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8 December 2022

The Director
Investigations 3
Anti-Dumping Commission
GPO Box 2013
Canberra
Australian Capital Territory 2600

By email

Dear Director

Nervacero S.A.
Statement of Essential Facts 601 - steel rebar from Spain

A Introduction

As you know, we act for Nervacero S.A. (“Nervacero”) in the above-referenced continuation inquiry (“this inquiry”). Nervacero is the only producer of reinforcing bar from Spain that is the subject of this inquiry.

On 7 March 2022, Infrabuild (Newcastle) Pty Ltd (“Infrabuild”) applied to the Anti-Dumping Commission (“the Commission”) for the continuation of anti-dumping measures for steel reinforcing bar (“rebar” or the “goods”) exported from Greece, Indonesia, Spain (by Nervacero S.A), Taiwan (by Power Steel Co., Ltd) and Thailand. The dumping duties were originally imposed on 7 March 2018. Following Infrabuild’s application, the Commission initiated this inquiry on 28 March 2022. The Commission published the statement of essential facts for this inquiry ("SEF 601") on 18 November 2022.

Nervacero now takes the opportunity to provide its comments concerning certain aspects of SEF 601.

At the outset, we welcome SEF 601's acknowledgment that the single shipment exported by Nervacero during the inquiry period, was not a sufficient basis for ascertaining new variable factors, due to the special circumstances pertaining thereto.

Nonetheless, we oppose the Commission's proposal to recommend that the Minister secure continuation of the anti-dumping measures as against Nervacero. We do so because we do not believe that the legal conditions set out in Section 269ZHF(2) of the *Customs Act 1901* ("the Act") concerning the likely effect of the expiry of the measure are not met. Available evidence does not support the view that expiry of the measure would lead or would be likely to lead to a continuation or recurrence of material injury in so far as exports from Nervacero is concerned.

Specifically, we wish to draw the Commission's attention to the following factors:

- the substantially changed market and operational conditions that are now being experienced by Nervacero, as the only exporter from Spain subject to the measure;
- the substantial changes in the economic condition of Infrabuild since the measure was first imposed; and
- market factors unrelated to prospective exports from Nervacero and the subject measure.

These factors and their relevance to the Commission's consideration of the matters at hand are now elaborated.

B Changed market and operational conditions support expiry

As correctly identified in SEF 601, Nervacero's export volumes to Australia have *"reduced significantly, such that from 2019 onwards, 94.7% of import volumes are from other sources (not subject to any measures)"*.[1] Likewise, with respect to market share, the Commission has found that *"Australian industry and exports from exporters not subject to measures accounted for around 99% of the Australian market"*.[2]

SEF 601 observes that there was an overall decline of imports from the sources subject to the measures, and that nearly all of the imports are now not those that are subject to this inquiry.[3] Of those imports that are subject to measures, there are only small quantities of imports from the *"REP 264 exporters"*[4] and from Thailand.[5]

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1 SEF 601, page 60

2 Ibid, page 74.

3 Ibid, pages 73-74

4 Refer to SEF 601, Figure 8, being Korea, Singapore, Spain (except Nervacero), and Taiwan (except Power Steel)

5 SEF 601, Figure 8.

Nervacero's exports to Australia diminished after 2018. This is due to a range of factors, including of course the imposition of the measure. However the key reasons for the decline in Nervacero's exports have been the following:

1 Cessation of Nervacero sales to the Australian industry itself– we recall that during the original investigation period Infrabuild's predecessor "OneSteel" was Nervacero's s [CONFIDENTIAL TEXT DELETED – description of volume] Australian customer, accounting for about [CONFIDENTIAL TEXT DELETED – description of volume] of Nervacero's total exports to Australia. The Australian industry ceased to import from Nervacero after 2018, partly due to its own production upgrade, and partly due to the management and market strategies adopted by the new Australian industry entity, Infrabuild.

2 Strong demand and profitable steel prices for rebar in both Spanish and European markets, and the overall lack of domestic capacity in Europe – these are further elaborated in this submission below, referring to information provided in the exporter questionnaire responses.

3 Relatively higher costs of production and higher logistics cost for Nervacero as a producer from Spain, in comparison to other suppliers for the Australian market, with lower costs of production and freight – these too are further elaborated in this submission below.

4 Higher costs of production, higher prices and continued high demand in the EU zone – market and industry disruptions are likely to continue, including for Nervacero, due to continued inflationary pressures and the energy crises associated with the EU's stance towards Russia's invasion of Ukraine, and the effect of the war in the region more broadly.

These conditions will not change because of the expiry of the measure. Each of 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.

In relation to Nervacero's own operational conditions, we would like to highlight that Nervacero's rebar production was operating at near full capacity during the inquiry period.[6] As such, Infrabuild's generic claim of "*excess production capacity*" cannot apply to Nervacero.[7]

Nervacero's sales of rebar in the domestic Spanish market accounted for nearly half of its total sales. In comparison, during the original investigation period, the Spanish domestic market accounted for [CONFIDENTIAL TEXT DELETED – percentage] of Nervacero's total sales of the GUC. Sales to the combined Spanish and European markets accounted for the vast majority of Nervacero's sales during the inquiry period – [CONFIDENTIAL TEXT DELETED – percentage] as compared to [CONFIDENTIAL TEXT DELETED – percentage] during the original investigation period.

A number of long-term factors have driven up the price of rebar in the EU. These include the energy crisis, escalated by sanctions on Russian natural gas, and the wider impact of the Russia-Ukraine conflict across the EU region. Further, the EU is pioneering legally-binding responses to the threat of climate change, with a mature system of carbon credits and an upcoming *"carbon border adjustment*

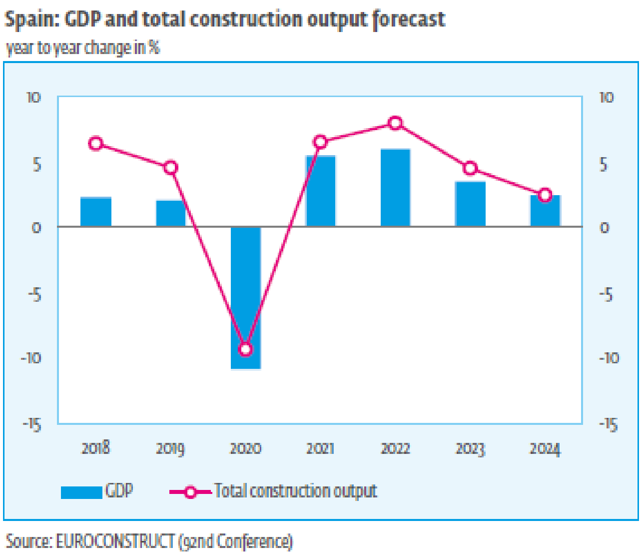
6 Nervacero Exporter Questionnaire Response, information under "G-10 Capacity Utilisation".

7 Refer to SEF 601, pages 64 and 65.

mechanism" ("CBAM") to address carbon leakage and to incentivise investment in carbon-neutral production methods in traditionally energy intensive sectors such as steel production. Nervacero and the Celsa Group have an industry leading climate change mitigation practice and have been taking actions to reduce carbon dioxide emissions.[8] All of these developments have been creative of inflationary pressure across all EU markets and have caused sharp cost increases for steel producers such as Nervacero.

An economic forecast published by the very well-regarded Euroconstruct network during the inquiry period predicts that the Spanish construction sector will experience a strong post-COVID recovery out to 2024:[9]

> *The scenario in this report envisages two years of substantial growth for the Spanish construction sector (6.5% in 2021 and 8.0% in 2022) that would be enough not only to recover pre-pandemic levels, but to end 2022 with 4% more output than 2019. We expect that the momentum will not fade suddenly, so 2023 could grow (4.5%) above the GDP forecast. In the outlook for 2024, the construction sector (2.5%) is likely to behave more in sync with the slowdown of the economy.*[10]



Euroconstruct predicts a high level of domestic demand for construction materials such as rebar, with inertial effects from policies such as the Spanish Recovery Plan and Next Generation European Union funds increasing demand out to 2024 in subsectors such as roads, waterworks and energy works.[11]

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8 For more information, see https://www.celsagroup.com/wp-content/uploads/2022/05/thelargestcircular_eng.pdf and https://www.nervacero.com/Celsa.mvc/Innovacion

9 See Confidential Attachment - *92nd Euroconstruct Country Report Winter 2021*, page 380.

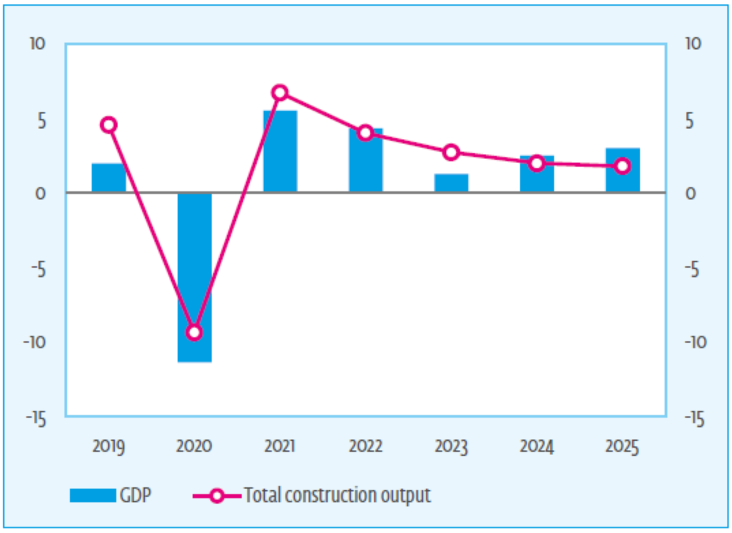
10 Ibid, page 380.

11 Ibid, page 389.

Notwithstanding the Russian invasion of Ukraine, Euroconstruct's longer term growth predictions remain unchanged. The latest forecast from Euroconstruct notes:[12]

> *The forecasts for Spanish economy from 2023 onwards have been revised downwards again. However, a recession is not expected, let alone a deep or long one. The Spanish economy will not come away unscathed from the energy crisis, although it will suffer a more bearable impact as a result of a lower dependence on Russian gas and a higher diversification of suppliers. Unfortunately, this relief will not be felt in inflation, which is no longer restricted to energy and has spread to virtually all goods and services, and will keep punishing household incomes and economic growth. GDP forecasts just contemplate 1.3% growth in 2023 and 2.5% in 2024.*
>
> *The construction sector has not yet seen a wide-spread drop in demand due to fears of an economic slowdown, but indicators show a change in the production pace. Employment in construction has not grown in 3Q22 (-1% less compared to 2Q22, but there are still 2.7% more employed than in 3Q21) and cement consumption is stagnating… As in most sectors, companies in the construction sector are suffering from a narrowing profit margins due to the rise in raw materials prices and interest rates. However, considering that output levels are low, there is no overstock in the real estate market and the Next Generation EU (NGEU) funds are providing a substantial safety net, we keep envisaging a growth scenario, but with underlying slowdown: the forecast starts at 4.0% for 2022, and it ends up at 1.8% for 2025.*

Spain: GDP and total construction output forecast
year to year change in %

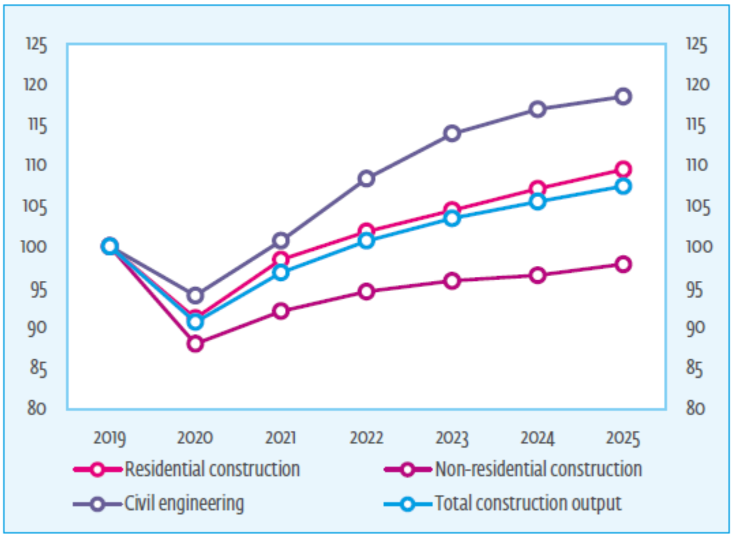


Source: EUROCONSTRUCT (94th Conference)

12 See Confidential Attachment - *94th Euroconstruct Country Report Winter 2021*, page 388.

Spain: Construction output forecast by sector

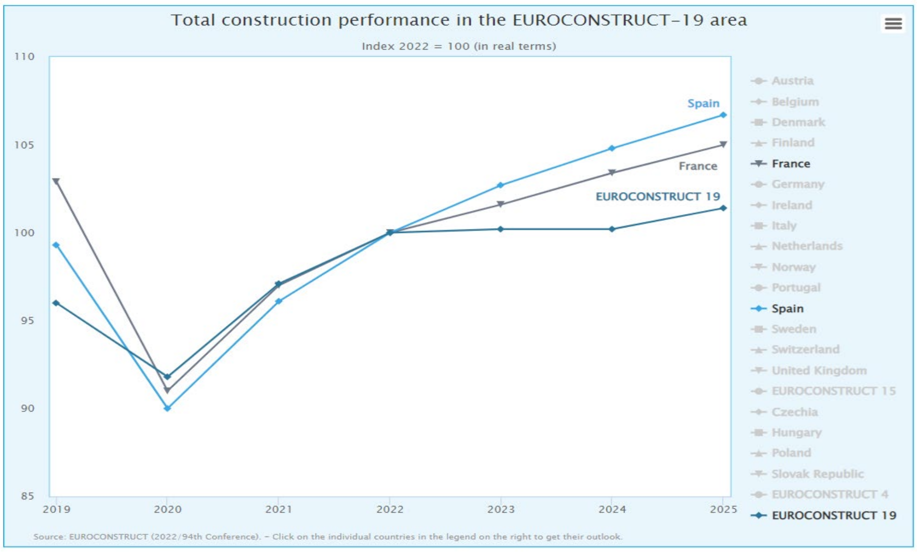
index 2019=100



Source: EUROCONSTRUCT (94th Conference)

Further, the shortage of supply associated with the war, higher energy and freight costs, and the effects of a post-war recovery point towards continued demand for locally produced steel products at high price points in the short, medium and longer term. Recent forecasts may be less bullish, however it is still expected that the Spanish domestic market will outperform most other European markets and will exhibit continued growth. Nervacero's main EU market, France, is also expected to demonstrate a continued growth trend:[13]

National trends in the EUROCONSTRUCT area



13 https://euroconstruct.org/ec/press/pr2022_94

There are no indications that these fundamentals are likely to change or change substantially in the near future in a way that would suggest that expiry of the measure will lead Nervacero to shift its sales away from existing markets to Australia, let alone at "dumped" or "injurious" levels.

Nervacero's view is supported by the submission from the Government of Spain:[14]

> *In its submission, the Government of Spain pointed to the following reasons as contributing factors for the decline in export volumes to Australia:*
>
> - *The volume of exports from Nervacero, and Spain overall, have diminished over recent years due to strong demand in the Spanish and European markets.*
> - *There has been a significant surge in ocean freight costs, especially from Europe and this has been a disincentive for Nervacero to export to Australia given the much higher transportation costs and lower prices that can be achieved compared to the European markets.*
> - *There has been significant steel price inflation in Europe and Spain since the pandemic and the energy price crisis in 2021, and this has been exacerbated by the Russian invasion of Ukraine.*
> - *This inflationary scenario with a shortage of raw materials in Europe, point to a lack of supply in both Spain/Europe and in Australia, rather than excess supply.*

To further demonstrate the higher price level of rebar in Europe, especially in recent periods, we refer the Commission to the following price information:[15]

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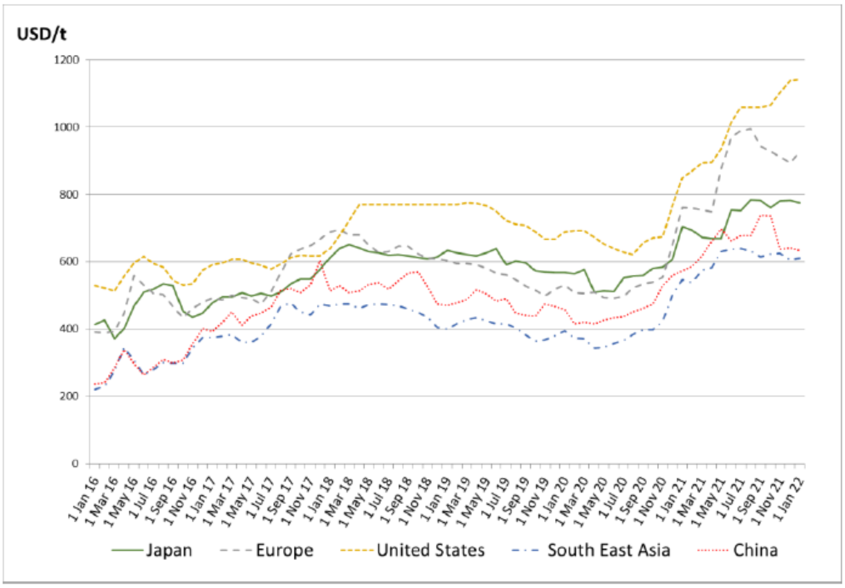
14 SEF 601, page 60

15 Organisation for Economic Co-operation and Development, Steel Market development: Q2 2022 report by Directorate for Science, Technology and Steel Innovation Committee, page 56. Available via link: https://www.oecd.org/industry/ind/steel-market-developments-Q2-2022.pdf

Figure 15. Steel price for rebar, by region



Note: The latest price is 1 January 2022.
Source: Platts Steel Business Briefing.

SEF 601 dismisses the Spanish Government's submissions in this regard, noting that *"exports from Europe have not reduced despite higher shipping costs and steel price inflation in Europe"*. Using Figure 9 of SEF 601, the Commission claims that *"European exports have continued to increase and are a significant proportion of total exports"*:

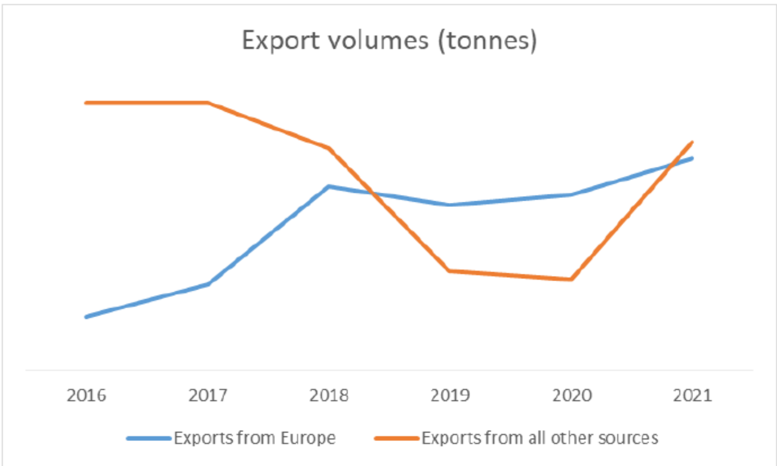


Figure 9 - Exports from Europe and all other sources (tonnes)

Nervacero is the only Spanish exporter subject to this inquiry. It basically ceased exports to Australia after 2018. To Nervacero's knowledge, the only sources of exports from the EU region are Poland and Italy. This is consistent with the information available on the Commission's TRINDEX database. Based on Nervacero's information, the imports from Poland and Italy accounted for not more than [CONFIDENTIAL TEXT DELETED – percentage] of total import into Australia. As such, we can only assume that the information pertaining to *"exports from Europe"* in Figure 9 of SEF 601 is mostly accounted for by imports from Turkiye, thereby confirming Nervacero's understanding that Turkiye has emerged as one of the largest sources of imports for the Australian market since 2018. Nervacero believes that Turkish imports account for at least [CONFIDENTIAL TEXT DELETED – percentage] of the total Australian import market.

Turkiye is not a member of the European Union and was not referred to as part of the "European markets" in the context of the submission. The term "European market" is commonly used by EU members to refer to EU countries, including former member the United Kingdom.

The Turkish economy is highly distinguishable from that of Spain or other European Union members.[16] It has not been affected by inflation and/or by the Russian invasion of Ukraine is concerned, as significantly as European countries. The disparity between the Turkish steel market and that of Spain/EU is also evident from SEF 601's own data in Figure 10, which shows that the "Southern Europe" price for rebar has been significantly higher than Turkiye's price for rebar in recent times:

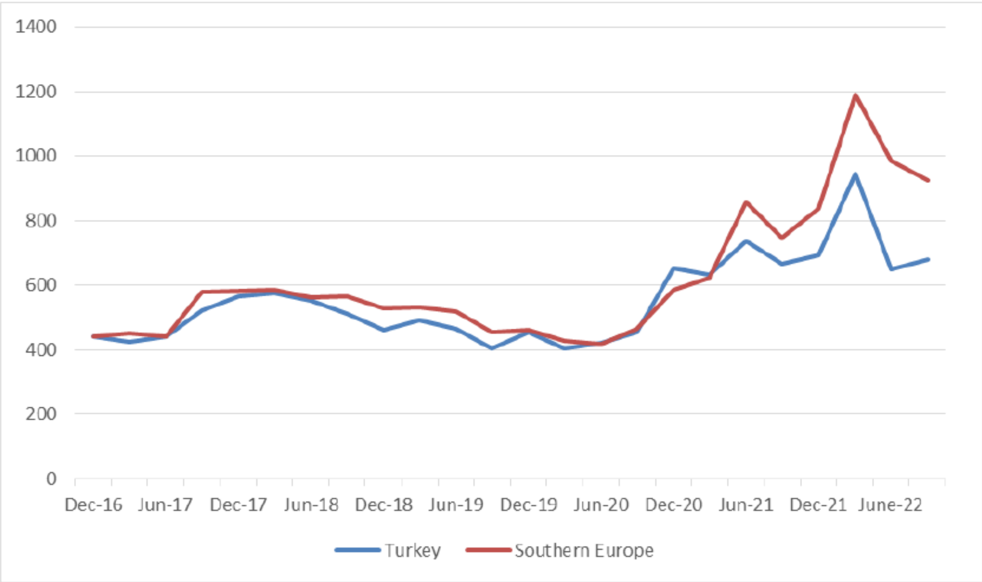


Figure 10 - Rebar FOB Southern Europe prices (US$/tonne)[58]

The information in Figure 10 supports the submissions of Nervacero and the Government of Spain that the European rebar market has been operating, and is likely to continue to operate, at higher price levels than other regions. This, as we have explained, and as is widely understood and expertly recognised, is due to the continued impacts on European industries of inflation, high energy costs, and the EU's response to the invasion of Ukraine.

We respectfully submit that the Commission should reconsider the submissions from Nervacero and the Government of Spain in this regard and re-evaluate the way SEF 601 uses information regarding exports from both non-EU member and non-Spanish sources in denying those submissions.

The fact is that the Australian market is mostly supplied by the domestic supplier and by suppliers from Turkiye and the Asian region. The Turkish and Asian suppliers benefit from lower costs of production and logistic costs due to their closer proximity to Australia. In contrast, Nervacero's costs and prices are

[16] See, for example, https://www.ft.com/content/95243a73-22c8-447e-bbae-a10a206d7e9e, https://blogs.lse.ac.uk/europpblog/2022/09/21/who-stands-to-gain-from-closer-relations-between-russia-and-turkey/, and https://www.cnbc.com/2022/11/25/georgia-armenia-turkey-economies-boom-with-russian-wealth-migration.html

affected by the shortage of supply in European markets, the higher costs of energy and freight and the overall effect of the Russian invasion, including the resultant unavailability of supply from Ukraine and the sanctions imposed on Russian products. These factors make Nervacero's products *less competitive* and a *less likely supplier* of rebar to the Australian market in the future.

Given the higher prices in the Spanish and EU markets, which are Nervacero's main market destinations, and the relatively higher costs of production and of freight to Australia, there is a strong incentive and indeed necessity for Nervacero to focus on supplying rebar to those European markets. We note that this point is acknowledged by SEF 601:[17]

> *Additionally, InfraBuild provided evidence available to it in the form of third party paid subscription data to support that the normal value for Spain has recently increased more than the export price. This was demonstrated by the commission's dumping assessment for the inquiry period. The Government of Spain's submission also referred to significant steel price inflation in Spain and Europe, which could have increased the normal value for Spain. The evidence provides a reasonable basis for the commission to conclude that, if exports continue for Spain, those goods are likely to continue to be dumped.*

Instead of the conclusion drawn by this passage from SEF 601, the more logical and realistic inference is that the effect of higher domestic and regional prices will be to obviate or lower the likelihood of Nervacero resuming exports to Australia, being a lower-priced destination only accessible to Nervacero at higher freight costs.

If it was the case that supply was available to be sold to non-European markets, price offers by Nervacero would be uncompetitive. SEF 601's hypothesis that Nervacero's export price would likely be "dumped" if Nervacero exported to Australia at the Australian market price level is a correct nonsense. To rephrase, the Commission is saying that Nervacero's prices in Europe are and will be higher than Australian market prices. This is not a conclusion about what is likely to happen in the future. The Commission's observation does not address the statutory test, which is the likelihood, in the sense of probability, that dumping and injury would recur if the measures were allowed to expire.

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. The Commission seems to think that all Nervacero wants to do is to "dump" rebar products into Australia and thereby injure the Australian industry. Why would it do so, given all of the facts that we and others have presented to the Commission and that are known to the Commission? All businesses seek profit and will sell their products where they can maximise profit. Nervacero is just such a business.

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.

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[17] SEF 601, page 68

Due to a combination of the high domestic/European market prices, high cost of production and of transport exacerbated by the far-reaching effect of ongoing energy crises and Russia's invasion of Ukraine,[18] and continuing high capacity utilisation directed to Spanish and European markets, Nervacero has been disincentivised to export rebar to Australia. The lack of exports during recent times is itself evidence of the effects of these conditions on Nervacero's sales behaviour. The "competitiveness gap" associated with the much higher price level in the Spanish and European market, Nervacero's higher costs of production and freight, and the lower customs duties enjoyed by the dominant sources of supply, especially from the Asian region, including Turkiye, will not be bridged by the expiry of the measures or by any predictable factor, whether in the short, medium or long term.

Nervacero acknowledges that the market conditions in Spain and EU more broadly have been less favourable since the second quarter of 2022, after a very strong post-pandemic rebound in 2021. However this is largely due to the impact of the Russian invasion of Ukraine on the EU market, and the hike in energy prices. The higher cost of production, combined with the high cost of freight, act as strong commercial disincentive and real obstacle for Nervacero to offer its product to foreign markets where Nervacero would need to compete with sources which are not affected by these factors. Doing so would be commercially undesirable and counterproductive. Nervacero's exports are presently considered and would continue to be considered to be less competitive than the dominant sources of imports, such as those from Turkiye, Singapore, Malaysia, and Indonesia, all of which enjoy lower customs duties and lower costs of freight for their exports to Australia compared to Nervacero.

There is no evidence that expiry of the measure would lead Nervacero to offer rebar to the Australian market at a dumped price that undercut those existing import sources in order to compete with the Australian industry. To the contrary, European steel makers face the challenges of reduced production and supply which will make it even more unlikely for Nervacero to revive its exports to Australia at all or substantially. We refer the Commission to this OECD analysis:[19]

> *In the EU and the UK, worldsteel forecasts finished-steel consumption to rebound by 16.3% in 2021 and then decrease by 1.3% in 2022 The Russian aggression against Ukraine is expected to weigh on the European steel industry (worldsteel, 2022[170]). Disruption in the global supply chain and rising energy prices represent the main challenges faced by EU steel makers. Many of the electric furnace in Europe could introduce temporary stoppages or expand short working hours due to rising energy costs (Kallanish, 2022[240]). In addition to increasing energy prices, shortages in steel and raw material supply are expected to impact European steel production as Russian and Ukraine combined account for a fifth of imports to the EU (Reuters, n.d.[241]).*
> [footnote omitted]

Indeed, there has been a consistent declining trend in exports of steel products, especially rebar, from the EU region. EU rebar exports reached a ten year low in 2021.[20] This is consistent with the submissions of both the Spanish Government and of Nervacero that it would be unlikely for Nervacero

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18 Australian Competition and Consumer Commission, Global container trade disruptions leave Australian businesses vulnerable dated 4 November 2021.

19 OECD Steel Market development: Q2 2022 report by Directorate for Science, Technology and Steel Innovation Committee, page 73. See, https://www.oecd.org/industry/ind/steel-market-developments-Q2-2022.pdf

20 See Eurofer, *European Steel Figures in 2022*, "Exports from the EU: Long Products", pages 44 and 46. https://www.eurofer.eu/assets/publications/brochures-booklets-and-factsheets/european-steel-in-figures-2022/European-Steel-in-Figures-2022-v2.pdf

to resume exporting to Australia at material levels, in competition with now-established lower priced/ lower cost suppliers.

In light of the above, we respectfully request the Commission to revisit its assessment of the likely effect of the expiry of measure with respect to Nervacero. Nervacero submits that the correct and preferable view is that the available evidence does not support a finding that the expiry of the measure will lead to or would likely lead to a continuation or recurrence of dumping and material injury caused by exports from Nervacero. To the contrary, the observed facts and expert predictions indicate that it would be unlikely for Nervacero's exports to be available for export to Australia or to be offered to Australian customers at price level competitive with other imports. A future recurrence of material injury by reason of exports by Nervacero could only be a matter of speculation rather than of likely probability.

C Changes of market and operational conditions for Infrabuild

SEF 601 confirms that there have been significant changes with respect to the Australian market for the goods under consideration and in the economic conditions of the new Australian industry entities referred to as Infrabuild. During the inquiry period, and since then, Infrabuild has enjoyed some of its best-ever financial performance. We refer to the following observation from the Commission's industry verification:

- *…the commission does not consider that InfraBuild has experienced a deterioration in its economic performance in the form of reduced production or sales volumes.*[21]
- *…the commission does not consider that InfraBuild has experienced a deterioration in its economic performance in the form of price depression or price suppression.*[22]
- *…the commission does not consider that InfraBuild has experienced a deterioration in its economic performance in the form of reduced profit and profitability during the inquiry period.*[23]
- *[Infrabuild] capital investment increased in each year.*[24]
- *[Infrabuild] revenue increased in each year.*[25]
- *InfraBuild's ROI has improved in each year. The commission notes that ROI was negative until 2020, after which ROI has improved significantly.*[26]
- *…an improvement during the inquiry period such that [Infrabuild's] productivity was at the highest level achieved.*[27]

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21 SEF 601, page 50.

22 Ibid, page 51.

23 Ibid, page 52.

24 Ibid, page 53.

25 Ibid.

26 SEF 601, page 54.

27 Ibid, page 55.

- *…InfraBuild's inventory turnover has increased in each year.*[28]
- *…InfraBuild's receivables turnover peaked in 2018 and has since reduced in each year*[29]

The above observations in SEF 601 have recently been confirmed by Infrabuild's own financial reporting and media announcements. Infrabuild states that its financial performance has been at a "record" level with exponential growth experienced:

> *Mr Patel said InfraBuild's group revenue for 2021-22 had risen by 32 per cent to $6 billion, and earnings before interest, taxes, depreciation and amortisation had increased by 92 per cent on strong demand from the construction and infrastructure industries.*
>
> *Mr Patel said the momentum had continued in the first three months of the new financial year. For the September quarter, revenue was up 2 per cent to $1.53 billion, and EBITDA was up 24 per cent to $197 million.*
>
> *He said the financial performance in 2021-22 was a record.*[30]

And

> *… [Infrabuild's] after tax profit more than doubled to $283.9 million and net assets increased by $278 million to $1.42 billion.*
>
> *The directors, including owner Sanjeev Gupta, said that they were "satisfied" with the FY22 performance in the accounts, and noted it was better than budgeted.*
>
> *…. The revenue boost was down to increased sales across all three divisions - recycling, manufacturing and distribution…*[31]

SEF 601's observation that Infrabuild has experienced "deterioration" in its market share should be viewed within this context, and considered against the record level of revenue, profit and sales volumes. SEF 601 notes that the total size of the Australian market for rebar during the inquiry period was approximately 1.35 million tonnes. This is close to the entire steel making capacity of Infrabuild's electric arc furnaces. During the inquiry period, Infrabuild recorded the second lowest number of employees involved in the production of the goods over the past five years,[32] yet with the highest tonnes of productivity per shift.[33] This data suggests that Infrabuild was running at its full capacity to the extent that its staffing allowed, and that it operated more efficiently during the inquiry period than ever before and was therefore able to capture high revenue and high returns. Indeed, in recent times, the

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28 Ibid.

29 Ibid.

30 See Confidential Attachment - *InfraBuild to buy US steel assets from Sanjeev Gupta's GFG*, Australian Financial Review, 17 November 2022, https://www.afr.com/companies/manufacturing/infrabuild-to-buy-us-steel-assets-from-sanjeev-gupta-s-gfg-20221117-p5bz2n.

31 See Confidential Attachment - *InfraBuild flies to $665.8m EBITDA, shame about IPO market*, Australian Financial Review 30 October 2022, https://www.afr.com/street-talk/infrabuild-flies-to-665-8m-ebitda-shame-about-ipo-market-20221030-p5bu3e

32 SEF 601, Table 19.

33 SEF 601, Table 21.

key factor in the Australian market has been availability of the product itself, and high prices, rather than competition for market share.[34]

Further, we again draw the Commission's attention to a significant change in the Australian market and to the Australian industry that has arisen since the original investigation. This change relates to Infrabuild's sales arrangements with the major customers in Australia, a change that provides effective safeguards to maintain and advance Infrabuild's sales volume and revenue. Nervacero raised this in its Exporter Questionnaire Response as follows:

> *Since the anti-dumping measures were first put in place in 2018, the Australian market conditions have shifted, which coincided with the GFG Alliance's acquisition of Arrium OneSteel, and its transition to Liberty OneSteel and now Infrabuild.*
>
> *The key change is Infrabuild's implementation of a "loyalty" scheme that locked in customer's demand for a commitment level of between 80 to 95 percent of their annual requirements, in exchange for rebates. The larger the percentage the more attractive the rebates become. This scheme is only offered to "Tier One" customers who are larger scale customers that are qualified to buy directly from Infrabuild. These are also the main group of customers that could use the large coils offered by Nervacero. Nervacero used to offer its products to these Tier One customers during the period of the original investigation 418, being 1 April 2016 to 31 March 2017.*
>
> *As a result of Infrabuild's loyalty scheme, Australian customers are disincentivised in purchasing products from Nervacero, and could only do so to the extent that the purchase of non-Infrabuild products would not affect its quantity commitments to Infrabuild. As a result, Nervacero no longer receives any inquiries from Tier One customers and only maintains communication with [CONFIDENTIAL TEXT DELETED – distribution channel].*
>
> *Nervacero understands that [CONFIDENTIAL TEXT DELETED – distribution channel] customers are basically "Tier Two" customers who cannot source the goods from Infrabuild because they are not qualified for direct purchase from Infrabuild. Therefore the distribution channel via [CONFIDENTIAL TEXT DELETED – distribution channel] is not in direct competition with Infrabuild. This change is underpinned by strong growth in both steel prices demand in Australia and globally in recent years, a trend that is likely to continue.*[35]

Infrabuild made a submission in this inquiry to dispute Nervacero's "description" of the scheme, claiming:

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34 https://www.abc.net.au/news/2022-05-20/sa-government-asks-accc-to-review-price-gauging-in-construction/101083646, and https://www.premier.sa.gov.au/media-releases/news-items-2022/call-for-accc-investigation-into-housing-affordability-pressures

35 Nervacero's Exporter Questionnaire Response, at B-1.1(a).

It is clear from inaccuracies contained in Nervacero's description of InfraBuild's "loyalty" scheme that the exporter has a limited understanding of the operation of the domestic industry's market offer.[36]

Whether or not there are any such "inaccuracies", Infrabuild does not dispute that such a scheme or "Advantage Program" exists and that it is widely utilised in the management of its sales to its large "Tier One" customers in Australia. Nervacero's submission has described Infrabuild's arrangement as a "loyalty scheme" in a generic sense. This is partly because, as Infrabuild says, Nervacero has limited understanding of the operation of Infrabuild – because Nervacero has never been a direct competitor with Infrabuild since its creation. In any case, according to the ACCC, *"loyalty schemes"* are simply schemes that *"offer points or discounts to boost repeat business"*. In the ACCC's *"Customer loyal schemes – Final report"* published in 2019, it states:

Loyalty schemes are ubiquitous in many sectors of the Australian economy and are particularly prevalent in the airline, supermarket, credit card, hotel and car rental industries. Consumer participation in loyalty schemes is high and the average Australian carries four to six loyalty cards.

Fundamentally, loyalty schemes are a marketing device with the primary objective of attracting and retaining customers. Many firms invest in loyalty schemes with the aim of gaining a competitive advantage over rivals by influencing customer behaviour to encourage repeat purchases and introduce customer resistance to competing offers or products. In this sense, loyalty schemes have a dual strategy—an offensive strategy of acquiring new customers as well as a defensive strategy of retaining existing customers.[37]

Infrabuild's explanation of its "Advantage Program" fits the ACCC's description of a loyalty scheme:

InfraBuild's Advantage programme is designed and operates as a market offer that is influenced by the price of 'like' imported goods. It represents a simplified pricing structure available to its customers (both related and independent).

…

It is standard practice in many capital-intensive industries for customers that purchase higher volumes to have access to differentiated net price outcomes. InfraBuild (and other international steel mills) rely on optimising volumes through operating facilities to ensure fixed costs per tonne are minimised.

Large fluctuations in production demand caused by sporadic large volume imports have a significant negative impact on a steel mill's operational stability and efficiency. In the competitive Australian rebar market, InfraBuild's market offer must therefore be structured to be

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36 EPR601-20, page 1. In typical Infrabuild submission-writing fashion, no details of the alleged inaccuracies have been provided to interested parties nor, it seems, the Commission.

37 See, ACCC's "*Customer loyal schemes – Final report*" page 5. https://www.accc.gov.au/system/files/Customer%20Loyalty%20Schemes%20-%20Final%20Report%20-%20December%202019.PDF

> *an attractive, transparent and competitive option for customers, or they will source their rebar elsewhere.*[38]

In other words, the objective and the effect of the Advantage Program is to incentivise the targeted customer by offering a *"differentiated net price outcome"* in exchange for a commitment to purchase *"higher volumes"*, in order to "*optimis[e] volumes"* manufactured and sold by Infrabuild's production facilities. Infrabuild does not dispute Nervacero's understanding that such scheme, regardless of its name and nature, is designed to and has the effect of locking-in and optimising supply of the goods under consideration to large scale *"Tier One"* customers who can buy directly from Infrabuild. The customer's desire to purchase from an alternative source is removed or blunted by the volume and pricing structure agreed with Infrabuild, and the *"differentiated net price outcomes"* that result therefrom

Clearly, this scheme has allowed Infrabuild to significantly improve its sales and revenue performances and has had a significant impact on the competition dynamics in the Australian market. Infrabuild dominates the steel long products market in Australia. Its market power is an unmissable feature of that dominance. The differentiated net price outcomes of its Advantage Program "lock in" that dominance. The success of its Advantage Program and its role in achieving that dominance is not discussed in SEF 601. We respectfully request the Commission to take the effect of the Advantage Program into account. In our view, the Advantage Program insulates Infrabuild against price competition from small higher cost/higher price exporters such as Nervacero. To maintain the overall rebated price level, a customer must maintain high levels of supply from Infrabuild. Nervacero cannot compete against the currently incumbent exporters from Turkiye and other Asian countries. If a local customer is going to risk upsetting Infrabuild, and thereafter being denied supply or losing rebates, it is certainly not going to do so by buying from Nervacero at higher prices than are available from the incumbent exporters.

The strength of Infrabuild's marketing and supply/price structures, in circumstances of capacity utilisation figures that are at the highest they have been for five years, is another changed condition that is being enjoyed by the Australian industry, and which makes it much less likely to be materially injured by future competition, if any, from Nervacero, as a result of the expiry of the measure.

We also reiterate that neither Nervacero nor the importer of Celsa Group products are in a position to resume direct competition with the Australian industry. As Nervacero explained in its Exporter Questionnaire Response:

> *As mentioned above, since the original investigation, the Tier One customers that [CONFIDENTIAL TEXT DELETED – distribution channel] used to supply have shifted to source the GUC from Infrabuild. During the inquiry period, [CONFIDENTIAL TEXT DELETED – details of distribution channel] Tier Two customers who cannot buy the GUC from Infrabuild.*[39]

We wish to highlight the following findings in SEF 601 in this regard, which are particularly relevant to coil products that were historically supplied by Nervacero and the Celsa Group:

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38 EPR601-20, pages 1 and 2.

39 Nervacero's Exporter Questionnaire Response, at B-1.3.

> *Since the measures InfraBuild continues to apply an Import Parity Pricing (IPP) model. Under the IPP model InfraBuild negotiates pricing with customers with reference to offers made in the rebar market for imported goods.*
>
> *InfraBuild noted in its application that since January 2020 the IPP model only applied to rebar in straight lengths, while a benchmarked pricing mechanism applied to other models. Regardless of the pricing mechanism used, InfraBuild submitted that customers continue to reference price offers relating to imported rebar, and consequently the price that it is able to achieve in the market continues to be influenced by the prices of imported goods.* [40]

The above findings highlight the fact that the highest price sensitivity in the Australian market, due to Infrabuild's use of the IPP model, relates to straight products rather than the coil products that Nervacero historically supplied to Australia.

Further, these evidences clearly establish that the conditions of competition in the Australian market have changed since the measure was put in place. This is contrary to the opinion expressed in SEF 601, which is not evidence based.[41]

SEF 601 also confirms Nervacero's understanding that, in more recent times, including during 2022, the Australian industry's prices have been more competitive in comparison to many import sources:

> *As detailed in section 7.5, Australian industry was able to achieve a higher margin between its selling prices and its costs of manufacture and sale during the inquiry period. The commission considers this improvement was in part due to <u>a shift in relative price competitiveness within the Australian market - due to the increase in the landed price of imports from all sources caused by the increased cost of shipping, Australian industry became relatively more competitive on price and was able to achieve higher average selling prices.</u> The commission considers that this shift in relative price competitiveness may incentivise exporters to reduce prices in the future in order to maintain or increase market share in a cooling market.*[42] [underlining supplied]

This shift indicates that the Australian industry has entrenched its domination of the "Tier One" customer market that was historically subject to competition from Nervacero during the original investigation period. The above statements also suggest that the Australian industry is offering products – especially the price-sensitive coil product - at prices that are more competitive than imported products.

In light of all these matters, Nervacero disagrees with the statement in SEF 601 that the conditions of competition have not changed in the Australian market:

> *The commission considers that despite the changes in the pattern of trade resulting from the measures, the conditions of competition in the Australian market have not changed since the measures. As such, the commission considers that price will continue to be the key determinant of purchaser behaviour, and would expect that if the measures were to expire dumped goods*

40 SEF 601, page 31.

41 Ibid, page 75.

42 Ibid, page 71.

> *will again enjoy a competitive price advantage that will see volumes move toward exporters of dumped goods.*[43]

With respect, it is not cogent to say that the conditions of competition in the Australian market have not changed *"despite the changes in the pattern of trade resulting from the measures"* and despite all of the conditions that have impacted on supply and demand not only in Australia but in the rest of the world since the original measures were imposed. Those conditions are documented in this submission and mentioned to some degree in other parts of SEF 601. The only explanation we can think of for the *"no-change"* finding is a misguided belief that stating such a finding means that continuation of the measures is justified on the *ipso facto* basis that the market situation is the same now as it was five years ago. If that is all the Commission has to rely upon, then a recommendation to the Minister to continue the measure against Nervacero on this occasion would be based only upon the fact that there were grounds to impose the measure against it in the first place. And, we reiterate, the market situation is not the same – it is much changed from what it was before.

Nervacero has transitioned from being a competitor to Infrabuild in the Australian market to being a higher cost/higher price producer, focussed on Spanish and EU markets, that is presently non-existent in the Australian market. It cannot compete with the prices offered by the new wave of exporters who are not impacted by dumping measures, are closer to Australia, and do not have to contend with the industrial and market disruptions and accelerations arising from a war on their doorstep.

Nervacero submits that the evidence points against a finding that the expiry of the measure would lead to or would likely lead to a recurrence of injury caused by imports from Nervacero.

D No nexus between expiry and recurrence of Nervacero dumping and injury

The Commissioner is required to consider the likely effect of the expiry of the measure for his recommendation to the Minister under Section 269ZHF(2) of the Act. This must be based on an objective assessment of positive evidence, and not on assumption or mere possibility.[44] The forward looking nature of the exercise necessarily requires drawing inferences from evidence. It does not mean that findings could be simply made based on assumption and conjecture. This is supported by the WTO Panel Report in *Pakistan – BOPP Film (UAE):*

> *We recall that, under Article 11.3, an authority must determine that the continuation or recurrence of injury is likely, and not merely possible, and that this determination must be based on positive evidence and not on assumption.*
>
> *We note that the NTC reasoned that, since after the imposition of anti-dumping duties imports had declined and domestic production had increased, it was likely that the opposite would happen if the duties were removed. While the fact that imports declined significantly and domestic production increased significantly after the imposition of the anti-dumping duties suggests that it is possible that the opposite could happen upon removal of the duties, the NTC did not explain why it considered these developments to be likely to occur (and not just*

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43 SEF 601, page 75.

44 *Minister for State for Home Affairs v Siam Polyethylene Co, Ltd (2010) 187 FCR 229; [2010] FCAFC 86 at [90] to [92].*

> *possible). Given the absence of any further explanation in this regard, we are of the view that the NTC's finding that 'termination of antidumping duties will likely result in an increase in imports of the product under review which will affect adversely … the productions of the domestic like product' was essentially conclusory in nature. We therefore find that the NTC failed to provide a reasoned and adequate explanation to support its finding that imports of BOPP film would likely increase in the event anti-dumping duties on these imports were to be removed.*[45]

Further, the investigating authority must demonstrate *"the nexus… between the expiry of the duty on the one hand, and the likelihood of 'continuation or recurrence of dumping and injury' on the other hand."*[46]

We respectfully submit that the evidence on the record does not support the finding of such a nexus, in so far as prospective exports from Nervacero is concerned.

As established above, the Australian industry is achieving record high profit and revenue. Lower priced import sources, with the advantage of lower cost and proximity to Australia, compete for business largely for lower volume customers than those mainly supplied by Nervacero. No evidence of which we are aware suggests that expiry of the measure against Nervacero will lead to sales by Nervacero at dumped prices that would cause material injury to Infrabuild, this being the salient and essential test for expiry or continuation. Nothing suggests that there would be a shift in market preference to a supplier from a higher cost and higher price home market, whose motivation for profit is best addressed by its home markets. The proposition that Nervacero would sell its goods at dumped prices in order to compete with these other import sources does not stack up. Even if it does, there is no suggestion that the Australian industry would be worse off than at present, given the competition that it currently faces. Nonetheless, we address the "likely effect" analysis presented in SEF 601 as now follows.

In relation to the *"likely effect on prices"*, SEF 601 states:

> *The commission identified that around half of all imports into the Australian market were clustered within a 3.5% price range, while around two thirds of imports were within a 6% price range.*
>
> *The commission considers that this analysis demonstrates that the Australian market is highly price sensitive. The commission considers that to capture sales volumes and market share in a price sensitive market the exporters currently subject to measures would likely seek to export to the Australian market at prices that undercut the existing import offers. This would likely have a deflationary effect on all participants in the market.*[47]

The price "cluster" suggests that imported products are more or less similarly priced. This is not surprising, given that a single supplier, being Infrabuild, holds 88% of the total market share, while the rest mostly compete with each other for that part of the market held by imports. This provides no guidance on the likely effect of the expiry of the measure itself. Further, this price cluster concept suggests, at best, that in order to enter the market a new entrant would also have to offer the goods at a similar price level. However, Nervacero is commercially disincentivised to compete in a lower priced

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45 Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.602-7.603, and para. 7.615.

46 Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras. 121 and 123.

47 SEF 601, page 73

market, and there are significant disadvantages for it in doing so. Even with the measure removed, and even if supply became available at better prices than it could achieve in European markets, Nervacero would still be disadvantaged by the customs tariff, which is not applicable to the main import sources, such as Turkiye, Indonesia, Malaysia and Singapore.

In relation to *"patterns of trade"*, SEF 601 states:

> *This analysis demonstrates that the measures have influenced patterns of trade in the Australian market. The commission considers that the changes in the pattern of trade that have followed the measures reinforce the price sensitivity in the Australian market, and demonstrate that those exporters subject to measures have only been able to obtain sales volumes and market share when exporting at dumped prices.*
>
> *The commission considers that if the measures were to expire, the subject country exporters that have ceased exporting to Australia would have no barrier against re-entering the Australian market, and would likely re-enter the market at prices that undercut other exporters as well as Australian industry. This would have a deflationary impact on prices for all participants in the market.*[48]

With respect, we submit that the above statements are conclusory. The pattern of trade analysis merely indicates that the import market has been dominated by sources not subject to the current measure. There is no indication that "price sensitivity" in the Australian market has been reinforced. We recall Infrabuild's advice that it only applies an IPP practice with respect to straight products, and the fact that Infrabuild has become more price competitive than imports, while achieving record high profit and revenue.

Further, expiry of the measure itself does not mean that there is "no barrier" against Nervacero re-entering the Australian market. There is a multitude of barriers, including the high cost of production, logistical barriers, customs tariffs, competition from existing suppliers at lower cost and prices, as well as the disincentive provided by the higher prices in the Spanish and regional market closer to Spain. Would a lower barrier associated with the expiry of measure against Nervacero create a "deflationary impact"? A deflationary impact could only be caused by a competitor introducing goods into the subject market at lower prices. That outcome, as we have been at pains to draw-out in this submission, is not at all likely.

In relation to *"likely effects on volumes"*, SEF 601 observes that:

> *Measures have, however, provided opportunities for exporters of lower priced goods not subject to measures to build market share by undercutting the price of Australian industry as well as the duty inclusive price of goods subject to measures.*
>
> *…*
>
> *The commission considers that despite the changes in the pattern of trade resulting from the measures, the conditions of competition in the Australian market have not changed since the measures. As such, the commission considers that price will continue to be the key determinant*

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48 SEF 601, page 73.

of purchaser behaviour, and <u>would expect</u> that if the measures were to expire dumped goods will again enjoy a competitive price advantage that will see volumes move toward exporters of dumped goods.

The commission considers it likely, based on the pattern of trade analysis conducted, that some of the sales volume captured by the exporters subject to measures will be at the expense of other exporters. Noting the deterioration in the Australian industry's market share during the inquiry period, at a time when the Australian market was expanding, the commission considers it likely that Australian industry will be vulnerable to losing sales volume and market share to dumped exports in the event that measures expire.[49] *[underlining supplied]*

These too, say nothing about what evidence there is to infer that expiry of the measure would be likely to lead to recurrence of injurious dumping from Nervacero. The underlined "expectation" is not supported by evidence. The evidence pertaining to the market and operational conditions faced by Nervacero, as discussed in Part B of this submission, point to the opposite conclusion. SEF 601's opinion that if exports subject to the measure capture market share at the expense of other exporters, suggests that the competition is more likely to be between imported products rather than with the Australian industry. The opinion that the Australian industry might be "vulnerable" is speculative and conclusory.

In relation to *"likely effect on profits"*, SEF 601 contains only the following:[50]

Profit and profitability rely on price and volume as inputs. Based on the analysis in sections 8.6.1 and 8.6.2 the Australian industry will be impacted by reduced profits and profitability from dumped exports in the event that measures expire.

We respectfully submit that this statement is conclusory and not supported by any evidence.

Further, in section 8.6.4 of SEF 601 in the consideration of whether *"injury from dumping [is] likely to be material?"* SEF 601 states:[51]

The Australian market for rebar expanded by around 18% in the inquiry period compared to the prior 12 months. Significant direct and indirect government stimulus aimed at the construction industry as well as increased consumer spending on home improvements fuelled this growth. This boost in demand coincided with longer shipping times and significantly increased costs of shipping caused by the pandemic. Despite the challenges faced by exporters during the inquiry period, exports captured around 90% of the growth in the size of the Australian market. Australian industry only captured around 10% of the additional volumes sold into the Australian market, resulting in a significant reduction in its market share. The commission considers that the Australian industry's failure to consolidate its market share in a buoyant market at a time when exporters' supply chains were disrupted by the pandemic is indicative of its ongoing vulnerability to the injurious effects of lower priced competition.

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49 SEF 601, page 75.

50 Ibid.

51 Ibid, pages 75 and 76

As noted above, the Australian industry's limited expansion should be viewed in the context of its reduced employment, record high unit profit and unit price, as well as its record high revenue and absolute profit. We assume that in the period referred to by the Commission Infrabuild decided to maximise its profit whilst operating at close to full capacity. Its record high profit levels well offset any concerns that its inability to capture more *"additional volume"* was due to fierce price competition from import sources. In any case, this scenario suggests that the incumbent import sources have succeeded in establishing their market in Australia and will be difficult to shift. Again, in so far as Nervacero is concerned, that evidence suggests Nervacero is unlikely to be a material threat either to Infrabuild or to the incumbent lower cost/ lower priced import sources. There is simply insufficient incentive for Nervacero to engage in such competition.

As to the following statements, we respectfully submit they are not evidence based:

> *The commission considers that an increasing presence of dumped goods in the market from the subject exporters would have a dampening impact on prices across the entire market. The price reductions required of the Australian industry to remain competitive if the measures expired would extrapolate into material reductions in revenue, profit and profitability. A deterioration in these factors is likely to worsen the Australian industry's economic condition in relation to the other economic factors that are in part a function of price and profit.*
>
> *The commission has also considered the alternative scenario where the Australian industry elects not to reduce prices in order to compete with the dumped exports. As detailed in section 8.6.2 above, the commission considers that if the measures were to expire it is likely that Australian industry would lose market share to exporters from the subject countries.*[52]

Lastly, SEF 601 offers some quantitative analysis of the likely materiality of injury:

> *The commission notes that prior to the measures subject country exporters held around 12% of the Australian market. The commission estimates that, based on the Australian market size and average selling prices during the inquiry period, the Australian market total revenue was over $1.6 billion. As such, each 1% of market share represents approximately $16 million in revenue. At this scale, small movements in market share can amount to significant lost revenue.*
>
> *… Given the nature of this industry, which had a total revenue of over $1.6 billion in the inquiry period, should the subject countries recapture some of the market share held prior to the measures, the Australian industry would likely experience a material level of injury by way of lost revenue from lost sales and market share. The Australian industry would also experience injury to other economic indices related to volume, such as reduced profit, profitability and reduced capacity utilisation.*[53]

52 SEF 601, page 76

53 Ibid.

We respectfully submit that this analysis is problematic, simplistic, and assumptive.[54] For example, we note that the Australian industry is unable to supply the entire market, and that there is evidence that the Australian industry can perform very well in all economic indices yet still "lose" market share to imports.

SEF 601 correctly notes:

> *…since 2019 almost the entirety of exports were from sources not subject to measures. From this, it can be reasonably inferred the Australian industry's economic performance during the inquiry period has not been impacted by the subject countries. Any deterioration of the Australian industry's economic indices during the inquiry period are attributable to imports from other sources in a highly price sensitive market. The commission accepts that the presence of imports from other sources may continue to adversely influence the economic condition of Australian industry. The commission notes however that the Australian industry may be affected by many factors. The commission does not accept that the existence of other potential causes of injury negates the injury that the Australian industry will likely experience as a result of the continuation or recurrence of dumped exports from the subject countries. While the commission accepts that injury caused by other factors should not be attributed to dumping, it is also noted that dumping need not be the sole cause of injury to the industry.*[55]

We respectfully submit that the Commission should accept the evidence on the record, including that evidence highlighted in this submission. The evidence points against the proposition that expiry of the measure against Nervacero will *"more probably than not"* lead to recurrence of dumping from Nervacero and material injury that the measure is intended to prevent. Further, we submit that the non-attribution requirement cannot be met. This is because the approach adopted in SEF 601 is to assume that expiry of the measure will lead to recurrence of dumping due to the removal of the duty "barrier", and that the added competition would lead to material injury to the Australian industry, because the Australian industry is already subject to strong competition from non-subject imports. This effectively attributes injury that will be caused by other factors to Nervacero, contrary to these facts and correct conclusions:

- competition from Nervacero is currently non-existent;[56]
- there is a low likelihood that such competition would re-emerge , given the various factors in both Nervacero's home market and the changed circumstances in the Australian market;
- Nervacero's exports would not be likely to be more competitive with or injurious to the Australian industry than the exports of the new incumbents that are already competing with the Australian industry.

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[54] The analysis is based on an assumption rather than a finding. That Nervacero would be likely to *"recapture some of the market share held prior to the measures"* has not been proven, based on the evidence before the Commission.

[55] SEF 601, page 77.

[56] Competition from Thailand existed but will become an "other factor", as SEF 601 proposes to recommend to the Minister that the measures against Thailand be allowed to expire.

E Conclusion

In conclusion, we respectfully request the Commission to revisit its assessment of the effect of the expiry of the measure against Nervacero, the likelihood of the recurrence dumped imports from Nervacero and of injury to the Australian industry arising thereby, and the nexus between the expiry of the measure and any such likelihood. The Commissioner should find that there is insufficient evidence on the record to recommend that the Minister secure the continuation of the measure with respect to exports from Spain by Nervacero.

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Yours sincerely

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