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commercial + international

17 October 2023

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

By email

Dear Director

## **Nervacero S.A. Response to Preliminary Reinvestigation Report 601**

As you know, we act for Nervacero S.A. ("Nervacero") in this Anti-Dumping Review Panel ("ADRP") review.

We refer to the abovementioned preliminary reinvestigation report ("PRR 601") published on 3 October 2023. We welcome the opportunity to provide submissions concerning this preliminary report.

Nervacero provides its comments with respect to each of the ADRP reinvestigation requests, as follows.

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At the outset, Nervacero advises that it disagrees with and is deeply disappointed with the findings and the approach adopted by PRR 601. With respect, Nervacero submits that the preliminary report failed to undertake the reinvestigations which the ADRP considers to be necessary in order to address the legal and factual flaws in the reviewable decision.

## **A Correct legal standard as requested for the reinvestigation has not been applied**

We recall the ADRP's express concerns with respect to Report 601's findings that "*should the measures expire, exports from the subject countries (including from Nervacero) were likely to continue or recur*",<sup>1</sup> which formed the basis of Report 601's finding that "*the expiration of the anti-dumping measures would be likely to lead to a continuation of, or a recurrence of dumping*".<sup>2</sup> The ADRP requested for such findings to be reinvestigated.

The ADRP's concern is supported by its understanding of the correct legal standard applicable to the continuation inquiry. The ADRP said this:

*...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 of the measure, then "this suggests that dumping will resume if the Measures are not continued"*<sup>3</sup>

It was on this basis that the ADRP found that Report 601's assessment and reliance on the "*competitive advantage of sources of exports*" issue was inconsistent with the legal standard. The ADRP stated:<sup>4</sup>

*The ADC referred to its statement in Section 1, Part B of its s.269ZZJ submission (set out in Paragraph 5 above) and stated 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 ADC submitted 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 and increase if the measures expire.*

*I have some difficulty with the ADC's reasoning. 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.*

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<sup>1</sup> ADRP Reinvestigation Request, para 7.

<sup>2</sup> Ibid, para 6.

<sup>3</sup> Ibid, para 5.

<sup>4</sup> Ibid, para 12 (i).

*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."*

Instead of conducting a reinvestigation that addresses the flaws identified by the ADRP, and applying the correct legal standard, PRR 601 appears to disagree with the ADRP's finding and reasserts that Report 601 applied the correct legal standard and cannot be faulted.<sup>5</sup> PRR 601 recites various parts of Report 601, including its problematic and unsubstantiated statement "*while no single factor is determinative...*", Report 601's finding is somehow justifiable "*when assessed in aggregate*". With respect, Report 601's finding was assessed in aggregate by the ADRP, and was found to be legally unsound. Reiteration of the flawed reasons does not address the basis on which the ADRP asked the Commission to undertake its reinvestigation.

PRR 601 heavily relies on the facts that Nervacero is part of the "Celsa Group" and that another entity within the Celsa Group has been supplying the Australian market as a justification for making the same findings as Report 601. If it is not already clear, the anti-dumping measure and the subject matter of this reinvestigation concerns exports of Nervacero from Spain. If necessary, we also point out that expiry of the measure with respect to Nervacero does not change the continued *absence* of measures with respect to Poland.

The fact that a Poland-based entity within the Celsa Group has continued to supply the Australian market does not and cannot logically support an inference that such supply would likely be replaced by exports from Nervacero if the measure expires, and at dumped prices. This is speculative, unsubstantiated and illogical. If anything, the record shows that the Australian market has gone through significant changes since the original investigation, and that Celsa Huta Ostrowiec has established itself as a viable alternative supplier. Celsa Huta Ostrowiec's supply of rebar to the Australian market has not been opposed by the Australian industry and is not subject to any allegation of dumping or injury. There is no reason to suggest that this would change.

As such, the so called "demonstrated behaviour" of Celsa Group – even if a relevant consideration - would in fact weigh against the probability that expiry of the measure would or would be likely to cause a recurrence of exports and dumping from Nervacero and the injury that the measure was intended to prevent. There is no evidence, either in fact or by inference, that the measure's expiration would make it more likely than not for Celsa Group to replace supply of the rebar from Celsa Huta Ostrowiec with rebar from Nervacero.

Further, with respect to PRR 601's reliance on the view that "*where the behaviour is the result of the measures, 'this suggests that dumping will resume if the Measures are not continued'*", Nervacero submits that this is a repetition of the wrong standard applied by Report 601 which the ADRP has identified and about which it has requested a reinvestigation. Once again, may we refer to the WTO Panel Report in *Pakistan – BOPP Film (UAE)*, which found that a determination that non-dumping behaviour would likely be replaced by dumping behaviour was inconsistent with the requirement under Article 11.3 of the Anti-Dumping Agreement. An investigating authority cannot make a likelihood and nexus determination based on an assumption that:

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<sup>5</sup> PRR 601, page 11.

...because dumped imports [have] decreased and the market share of the domestic industry [has] increased following the introduction of the anti-dumping duties, the opposite would happen upon removal of the duties.<sup>6</sup>

## **B Incorrect and inadequate redressing of factual error**

Another factor identified by the ADRP's reinvestigation request concerns Report 601's assessment of "competitive advantage of sources of exports". The ADRP has highlighted the Commission's wrong statements that "the same (or similar) general import tariffs apply to imports" from Nervacero and the other current sources of imports, therefore "import tariffs are not a genuine reason for Nervacero's absence" of exports to Australia."<sup>7</sup>

PRR 601 now acknowledges that the Commission's previous statements were factually wrong, but then asserts that the same conclusion can be reached by once again dismissing the impact of the higher tariff rate as a commercial reality faced by Nervacero.

According to PRR 601, simply because Nervacero had supplied the Australian market before the measure was put in place, it must follow that the higher import tariff is not a competitive barrier that it faces. We remind the Commission that there is a zero tariff rate applicable to all other major sources of imports for the Australian market – including Malaysia, Indonesia, Poland, Singapore, Türkiye and Taiwan. Adopting PRR 601's logic, the existence or previous record of trade activity would suggest that trade barriers have no effect. If this is true, then there will be no need for any free trade agreement negotiations aimed at reducing tariffs and other import barriers. Respectfully, Nervacero submits that the view expressed in PRR 601 is unacceptable and unrealistic.

The fact that Nervacero was able to supply the Australian market several years ago was because both the production and market conditions in Nervacero's home market, and the conditions and supply chain arrangements in Australia, were entirely different to what they are now and what they are likely to be in the foreseeable future. This is another economic reality that Report 601 tried to deny and that has not been properly recognised in PRR 601.

As an example, in Investigation 264, more than one third of Nervacero's Australian sales were made to the other manufacturer suppliers – being the Singaporean exporter Natsteel and the Australian industry supplier OneSteel. It is also relevant to note – to the extent that "past behaviour" can be a relevant consideration - that the dumping margin for Nervacero's exports in that investigation was *de minimis*. For Investigation 418, which resulted in the imposition of the current measure, the Australian industry supplier OneSteel was in administration and was the second largest customer for Nervacero, accounting for nearly one quarter of Nervacero's total exports to Australia. Both Natsteel and OneSteel have shifted away from relying on Nervacero – or the Celsa Group for that matter - for their respective supply of the Australian market.

Based on Nervacero's understanding, it is now Natsteel, together with exports from Türkiye, which have become the largest source of rebar coil imports to Australia. Both sources have a zero import tariff. As Nervacero repeatedly highlighted in its submissions in Continuation Inquiry 601, in more recent times and in the foreseeable future the Australian market has been and will continue to be dominated by

<sup>6</sup> Panel Report, Pakistan – BOPP Film (UAE), para 7.608.

<sup>7</sup> ADRP Reinvestigation Request, para 12(ii), citing the ADC's section 269ZZJ submission.

supplies from lower cost suppliers, including the Australian industry itself and the other main sources of supply in the Asian region. The higher import tariff rate and higher overall costs applicable to Nervacero's exports compared to its Asian competitors and the Australian industry itself are real commercial considerations and barriers that cannot be ignored or dismissed. Its exclusion from the market over such a long period of time has coincided with significant re-shuffle of supply chain and customer relationships, to be replaced by suppliers that have the same commercial objectives as Nervacero, which is to be competitive and to maximise profit. How it is that they can trade with Australian customers and compete with the Australian industry, without the cost and distance barriers faced by Nervacero, while Nervacero continues to be discriminated against and to have dumping measures endlessly applied to its exports, is a mystery that is inexplicable and unjustifiable.

### **C New factual and legal errors**

Nervacero also takes issue with PRR 601's new assertion that there will be a "downturn" in the Spanish market for rebar and the Spanish economy more generally.<sup>8</sup> There are several problems with this finding.

First, it is factually wrong. Information that Nervacero has presented to the Commission to date projects a slowdown in *growth* in the Spanish economy following a number of years of strong *growth*. A slower growth rate is completely different to a "downturn", which means a decline.

Confusingly, PRR 601 finds that exports at dumped price are likely because of the anticipated "downturn" in Nervacero's domestic market which, we presume, is argued to be a future source of excess capacity, coupled with perceived strong prices in the domestic market. This is a paradoxical speculation. A downturn in the domestic market could provide an incentive to export, due to the lower demand and lower prices in domestic market. However this would be more likely to *reduce* the likelihood of the export price being at dumping level, because of the lower domestic price. In a scenario in which the export market is experiencing strong growth, dumping is even more unlikely – because strong growth and pricing in the domestic market would tend to make it commercially unviable and unattractive to export to a far-away lower priced market, such as Australia, thereby reducing the likelihood of both export and dumping. This is the situation presently enjoyed by Nervacero.

PRR 601 uses its wrongful depiction of a "downturn" in the Spanish economy as the basis for its view that dumping is likely to recur:

*Based 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 likely that in the absence of measures Nervacero would likely export goods to Australia at dumped prices.*

This is nothing more than a repetition of the opinion that dumping is likely to recur and that a measure should continue in place because dumping led to the imposition of the measure in the first place. This is the same assumption-based standard that the ADRP has identified and requested to be reinvestigated.

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<sup>8</sup> PRR 601, pages 10 and 19.

## D Assessment continues to be speculative and incoherent

The other factor that the ADRP requested to be reinvestigated concerns Report 601's assessment of "likely future supply and demand conditions in Australian market". The ADRP's Reinvestigation Request provides the reasons for this request as follows:<sup>9</sup>

15. *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. Nervacero further stated that REP 601 then goes on to "expect" that the high international freight cost – a prohibitive factor that is particularly significant for Nervacero as a Spanish exporter - "would likely return to lower levels", and therefore that exports from subject exporters would likely continue or recur. Nervacero contends that this too, is without evidence and falls well short of the standard required for assessing likelihood.*
16. *Nervacero's contention has validity. While the ADC's assessment appears to [be] well-reasoned and logical in coming to both conclusions referred to above, both analyses appear to be based on the ADC's own opinion and are somewhat speculative and without sufficient factual or documentary basis. While the ADC's consideration that domestic demand for rebar is likely to moderate, makes reference to the dissipation of the fiscal stimulus applied during the COVID-19 pandemic and monetary setting beings tightened, there are no footnotes or references to any documentary evidence such as: published (or private) economic or industry reports, forecast or analyses (whether general to the building or steel industries or more specific to the rebar industry, or even to the Australian economy), that would allow the ADC to draw reasoned and adequate conclusions. It cannot be said to be based on "positive evidence"... [footnote omitted, underlining supplied]*

PRR 601 confirms the speculative nature of the Commission's assessment in Report 601. It makes new speculative findings about the likely future supply and demand conditions in Australia, while trying to defend and maintain the findings of Report 601 at the same time.

As highlighted by the ADRP, Report 601 characterised Australian market conditions as follows:<sup>10</sup>

*The commission considers that domestic demand for rebar is likely to moderate given that the fiscal stimulus applied during the COVID-19 pandemic has dissipated. Further, monetary policy settings have recently been tightened in an attempt to curb the burgeoning inflationary pressures caused by the unusual combination of supply and demand factors that emerged during 2020 and 2021, and will likely lead to a decrease in building and construction activity. Despite the likely moderation in demand for rebar, the commission considers that Australia will remain an attractive market for exporters, as has historically been the case. [underlining supplied]*

<sup>9</sup> ADRP Reinvestigation Request, paras 15 and 16.

<sup>10</sup> Ibid, para 13, citing Report 601, page 65.

PRR 601 has come to a substantially different view about the likely future conditions in the Australian market, despite claiming to have “maintained” the findings in Report 601. Instead of predicting moderate demand, PRR 601 now notes that the strong growth in demand that was observed during the inquiry period is likely to continue. We note the following new findings in PRR 601:

*The commission has found:*

- *The Australian rebar market is attractive to exporters.*
- *There has been strong growth in the Australian market for rebar over the inquiry period.*
- *This growth is largely the result of fiscal stimulus, which is expected to continue to provide a boost to the market for rebar into the short to medium-term, despite now tightened monetary policy settings. [underlining supplied]*

...

*In a report provided by InfraBuild in their submission dated 22 August 2023, Oxford Economics Australia also noted that the effects of fiscal stimulus on engineering construction activity have been (as of August 2023) significant and will likely continue into 2025. [underlining supplied]*

More confoundingly, PRR 601 then offers fresh speculation that contradicts its own evidence, stating that:<sup>11</sup>

*The commission considers that tightening monetary policy since the inquiry period may have already had and will continue to have, a dampening effect on construction activity and Australian demand for rebar.*

and,<sup>12</sup>

*Demand remains high but may decrease*

*The commission has found that demand indicators for rebar in Australia continue to grow.*

*However, the commission considers that once the effects of fiscal stimulus abate and the full impact of tightening monetary policy is felt, construction activity may slow, reducing demand for rebar.*

*The commission examined ABS data in REP 601 to assess demand for rebar following COVID-19. The commission found that there was an increase in building and construction activity following the inquiry period. The commission considered that it was unlikely that this growth would continue.*

*The commission has analysed updated ABS data for building work done (Figure 6). The updated data shows that the total value of building work has continued to grow since the inquiry*

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<sup>11</sup> PRR 601, page 24

<sup>12</sup> Ibid, pages 25 - 26



period, hitting \$37 billion in March 2023. The commission considers that this indicates that there has been strong growth in the market for rebar since the inquiry period.

...

As noted earlier from the report by Oxford Economics Australia, fiscal stimulus remains impactful on the current pipeline of construction projects. Tightening monetary policy settings have yet to lead to a significant reduction in the level of construction activity in Australia. However, there is evidence that the growth in construction activity will decrease in the next few years. Domestic demand for rebar is likely to moderate when the effects of fiscal stimulus reduce and the impacts of tightened monetary policy are felt fully. [underlining supplied]

Nervacero submits that these new observations in PRR 601 highlight the speculative nature of the Australian market condition assessment in Report 601 and contradict that assessment. PRR 601 freshly speculates that moderation in domestic market growth may still occur at some point in the future, despite evidence that continued strong growth is likely to continue well beyond the inquiry period, and beyond the expiry date of the subject measure, being 7 March 2023.

Equally problematic is PRR 601's resort to evidence that goes well beyond both the inquiry period and the evidence that could be considered by the Minister for the purpose of the inquiry. The legal test under Section 269ZHF(2) requires that:

*The Commissioner must not recommend that the Minister take steps to secure the continuation of the anti-dumping measures unless the Commissioner 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.*

As confirmed by the ADRP, the Commissioner's recommendation and determination must be made based only on positive evidence and reliable, verifiable facts. An investigating authority cannot adopt a "shoot first" approach in such inquiry, by securing the continuation of the measure first, based on assumptions and speculation, and hope that supportive evidence will emerge in the future to justify the flawed decision in retrospect. The continuation inquiry requires a prospective determination. If there is insufficient evidence for the Commissioner to be satisfied that the mandatory conditions under Section 269ZHF(2) are met, then the measure must be allowed to expire.

## **E Concluding remarks**

PRR 601's latest finding is that strong growth in the Australian market for rebar is likely to continue over the short to medium term, and well after the expiry date of the subject measure. Nervacero submits that this tells against the PRR 601's proposed reinvestigation finding, which is that "out of the blue" Nervacero will be likely, on the basis of probability, to export at dumped prices and cause material injury to the Australian industry thereby because the measure against it is allowed to expire.

Factors other than exports from Nervacero:

- the government's financial stimulus and broader economic policy settings;
- the Australian industry's own supply and competitive behaviours;



- the dominant sources of imports supplied from non-subject countries,

will continue to dictate the economic condition of the Australian industry.

The ADRP clearly indicated the concerns it had with respect to Report 601. Any fair-minded person would agree that nothing has come forward in PRR 601 to resolve those concerns.

By reason of all the matters set out in this submission, we respectfully ask the Commission to conclude, in its Final Reinvestigation Report, that the correct and preferable decision is that the expiration of the measures against Nervacero would not lead, nor would be likely to lead, to a recurrence of dumping and causation of material injury that the measure against Nervacero is intended to prevent.

Yours sincerely



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