APPLICATION FOR REVIEW OF A DECISION BY THE MINISTER FOLLOWING A REVIEW INQUIRY

Anti-Dumping Review Panel
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INFORMATION FOR APPLICANTS

WHAT DECISIONS ARE REVIEWABLE BY THE ANTI-DUMPING REVIEW PANEL?

The role of the Anti-Dumping Review Panel (the ADRP) is to review certain decisions made by the Minister responsible for the Department of Industry and Science, or by the Anti-Dumping Commissioner (the Commissioner).

The ADRP may review decisions made by the Commissioner:

- to reject an application for dumping or countervailing measures;
- to terminate an investigation into an application for dumping or countervailing measures;
- to reject or terminate examination of an application for duty assessment; and
- to recommend to the Minister the refund of an amount of interim duty less than the amount contended in an application for duty assessment, or waiver of an amount over the amount of interim duty paid.

The ADRP may review decisions made by the Minister, as follows:

Investigations

- to publish a dumping duty notice
- to publish a countervailing duty notice
- not to publish a dumping duty notice
- not to publish a countervailing duty notice

Review inquiries

- to alter or revoke a dumping duty notice following a review inquiry
- to alter or revoke a countervailing duty notice following a review inquiry
- not to alter a dumping duty notice following a review inquiry
- not to alter a countervailing duty notice following a review inquiry
- that the terms of an undertaking are to remain unaltered
- that the terms of an undertaking are to be varied
- that an investigation is to be resumed
- that a person is to be released from the terms of an undertaking.

Continuation inquiries

- to secure the continuation of dumping measures following a continuation inquiry
- to secure the continuation of countervailing measures following a continuation inquiry
- not to secure the continuation of dumping measures following a continuation inquiry
- not to secure the continuation of countervailing measures following a continuation inquiry

Anti-circumvention inquiries

- to alter a dumping duty notice following an anti-circumvention inquiry
- to alter a countervailing duty notice following an anti-circumvention inquiry
- not to alter a dumping duty notice following an anti-circumvention inquiry, and
- not to alter a countervailing duty notice following an anti-circumvention inquiry.

Before making a recommendation to the Minister, the ADRP may require the Commissioner to:

- reinvestigate a specific finding or findings that formed the basis of the reviewable decision, and
- report the result of the reinvestigation to the ADRP within a specified time period.

The ADRP only has the power to make **recommendations to** the Minister to affirm the reviewable decision or to revoke the reviewable decision and substitute with a new decision. The ADRP has no power to revoke the Minister's decision or substitute another decision for the Minister's decision.

WHICH APPLICATION FORM SHOULD BE USED?

It is essential that applications for review be lodged in accordance with the requirements of the *Customs Act 1901* (the Act). The ADRP does not have any discretion to accept an invalidly made application or late-lodged application.

Division 9 of Part XVB of the Act deals with reviews by the ADRP. Intending applicants should familiarise themselves with the relevant sections of the Act, and should also examine the explanatory brochure (available at www.adreviewpanel.gov.au).

There are separate application forms for each category of reviewable decision made by the Commissioner, and for decisions made by the Minister. It is important for intending applicants to ensure that they use the correct form.

This is the form to be used when applying for an ADRP review of a decision of the Minister under s 269ZDB, following a review inquiry. It is approved by the Commissioner pursuant to s.269ZY of the Act.

WHO MAY APPLY FOR REVIEW OF A DECISION FOLLOWING A REVIEW INQUIRY?

Any interested party may lodge an application for review to the ADRP of a review of a ministerial decision. An "interested party" may be:

- if an application was made which led to the reviewable decision, the applicant
- a person representing the industry, or a portion of the industry, which produces the goods which are the subject of the reviewable decision
- a person directly concerned with the importation or exportation to Australia of the goods
- a person directly concerned with the production or manufacture of the goods
- a trade association, the majority of whose members are directly concerned with the production or manufacture, or the import or export of the goods to Australia, or
- the government of the country of origin or of export of the subject goods.

Intending applicants should refer to the definition of "interested party" in s 269ZX of the Act to establish whether they are eligible to apply.

WHEN MUST AN APPLICATION BE LODGED?

An application for a review must be received within 30 days after a public notice of the reviewable decision is first published in a national Australian newspaper (s 269ZZD).

The application is taken as being made on the date upon which it is received by the ADRP after it has been properly made in accordance with the instructions under 'Where and how should the application be made?' (below).

WHAT INFORMATION MUST AN APPLICATION CONTAIN?

An application should clearly and comprehensively set out the grounds on which the review is sought, and provide sufficient particulars to satisfy the ADRP that the Minister's decision should be reviewed. It is not sufficient simply to request that a decision be reviewed.

The application should include a statement identifying what the applicant considers the correct or preferable decision should be, that may result from the grounds the applicant has raised in the application. There may be more than one such correct or preferable decision that should be identified, depending on the grounds that have been raised.

The application must contain a full description of the goods to which the application relates and a statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision (s 269ZZE).

If an application contains information which is confidential, or if publication of information contained in the application would adversely affect a person's business or commercial interest, the application will be rejected by the ADRP unless an appropriate summary statement has been prepared and accompanies the application.

If the applicant seeks to bring confidential information to the ADRP's attention (either in their application or subsequently), the applicant must prepare a summary statement which contains sufficient detail to allow the ADRP to reasonably understand the substance of the information, but the summary must not breach the confidentiality or adversely affect a person's business or commercial interest (s 269ZZY).

While both the confidential information and the summary statement must be provided to the ADRP, only the summary statement will be lodged on the public record maintained by the ADRP (s 269ZZX). The ADRP is obliged to maintain a public record for review of decisions made by the Minister, and for termination decisions of the Commissioner. The public record contains a copy of any application for review of a termination decision made to the ADRP, as well as any information given to the ADRP after an application has been made. Information contained in the public record is accessible to interested parties upon request.

Documents containing confidential information should be clearly marked "Confidential" and documents containing the summary statement of that confidential information should be clearly marked "Non-confidential public record version", or similar.

The ADRP does not have any investigative function, and **must** take account only of information which was before the Minister when the Minister made the reviewable decision (s 269ZZ). The ADRP will disregard any information in applications and submissions that was not available to the Minister.

HOW LONG WILL THE REVIEW TAKE?

The timeframes for a review by the ADRP will be dependent on whether the ADRP requests the Commissioner to reinvestigate specific findings or findings that formed the basis of the reviewable decision.

If reinvestigation is not required

Unless the ADRP requests the Commissioner to reinvestigate a specific finding or findings, the ADRP must make a report to the Minister:

- at least 30 days after the public notification of the review
- but no later than 60 days after that notification.

In special circumstances the Minister may allow the Review Panel a longer period for completion of the review (s 269ZZK(3)).

If reinvestigation is required

If the ADRP requests the Commissioner to reinvestigate a specific findings or findings, the Commissioner must report the results of the reinvestigation to the ADRP within a specified period.

Upon receipt of the Commissioner's reinvestigation report, the ADRP must make a report to the Minister within 30 days.

WHAT WILL BE THE OUTCOME OF THE REVIEW?

At the conclusion of a review, the ADRP must make a report to the Minister, recommending that the:

- Minister affirm the reviewable decision (s 269ZZK(1)(a)), or
- Minister revoke the reviewable decision and substitute a specified new decision (s 269ZZK(1)(b)).

After receiving the report from the ADRP the Minister must:

- affirm his/her original decision, or
- revoke his/her original decision and substitute a new decision.

The Minister has 30 days to make a decision after receiving the ADRP's report, unless there are special circumstances which prevent the decision being made within that period. The Minister must publish a notice if a longer period for making a decision is required (s 269ZZM).

WHERE AND HOW SHOULD THE APPLICATION BE MADE?

Applications must be EITHER:

- lodged with, or mailed by prepaid post to:

  Anti-Dumping Review Panel
  c/o Legal Services Branch
  Department of Industry and Science
  10 Binara Street
  Canberra City ACT 2601
  AUSTRALIA

- OR emailed to:

  ADRP@industry.gov.au

- OR sent by facsimile to:

  Anti-Dumping Review Panel
  c/o Legal Services Branch
  +61 2 6213 6821

WHERE CAN FURTHER INFORMATION BE OBTAINED?

Further information about **reviews by the ADRP** can be obtained at the ADRP website (www.adreviewpanel.gov.au) or from:

Anti-Dumping Review Panel
c/o Legal Services Branch
Department of Industry and Science
10 Binara Street
Canberra City ACT 2601
AUSTRALIA

Telephone: +61 2 6276 1781
Facsimile: +61 2 6213 6821

Inquiries and requests for **general information about dumping matters** should be directed to:

Anti-Dumping Commission
Department of Industry and Science
Ground Floor Customs House
1010 Latrobe Street
MELBOURNE 3008

Telephone: 1300 884 159
Facsimile: 1300 882 506
Email: clientsupport@adcommission.gov.au

FALSE OR MISLEADING INFORMATION

It is an offence for a person to give the ADRP written information that the person knows to be false or misleading in a material particular.

(Penalty: 20 penalty units – this equates to $3400).

PRIVACY STATEMENT

The collection of this information is authorised under section 269ZZE of the *Customs Act 1901*. The information is collected to enable the ADRP to assess your application for the review of a decision of the Minister under s 269ZDB of the *Customs Act 1901* following a review inquiry.

APPLICATION FOR REVIEW OF A DECISION OF THE MINISTER FOLLOWING A REVIEW INQUIRY

Under s 269ZZE of the *Customs Act 1901* (Cth), I hereby request that the Anti-Dumping Review Panel reviews a decision by the Minister responsible for Australian Customs and Border Protection Service:

To alter:

☑ a dumping duty notice(s) following a review inquiry
☑ a countervailing duty notice(s) following a review inquiry.

OR

To revoke:

□ a dumping duty notice(s) following a review inquiry, and/or
□ a countervailing duty notice(s) following a review inquiry.

OR

Not to alter:

□ a dumping duty notice(s) following a review inquiry, and/or
□ a countervailing duty notice(s) following a review inquiry.

OR

□ that the terms of an undertaking are to remain unaltered
□ that the terms of an undertaking are to be varied
□ that an investigation is to be resumed
□ that a person is to be released from the terms of an undertaking

in respect of the goods which are the subject of this application.

I believe that the information contained in the application:

- provides reasonable grounds for a review to be undertaken
- provides reasonable grounds for the decision not being the correct or preferable decision, and
- is complete and correct to the best of my knowledge and belief.

I have included the following information in an attachment to this application:

- ☑ Name, street and postal address, and form of business of the applicant (for example, company, partnership, sole trader).
- ☑ Name, title/position, telephone and facsimile numbers and e-mail address of a contact within the organisation.
- ☑ Name of consultant/adviser (if any) representing the applicant and a copy of the authorisation for the consultant/adviser.
- ☑ Full description of the imported goods to which the application relates.
- ☑ The tariff classification/statistical code of the imported goods.
- ☑ A copy of the reviewable decision.
- ☑ Date of notification of the reviewable decision and the method of the notification.
- ☑ A detailed statement setting out the applicant's reasons for believing

that the reviewable decision is not the correct or preferable decision.

- ☑ A statement identifying what the applicant considers the correct or preferable decision should be, that may result from the grounds the applicant has raised in the application. There may be more than one such correct or preferable decision that should be identified, depending on the grounds that have been raised.
- ☑ [If the application contains material that is confidential or commercially sensitive] an additional non-confidential version, containing sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Signature: 

Name: MR JOHN BRACIC

Position: DIRECTOR

Applicant Company/Entity: J.BRACIC & ASSOCIATES PTY LTD

Date: 18 / 09 / 2015

J.BRACIC & ASSOCIATES
TRADE REMEDY ADVISORS

APPLICATION FOR REVIEW OF THE DECISION TO PUBLISH A DUMPING DUTY NOTICE ON EXPORTS OF ALUMINIUM EXTRUSIONS BY PANASIA FROM THE PEOPLES REPUBLIC OF CHINA

1. APPLICANT

Name: PanAsia Aluminium (China) Limited)
Address: Tangerine Garden, Guangshan Road, Licheng Town,
Zengcheng City, Guangdong Province, 5113300, PRC
Entity: Company

Name: Opal (Macao Commercial Offshore) Limited (OPAL)
Address: Base M, 13/F, The Macau Square
Avenida do Infante D. Henrique, No 43-53A, Macau
Entity: Company

Herein referred to jointly throughout the application as "PanAsia".

2. APPLICANT'S CONTACT DETAILS

Name: Mr Vincent Wai
Position: Chief Financial Officer
Tel: 852-2972-2028
Fax: 852-2972-2309
Email: vincent.wai@palum.com

APPLICANT'S REPRESENTATIVE
Name: John Bracic
Company: J.Bracic & Associates Pty Ltd
Postal address: PO Box 3026, Manuka, ACT 2603
Tel: 0499 056 729
Email: john@jbracic.com.au

3. DESCRIPTION OF THE IMPORTED GOODS

The Anti-Dumping Commission's (the Commission) Report No. 248[1] describes the goods as follows:

> Aluminium extrusions produced via an extrusion process, of alloys having metallic elements falling within the alloy designations published by The

[1] Report 240, page 14.

Aluminium Association commencing with 1, 2, 3, 5, 6 or 7 (or proprietary or other certifying body equivalents), with the finish being as extruded (mill), mechanical, anodized or painted or otherwise coated, whether or not worked, having a wall thickness or diameter greater than 0.5 mm., with a maximum weight per metre of 27 kilograms and a profile or cross-section which fits within a circle having a diameter of 421 mm.

The goods include aluminium extrusion products that have been further processed or fabricated to a limited extent, after aluminium has been extruded through a die. For example, aluminium extrusion products that have been painted, anodised, or otherwise coated, or worked (e.g. precision cut, machined, punched or drilled) fall within the scope of the goods.

The goods do not extend to intermediate or finished products that are processed or fabricated to such an extent that they no longer possess the nature and physical characteristics of an aluminium extrusion, but have become a different product.

4. TARIFF CLASSIFICATION OF THE IMPORTED GOODS

The reviewable decision affects imported goods classified to the following subheadings in Schedule 3 to the Customs Tariff Act 1995:

- 7604.10.00/06 - non alloyed aluminium bars, rods and profiles;
- 7604.21.00/07 - aluminium alloy hollow angles and other shapes;
- 7604.21.00/08 - aluminium alloy hollow profiles;
- 7604.29.00/09 - aluminium alloy non hollow angles and other shapes;
- 7604.29.00/10 - aluminium alloy non hollow profiles;
- 7608.10.00/09 - non alloyed aluminium tubes and pipes;
- 7608.20.00/10 - aluminium alloy tubes and pipes;
- 7610.10.00/12 - doors, windows and their frames and thresholds for doors, and
- 7610.90.00/13 - Other

5. DATE AND METHOD OF NOTIFICATION OF THE REVIEWABLE DECISION

Public notification of the reviewable decision was made on 19 August 2015 and was published in The Australian newspaper and the Gazette (enclosed) on that day.

6. REASONS FOR BELIEVING THAT THE REVIEWABLE DECISION IS NOT THE CORRECT OR PREFERABLE DECISION.

PanAsia contends that the findings in Report 248 are not correct or preferable due to:

i) ascertained export prices being determined pursuant to subsection 269TAB(3) of the Act, without proper consideration of all relevant available information, and in particular the mandatory requirement to undertake a comparative assessment in identifying the best available information

ii) the inclusion of charges for services in the determination of the benchmark price for the purposes of establishing the amount of countervailable subsidy received from the purchase of goods; and
iii) ascertained normal values were overstated by the extent to which the benchmark price included additional charges for services not incurred by PanAsia in its purchases of primary aluminium.

6.1 Determination of export price under subsection 269TAB(3)

REP 248 recommends that PanAsia's export prices be determined in accordance with s.269TAB(3) of the *Customs Act 1901* (the Act), having regard to all relevant information. The report concludes that export prices could not be established under the preceding subsections due to the lack of sufficient verifiable information from importers which were the subject of an earlier completed anti-circumvention inquiry (REP 241).

REP 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.

However in determining export prices under subsection 269TAB(3), PanAsia submits that the Commission and the Parliamentary Secretary have not fulfilled their mandatory obligations to undertake an objective investigation of all relevant information and basing their findings on the best available information. As such, 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.

6.1.1 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*[2], 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.*"

In Beef and Rice[3], 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:

[2] Panel Report, US – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/R, para 7.55; Page 23.
[3] Panel Report, Mexico – Definitive Anti-Dumping Measures on Beef and Rice, WT/DS295/R, para 7.166, page 144.

> *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[4] and more recently REP 203[5]. 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"[6] of information provided by interested parties to ensure that "this information [is] the most fitting or appropriate for making determinations…"[7].*
>
> *As non-cooperating exporters do not provide Customs and Border Protection with information so that an individual dumping margin can be determined, all relevant 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:

4 Reinvestigation of certain findings in REP 159C – Certain Clear Float Glass,
5 Reinvestigation of certain findings in REP 177 – Certain Hollow Structural Sections
6 Appellate Body Report, Mexico – Beef and Rice, WT/DS295/R at para 7.167
7 Appellate Body Report, Mexico – Beef and Rice, WT/DS295/R at para 7.167

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 such 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.

6.1.2 Assessment of relevant information

In finding that exports by PanAsia to the relevant importers subject of the anti-circumvention inquiry could be determined under subsection 269TAB(1) of the Act, the Commission was under an obligation to objectively consider and assess all relevant available information in determining arms-length export prices pursuant to s.269TAB(3) of the Act. In doing so, the Commission's primary objective is to examine and assess whether relevant 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 ultimately relied upon, was not the best information or facts available. Other more accurate and verified information existed which was clearly better and a more appropriate estimate of arms-length export prices during the review investigation period.

a) Export prices to Protector Aluminium

Following the publication of the Statement of Essential Facts Report No. 248 in which the Commission preliminarily concluded that exports by PanAsia to the importer Protector Aluminium Pty Ltd (Protector Aluminium), were not suitable for determining export prices, the Commission altered its view following submissions in response to the SEF by PanAsia. In REP 248, the Commission found that exports to Protector Aluminium were arms-length as there was no evidence that the importer had engaged in anti-circumvention activity, and as such, the findings of the anti-circumvention inquiry did not apply to those particular exportations.

PanAsia reiterates its view submitted to the Commission that in respect of exports to Protector Aluminium, there is 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 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.

As such, the Commission has determined 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. PanAsia submits then that the 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 as they have been verified by the Commission as being accurate and reliable.

Further, PanAsia considers that it was binding on the Commission to have undertaken a comparative evaluation envisaged by Annex II of the ADA, by assessing arms-length export prices to Protector Aluminium 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.

Had the Commission performed this type of comparative assessment, PanAsia submits that it would have reasonably concluded that arms-length export prices by PanAsia and other cooperating exporters, were similar within an acceptable range. This would have further supported the finding that arms-length export prices to Protector Aluminium was the best available information for determining export prices under subsection 269TAB(3) of the Act.

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 at arms-length transactions.

PanAsia considers then that arms-length export prices from cooperating exporters are the next most reliable and accurate measure of arms-length export prices during the review period, and considerably more reasonable than the Commission's recommended deductive method. REP 248 recognises this by determining export prices for residual exporters on the basis of export pricing information from selected cooperating exporters[8]. The Commission's 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*

[8] Rep 248, section 4.3.5, page 31.

> *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'.*

Therefore, PanAsia requests the Anti-Dumping Review Panel to require the Commission to re-examine all of the relevant information available to it, and in particular undertake a proper comparison of all verified arms-length export prices from PanAsia and other cooperating exporters, with the deductive export prices recommended and accepted by the Parliamentary Secretary. PanAsia considers that an objective evaluation as required by Annex II of the Anti-Dumping Agreement would clearly show that the Commission's estimate of PanAsia's arms-length export prices is flawed and unreasonable when compared with available verified information found to be accurate and reliable.

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 many of the Commission's final report findings over the past decade[9]. In most if not all of those highlighted cases, the exporters were found to have not sufficiently cooperated with the investigation.

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 was under a greater obligation to ensure that findings based on other relevant information, were checked against declared Customs values and information obtained from other cooperating parties during the review.

c) Sampled sales by relevant importers

PanAsia contends that the Commission's recommended methodology for determining arms-length export prices lacks reliability and accuracy. In the absence of an objective examination of the sales information relied upon, it is evident to PanAsia that the Commission has relied on information that is clearly not the best information available.

i) <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.

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 where the Commission continue to hold this view is

[9] 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.

the recently terminated investigation into zinc coated (galvanised) steel exported from India and Vietnam.[10]

It is noted that the Commission has not responded to the issue raised by PanAsia in respect of the sample size relied upon to determine export prices in REP 248. In light of the Commission's preferred practice of not relying on negligible volume for determine export prices, in PanAsia's view it was incumbent on the Commission to at the very least outline and explain why such a small volume of sales were sufficiently reliable and representative of arms-length sales during the review period.

PanAsia's concern regarding the representativeness of the sales information relied upon is further highlighted by the non-alignment between the anti-circumvention inquiry period and the review period. Based on verified information presented to the Commission, there is a [redacted] week lead time between date of export and date of delivery to the importer's distribution centres. In addition, PanAsia considers that based on the importer's ordering patterns, the importer's held an estimated 30 days of stock inventory. On that basis, PanAsia considers that an estimated average period of 3 months existed between the date of export of the goods and the corresponding date of sale of those same goods by the importers.

In those circumstances, 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's investigation period. Those sales and the corresponding exports are therefore outside the scope of the review given a nominated investigation period of 1 April 2013 to 31 March 2014.

It follows then that the importer's September quarter 2013 sales would correspond to goods 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 did not have any sales that corresponded 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's investigation period.

In SEF 248, the Commission stated that '*[t]he sampled data is spread across all quarters in 2013 of the investigation period and for each finish type*'. This is factually incorrect as [redacted] [export sales information]. REP 248 provides no response to this issue raised in PanAsia's submission to SEF 248, and as such, it is assumed that the Commission accepts that its statement was incorrect and that not all finishes were spread across each of the quarters in 2013.

Further, the Commission explained in SEF 248 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.*' In response to the SEF, PanAsia queried how it was possible to index selling prices in quarter 4 2013 for

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

each finish type given that [redacted] [export sales information].

The Commission subsequently clarified its approach in REP 248 with the following statement:

> *The Commission calculated the export price for quarter 1 2014 by indexing prices in the prior quarter using the variation of prices between the two quarters prior to quarter 1 2014. This method was considered a reasonable approach when the Commission observed that the movement in export price between quarter 4 2013 and quarter 1 2014 was minimal.*

Notwithstanding that the explanation of the approach adopted by the Commission differs significantly between SEF 248 and REP 248, PanAsia continues to query the approach outlined in REP 248. In PanAsia's view, there were no sampled sales of anodised or mill finish extrusions in December quarter 2013 to be indexed.

Taking into account the various issues outlined above surrounding the representativeness of the sampled sales relied upon by the Commission, PanAsia has prepared the following table which outlines its understanding of the relevant periods relating to the sample sales information, and clearly 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.

PanAsia requests the ADRP to require the Commission to clearly identify the relevant period and volume for each finish of aluminium extrusion used in calculating a deductive export price, so that the ADRP is able to properly assess for itself whether the sales are representative, and the best available information in light of verified arms-length export sales by PanAsia and cooperating exporters in significant volumes.

ii) Variance in selling prices

Further, the inappropriateness of relying on an insignificant volume of sales is 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] [export sales information] over the review period. PanAsia expects that the Commission would have had ample opportunity 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[11] 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. Therefore, PanAsia submits that the Commission's reliance on limited and unreliable sales information was not correct or preferred.

6.1.3 Conclusion

In conclusion, PanAsia contends that the ADRP should request the Commission to undertake an objective examination of the relevant information available in determining its arms-length export prices. A proper assessment would 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. 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 arm-length export prices. 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 negligible sample size, price variation across the small sample and lack of sufficient coverage across the full period of review. As such, PanAsia requests that the ADRP reject the use of the sample sales for determining export prices.

6.2 Incorrect Benchmark for assessing adequate remuneration (Program 15)

6.2.1 Ingot benchmark

REP 248 finds that for the purposes of establishing whether a benefit is conferred by Program 15 (primary aluminium at less than adequate remuneration), an appropriate

[11] Ibid.

benchmark price for primary aluminium is the 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 approach in the original investigation (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*.'[12] [emphasis added]

The key point of difference then between the methodology used in the original investigation (REP 148) and the current review (REP 248), 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 REP 248 the Commission has recommended a benchmark 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 determined '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

[12] Report 148, section 7.4.1, page 57

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 methodology in REP 148, it would have been determined that an exporter in those circumstances 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 resulted in 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 determined using the approach adopted in the current review, is directly a result of the additional regional premium, import charges and inland transportation expenses.

PanAsia submits that these additional expenses, some of which are notional expenses, relate to services provided by various parties and do not relate to the purchase cost of the subsidised goods, being primary aluminium. Each of these items are addressed separately below.

6.2.2 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 premiums. 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 by the Australian industry member, Capral Limited (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.*'[13]

[13] EPR 148, Record No. 376, section 7.1, page 4.

It further added in a later submission[14]:

> *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[15], 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 major japanese port premium is an additional service charge for casting the primary aluminium into ingots and delivering the goods to a major international port. Given that 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 is inappropriate.

PanAsia contends that in countervailing the service cost of casting the primary aluminium into ingots, the Commission was obliged in those circumstances to firstly investigate and make findings whether the provision of these services meet the definition of a subsidy as defined in s.269T of the Act, and is countervailable pursuant to s.269TAAC of the Act.

It is worth noting that following submissions by PanAsia in response to SEF 248, the Commission accepted that the inclusion of inland transportation expenses in the benchmark price was not appropriate '*on the basis that such services are not provided by the government entity…*'. PanAsia contends that the regional/ingot premium or Major Japanese Port Premium referred to by Capral, are equally services that are not provided by supplying entities in China.

Further, PanAsia submits that the Commission ought to have rejected Capral's claim for the inclusion of an ingot premium in any case. 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 major Japanese port premium is not warranted.

[14] EPR 148, Record No. 400, section 3, page 1.
[15] EPR 248, Record No. 038, section 2.4.5, page 6.

Given that the LME price already reflects an ingot price, it is reasonable to assume that the major Japanese port premium is as Capral submits, essentially a notional delivery cost for the goods. As Capral has previously noted[16],

> *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 was 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[17] 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*"

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 also includes notional costs for ocean freight, import and port charges.

1.1.1 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

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

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 a price equal to the Commission's determined LME cash price plus regional ingot premium, it would continue to be found to have received a benefit solely on the basis that it did not incur and pay a notional port and brokers charge 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.

1.1.2 Billet benchmark

Again PanAsia considers that the Commission has 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[18]:

> *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 REP 248 to be baseless and illogical. As explained earlier in this application, Capral considers the regional premium or ingot premium or Major Japanese Port Premium to reflect the delivered cost of casting the primary aluminium into ingots. However, as outlined by Capral in its submissions to the original investigation, the billet premium already incorporates an ingot premium and freight component.

There is no evidence on the public record or referenced in any of Capral's submissions that demonstrate that when purchasing billet, individual ingot and billet premiums are charged to the customer. This would be illogical as the preimary aluminium producer would not be casting the metal into ingots and then using ingots to cast the billets.

Therefore, PanAsia submits that the ADRP should request the Commission to provide the relevant evidence or information relied upon to draw such a conclusion.

6.3 Overstated uplift to purchase costs of primary aluminium

Following its finding that PanAsia obtained an amount of benefit from the purchase of primary aluminum by the difference between the actual purchase prices and the estimated benchmark price for primary aluminium as explained above, the Commission decided to uplift PanAsia's actual recorded and reported primary aluminium costs to reflect the amount of benefit received.

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

To the extent that the benchmark price for primary aluminium was overstated with the inclusion of additional charges and expenses relating to services not relevant to PanAsia's actual purchases, PanAsia contends that the uplift in its primary aluminium costs were equally overstated.

Given that normal values were calculated on the basis on a cost construction pursuant to subsection 269TAC(2)(c) of the Act, PanAsia submits that the corresponding ascertained normal values are themselves overstated and therefore incorrect. This directly impacts the amount of interim dumping duty imposed by the Parliamentary Secretary.

7. A statement identifying what the applicant considers the correct or preferable decision should be, that may result from the grounds the applicant has raised in the application

PanAsia submits that had the Commission undertaken an objective and proper examination of all relevant information gathered during the investigation, and based its findings on positive verifiable evidence, the determined ascertained variable factors, being the ascertained export price, ascertained normal value and amount of countervailable subsidy, would have been significantly different. As a result, the amounts of interim dumping duty and interim countervailing duty imposed by the Parliamentary Secretary would have been significantly less than the amounts actually imposed.

PanAsia contends that for the purposes of determining export prices pursuant to subsection 269TAB(3) of the Act, the best available information has been overlooked by the Commission without any comparative analysis. In PanAsia's view, verified and accurate information from cooperating exporter's arms-length export prices are available and the best information for the determining export prices.

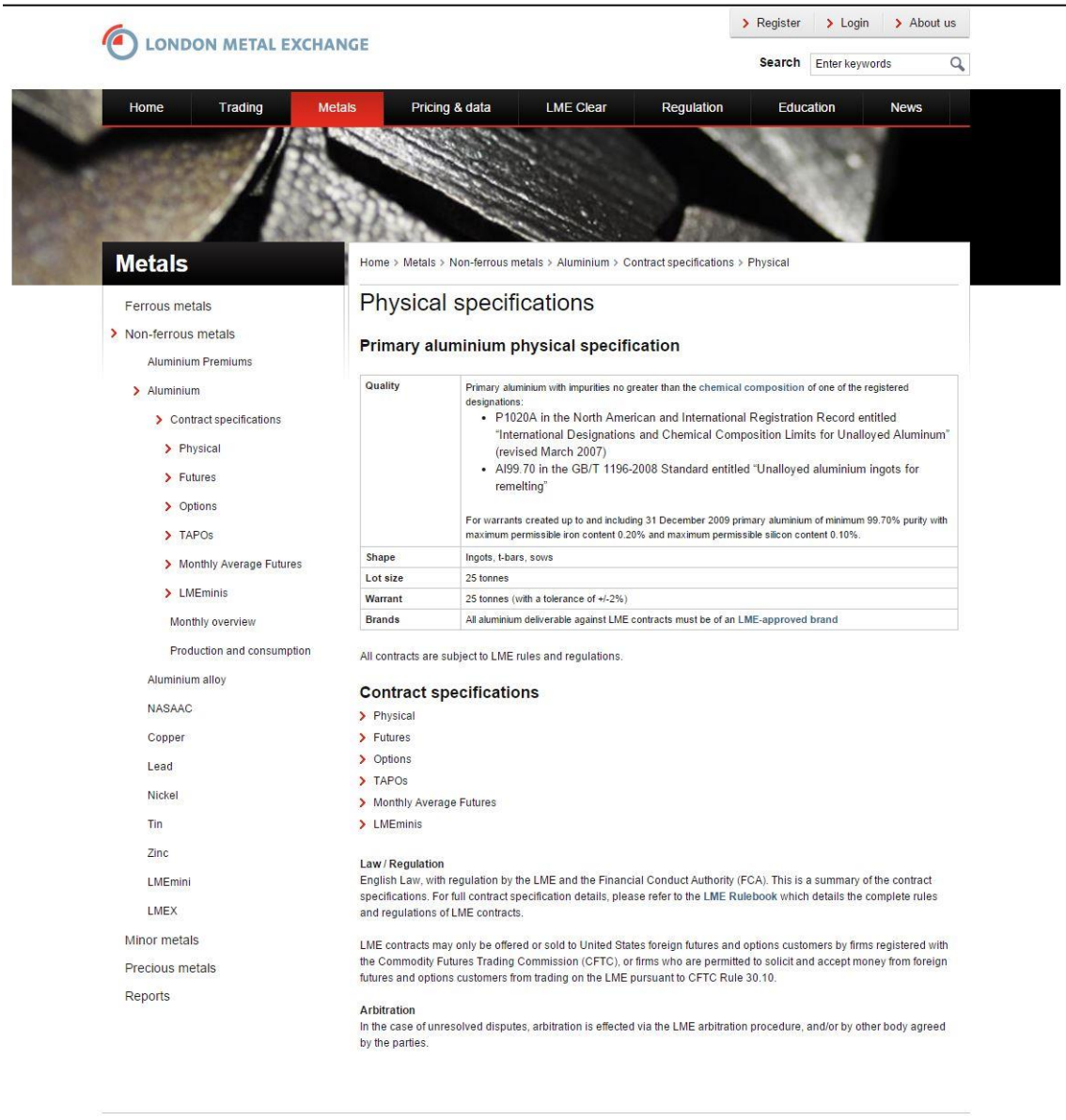
In the case of program 15, PanAsia submits that the correct and preferred decision was to determine the benchmark price consistent with the Commission's original methodology of using the LME published cash price. The inclusion of additional charges stemming from services provided by suppliers outside China goes beyond the requirement to establish a benefit from a financial contribution received in the form of a purchase of goods.

In determining a benchmark price based on the LME primary aluminium cash price, PanAsia also submits that the correct and preferable decision was to adjust PanAsia's costs to reflect the LME purchase prices, for the purposes of ascertaining corresponding normal values.

Yours sincerely

John Bracic

Attachment A – Primary aluminium physical specifications



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Physical specifications

Primary aluminium physical specification

Quality	Primary aluminium with impurities no greater than the chemical composition of one of the registered designations: • P1020A in the North American and International Registration Record entitled "International Designations and Chemical Composition Limits for Unalloyed Aluminum" (revised March 2007) • Al99.70 in the GB/T 1196-2008 Standard entitled "Unalloyed aluminium ingots for remelting" For warrants created up to and including 31 December 2009 primary aluminium of minimum 99.70% purity with maximum permissible iron content 0.20% and maximum permissible silicon content 0.10%.
Shape	Ingots, t-bars, sows
Lot size	25 tonnes
Warrant	25 tonnes (with a tolerance of +/-2%)
Brands	All aluminium deliverable against LME contracts must be of an LME-approved brand

All contracts are subject to LME rules and regulations.

Contract specifications

- Physical
- Futures
- Options
- TAPOs
- Monthly Average Futures
- LMEminis

Law / Regulation
English Law, with regulation by the LME and the Financial Conduct Authority (FCA). This is a summary of the contract specifications. For full contract specification details, please refer to the LME Rulebook which details the complete rules and regulations of LME contracts.

LME contracts may only be offered or sold to United States foreign futures and options customers by firms registered with the Commodity Futures Trading Commission (CFTC), or firms who are permitted to solicit and accept money from foreign futures and options customers from trading on the LME pursuant to CFTC Rule 30.10.

Arbitration
In the case of unresolved disputes, arbitration is effected via the LME arbitration procedure, and/or by other body agreed by the parties.