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18 June 2015

Director Operations 4
Anti-Dumping Commission
Level 35, 55 Collins Street
Melbourne VIC 3000

Review of measures applying to aluminium extrusions exported from China

Dear Director,

This submission is made on behalf of PanAsia Aluminium (China) Co. Ltd (PanAsia) and in response to the Anti-Dumping Commission's (the Commission) preliminary findings outlined in Statement of Essential Facts Report No. 248 (SEF 248).

At the outset, PanAsia wishes to express its serious concerns with the Commission's lack of objective examination of the information gathered and available during the investigation, in making its preliminary findings. Without any documented evidence or reasonable basis, the Commission has rejected the use of arms-length export transactions to Protector Aluminium Pty Ltd (Protector Aluminium) in determining PanAsia's export prices. As the Commission's SEF report provides no explanation or reasoning for the rejection of this information, PanAsia is concerned that its opportunity to properly comment on this matter is restricted.

Likewise, PanAsia is alarmed by the Commission's heavy reliance on incomplete and inaccurate information without proper assessment or evaluation as to whether other relevant information is the best information available. The Commission's complete disregard for the constraints imposed by Annex II of the World Trade Organization Anti-Dumping Agreement (ADA) on the use of best information available in cases where interested parties cooperate insufficiently in the investigation is particularly concerning.

1. Arms-length export transactions (s.269TAA)

SEF 248 preliminarily finds that in accordance with subsection 269TAA(1)(c) and (2) of the *Customs Act 1901* (the Act), *'…sales of those goods at a loss as indicating that the identified Importers or an associate of the Identified Importers will, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole of* [sic] *part of the price'*.

PanAsia strongly disputes the finding that it exported aluminium extrusions at non arms-length transactions and submits that the Commission has incorrectly applied the relevant provisions governing arms-length transactions in determining export prices.

1.1 Exports to Protector Aluminium

Firstly, s.269TAA(2) of the Act allows the Minister to treat sales of goods at a loss as indicating a reimbursement for the purposes of s.269TAA(1)(c) of the Act, only where:

> *(a) goods are exported to Australia otherwise than by the importer and are purchased by the importer from the exporter (whether before or after exportation) for a particular price; and*
>
> *(b) the Minister is satisfied that the importer, whether directly or indirectly through an associate or associates, sells those goods in Australia (whether in the condition in which they were imported or otherwise) at a loss.*

In determining whether goods are sold by the importer at a loss, subsection 269TAA(3) of the Act requires the Minister to have regard to:

> *(a) the amount of the price paid or to be paid for the goods by the importer; and*
>
> *(b) such other amounts as the Minister determines to be cost necessarily incurred in the importation and sale of the goods; and*
>
> *(c) the likelihood that the amounts referred to in paragraphs (a) and (b) will be recovered within a reasonable time; and*
>
> *(d) such other matters as the Minister considers relevant.*

It is noted that SEF 248 does not contain a single reference to the importer Protector Aluminium or make any preliminary findings in respect of the profitability of Protector Aluminium's sales. A review of the anti-circumvention final report[1] (REP 241) also reveals no findings or evidence to show Protector Aluminium's sales were made at a loss. In fact, REP 241 clearly identifies that the Commission only forwarded importer questionnaires to the five subject importers and did not request any costs and sales information from Protector Aluminium that would be required to assess the importer's profitability.

PanAsia submits that there is no information available to the Commission or the Minister to be able to determine and be satisfied that sales by the importer Protector Aluminium were sold at a loss. Therefore, with respect to imports of aluminium extrusions by Protector

[1] EPR 241; Record No. 039.

Aluminium during the review period, the satisfaction required to enliven the power of the Minister to exercise the discretion at s.269TAA(2) of the Act, is not fulfilled.

As the PanAsia verification report[2] also highlights, the Commission did not find any evidence that there was any consideration payable for, or in respect of, the aluminium extrusions other than their price; the price was influenced by a commercial or other relationship between the Australian importers and PanAsia; or the buyer, or an associate of the buyer, was directly or indirectly reimbursed, compensated or otherwise received a benefit for, or in respect of, the whole or any part of the price. As such, PanAsia submits that the Commission has erred in treating its exports of aluminium extrusions to Protector Aluminium as non-arm's length.

In the absence of any information to find PanAsia's exports to Protector Aluminium to be non-arm's length transactions, the Commission is obliged to use those export sales in determining export prices under s.269TAB(1)(b) of the Act.

1.2 Exports to importers subject of anti-circumvention claims

1.2.1 Claims of association by Capral

PanAsia reiterates its statements made in previous submissions that it was in no way related or associated with its Australian customers during the review period. Ownership of the P&O Aluminium entities previously held by PanAsialum Holdings Ltd, were disposed of on 31 December 2009.

Notwithstanding the clear evidence provided and available to the Commission to refute the claims of association raised by Capral in its numerous submissions to the review and the anti-circumvention inquiry, PanAsia notes that the Commission makes no attempt to address this specific issue in SEF 248. Given that issues of ownership and association between PanAsia and its Australian customers has been a key focus of Capral's non arms-length claims, PanAsia requests the Commission to outline its investigation into these claims and make clear its findings into whether any such association was found to exist during the review period.

1.2.2 Treatment of losses by the importers

Whilst PanAsia was not directly involved in the matters under investigation in the anti-circumvention inquiry, it strongly disputes the preliminary finding in SEF 248 that the trading performance of the importers is in any way suggestive of a reimbursement or other payment by PanAsia.

PanAsia considers that the Commission has not properly had regard to all relevant information in assessing whether goods were sold by the importers at a loss. As outlined earlier, subsection 269TAA(3) of the Act requires the Minister to have regard to other such matters as the Minister considers relevant. PanAsia submits that the relevant importers outlined a number of factors in their submissions to the anti-circumvention inquiry that contributed to the identified losses during the inquiry period.

[2] EPR 248; Record No. 053.

These include:

1. Following the decision by Federal Court[3], the unlawful imposition of individual interim dumping and countervailing duties for each specific model (by finish) of aluminium extrusion, had a direct impact on the importers' fully absorbed cost to import and sell the imported goods by inflating the FOB export prices. This in turn resulted in a duty liability being incurred by the importers that was significantly greater than it otherwise would have been had the interim duties been imposed consistent with the Act.
2. The importers' selling prices during the inquiry period were set taking into account an incorrect cost base that is a direct result of the unlawful imposition of measures by different finishes of aluminium extrusions.
3. The importers had agreed to terms with PanAsia for the supply of goods at prices equivalent to the ascertained export prices by finish. Therefore, the free-on-board export prices between PanAsia and the subject importers were equal to the ascertained export prices. The decision by the subject importers to agree to these prices was a direct result of the operation of the fixed and variable duty collection system which ensures that an importer's cost base is at a minimum equal to the ascertained export price, irrespective of the actual export prices agreed between the buyer and seller.
4. External factors related to the increase in imports of aluminium extrusions from countries not subject to measures such as Indonesia, Malaysia, Thailand and Vietnam, and
5. Competitive pricing for locally produced extrusions by Capral Limited (Capral) which significantly undercut the subject importers' selling prices in the Australian market.

PanAsia submits that factors 1 to 3 outlined above are directly relevant to the Minister's obligation under s.269TAA(3) of the Act, to have regard to the amount of the price paid for the goods, the amounts relating to costs incurred in the importation and sale of the goods, and the likelihood that those amounts will be recovered within a reasonable time. Accordingly, PanAsia considers that SEF 248 and the preliminary findings are flawed as the Commission does not address these relevant matters that go directly to the issue and determination of sales at a loss.

Nor does the SEF provide any explanation as to why such matters were not considered relevant for the purposes of s.269TAA(3) of the Act. The Commission notified and advised the P&O Aluminium entities and Oceanic Aluminium that it would 'rely on any information submitted by, and verification processes undertaken'[4]. Yet SEF 248 contains no

[3] Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth; FCA 870 (30 Aug 2013)
[4] EPR 248; Record No. 10 and 11.

discussion or assessment of the information submitted by these parties in the context of this review.

Further, PanAsia contends that given the basis on which selling prices are negotiated in the Australian market, it is reasonable to conclude that each of the identified factors contributed to the trading performance of the subject importers during the review period. Likewise, it is evident that none of these factors are relevant to the Minister forming an opinion that losses incurred by the importers are indicative of a reimbursement or compensation being received by the importers.

Finally, based on its understanding of export prices from its competing exporters, PanAsia considers that a proper and objective comparison would show that its export prices were consistent and on a par with arms-length export prices determined for other cooperating exporters during the review. PanAsia notes that the Commission undertook this type of comparison in assessing whether export prices by Guang Ya were reliable. SEF 248[5] states:

> *Further verification of Guang Ya export data was compared against like exporters. The weighted average export prices and costs were found to correspond with other exporters within an acceptable range. Relying on the comparison to other verified exporters and its own supporting data, the Commission did not identify any significant variances that would warrant Guang Ya's export spreadsheet unreliable.*

Therefore PanAsia requests that the Commission undertake this same type of assessment of its export sales information to determine whether its export prices accord with other arms-length export prices into the Australian market. This is especially necessary given that PanAsia's information has been verified and found to be relevant and reliable.

1.2.3 Conclusion

In conclusion, PanAsia states that its export sales to Protector Aluminium are arms-length sales and as such the Minister is obliged to use this information in determining export prices. As far as PanAsia is aware, there is no information or evidence that demonstrates that its export sales to Protector Aluminium are anything but arms-length transactions.

Likewise, PanAsia considers its exports to other relevant importers to be arms-length transactions and rejects the notion that losses incurred by those importers is sufficient to form the opinion that a reimbursement or benefit is provided to the importers by PanAsia. An objective examination and assessment of the factors identified by the relevant importers as contributing to their trading performance would properly conclude that any operating losses are the result of negative impacts on their cost structures and competitive market forces.

PanAsia requests the Commission to reconsider and reassess these issues in an objective and fair manner.

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[5] EPR 248; Record No. 057; Page 25.

2. Regard to all relevant information

SEF 248 makes a preliminary finding that PanAsia's export prices be determined in accordance with s.269TAB(3) of the Act, having regard to all relevant information. The Commission concluded that export prices could not be established under the preceding subsections due to the lack of sufficient verifiable information from the importers subject of the anti-circumvention inquiry.

SEF 248 correctly describes PanAsia as a cooperating exporter. All requested and necessary information was provided to the Commission in a timely manner and in the format required. PanAsia's submitted information was the subject of verification and found by the Commission to be accurate and reliable. As such, PanAsia should not be penalised for the difficulties experienced by the importers in providing requested information to the anti-circumvention inquiry.

However it is clear to PanAsia that the Commission has not undertaken an objective investigation in basing its determination of export prices on the best available information. PanAsia considers that the Commission has erred in determining export prices under s.269TAB(3) of the Act as there is sufficient information available that is both relevant and reliable for establishing arms-length export prices during the review period.

Further, in arriving at its preliminary decision to determine export prices in accordance with s.269TAB(3) of the Act, PanAsia submits that the Commission has not complied with its own policy and its obligations under the WTO Anti-Dumping Agreement to evaluate and assess all relevant information in deciding which information is best for the particular circumstances.

2.1 Use of relevant information

2.1.1 Failure to evaluate all relevant information

Pursuant to Article 6.8 and Annex II of the WTO Anti-Dumping Agreement, an investigating authority may rely on the facts available where a respondent has failed to provide some or all of the necessary information requested by the investigating authority. Australia's anti-dumping legislation incorporates and reflects those provisions in subsections 269TAB(3) and 269TAC(6) of the Act.

In addressing the function of Article 6.8 and Annex II, in *US – Hot-Rolled Steel*[6], the Panel stated that "*one of the principle elements governing anti-dumping investigations that emerges from the whole of the AD Agreement is the goal of ensuring objective decision-making based on facts. Article 6.8 and Annex II advance that goal by ensuring that even where the investigating authority is unable to obtain the 'first-best' information as the basis of its decision, it will nonetheless base its decision on facts, albeit perhaps 'second-best' facts.*"

[6] Panel Report, US – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/R, para 7.55; Page 23.

In Beef and Rice[7], the Panel noted that '*Annex II, entitled "Best Information Available in Terms of Paragraph 8 of Article 6" contains a number of obligations the investigating authority has to comply with in order for the use of facts available in a given case to be in accordance with Article 6.8 of the AD Agreement.*'

The Panel interpreted the conditions of Annex II on the investigating authority as follows:

> *The use of the term "best information" means that information has to be not simply correct or useful per se, but the most fitting or "most appropriate" information available in the case at hand. Determining that something is "best" inevitably requires, in our view, an evaluative, comparative assessment as the term "best" can only be properly applied where an unambiguously superlative status obtains. It means that, for the conditions of Article 6.8 of the AD Agreement and Annex II to be complied with, there can be no better information available to be used in the particular circumstances. Clearly, an investigating authority can only be in a position to make that judgement correctly if it has made an inherently comparative evaluation of the "evidence available". This is reinforced, in our view, by the requirement in paragraph 3 of Annex II that all information which is verifiable, which is appropriately submitted and supplied in a timely fashion is to be taken into account when determinations are made. In similar vein, paragraph 5 of Annex II does not allow an authority to disregard information, even though that information is not ideal in all respects, provided the interested party has acted to the best of its ability. Finally, and perhaps most importantly, such a conclusion is evident from the requirement set forth in paragraph 7 of Annex II that, in case the authorities have to base their findings on information from a secondary source they should do so with special circumspection, and check, where practicable, the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns and from the information obtained from other interested parties during the investigation.*

This requirement to undertake a comparative evaluation is supported by the Commission's stated policy in Report 159D[8] and more recently REP 203[9]. In assessing the use of relevant information for the purposes of determining export price and normal values for uncooperative parties, the Commission notes at page 16 of Report 159D, that:

> *Thus, in conducting an investigation, Customs and Border Protection should undertake an "evaluative, comparative assessment"[10] of information provided by interested parties to ensure that "this information [is] the most fitting or appropriate for making determinations…"[11].*
>
> *As non-cooperating exporters do not provide Customs and Border Protection with information so that an individual dumping margin can be determined, all relevant*

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[7] Panel Report, Mexico – Definitive Anti-Dumping Measures on Beef and Rice, WT/DS295/R, para 7.166, page 144.

8 Reinvestigation of certain findings in REP 159C – Certain Clear Float Glass,

9 Reinvestigation of certain findings in REP 177 – Certain Hollow Structural Sections

10 Appellate Body Report, Mexico – Beef and Rice, WT/DS295/R at para 7.167

11 Appellate Body Report, Mexico – Beef and Rice, WT/DS295/R at para 7.167

> *information is actively sought from interested parties. Customs and Border Protection will ordinarily have regard to a breadth of information as a result of this inquiry. It is then necessary to critically assess this information to ascertain whether it can be relied upon in order to determine export prices and normal values pursuant to subsections 269TAB(3) and 269TAC(6) respectively. If the information is considered to be unreliable, it is disregarded pursuant to subsections 269TAB(4) and 269TAC(7).*

On page 17 of that same report, the Commission outlined its approach to the use of relevant information from other cooperating exporters in determining export price or normal values for non-cooperating parties. It stated:

> *Customs and Border Protection must then scrutinise the verified information of cooperating exporters to ensure that it is reasonable in the circumstances to attribute this information to non-cooperating exporters.*

REP 248 contains no evaluative, comparative assessment or any such critical assessment of all relevant information available to the Commission. PanAsia submits then that the Commission did not undertake such an assessment and did not comply with its own policy guidelines in this area or its obligations pursuant to Annex II of the WTO Anti-Dumping Agreement. Therefore in failing to properly investigate and evaluate other relevant and verified information, the Commission is unable to establish that the information relied upon in determining export prices under s.269TAB(3) of the Act, was the best information to be attributed to PanAsia.

2.1.2 Assessment of relevant information

In finding that exports by PanAsia to the relevant importers were non-arms-length transactions due to the importers selling the imported goods at a loss, the Commission is under an obligation to objectively consider and assess all relevant available information in determining export prices pursuant to s.269TAB(3) of the Act. In doing so, the Commission's primary criteria is to examine whether the information provides a reliable basis for establishing arms-length export prices.

As explained and assessed below, PanAsia contends that had the Commission undertaken the required comparative evaluation and assessment of all relevant information available, it would have concluded that the information relied up in the SEF, was not the best information or facts available.

a) Export prices to Protector Aluminium

As outlined earlier in this submission, export sales to Protector Aluminium during the review period were at arms-length and therefore required to be used for the purposes of determining those particular export prices. The Commission found no evidence that:

- there is any consideration payable for in respect of the goods other than the price;
- the price is influenced by a commercial or other relationship between Protector Aluminium, or an associate of Protector Aluminium, and PanAsia, or an associate of PanAsia;

- in the opinion of the Minister, Protector Aluminium, or an associate of Protector Aluminium, will, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price.

On this last matter, there have been no claims made by Capral alleging that Protector Aluminium has been circumventing the measures by way of avoidance of the intended effect of duty. In addition, the Commission has made no findings of fact in its anti-circumvention inquiry report (REP 241), that sales by Protector Aluminium were being made at a loss. Therefore in the absence of any information to the contrary, the Commission must find as fact that the export sales by PanAsia to Protector Aluminium were arms-length transactions for the purposes of determining export prices pursuant to s.269TAB of the Act.

The Commission is in a position to further assess the reliability of these export prices by undertaking a comparative evaluation against arms-length export prices determined for the other cooperating exporters, Kam Kiu Aluminium Products Sdn Bhd, Guangya Zhongya Aluminium Co Ltd and Guang Ya Aluminium Industries Co Ltd. PanAsia notes that this type of comparative evaluation was performed by the Commission in assessing the reliability of Guang Ya Aluminium's export prices, which was found to correspond with other exporters within an acceptable range.

An objective assessment by the Commission as outlined above will clearly show that arms-length export transactions made by PanAsia to Protector Aluminium during the review period, is the best available information to establish PanAsia's export prices. These export sales have been verified by the Commission as being accurate and reliable, and as such, PanAsia contends that these export prices should also be relied upon for the purposes of determining export prices for export sales to PanAsia's other importing customers.

b) Export prices by cooperating exporters

PanAsia notes that the Commission determined export prices for the cooperating exporters Kam Kiu Aluminium Products Sdn Bhd, Guangya Zhongya Aluminium Co Ltd and Guang Ya Aluminium Industries Co Ltd in accordance with s.269TAB(1)(a) of the Act. The export prices for these cooperating exporters were based on invoice prices relating to sales of goods found to be arms-length transactions.

PanAsia considers that these export prices are clearly a more reliable and accurate measure of arms-length export prices during the review period than the Commission's proposed deductive method. The Commission itself has found this to be the case as export prices for residual and uncooperative exporters were also based on export price information from selected cooperating exporters. The Commission's preliminary decision then to not rely on arms-length export prices from cooperating exporters in determining PanAsia's export prices, highlights its failure to examine objectively the available evidence with special circumspection.

The Appellate Body in Mexico - Anti-Dumping Measures on Rice agreed with the Panel, explaining that:

> *[T]he agency's discretion is not unlimited. First, the facts to be employed are expected to be the 'best information available'… . Secondly, when culling necessary information from secondary sources, the agency should ascertain for itself the reliability and accuracy of such information by checking it, where practicable, against information contained in other independent sources at its disposal, including material submitted by interested parties. Such an active approach is compelled by the obligation to treat data obtained from secondary sources 'with special circumspection'.*

PanAsia requests the Commission to re-examine all of the relevant information available to it, and in particular undertake a proper comparison of the verified arms-length export prices from other cooperating exporters with the unsound sampled sales information used to preliminary determine its export prices. PanAsia considers that an objective evaluation as required by Annex II of the Anti-Dumping Agreement would clearly show that the basis for the Commission's approach to ascertaining PanAsia's export prices was entirely flawed and unsupported when compared with the best available information.

Lastly, PanAsia notes that the Commission's preferred practice in determining export prices and normal values for uncooperative parties, has been to rely on information from cooperating parties, found to be reliable and accurate through verification. This is evident from a review of any of the Commission's final report findings over the past decade[12]. However in this particular case, the Commission has found PanAsia to be a cooperative exporter that complied with all of the information requirements in a timely manner. In these circumstances, PanAsia considers that the Commission is under a greater obligation to ensure that findings based on other relevant information, are checked against declared Customs values and information obtained from other cooperating parties during the review.

c) Sampled sales by relevant importers

PanAsia makes the following observations that it considers seriously calls into question the reliability and accuracy of the Commission's methodology. In the absence of an objective examination of the sales information, it is evident to PanAsia that the Commission has relied on information that is clearly not the best information available.

<u>Insignificant volume of sampled sales</u>

Firstly, PanAsia notes that the total volume of sampled sales relied upon by the Commission to calculate deductive export prices represents approximately 0.52% of its total exports of aluminium extrusions during the review period. It is inconceivable that such a small sample of sales could be considered to be representative of arms-length sales into the Australian market during the review period.

[12] REP 134, pages 9-10; REP 138, page 38; REP 139, pages 15, 19; REP 148, pages 51-52; REP 172a, pages 12-13; REP 172b, pages 13-14; REP 172c, page 15; REP 172d, page 13; REP 177, pages 68-70; REP 188, pages 31, 32-33, 39; REP 190, pages 75, 78, 85, 93 and 95; REP 195A, page21; REP 196, page 29-30; REP 198, pages 28-29, 32-33, 37-38; REP 203, pages 40-43; REP 217, page 49; REP 219, pages 66, 70, 72 and 74; REP 221, page 34 and 41; REP 223, page 61; REP 234, page 46; REP 237, pages 41; REP 238, pages 48-50; REP 240, pages 35, 38; REP 242, pages 22, 27.

Previous assessments of relevant information have resulted in the Commission rejecting the use of information on the basis of volume being too small to be representative and reliable. The most recent example is the current dumping investigation into zinc coated (galvanised) steel exported from India and Vietnam.[13] It is unreasonable then for the Commission to not even undertake an assessment of the sample sales and simply rely on information that is clearly too insignificant to be considered representative and reliable.

Variance in selling prices

Second, the inappropriateness of relying on a miniscule volume of sales is further highlighted by the range of unit prices across the breadth of products falling within the goods subject of the dumping and countervailing notices. The Commission will have in its possession, sales information from cooperating importers and industry members to confirm that unit prices vary greatly depending on the particular characteristics of the individual extruded profiles.

In those circumstances, the risk of sampling error is increased as the small sample size is unlikely to be representative of the entire population of relevant sales. This is clearly evident from the substantial fluctuations in the calculated unit selling prices over the anti-circumvention inquiry period. For example, quarterly unit prices for powder coated extrusions increase by [redacted]% between the June quarter 2013 and the September quarter 2013, before falling [redacted]% in the December quarter 2013.

A comparison of quarterly unit prices between the various finishes also reveals obvious irregularities with powder coated extrusions being up to [redacted] % cheaper than mill finish extrusions in the March quarter 2013 and June quarter 2013, and then up to [redacted]% more expensive in the September quarter 2013 and December quarter 2013.

A review of PanAsia's arms-length export prices to Protector Aluminium shows that [redacted] [price comparison] over the review period. PanAsia expects that the Commission will be able to confirm similar variances between the various finishes of aluminium extrusions by checking verified information gathered during the review from cooperating importers, exporters and industry members.

Once again, the Commission has previously undertaken assessments of relevant information in other investigations[14] and considered that significant variance between selling prices within a model category and between models is sufficient to consider the sales information to be unreliable.

Sampled sales not representative of the review period

The Commission does not appear to have adjusted the sampled selling prices to ensure that the deductive quarterly export prices accurately reflect the date of export. It is evident from

[13] EPR 249, Record No. 055, Determination of dumping margins – uncooperative exporters.
[14] Ibid.

the importer verification reports that the relevant importers maintain warehousing operations where stocks of product are kept on hand.

To highlight by example, based on an assumed 30 day stock turnover period, it is reasonable to conclude that an extrusion sold by an importer in December 2013 will have entered the importer's warehouse in November 2013. Then based on an average delivery period of [redacted], it is estimated that the particular product will have been exported by PanAsia in September 2013. Therefore the average timing difference between the date of sale by the importers and the date of export by PanAsia is three months.

The Commission appears to have overlooked this timing difference in determining the deductive export prices. This issue is critical as the Commission is compelled to ensure proper comparison between the export price and normal value. However, without a proper timing adjustment the Commission is effectively determining an export price based on the date of sale into the Australian market with a normal value based on the date of export. As explained, the difference in period between the date of sale by the importers and the date of export by PanAsia is approximately 3 months.

The issue of timing is further highlighted given the non-alignment between the anti-circumvention inquiry period and the review period. Given the 3 month period between date of export by PanAsia and date of sale by the importers, it is clear that selling prices of goods sold by the importers in the June quarter 2013 would have been exported in the March quarter 2013 and prior to the review period. Therefore those sales are irrelevant to the review. The importer's September quarter 2013 sales would correspond to the goods being exported by PanAsia in the June quarter 2013 and likewise December quarter 2013 sales would have corresponded to goods being exported in the September quarter 2013.

As the anti-circumvention inquiry period ended 31 December 2013 and the Commission did not request additional sales information from the importers relating to the March and June quarters of 2014, the Commission does not have any sales that correspond to goods being exported in the December quarter 2013 and March quarter 2014. In effect then, the sales relied upon by the Commission to calculate deductive export prices covers only the first half of the review period.

In SEF 248, the Commission states that '*[t]he sampled data is spread across all quarters in 2013 of the investigation period and for each finish type*'. PanAsia considers this to be incorrect [redacted] [export sales information]. The SEF provides no explanation of the approach used by the Commission to properly determine export prices [redacted] [export sales information].

Further, the Commission explains in the SEF that the '*[e]xport prices for the remaining quarter, quarter 1 2014, were indexed from the prior quarter against fluctuations in the verified quarterly CTM for each finish type between quarter 4 2013 and quarter 1 2014.*' It is unclear how the Commission has been able to index sales information for each finish type given [redacted] [export sales information].

The table, which outlines PanAsia's understanding of the Commission's approach to use of the sample sales information, highlights the lack of sufficient sample sales across the review period to be considered reliable and representative of arms-length export transactions for the whole of the review period.

[TABLE REMOVED DUE TO CONFIDENTIALITY]

It is abundantly clear from the table above that the sales information relied upon by the Commission for determining arms-length export prices do not provide sufficient coverage of exports that took place during the period of review. As a result, PanAsia contends that the sampled sales information is inadequate for determining export prices.

Due allowance for weight differences

PanAsia notes that the Commission has made no mention of the issue relating to differences in the actual and theoretical weight of goods exported to Australia. In the PanAsia verification report, the Commission found that evidence supported an adjustment claim and concluded that an adjustment of [redacted]% to the export volume was warranted.

However, in calculating the importer's quarterly unit selling prices for each of the various models, it appears that the Commission has ignored the need to adjust the volumes of the export goods. The Commission has calculated unit selling prices per kilogram by dividing the invoice values by the theoretical weight of the goods sold. In effect, the calculated unit selling prices reflect a price for one theoretical kilogram or [redacted] actual kilograms.

The quarterly deductive unit export prices are then weighted by the respective actual weights of the goods exported to derive the weighted average export prices. PanAsia submits that the Commission has erred in its calculations by not adjusting the importer's sales volumes by the [redacted]% verified difference between theoretical and actual weight of the goods exported. Calculating unit prices on this basis ensures that export prices and corresponding normal values are being properly compared on the same weight basis.

In conclusion, an objective assessment of the information relied upon by the Commission to calculate deductive export prices clearly shows that the information is inaccurate, incomplete and not properly adjusted to allow for reliable arms-length export prices to be determined.

Accordingly, PanAsia requests the Commission to reconsider its approach to establishing its arms-length export prices and

2.1.3 Conclusion

In conclusion, PanAsia requests the Commission to undertake an objective examination of the relevant information available in determining its arms-length export prices. A proper assessment will clearly show that arms-length export prices by PanAsia to Protector Aluminium exist during the review period and that these sales are the best and most reliable information available for determining arms-length export prices by Panasia to importers found to be selling at a loss. Alternatively, PanAsia considers that arms-length

export sales information from other cooperating exporters exist during the review period which would be suitable for determining PanAsia's export prices to importers found to be selling at a loss. These export sales have been found to be accurate and reliable given that the Commission has relied on this information for determining export prices for cooperating exporters, residual exporters and non-cooperating exporters.

Given that PanAsia was itself found to be a cooperating exporter, there are no legitimate reasons to justify the rejection of the above relevant information for the purposes of determining PanAsia's export prices. Conversely, the sampled sales information relied upon by the Commission has been shown to be unreliable due to the miniscule sample size, price variation across the small sample, lack of sufficient coverage across the full period of review and the lack of proper comparison with corresponding normal values due to timing and weight differences. As such, PanAsia requests that the Commission reject the use of the sample sales for determining export prices.

3. Program 15 (Primary aluminium provided at less than adequate remuneration)

3.1 Benchmark for assessing adequate remuneration

3.1.1 Ingot benchmark

In SEF 248, the Commission has determined that an appropriate benchmark price for primary aluminium is a London Metal Exchange (LME) based price plus additional premiums and expenses. The report highlights the following proposed formula for calculating the benchmark price:

1. LME cash price; plus
2. Regional premium; plus
3. Import costs; plus
4. Inland transport.

PanAsia notes that the Commission has substantially deviated from its original approach in REP 148 to the determination of a benchmark price for primary aluminium. In the original investigation, the Commission established a benchmark that reflected the LME price for primary aluminium only and did not include any such adjustments for regional premiums, import costs and inland transport (where applicable). The Commission's primary reasoning in the original investigation for determining a benchmark exclusive of these additional costs and expenses was '*that a benchmark price reflecting adequate remuneration should be an unsubsidised price for the goods having regard to the prevailing market conditions for like goods in that country*.'[15] [emphasis added]

[15] Report 148, section 7.4.1, page 57

The key point of difference then between the Commission's original and proposed benchmark is that in the original investigation, the Commission determined a benchmark that reflected an unsubsidised price for the goods claimed to be subsidised (primary aluminium). However in SEF 248, the Commission is now proposing a price that reflects an unsubsidised price for the subsidised goods (primary aluminium) plus additional amounts for services.

To highlight by example, the table below provides a comparison of theoretical purchases of primary aluminium on the domestic market in China with the Commission's proposed 'unsubsidised' benchmark for primary aluminium.

Month of purchase	Quantity (Tonnes)	Purchase price (excl. VAT)	Unit price (excl. VAT)	Delivery terms	Corresponding benchmark	Benefit (Review SEF 248)	Benefit (Original investigation REP 148)
Apr-13	100	$185,600	$1,856	Ex-warehouse	$2,163	$307	$0
Apr-13	100	$200,000	$2,000	Ex-warehouse	$2,163	$163	-$144

Proposed benchmark for primary aluminium		
Aluminium ingot (USD$)		Apr-13
LME cash price	$	1,856
Regional premium (MJP)	$	243
Import charges	$	30
Inland transport	$	35
Benchmark - ingot (USD$)	$	2,163

As the table shows, two transactions of purchased primary aluminium were made in the month of April 2013. The first lot of primary aluminium was purchased at a price equal to the average monthly LME cash price of $1,856 per tonne. The second lot of primary aluminium was purchased at a price higher than the average monthly LME cash price at $2,000 per tonne or 7.8% higher than the equivalent LME price.

On the basis of the Commission's original LME cash price benchmark, in this scenario the Commission would have found that the exporter did not benefit from a financial contribution in the form of primary aluminium being provided at less than adequate remuneration. In fact, these circumstances would have led to the Commission reducing the exporter's costs in determining a competitive market cost for the purposes of constructing normal values. However with the inclusion of additional expenses relating to a regional premium, import charges and inland transport, the unit purchase prices for both transactions in the example above are found to be less than the proposed benchmark. It is clear then that in this example, the full amount of benefit that would have been calculated by the Commission in this review, was directly a result of the regional premium, import charges and inland transport.

To highlight the actual differences between the LME price for imported ingot primary aluminium and the [redacted] price for domestically sourced ingot primary aluminium, the table below provides a price comparison in Hong Kong Dollars between January 2013 and

June 2014. It shows that domestic prices for primary aluminium were higher in China in all but one month of the review period. This supports the view that a proper comparison of the corresponding prices for only primary aluminium would reveal that PanAsia was not receiving goods (primary aluminium) at less than adequate remuneration from the Government of China or a public body in China. On that basis, the Commission's proposed benchmark is flawed for the following reasons.

[TABLE REMOVED DUE TO CONFIDENTIALITY]

Regional premium

Firstly, s.269TACC(3) of the Act outlines the Minister's obligations in determining whether a financial contribution confers a benefit. The financial contribution in the case of program 15 is the provision of primary aluminium from the Government of China and/or public bodies in China. The financial contribution relevant to this program is not the provision of services such as a regional 'ingot' delivery premium or inland transportation or the forgoing of revenue due to the government in the form of import charges. The international market price for primary aluminium is the LME cash price and therefore this is the only relevant component of the Commission's proposed benchmark for establishing an unsubsidised price for primary aluminium.

Second, the Commission does not appear to have undertaken an objective investigation into the information and claims presented Capral in respect of the regional/ingot premium or Major Japanese Port (MJP) premium. It is noted that Capral have previously referred to the MJP as an ingot premium and explained that the '*premium reflects the fact that the metal from the smelting pots has been cast into an ingot with a typical size being between 10kg and 25kg.*'[16]

It further added in a later submission[17]:

> *The LME price used by Customs only reflects the price for metal with a minimum purity of 99.7% (Fe 0.2% max, Si 0.1% max) aluminium. ... The extruder must also pay a premium to the smelter to cast the metal from the smelting pots into an ingot*, [original emphasis]

In its submission to this review[18], Capral comments that '*… the MJP is only an ingot premium.*'

Capral's statements confirm that the LME price is a market price for primary aluminium, the good the subject of the financial contribution relevant to Program 15. Whereas according to Capral, the MJP is an additional service charge for casting the primary aluminium into ingots and delivering the goods to a major international port. Given that

[16] EPR 148, Record No. 376, section 7.1, page 4.
[17] EPR 148, Record No. 400, section 3, page 1.
[18] EPR 248, Record No. 038, section 2.4.5, page 6.

the financial contribution relevant to this subsidy program does not relate to the provision of services by the Government of China or public bodies in China, the inclusion of these additional service charges are inappropriate.

If the Commission continues to hold the view that charges for these additional services should be included in the benchmark price, then PanAsia contends that the Commission is obliged to investigate and make findings whether the provision of these services meets the definition of a subsidy as defined in s.269T of the Act, and is countervailable pursuant to s.269TAAC of the Act.

In the original investigation the Commission rejected Capral's claim that the LME benchmark should include a premium for casting of metal into ingots. The LME website (Attachment A) refers to the physical specifications for primary aluminium as Al99.70 in the GB/T 1196-2008 Standard entitled "Unalloyed aluminium ingots for remelting" in the shape of ingots, t-bars, sows. This confirms that the published LME prices are for primary aluminium already cast into ingots and as such, the inclusion of an ingot or MJP premium is not warranted.

Given that the LME price already reflects an ingot price, it is reasonable to assume that the MJP premium is as Capral's information highlights, essentially a notional delivery cost for the goods. As Capral has previously noted[19],

> *The purchase of aluminium ingot is a physical transaction and it is not possible to separate the purchase of the metal component (LME) and premiums for casting and delivery to a certain location. The ingot producers separate these for pricing reasons only. … It is the total delivered price that is important for that single physical transaction.*

PanAsia considers that the Commission is under an obligation to separate the relevant component that relates to the provision of the good (primary aluminium) from other components that do not form part of the financial contribution such as delivery expenses, import charges and other services. In considering the question of what types of alternative benchmarks could be relied upon in a manner consistent with Article 14(d) of the WTO Subsidies and Countervailing Agreement (SCM), the Appellate Body found in US – Softwood Lumber IV[20] that, where an investigating authority relies on an external benchmark, "it is under an obligation to ensure that the resulting benchmark relates or refers to, or is connected with, prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d)." The Appellate Body further "underscored the importance of making appropriate adjustments to ensure that alternative benchmarks reflect prevailing market conditions in the country of provision"

[19] EPR 148, Record No. 400, section 3, page 1-2.
[20] Appellate Body Report, WT/DS257/AB/R, para 106, page 43

Therefore, given that the regional premium included in the benchmark price reflects ocean freight and other delivery related expenses, and PanAsia's purchases were made on an ex-warehouse basis, it is clearly inappropriate to determine a benchmark inclusive of a regional premium that essentially relates to ocean freight expenses, port charges etc.

3.1.2 Import charges

As with the regional premium, the inclusion of import charges in the ingot benchmark ultimately reflects a flawed finding by the Commission that Chinese exporters must import their primary aluminium in order to not be receiving a benefit from a financial contribution. Subsection 269TACC(4) of the Act requires that the adequacy of remuneration is to be determined having regard to prevailing market conditions for like goods in the country where those goods are provided or purchased.

Upon purchasing primary aluminium domestically, PanAsia does not incur and is not required to incur any such expenses relating to port charges or broker's fees given that the goods (primary aluminium) are not imported and do not involve the use of port facilities. In that case, the Commission's approach is unreasonable and not consistent with the obligations of s.269TACC(4) of the Act or Article 14(d) of the Anti-Dumping Agreement.

To highlight more clearly by example, if PanAsia had purchased primary aluminium domestically in China at price equal to the Commission's determined LME cash price plus regional ingot premium plus inland transportation, then it would still be found to have received a benefit solely on the basis that it did not incur and pay the notional port and broker's charges to unknown third parties. This demonstrates that the Commission's approach is fundamentally flawed as it seeks to determine a benchmark that includes import charges that are clearly services that do not fall within the scope of Program 15 and involve service providers that have not been found to meet the definition of a public body.

3.1.3 Billet benchmark

Again PanAsia considers that the Commission have not properly examined Capral's claims presented to the review against its previous claims and information submitted in the original investigation. In its submission to REP 148, Capral stated[21]:

> *Billet premiums are considerably higher than ingot premiums and will possibly include the ingot premium as part of the base calculation….*

PanAsia considers Capral's previously stated understanding to be correct and the Commission's understanding in SEF 248 to be baseless and illogical. As explained earlier in the previous section of this submission, Capral considers the regional premium or ingot premium or MJP to reflect the delivered cost of casting the hot metal into ingots. However, as outlined by Carpal in its submissions to the original investigation, the billet premium already incorporates an ingot premium and freight component.

[21] EPR 148, Record No. 376, section 7.3, page 5.

There is no evidence on the public record or referenced in any of Capral's submissions that demonstrate that when purchasing billet, two separate ingot and billet premiums are charged. PanAsia requests the Commission to highlight the evidence or information relied upon to draw such a conclusion. In fact, given that Capral has previously highlighted that "all these premiums would then have freight adjustments applied for particular destinations and are normally quoted CIF to major international ports', it is clear that the Commission's billet benchmark has ocean freight and port charges double counted with the inclusion of a CIF ingot premium and a CIF billet premium.

3.1.4 Error in PanAsia's calculation of benefit

As verified by the Commission, the delivery terms for PanAsia's primary aluminium purchases during the review period are [redacted]. Yet in calculating the amount of benefit received, the Commission compared the [redacted] [price comparison]. It is clear that the prices are not comparable with [redacted] [price comparison].

By not properly comparing actual and benchmarked prices, the Commission has overestimated the amount of benefit received by approximately [redacted]% over the review period. PanAsia requests the Commission to correct this error in recalculating the amount of benefit received under Program 15.

Further, in converting the monthly benchmark prices denominated in US dollars into equivalent Chinese Renmimbi prices, the Commission's calculations appear to use a single exchange rate for the entire review period of 6.25. Exchange rates taken from www.oanda.com show that the monthly average rate has fluctuated from a high of 6.2417 in April 2013 and a low of 6.0982 in January 2014.

Conversion of the US dollar benchmark using the accurate monthly average rates shows that the Commission has overestimated the amount of benefit by [redacted]% for the review period. PanAsia requests the Commission to correct this error in recalculating the amount of benefit received under Program 15.

Yours sincerely,

John Bracic