that require reinvestigation, and that the same findings should now be made again. Such argument is no more than “second guessing” the ADRP’s proper exercise of its statutory power to request reinvestigation under Section 269ZZL(1) of the Act. Such claim and must be dismissed by the Commission in this reinvestigation.

The ADRP has correctly identified the legal and factual errors in the various aspects of likelihood determination in Report 601. With respect, Nervacero submits that the Commission should find that,

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<sup>4</sup> InfraBuild Submission, page 2.

<sup>5</sup> Panel Report, *Pakistan – Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates*, (“*Pakistan – BOPP Film (UAE)*”) WT/DS538/R and Add.1, circulated to WTO Members 18 January 2021, subheading 7.12.1

<sup>6</sup> *Panel Report, Pakistan – BOPP Film (UAE)*, para. 7.543.

<sup>7</sup> InfraBuild Submission, pages 3 to 4.

based on the correct evidentiary standard and the legal requirements under Section 269ZHF(2) of the Act and Article 11.3 of the Anti-Dumping Agreement, there is insufficient evidence for the Commissioner to be satisfied that he should recommend securing a continuation of the measure with respect to Nervacero.

## **B Lack of positive evidence for likely recurrence of dumping or injury**

The second part of the InfraBuild Submission sought to respond to the ADRP's findings regarding the lack of positive evidence in the assessment of the "*likely future supply and demand conditions in the Australian market*" factor in Report 601.<sup>8</sup>

InfraBuild recited some of the information that it submitted during Continuation Inquiry 601, and InfraBuild's own subjective opinions and speculations.<sup>9</sup> None of the repeated reference and assertions amount to positive evidence that expiry of the measure would lead or would be likely to lead to continuation or recurrence of material injury and dumping with respect to exports from Nervacero.

Further, we note that the InfraBuild Submission also sought to provide "additional information and evidence" in the following categories:

- Statements from "*Budget Paper No. 1 (2023-2024)*", "*Oxford Economics Australia*", and ABS data which InfraBuild claims to show continued growth in construction projects;<sup>10</sup> and
- "*Freightos Baltic Index (FBX): Global container freight index*" which InfraBuild claims to show freight cost resuming to pre-pandemic level

This additional information does not address Nervacero's claim, as noted in the ADRP's Reinvestigation Request:<sup>11</sup>

*Nervacero stated in its application for review that the ADC's observations were speculative, and self-contradictory at best, and that there was no attempt to reconcile the predicted moderation in demand and the prediction that the market would "remain attractive" at the same time.*

More relevantly, contemporary information specifically relating to rebar imports in Australia, such as the Commission's Trade Remedy Index, shows that total rebar import volume since January 2023 have been generally lower than the inquiry period of Continuation Inquiry 601, and with price remaining at a relatively high level since the last quarter of calendar year 2021.<sup>12</sup> Importantly, there continues to be no imports of the goods under consideration from Nervacero or Spain.

Nervacero recalls that, in Continuation Inquiry 601, it provided extensive information highlighting the *unlikelihood* for Nervacero to revive its exports to Australia.<sup>13</sup> This included the challenges faced by Nervacero in Spain due to the higher cost of production and the war in Ukraine, and the strong

<sup>8</sup> InfraBuild Submission, pages 5 to 9.

<sup>9</sup> InfraBuild Submission, pages 6 and 9.

<sup>10</sup> However, the Budget Paper also anticipate that in 2023-24, goods imports may also be "*expected to soften with weaker domestic demand*". See page 64 of the Budget Paper (pdf page 26).

<sup>11</sup> Reinvestigation Request, para 15.

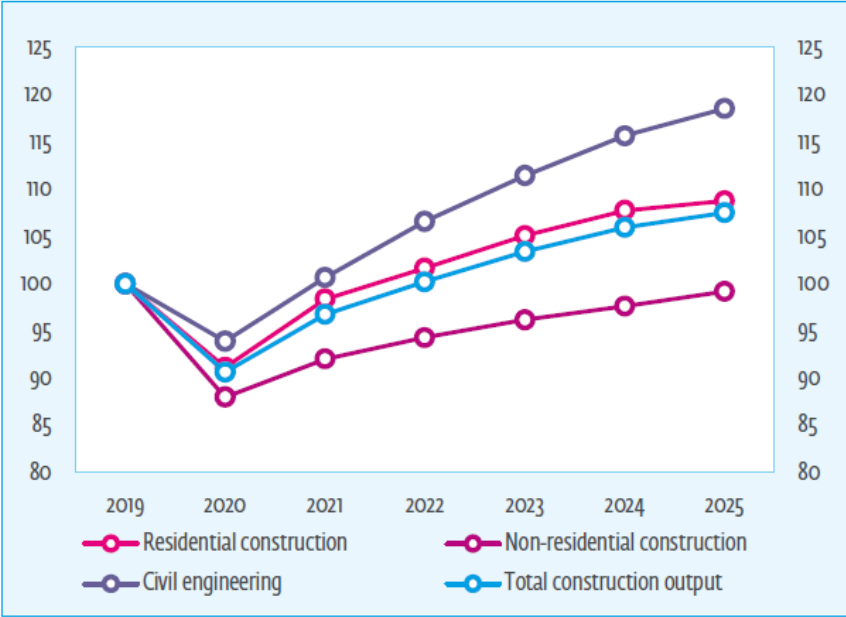
<sup>12</sup> <https://www.industry.gov.au/publications/trade-remedy-index-trindex>

<sup>13</sup> EPR601-27, pages 2 to 10.

competition from dominant sources of supply in the Australian market, both by the Australian industry and sources not subject to the measure. These circumstances have sustained and continue to support Nervacero's claims. For instance, consistent with Nervacero's previous submission contemporary data from Euroconstruct shows that Nervacero's main markets in Europe, being the Spanish domestic market and France, are still expected to outperform other EU markets with continued growth, this is despite the continued significant impact from the war in Ukraine:<sup>14</sup>

**Spain: Construction output forecast by sector**

index 2019=100

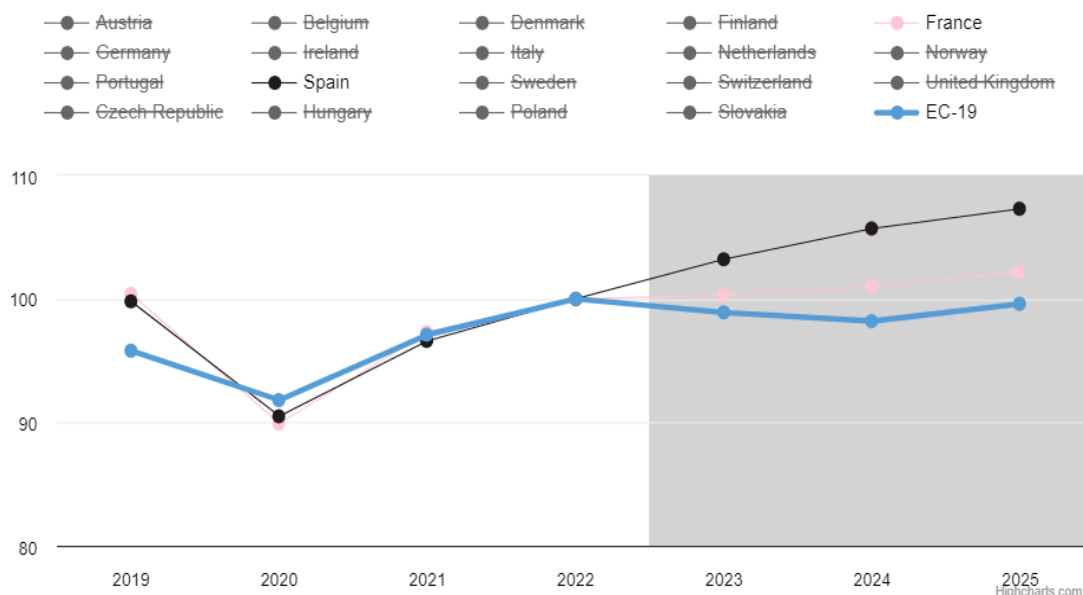


Source: EUROCONSTRUCT (95th Conference)

<sup>14</sup> 95<sup>th</sup> Euroconstruct Country Report Summer 2023; and [https://www.euroconstruct.org/news/2023\\_95\\_pr\\_nl/](https://www.euroconstruct.org/news/2023_95_pr_nl/)

**Figure 2: National construction output in the EUROCONSTRUCT area**

Year to year change, % in real terms  
S: EUROCONSTRUCT.



The exceptional economic health in Nervacero's key European markets is contrasted and influenced by the continued challenges faced by steel industry in the broader EU contexts, according to an OECD analysis:<sup>15</sup>

*The impact of Russia's aggression against Ukraine is expected to be larger in the EU compared to other regions due to its close trade and energy links with Russia (worldsteel, 2022[60]). As of February 2, 2023, Eurofer expects a 4.6% fall in EU steel consumption in 2022, and a further 1.6% fall in consumption in 2023 (Holman, 2023[61]). Energy crises, inflation, supply chain issues, and very high decarbonisation costs are hurting the European steel industry (Holman, 2023[61]). Eurofer expects steel consumption to somehow recover by 1.6% in 2024, however, warns that any recovery is conditional on the evolution of energy prices, Russia's war of aggression against Ukraine, inflation and global supply chains. Over the medium term, the ambitious targets for decarbonisation set by the EU should boost EU steel demand due to the steel required to build adequate energy infrastructure – particularly for wind and solar energy. [underlining supplied]*

The latest OECD analysis also confirms the trend of *reduction* in production and export from the EU region, and the continued high prices and high costs experienced in the region:

*In the European Union, steel production fell by 10.5% in 2022. Amongst the larger steel producers of the European Union, the decrease was more pronounced in Spain (-19.2%), followed by France (-13.1%), Italy (-11.9%), and Germany (-8.4%). European steel makers have been very heavily impacted by rising energy prices in 2022 (S&P Global, 2022[ ]). For steelmakers, the squeeze from rising fuel and energy costs has happened on two fronts simultaneously: steel firms use either blast furnaces or electric arc furnace (EAF) technologies to produce steel. The former relies heavily on metallurgical coal, while the latter requires other*

<sup>15</sup> OECD Steel Market Developments – Q2 2023, page 39, <https://www.oecd.org/industry/ind/steel-market-developments-Q2-2023.pdf>

energy inputs such as electricity from a grid (S&P Global, 2022[1]). Affordable electricity is thus an important factor for steel produced through EAF.<sup>16</sup>

...

EU exports declined by 10.7% to a level of 23 mmt when compared to 2021, partly reflecting the economic slowdown in nearby economies due to the Russia's war and the rise in prices of many steel products that made European products less attractive.<sup>17</sup>

...

Turkish exports rebounded after the heights observed in 2021 (from 21.9 mmt to 18.3 mmt). Imports remained stable to a level of 16.1 mmt. The reduction of imports from traditional Turkish partners have been partly offset by the increase in steel shipments from Russia.<sup>18</sup> [underlining supplied]

Specifically on rebar, the OECD report refers to "Figure 12", entitled "Steel price for rebar have remained historically high for most regions", with the following comments:<sup>19</sup>

Although EU rebar prices have come down, mills are cutting back on production going into 2023 to avoid selling at a loss amid high and uncertain energy price and high raw material prices, according to the International Rebar Producers and Exporters Association (Can, 2023[18]). Furthermore, EU mills seem to have full order for the first quarter of 2023, and hence are not prone to giving discounts to their buyers (Tanatar, 2023[19]). Hence, it is possible that the stabilisation of prices at a high level for rebar witnessed in the EU is going to continue in 2023.

...

Overall, it is probable that the regional price differentials will continue in 2023 as they seem to be due to different factors specific to each region: high energy price and energetic uncertainties for the EU coupled with mitigated sentiment and uncertainty on the health of the EU industry in general, domestic demand with high scrap costs in the US, and an ailing real estate sector amid an easing of COVID restrictions and a boost of sentiment in China.<sup>20</sup>[underlining supplied]

The contemporary information is entirely consistent with the information presented by Nervacero in Continuation Inquiry 601, as stated:<sup>21</sup>

*These conditions will not change because of the expiry of the measure. Each these factors countermands the proposition that expiry of the measure is likely to lead to a recurrence of material injury to the Australian industry caused by exports from Nervacero. A recurrence of exports from Nervacero above negligible volumes cannot be said to be a likely probability.*

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<sup>16</sup> OECD Steel Market Developments – Q2 2023, page 15

<sup>17</sup> Ibid, page 20

<sup>18</sup> Ibid, page 22

<sup>19</sup> Ibid, page 26.

<sup>20</sup> Ibid, page 27

<sup>21</sup> EPR601-27, page 3 and 10.

...

*What the evidence establishes is that dumping and injury would not recur. On any objective and unbiased basis, the Commission should conclude that Nervacero will have no incentive to either offer supply to Australian customers, nor to offer or accept lower prices for such supply...*

*There is no evidence that "dumping" by Nervacero would likely be realised and would cause material injury to the Australian industry. There is no evidence to establish that the probability for such dumping and injury to recur is more than the likelihood that Nervacero's product will simply continue to have no or negligible presence in the Australian market, being a market in which its prices are considered to be uncompetitive, as has been recognised by the Commission.*

## **C Conclusion**

As demonstrated above, the InfraBuild Submission appears to have mischaracterised or misunderstood the legal test as confirmed and applied in the ADRP's Reinvestigation Request. The correct legal test requires an investigating authority to conduct the likelihood and nexus assessment in a continuation inquiry based on positive evidence and not on assumptions. As noted by the Reinvestigation Request:

*...it would therefore 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 of the measure, then "this suggests that dumping will resume if the Measures are not continued".<sup>22</sup>*

The repeated and additional information as referred to in the InfraBuild Submission do not support its allegation that dumping and injury caused by exports from Nervacero are "likely" if the measure is allowed to expire.

Once again, Nervacero respectfully submits that the Commission should find, in light of the legal and factual issues identified in the ADRP's Reinvestigation Request, and based on positive evidence, there are insufficient evidence to support a conclusion or finding that expiry of the anti-dumping measure would lead, or would be likely to lead, to a continuation or recurrence of dumping and material injury in so far as exports from Nervacero are concerned.

Yours sincerely



**Charles Zhan**  
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**Susie Li**  
Lawyer

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<sup>22</sup> Reinvestigation Request, para 5.