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22 December 2022

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

By email

Dear Director

Nervacero S.A.
Continuation Inquiry 601 - response to Infrabuild submission

As you know, we act for Nervacero S.A. ("Nervacero") in the above-referenced continuation inquiry ("this inquiry").

We refer to the submission made by Infrabuild (Newcastle) Pty Ltd ("Infrabuild") to the Commission dated 8 December 2022 ("Infrabuild Submission"),[1] which contained specific remarks and claims regarding the Commission's proposed recommendation regarding Nervacero and other interested parties in this inquiry. In this submission, Nervacero provides its responses to the Infrabuild Submission comments, insofar as they relate to Nervacero.

Infrabuild Submission claims that the Commission's view, that the single container exported from Nervacero to Australia during 2021, given the special circumstances, should not be the basis for resetting the anti-dumping duty for another five years, is somehow not "consistent" with Section 269ZHG(4) of the *Customs Act 1901* ("the Act"):[2]

> *It is InfraBuild's contention that the Commissioner's recommendation concerning the dumping duty notice as it relates to the exporter from Spain, Nervacero, should be consistent with a determination by the Minister under sub-paragraph 269ZHG(4)(a)(iii)…*[3]

This contention is misguided and without legal basis. Section 269ZHG(4)(a) provides the manner and options that the Minister has in the declaration for securing the continuation of a measure – if he can be

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1 Infrabuild Submission, ERP601-26

2 Infrabuild Submission

3 Ibid, page 1.

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satisfied that the measure should be secured. Section 269ZHG(4)(a) contains three options for such declaration, under sub-paragraphs 269ZHG(4)(a)(i), (ii) and (iii). Notably, Section 269ZHG(4)(a)(ii) provides that one of such options is for the "*the notice ceases to apply in relation to a particular exporter or to a particular kind of goods*". Indeed this would be a suitable declaration to make in relation to Nervacero – as explained in Nervacero's detailed submission in response to SEF 601.[4]

In any case, the Commission is not obliged to recommend, and the Minister is not obliged to make a declaration under Section 269ZHG(4)(a)(iii) of the Act with respect to Nervacero in order for such decision to be "consistent" with the relevant legal requirements.

The Commissioner is required to give a report to the Minister recommending any change to the notice, the subject of inquiry, in a manner prescribed by Section 269ZHF(1) of the Act. The Commissioner is guided by the overarching obligation under section 269ZHF(2) of the Act – requiring the Commissioner to not recommend securing a continuation of measure unless the nexus and likelihood conditions are met. Section 269ZHF(1) of the Act provides:

> *The Commissioner must, after conducting an inquiry into the continuation of anti-dumping measures… give the Minister a report recommending:*
>
> *(a) to the extent that the measures involved the publication of a dumping duty notice or a countervailing duty notice:*
>
> *(i) that the notice remain unaltered; or*
>
> *(ii) that the notice cease to apply to a particular exporter or to a particular kind of goods; or*
>
> *(iii) that the notice have effect in relation to a particular exporter or to exporters generally, as if different variable factors had been ascertained; or*
>
> *(iv) that the notice expire on the specified expiry day;*

As such, subject to Section 269ZHF(2), a recommendation for the notice to "remain unaltered" is a recommendation that the Commissioner could make, *consistent* with Section 269ZHF(1), taking into account the particular circumstances pertaining to each exporter that the Commission was able to establish through the inquiry.

Furthermore, contrary to Infrabuild's claim,[5] the fact that the Minister may determine the export price for the purposes of a variable factors review under Division 5 of the Act, does not impose an obligation on the Commission to determine the export price during a continuation inquiry and under Division 6A of the Act. Neither does determination of export price under Division 5 of the Act, prevent the Commission from taking into account – rather than "disregard[ing]"[6] - Nervacero's particular circumstances, under Division 6A of the Act. The Minister's power prescribed for a variable factors review neither enables nor precludes the Commission from giving consideration to Nervacero's particular circumstances during the inquiry period for the purpose of forming its view as to the most suitable recommendation to the Minister in the context of a continuation under Division 6A. Indeed, such approach is entirely consistent with the likelihood and future focused nature of the continuation inquiry.

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4 ERP601-27.

5 Infrabuild Submission, page 3.

6 Ibid, page 4.

Lastly, we note Infrabuild's comments that the two coils contained in Nervacero's single shipment exported during the inquiry period as prime product and should be treated as "regular commercial sales":

> *The rebar produced and sold was 'prime' product to meet the testing requirements and designated 'P' for prime product in Nervacero's disclosure of export models to Australia, as such there is no reason why these export sales should not be treated as regular commercial sales. Nervacero did not need to export them at dumped prices, unless that was the only manner by which it could secure the export sales.*

Nervacero has already provided detailed explanation regarding the operational and commercial circumstances relating to these coils produced between 2017 and 2019.[7] Nervacero identified the coils as "prime" products. This is purely due to their physical quality given the coils were produced to meet ACRS requirement, despite the exceptional circumstances surrounding the exportation of these products – at a time when Nervacero has effectively ceased commercial production and exportation of the goods and is not competing with Infrabuild. The lower price was in recognition of the fact that the coils had been left in the storage for a pro-longed period. It was entirely appropriate for the Commission to recognise the exportation of the single shipment of two coils which were commercially negligible from any parties' perspectives – whether it being Nervacero, Infrabuild or any other parties in the Australian market. Thus, such export was not a sufficient or preferable basis for purpose of "re-fixing" the dumping duty for another five years.

Even if, as the Infrabuild Submission suggests, that the variable factors from the inquiry period must form the basis of a continued measure – a proposition not supported by the legislation – it would be reasonable and preferable for the Commission to fully take into account the special circumstances surrounding the low volume, the unrepresentative and non-commercial nature of the single shipment by selecting a more suitable duty type. For instance, the Commissioner could recommend that the continued measure (if it can be legally continued) to be based on a floor price, calculated based on verified normal value or a non-injurious price from the inquiry period. This is of course without detracting from Nervacero's primary submission in response to SEF 601, that the Commissioner cannot be satisfied that conditions for recommending continuation of the measure have been met, as required by Section 269ZHF(2) of the Act.

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Yours sincerely

Charles Zhan
Partner

Anjali Goyal
Senior Lawyer

[7] Nervacero verification report, EPR601-24, page 6.