



**Australian Government**  
**Australian Customs and  
Border Protection Service**

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Customs Act 1901 - Part XVB

**TRADE MEASURES BRANCH**

**TERMINATION OF A RESUMED  
INVESTIGATION**

**INVESTIGATION NO. 148A-(2)**

ALLEGED DUMPING AND SUBSIDISATION OF

**CERTAIN ALUMINIUM EXTRUSIONS**

THE PEOPLE'S REPUBLIC OF CHINA

**19 May 2011**

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## ABBREVIATIONS

ACDN	Australian Customs Dumping Notice
Anti-Dumping Agreement	Agreement on Implementation of Article IV of the General Agreement on Tariffs and Trade 1994
Capral	Capral Limited
CEO	Chief Executive Officer of the Australian Customs and Border Protection Service
Chalco	Aluminium Corporation of China Limited
China	People's Republic of China
CSRB	China State Reserve Bureau
CTMS	cost to make and sell
Customs and Border Protection	the Australian Customs and Border Protection Service
the Delegate	the Delegate of the CEO of Customs and Border Protection for the resumed investigation into Tai Ao
GOC	Government of China
ICVD	interim countervailing duty
IDD	interim dumping duty
Investigation 148	the original investigation into aluminium extrusions exported to Australia from China.
Investigation 148A	this resumed investigation into aluminium extrusions exported to Australia from China by Tai Ao
LME	London Metal Exchange
the Minister	the Minister for Home Affairs
MJP premium	the Major Japanese Ports Premium
PAD	preliminary affirmative determination
PanAsia	PanAsia Enterprises Group Limited
REP148	final report for Investigation 148
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SEF	statement of essential facts
SEF148	SEF for Investigation 148
SEF148A	SEF for this resumed investigation (Investigation 148A)
SHFE	Shanghai Futures Exchange
SOEs	state-owned enterprises
Tai Ao	Tai Ao Aluminium (Taishan) Co Ltd
Tai Ao Australia	Tai Ao Aluminium (Australia) Pty Ltd
TER148A	Australian Customs and Border Protection Service report, <i>Termination of Part of an Investigation</i> , 13 April 2010
the Act	the <i>Customs Act 1901</i>
the goods	the goods the subject of the application
the Regulations	the <i>Customs Regulations 1926</i>
TMRO	Trade Measures Review Officer
WTO	World Trade Organisation

# 1 SUMMARY AND RECOMMENDATIONS

This resumed investigation is in response to:

- an investigation following an application by Capral Limited (Capral) for publication of a dumping duty notice and a countervailing duty notice in relation to certain aluminium extrusions (aluminium extrusions) exported to Australia from the People's Republic of China (China);
- a decision by a delegate of the Chief Executive Officer (CEO) of the Australian Customs and Border Protection Service (Customs and Border Protection) to terminate that investigation (Investigation 148) insofar as it related to the Chinese exporter Tai Ao Aluminium (Taishan) Co Ltd (Tai Ao) in accordance with s.269TDA(1) and (2) of the *Customs Act 1901* (the Act);<sup>1</sup>
- an application by Capral to the Trade Measures Review Officer (TMRO) for review of that termination decision; and
- a decision by the TMRO to revoke the termination decision and resume Customs and Border Protection's investigation into Tai Ao (this investigation, Investigation 148A).

This report sets out the findings on which the Delegate of the CEO for the resumed investigation into Tai Ao<sup>2</sup> has decided to again terminate the investigation into Tai Ao in accordance with s.269TDA(1) and (2) of the Act.

## 1.1 Authority to make decision

Division 2 of Part XVB of the Act sets out, among other matters, the procedures to be followed and the matters to be considered by the CEO in conducting investigations in relation to the goods covered by an application for the purpose of making a report to the relevant minister.

The CEO's powers under this Division have been delegated to certain officers of Customs and Border Protection.

*Note: this resumed investigation into Tai Ao has been assigned a different delegate of the CEO to Investigation 148.*

## 1.2 Findings

Customs and Border Protection has found that aluminium extrusions exported to Australia from China by Tai Ao:

- were exported at dumped prices, but the dumping margin did not exceed the de minimus level; and
- were in receipt of countervailable subsidies, but that the subsidy margin did not exceed the negligible level.

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<sup>1</sup> All references to legislative provisions in this report is a reference to a provision of the *Customs Act 1901*, unless otherwise specified.

<sup>2</sup> Hereafter referred to as 'the Delegate'.

Consequently, the Delegate has decided to terminate the investigation into Tai Ao in accordance with s.269TDA(1) and s.269TDA(2) of the Customs Act 1901 (the Act).

PUBLIC RECORD

## **2 BACKGROUND**

### **2.1 Initiation – Investigation 148**

On 11 May 2009, Capral lodged an application<sup>3</sup> for the publication of a dumping duty notice and a countervailing duty notice in respect of aluminium extrusions exported to Australia from China. Additional information in support of the application was received from Capral on 14 May and 28 May 2009.

Following consideration of the application and additional information, Customs and Border Protection decided not to reject the application, and Investigation 148 into the alleged dumping and subsidisation of certain aluminium extrusions exported to Australia from China was initiated on 24 June 2009.

At the date of initiation of Investigation 148, Customs and Border Protection published a notice in *The Australian* newspaper, and released ACDN 2009/20, which contained further details of Investigation 148.

The investigation period for Investigation 148, used to determine whether dumping and subsidisation had occurred, was set as 1 July 2008 to 30 June 2009.

During Investigation 148, Customs and Border Protection examined the Australian market and the economic condition of the industry from 1 January 2006 for the purposes of injury analysis.

In its application for Investigation 148, the applicant provided the following description of the goods the subject of its application:

Aluminium extrusions produced via an extrusion process, of alloys having metallic elements falling within the alloy designations published by The Aluminum 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 application also contained additional information to assist in understanding the goods the subject of the application.

Further description of the goods is included in ACDN 2009/20.

### **2.2 Preliminary affirmative determination and imposition of securities**

Under the Act, the CEO may, at any time not earlier than 60 days after the date of initiation of an investigation, make a preliminary affirmative determination (PAD)<sup>4</sup> in respect of the goods subject to an application.

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<sup>3</sup> Under s.269TB of the Act

<sup>4</sup> Under s.269TD

In order to make a PAD, the CEO must be satisfied:

- a) that there appears to be sufficient grounds for the publication of a dumping duty notice and/or countervailing duty notice; or
- b) that it appears that there will be sufficient grounds for the publication of such a notice subsequent to the importation into Australia of such goods.

On 3 November 2009, Customs and Border Protection publicly notified that a PAD had been made in Investigation 148, as there appeared to be sufficient grounds for the publication of a dumping duty notice and a countervailing duty notice in respect of the goods exported to Australia from China for all exporters.

Following this PAD, Customs and Border Protection made notification and began collecting securities in respect of any interim dumping duty (IDD) that may have become payable in respect of the goods entered for home consumption in Australia on or after 6 November 2009.

### **2.3 SEF148**

On 1 March 2010, Customs and Border Protection published its Statement of Essential Facts (SEF) for Investigation 148 (SEF148).<sup>5</sup>

SEF148 contained Customs and Border Protection's preliminary findings in the investigation relating to all exporters of the goods, including its calculations of Tai Ao's dumping and subsidy margins.

Several submissions were received in response to SEF148, and those deemed to be received in a timeframe that did not hinder the timely reporting to the Minister for Home Affairs (the Minister)<sup>6</sup> were considered by Customs and Border Protection in preparing its final report to the Minister (REP148).<sup>7</sup>

These submissions are outlined in Section 2.3 of REP148.

### **2.4 Termination of investigation into Tai Ao**

On 13 April 2010, Customs and Border Protection made notice of a decision to terminate its investigation insofar as it related to Tai Ao,<sup>8</sup> as that exporter's dumping margin was de minimus, and its subsidy margin did not exceed the negligible level.<sup>9</sup>

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<sup>5</sup> Investigation 148 Public Record, File 2009/040393-01, Folio 1-104.

<sup>6</sup> At the time of finalising REP148, the Minister for Home Affairs remained the Minister responsible for making a decision in Investigation 148, though this decision-making power was later referred to the Attorney-General.

<sup>7</sup> Customs and Border Protection, *report to the Minister No. 148*, Investigation 148 Public Record, File 2010/023375-02, Folios 1-134.

<sup>8</sup> Under ss.269TDA(1) and (2) of the Act.

<sup>9</sup> These calculations have been reviewed and revised during the resumed investigation, and are summarised in this report at Chapter 5.

At the time of termination of the investigation into Tai Ao, Customs and Border Protection published its *Termination of Part of an Investigation* report (TER148A)<sup>10</sup> on its public record, setting out its findings in relation to Tai Ao and reasons for the decision to terminate the investigation into that company.

In TER148A, Customs and Border Protection calculated:

- export prices where Tai Ao's Australian customer was found to be the importer of the goods under s.269TAB(1)(a) of the Act;
- export prices where Tai Ao was found to be the importer of the goods under s.269TAB(1)(c) of the Act; and
- constructed normal values under s.269TAC(2)(c) of the Act, as although Tai Ao sold like goods on the domestic market during the investigation period, it was not possible to reasonably work out the amount of any adjustment to account for these differences between these goods and exported goods (under s.269TAC(8)).

The dumping margin for Tai Ao was found to be de minimus.

Customs and Border Protection also found that, during the investigation period, Tai Ao had received benefits under two countervailable subsidy programs:

- Program 13: Exemption of tariff and import VAT for imported technologies and equipment (the subsidy rate for which was calculated as 0.82%); and
- Program 15: Primary aluminium provided by Government at less than fair market value (the subsidy rate for which was calculated as 0.56%).

The total subsidy rate applicable to Tai Ao during the investigation period was calculated at 1.40%.

## **2.5 Revision of securities**

Following the publication of SEF148, and consideration of submissions made in response, Customs and Border Protection considered it appropriate to revise the levels of securities in place concerning aluminium extrusions from China.

On 14 April 2010, Customs and Border Protection published notification that securities had been revised to include collecting securities in respect of interim countervailing duty (ICVD) that may become payable in respect of the goods exported from China, as well as revising the security rates relating to any IDD that may become payable.

Tai Ao was excluded from these securities, having been terminated against.

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<sup>10</sup> Australian Customs and Border Protection Service, *Termination of Part of an Investigation*, available at [www.customs.gov.au](http://www.customs.gov.au).

## 2.6 REP148 and TMRO review

Following consideration of submissions received in response to SEF148, Customs and Border Protection prepared its final report to the Minister for Investigation 148 (REP148), and forwarded REP148 to the Minister for consideration on 15 April 2010.

REP148 was later referred to the Attorney-General for decision.

REP148 outlined Customs and Border Protection's findings that aluminium extrusions were exported to Australia at dumped and subsidised prices by all exporters other than Tai Ao, and that the Australian industry had suffered material injury as a result.

REP148 recommended to the Minister that a dumping duty notice and a countervailing duty notice be published in respect of aluminium extrusions exported to Australia from China by all exporters other than Tai Ao.

On 21 October 2010, the Attorney-General assented to REP148 and the recommendations contained therein.

Public notification of this decision was made in *The Australian* newspaper on 28 October 2010, and REP148 was published on Customs and Border Protection's website.<sup>11</sup>

*Note: following the Attorney-General's assent to REP148, certain securities collected by Customs and Border Protection in relation to aluminium extrusions from China have been converted to IDD and ICVD.*

Following publication of the dumping duty notice and countervailing duty notice in respect of all exporters other than Tai Ao,<sup>12</sup> several interested parties lodged applications with the TMRO for review of the decision to publish these notices (and matters relevant to the calculation of the dumping and subsidy margins established within these notices).

Following his review of these applications (and related submissions by interested parties), the TMRO recommended to the Attorney-General that certain aspects of Investigation 148, in relation to all exporters other than Tai Ao, be returned to Customs and Border Protection for reinvestigation.

The Attorney-General agreed to the TMRO's recommendations (contained within his reasons for decisions report<sup>13</sup>), and public notice of the reinvestigation was made on 16 May 2011.

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<sup>11</sup> [www.customs.gov.au](http://www.customs.gov.au)

<sup>12</sup> As the dumping duty notice and countervailing duty notice related to all exporters other than Tai Ao, due to the investigation into Tai Ao being terminated.

<sup>13</sup> Trade Measures Review Officer, *Certain Aluminium Extrusions exported from The People's Republic of China - Tai Ao Aluminium (Taishan) Co Ltd*, 24 August 2010.

Customs and Border Protection will thus undertake a reinvestigation of the matters referred back to it for review by the TMRO. However, the reinvestigation is a separate matter to this resumed investigation into Tai Ao.

## **2.7 Appeal to the TMRO regarding termination of the investigation into Tai Ao, and revocation of termination**

Following the decision to terminate the investigation into Tai Ao, on 14 May 2010 Capral applied to the TMRO for review of that decision.

The Minister (who remained as the decision-maker in this case at that time) extended the TMRO's 60 day reporting deadline in this case to 24 August 2010 (in accordance with s.269ZZT(5) of the Act).

Following consideration of Capral's application for review, the TMRO revoked the decision to terminate the investigation into Tai Ao on 24 August 2010.

The TMRO's revocation resumed the investigation into Tai Ao (Investigation 148A), requiring Customs and Border Protection to publish a SEF for the resumed investigation (SEF148A).

## **2.8 SEF148A**

SEF148A for the resumed investigation was placed on Customs and Border Protection's Public Record on 4 April 2011.

SEF148A addressed:

- those matters referred back to Customs and Border Protection by the TMRO for reconsideration;
- those matters raised by interested parties in submissions to the resumed investigation (where applicable); and
- other matters considered to warrant re-consideration by Customs and Border Protection during the resumed investigation.

Within SEF148A, Customs and Border Protection preliminarily determined that:

- the dumping margin attributable to Tai Ao's exports of aluminium extrusions to Australia during the investigation period was de minimus; and
- subsidy programs 'Program 15 – Goods provided at less than adequate remuneration' and 'Program 13 – Exemption on Tariff and Import VAT for imported technologies and equipment'<sup>14</sup> are countervailable subsidy programs that conferred benefit onto Tai Ao's exports of aluminium extrusions from China to Australia during the investigation period, but the combined subsidy margin for Tai Ao from these programs during the investigation period was negligible.

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<sup>14</sup> Found within Investigation 148 to be a duplicate of countervailable subsidy Program 21 *Tariff and VAT Exemptions on Imported Materials and Equipments*'.

SEF148A invited interested parties to make submissions in response to its preliminary findings by 27 April 2011.

The following submissions were lodged by interested parties in response to SEF148A:

<b>Entity</b>	<b>Submission received</b>	<b>Submission title/description</b>
Capral	27 April 2011	<i>Case 148A, Capral Submission on Statement of Essential Facts No 148A</i>
Tai Ao	20 April 2011	<i>Response to Statement of Essential Facts No. 148A</i>
Tai Ao	5 May 2011	<i>Letter – Capral submission on Statement of Essential Facts No. 148A</i>
Government of China	27 April 2011	<i>Submission concerning Statement of Essential Facts No 148A</i>
PanAsia Enterprises Group Limited	27 April 2011	<i>Response to Statement of Essential Facts 148A Concerning Certain Aluminium Extrusions Exported to Australia from the PRC</i>

These submissions have been considered by Customs and Border Protection in making the final findings contained within this report.

*Note: this report should be read in conjunction with SEF148A. All preliminary findings made within SEF148A have been adopted by Customs and Border Protection in making the final findings within this report, unless otherwise specifically altered within this report.*

## 3 PREVIOUS DUMPING AND SUBSIDISATION FINDINGS

### 3.1 Dumping

#### 3.1.1 TER148A

Within the original termination report for Tai Ao (TER148A), Customs and Border Protection found the following.

##### Export prices

For exports where Tai Ao was also found to be the importer, export prices were determined under s.269TAB(1)(c), using Tai Ao's invoiced prices to arm's length customers less amounts for prescribed deductions.

For exports where Tai Ao's Australian customer was determined to be the importer, Customs and Border Protection was satisfied that the requirements of s.269TAB(1)(a) were met and calculated export prices using Tai Ao's invoiced prices less amounts for ocean freight and marine insurance where applicable.

##### Normal values

Tai Ao made domestic sales of like goods during the investigation period, but these like goods were found to be sufficiently different in terms of physical characteristics, end-use applications, production process and overall cost of production such that it was not possible to reasonably work out the amount of any adjustment to account for those differences and fair comparison could not be ensured, and thus Tai Ao's domestic sales were not considered suitable for establishing normal values under s.269TAC(1).

Normal values for Tai Ao were therefore constructed under s.269TAC(2)(c) by

- the revised monthly cost of production for the exported goods (calculated by substituting a London Metals Exchange (LME) based competitive market proxy for Tai Ao's domestic primary aluminium costs, having determined that these costs were not reasonably reflective of competitive market costs for the purposes of Subregulation 180(2) of the *Customs Regulations 1926* (the Regulations));
- the actual selling, general and administration costs incurred on domestic sales of like goods; and
- a reasonable amount for profit by reference to the profit achieved on domestic sales of like goods after comparing domestic ordinary course of trade selling prices to the revised cost to make and sell during the investigation period.

The constructed normal values incorporate the following adjustments made under s. 269TAC(9) to ensure they were fairly comparable to export prices:

- upward adjustment for export inland freight;
- upward adjustment for export handling and other FOB charges;

- upward adjustment for export credit terms;
- upward adjustment for Australian intermediary expenses;
- upward adjustment for VAT liability on exports;
- upward adjustment for export financing charges; and
- downward adjustment for difference in theoretical and actual weights.

### Dumping margin

Tai Ao's dumping margin was calculated over the whole investigation period in accordance with s.269TACB(2)(a) by a comparison of Tai Ao's weighted average monthly export prices with the corresponding monthly weighted average normal values, and the product dumping margin for exports by Tai Ao was found to be de minimus.

#### **3.1.2 SEF148A**

Within SEF148A, Customs and Border Protection preliminarily determined the approach taken during Investigation 148 (outlined in TER148A) in calculating Tai Ao's normal values (including adjustments) under s.269TAC(2)(c), and export prices under ss.269TAB(1)(a) and 269TAB(1)(c) was correct.

These calculations were again used in calculating Tai Ao's preliminary dumping margins within SEF148A, however some alteration was made for:

- correcting the LME values used as a basis for substituting domestic primary aluminium with a competitive market proxy;
- isolating imported primary aluminium billet out of the substitution of the LME-based proxy in calculating Tai Ao's normal values; and
- the calculation of the adjustment to Tai Ao's normal values for differences between domestic sales in actual weights and export sales in nominal weights.

See SEF148A for discussion of each of these corrections.

Having corrected these errors, Customs and Border Protection calculated within SEF148A that Tai Ao's dumping margin for the investigation period was **below -0.10%**, and hence below the de minimus level (2%)

## **3.2 Subsidies**

### **3.2.1 TER148A**

Within the original termination report for Tai Ao (TER148A), Customs and Border Protection found that during the investigation period Tai Ao had received financial contributions that conferred benefits to the exported goods. The amount of subsidisation attributable to the benefit under each of the subsidy programs was calculated as:

- Program 13: Exemption of tariff and import VAT for imported technologies and equipment: 0.82%; and
- Program 15: Primary aluminium provided by Government at less than fair market value: 0.56%.

Within TER148A, the total subsidy rate applicable to Tai Ao during the investigation period was calculated at 1.4%, when measured as a percentage of the export price.

### 3.2.2 SEF148A

Within SEF148A, Customs and Border Protection preliminarily upheld the findings of TER148A, and preliminarily determined that:

- Tai Ao was in receipt of countervailable subsidy Program 15, and the subsidy margin for this program is correctly calculated as 0.56%;
- Tai Ao was in receipt of countervailable subsidy Program 13, and the subsidy margin for this program is correctly calculated as between 0.82% and 1.17%<sup>15</sup> (noting that some potential adjustments to the calculation of this program were identified, but the exact amount was not pursued due to the combined subsidy rate remaining below negligible regardless).

See SEF148A for detailed discussion of each of these programs and calculation modifications.

Thus, Customs and Border Protection preliminarily determined that Tai Ao's total subsidy margin for the investigation period was between **1.38% and 1.73%**, and thus below the negligible level for China (2%).

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<sup>15</sup> The reason for there being a range calculated for this subsidy program, as opposed to a definite percentage, is due to Customs and Border Protection not pursuing exact calculations of the program, as it was determined that Tai Ao's combined subsidy rate would be negligible regardless (see SEF148A at Section 6.5.2).

## **4 SUBMISSIONS IN RESPONSE TO SEF148A**

As mentioned in Section 2.8 above, Customs and Border Protection received multiple submissions in response to the preliminary findings within SEF148A, which have been considered in making the final findings within this report. Discussion of these submissions is contained within this section of this report below.

### **4.1 Particular market situation**

#### **4.1.1 Background and submissions**

Within its application for Investigation 148, Capral has contended that, regardless of whether the requirements of s.269TAC(1) have been otherwise met, normal values should not be ascertained under s.269TAC(1) because the situation of the Chinese aluminium extrusions market was such that domestic sales were rendered unsuitable for calculating normal values (i.e. a ‘particular market situation existed’).<sup>16</sup>

Within SEF148, Customs and Border Protection found that no such particular market situation existed within the Chinese aluminium extrusions market.

Capral appealed this finding to the TMRO when making its appeal against the termination of the investigation into Tai Ao.

Within the TMRO’s report reviewing the termination of the investigation into Tai Ao, the TMRO discussed this finding of Customs and Border Protection and did not return the matter for further consideration by Customs and Border Protection during the resumed investigation. In SEF148A, Customs and Border Protection considered this to be an endorsement of its findings in relation to particular market situation.

In response to SEF148A,<sup>17</sup> Capral has submitted that it does not consider the TMRO’s comments are an endorsement of Customs and Border Protection’s findings that no such particular market situation exists.

Capral has further submitted that, within its investigation into aluminium extrusions from China, Customs and Border Protection incorrectly applied the ordinary course of trade test to support a finding that a particular market situation did not exist.

#### **4.1.2 Customs and Border Protection’s analysis**

Customs and Border Protection notes that this matter is not relevant to Tai Ao as it has found that Tai Ao’s normal values cannot be calculated under s.269TAC(1) in any case, regardless of whether a particular market situation exists or not (see further discussion at Section 4.9 of this report and Section 6.3 of SEF148A). Consequently, this matter is not further addressed within this report.

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<sup>16</sup> In accordance with s.269TAC(2)(a)(ii).

<sup>17</sup> Capral Limited, *Case 148A, Capral Submission on Statement of Essential Facts No 148A* at Paragraphs 18-22.

## 4.2 Appropriateness of using the LME as a proxy for the entire investigation period

### 4.2.1 Background and submissions

Within Chapter 4 of SEF148A, in calculating Tai Ao's cost to make aluminium extrusions to construct normal values under s.269TAC92)(c), Customs and Border Protection found that:

- the price paid for domestic primary aluminium (i.e. primary aluminium produced in China – not imported primary aluminium) was not reasonably reflective of competitive market costs for the purposes of r.180(2) of the Regulations, at all times throughout the investigation period;
- the LME price for primary aluminium represented a competitive market price for primary aluminium, and maintained this status as a competitive market price throughout the investigation period;
- the LME price should therefore be used as a competitive market proxy price to adjust Tai Ao's domestic primary aluminium costs throughout the entire investigation period.

During the resumed investigation into Tai Ao (prior to SEF148A), Capral submitted to Customs and Border Protection that, when adjusting Tai Ao's costs of domestic primary aluminium, the LME-based proxy should only be applied where Tai Ao's actual cost of primary aluminium is below the LME-based proxy price for that purchase.

As noted above, within SEF148A, Customs and Border Protection did not accept Capral's approach to substitution of the LME-based proxy, and rather applied the proxy to all of Tai Ao's purchases of domestic primary aluminium, regardless of whether the actual price paid was below or above the proxy price.

In response to SEF148A, Capral has again submitted its objections to this approach (which are examined in the most detail within Capral's submitted *Opinion of Stephen Lloyd SC of 19 April 2011*,<sup>18</sup> submitted as Attachment 1 to Capral's *Case 148A, Capral Submission on Statement of Essential Facts No 148A*.<sup>19</sup>

Within the *Opinion of Stephen Lloyd SC of 19 April 2011*, it is submitted (at Paragraph 26) that:

*In essence, my [Mr. Lloyd's] view is that the Customs Act authorises the Minister to not use prices that do not reflect a competitive price in that they are too low and do not therefore provide a fair basis for comparison. There is not reason for allowing the normal value to be reduced because government interventions have operated to increase the costs actually faced by an exporter.*

Mr Lloyd further contends at Paragraph 33:

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<sup>18</sup> Investigation 148A Public Record, File 2010/040180-03, Folios 23-53.

<sup>19</sup> Investigation 148A Public record, File 2010/040180-03, Folios 1-24.

*Customs has not provided any justification [...] for using the LME price even where the costs actually incurred were higher. Even accepting that the Chinese prices for aluminium were not competitive market costs for the whole period, that only leads to the conclusion that Customs has no basis under reg 180(2) to determine the “cost of production” under s 269TAAD(4) and s 269TAC(2)(c)(i) of the Act. Customs has said that, where this is the case, they have determined that they should determine the cost of production on a “reasonable” basis. I have doubted the correctness of that above. However, even if it be assumed that Customs’ view of the law is correct, they have not explained why it is reasonable to determine the cost of production on a basis that is likely to be lower than the actual cost of production incurred. They have not explained why this approach is likely to lead to the “true” normal value, unless they are attempting to identify not the normal value of products actually made but the theoretical lowest price that such products could have been made if there had been no government intervention that had inflated local costs. In my view, it is far from clear that this latter course is authorised by the legislation.*

However, within his advice, Mr Lloyd also states at Paragraph 29 that he considers that it was open for Customs and Border Protection to take the approach of applying the LME-based proxy to all of Tai Ao’s domestic primary aluminium under s.269TAC(6) in any event, though if normal values were calculated under this provision, a different approach may have been taken.

#### **4.2.2 Customs and Border Protection’s analysis**

Customs and Border Protection has considered Capral’s submissions on this matter, and again finds that its approach in substituting the LME-based proxy for all of Tai Ao’s costs should stand.

Contrary to Mr Lloyd’s opinion outlined above, as was the position within SEF148A, Customs and Border Protection considers that, where the conditions of r.180(2) have not been met (in this case, as Tai Ao’s cost of domestic primary aluminium was found to not be reasonably reflective of competitive market costs), a reasonable method of calculating an exporter’s cost to make the goods (or like goods, depending on the context) should be used.

In these circumstances, Customs and Border Protection considers its approach to calculating Tai Ao’s domestic primary aluminium costs is reasonable as it has determined that:

- all of Tai Ao’s costs of domestic primary aluminium throughout the investigation period are not reasonably reflective of competitive markets costs, and hence should not be used in any circumstances, and this is due at least in part to Government of China (GOC) interventions in the domestic primary aluminium market (see SEF148A at Section 4.2);
- the LME price was a competitive market price for primary aluminium throughout the entirety of the investigation period (see SEF148A at Sections 4.3 and 4.4); and

- the application of the LME to Tai Ao's domestic primary aluminium costs adjusts the costs to align them with what Customs and Border Protection considers a competitive market cost of primary aluminium in China would have been (discussed within SEF148A at Section 4.5), reasonably removing the distorting forces on the costs of domestic primary aluminium paid by Tai Ao (including the effects of GOC interventions).

Customs and Border Protection then considers that, once it has aligned Tai Ao's costs of domestic primary aluminium with what it is reasonably considered they would have been if the Chinese market was a competitive market, these costs are suitable and reasonable to use in constructing Tai Ao's normal values.

Customs and Border Protection considers that the fact that this approach may at times lower and at other times raise Tai Ao's constructed normal values from what they would have been had the LME-based proxy not been applied is immaterial. Customs and Border Protection's aim in making this modification to Tai Ao's costs is to arrive at normal values that reasonably reflect what the normal values would have been in a competitive market.

In any event, Customs and Border Protection notes that Capral (within its *Opinion of Stephen Lloyd SC of 19 April 2011*) considers that the approach used by Customs and Border Protection is open to it under s.269TAC(6).

Customs and Border Protection has not altered its approach to applying the LME-based market proxy to Tai Ao's domestic aluminium costs so as to only apply the proxy where it is below the actual cost incurred by Tai Ao for its domestic primary aluminium.

The LME-based proxy has been applied to all of Tai Ao's costs of domestic primary aluminium.

### **4.3 Use of data from entire investigation period – determining dumping margin**

#### **4.3.1 Background and submissions**

In calculating Tai Ao's dumping margin at the time of TER148A, Customs and Border Protection compared Tai Ao's weighted average normal value with the company's weighted average export price for the investigation period.

During the resumed investigation into Tai Ao, Capral made various submissions regarding the period(s) of data and method that should be used by Customs and Border Protection for its dumping analysis to determine whether dumping has occurred and the level of dumping under s.269TACB.

Specifically, Capral had submitted that, in calculating Tai Ao's dumping margin, the investigation period data should be broken down into smaller periods (namely 6 x 2-month periods), and specific periods be isolated to calculate Tai Ao's dumping margin that would more likely reflect future market conditions and/or future levels of dumping (as the investigation period was considered to contain market abnormalities that may not continue into the future).

Within SEF148A, Customs and Border Protection noted it had again calculated Tai Ao's dumping margin, in accordance with s.269TACB(2)(a):

*...as a comparison between Tai Ao's total weighted average normal value (constructed under s.269TAC(2)(c)) with Tai Ao's total export price for the entire investigation period.<sup>20</sup>*

In its analysis of this point within SEF148A, Customs and Border Protection concluded that, in calculating whether dumping had occurred and levels of dumping under s.269TACB, it must use all relevant data from the entire investigation period, and not a particular sub-set of that data. Customs and Border Protection expressed its opinion that to use only a sub-set of an investigation period's data to calculate whether dumping has occurred and the levels of this dumping would likely be a breach of its obligations under the Anti-Dumping Agreement<sup>21</sup> (see SEF148A at Section 4.4.2).

In coming to this conclusion, Customs and Border Protection reproduced an excerpt from the European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil dispute (the EC-Brazil dispute) that it considered supported its opinions on this matter.

Following SEF148A, Capral has submitted further discussion on this point, particularly within its *Opinion of Stephen Lloyd SC of 19 April 2011*.<sup>22</sup>

Within this opinion, Mr Lloyd further examines the WTO Panel and the Appellate Body's findings in the EC-Brazil dispute and concludes that the approach proposed by Capral would likely not breach Australia's obligations under the Anti-Dumping Agreement.

#### **4.3.2 Customs and Border Protection's analysis**

Customs and Border Protection again concludes that, in determining whether dumping has occurred, and the level of any such dumping under s.269TACB of the Act, all relevant data from the entire investigation period must be used, and a dumping margin for the entire investigation period established.

Customs and Border Protection considers that this is supported by the WTO Panel and Appellate Body findings in the EC-Brazil dispute, particularly the Appellate Body's findings (also reproduced by Mr Lloyd in his opinion) that:

*79. ... Brazil's assertion in this case could open up the possibility of the investigating authority making an affirmative dumping determination based solely on the data of the last quarter of the POI.*

*80. Permitting such discretionary selection of data from a period of time within the POI<sup>23</sup> would defeat the objectives underlying investigating*

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<sup>20</sup> Customs and Border Protection, *Statement of Essential Facts No 148A* at Section 4.43, available online at [www.customs.gov.au](http://www.customs.gov.au).

<sup>21</sup> The Agreement on Implementation of Article IV of the General Agreement on Tariff and Trade 1994

<sup>22</sup> Investigation 148A Public Record, File 2010/040180-03, Folios 23-53.

*authorities' reliance on a POI for the purposes of a dumping determination. As the Panel correctly noted, the POI "form[s] the basis for an objective and unbiased determination by the investigating authority." Like the Panel and the parties to this dispute, we understand a POI to provide data collected over a sustained period of time, which period can allow the investigating authority to make a dumping determination that is less likely to be subject to market fluctuations or other vagaries that may distort a proper evaluation. We agree with the Panel that the standardized reliance on a POI, although not fixed in duration by the Anti-Dumping Agreement, assures the investigating authority and exporters of—a consistent and reasonable methodology for determining present dumping, which anti-dumping duties are intended to offset. In contrast to this consistency and reliability, Brazil's approach would introduce a significant level of subjectivity on the part of the investigating authority to determine when data from a subset of the POI may be a reliable indicator of an exporter's future pricing behaviour. As the European Communities points out, the "broad judgmental role" accorded investigating authorities by Brazil's approach is not consistent with the detailed nature of the rules and obligations of the Anti-Dumping Agreement governing various aspects of the dumping determination.*

*81. In our view, the Anti-Dumping Agreement takes into account the possibility of such major changes occurring at a late stage of the POI, or even after the POI, not by allowing investigating authorities to pick and choose a subset of data or sub-periods of a POI according to their subjective considerations, but by review mechanisms. Article 11.1 of the Anti-Dumping Agreement is categorical that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." In furtherance of this general rule, Article 11.2 requires investigating authorities in certain circumstances, including at the request of an interested party after a reasonable period of time, to "review the need for the continued imposition of the duty." The Anti-Dumping Agreement, in subparagraphs 1 through 3 of Article 9.3, also lays down that the anti-dumping duty collected shall at no point in time exceed the dumping margin and that any such excess shall be refunded. Therefore, if a major change that occurs during or after the POI has reduced the margin of dumping or eliminated the dumping altogether, these provisions of the Anti-Dumping Agreement ensure that the exporter's legitimate interests are safeguarded [emphasis added].*

It is noted that the TMRO recently considered this matter within his review of the decision to publish a dumping duty notice and a countervailing duty notice in respect of all exporters excluding Tai Ao, and did not consider it to be a matter that required reinvestigation by Customs and Border Protection.

Once imports have been found to have been dumped, considers that, in setting prospective anti-dumping measures under s.269TG(2), there may be scope under the Act for the Minister to ascertain the variable factors of those measures that reflect levels of dumping within a sub-set of the investigation period, or possibly having regard to some other relevant information. This is supported by Mr. Lloyd in his

opinion, which reproduces excerpts from a previous advice to Capral (of 19 April 2011) that states:

*...while the Minister is obliged to have regard to the information pertaining to the whole investigation period, it does not follow that the dumping margins specified in any dumping notice has to reflect an average dumping margin over the whole investigation period. The Customs Act does not mandate such a result. The margin included by the Minister in a notice can reflect a dumping margin that is based upon what the Minister considers —would be the normal value of the goods to which the declaration relates [emphasis added by Mr. Lloyd].<sup>24</sup>*

Customs and Border Protection notes that, within this opinion, Mr Lloyd appears to support the finding that a dumping margin for Tai Ao must be worked out using all data from the entire investigation period, but that the Minister is not constrained by this when establishing the dumping margins for any prospective dumping duty notice. However, having particular regard to the findings of the EC-Brazil dispute, Customs and Border Protection considers there is still some question as to whether this approach would be contrary to the Anti-Dumping Agreement.

Regardless, within this resumed investigation (limited to Tai Ao), Customs and Border Protection notes that the Minister's scope to implement measures in this manner is immaterial, as, when Tai Ao's dumping margin for the entire investigation period is calculated (by comparing the company's weighted average normal value and weighted average export price for the entire investigation period under s.269TACB(2)(a)), a de minimus dumping margin of below -0.10% is calculated (as affirmed within this termination report).

Customs and Border Protection notes that, where an investigation finds that an exporter has not sold goods to Australia during the investigation period that were dumped above the de minimus level (and hence the investigation is terminated), the Australian industry is able to lodge a new application against this exporter for publication of a Dumping Duty Notice, if it is considered that circumstances have changed and exports from this exporter have since been dumped.

## **4.4 Tai Ao's cost data**

### **4.4.1 Background and submissions**

Within its application to the TMRO for review of the original decision to terminate the investigation into Tai Ao, Capral submitted to the TMRO its contention that all of Tai Ao's cost to make and sell aluminium extrusions (not only primary aluminium) are unsuitable for use in determining Tai Ao's cost to make and sell (and hence constructing normal values for Tai Ao under s.269TAC(2)(c)).

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<sup>24</sup> *Opinion of Stephen Lloyd SC of 19April 2011*, Investigation 148A Public Record, File 2010/040180-03, Folios 23-53, at Paragraph 9.

In his report following his review of the termination decision,<sup>25</sup> the TMRO considered that several of Capral's claims related to this matter warranted further consideration, and returned them to Customs and Border Protection for reconsideration during the resumed investigation.

Customs and Border Protection evaluated these matters in detail within the resumed investigation, and found within SEF148A that:

*...there is nothing that has been either presented to Customs and Border Protection, or discovered during Investigation 148 or the resumed investigation, that would lead Customs and Border Protection to conclude that Tai Ao's recorded and verified other costs to produce and sell (i.e. besides domestic primary aluminium and the flow-on to scrap aluminium)<sup>26</sup> aluminium extrusions are not suitable for use in calculating Tai Ao's normal values. It is therefore reasonable to use Tai Ao's unaltered cost data in calculating Tai Ao's costs for the purposes of constructing normal values under s.269TAC(2)(c) of the Act.<sup>27</sup>*

Following SEF148A, Capral has again submitted its opinion that the reasonableness of Tai Ao's other costs (i.e. in addition to primary aluminium, which has been addressed separately) should be doubted.

In particular, Capral has highlighted changes in Tai Ao's rate of its cost of sales as a percentage of revenue over time, which Capral has observed within a report provided by Capral during the resumed investigation ('Sinosure Credit Report' submitted as a confidential attachment to Capral's *Submission on KPMG Report*<sup>28</sup>), a matter raised by Capral in submissions prior to SEF148A as well. In doing so, Capral requests Customs and Border Protection publish a response as to its investigation of this identified anomaly.

Further, Capral has submitted a summary of the dumping and countervailing findings of the USA and Canada applicable to Tai Ao in their recent investigations into certain aluminium extrusions from China, and contrasted these with Customs and Border Protection's SEF148A findings in relation to Tai Ao.

Capral has requested the Customs and Border Protection publish an explanation as to why the outcomes of the Canadian and United States investigations do not cause it to call into question the reasonableness of Tai Ao's cost data.

#### **4.4.2 Customs and Border Protection's assessment**

Customs and Border Protection considers that it has examined the reasonableness of Tai Ao's costs in great detail within SEF148A, particularly within Chapter 5 of that SEF. The reasonableness of Tai Ao's (and other exporters') cost data was also

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<sup>25</sup> Trade Measures Review Officer, *Certain Aluminium Extrusions exported from The People's Republic of China - Tai Ao Aluminium (Taishan) Co Ltd*, 24 August 2010.

<sup>26</sup> As domestic primary aluminium was found to be not reflective of competitive market costs – see Chapter 4, SEF148A.

<sup>27</sup> SEF148A at Section 5.9.

<sup>28</sup> Investigation 148 Public Record, File 2010/040180-02, Folios 31-43.

considered by Customs and Border Protection in detail during the original investigation (Investigation 148).

As outlined above, these assessments resulted in Customs and Border Protection determining that Tai Ao's cost to make and sell data, besides the cost of domestic primary aluminium, are reasonable and reliable. This data was thus used to calculate Tai Ao's cost to make and sell for the purposes of SEF148A.

For the purposes of this report and final determination, Customs and Border Protection again affirms its position that no information has been presented or encountered that causes it to doubt the reasonableness of Tai Ao's other costs data.

This includes the supplied Sinosure report, and the information contained therein (noting that Customs and Border Protection considers there are numerous potential explanations for the changes in the cost of sales/revenue reported within this report, and that Tai Ao's costs data used in calculating Tai Ao's cost to make and sell aluminium extrusions was thoroughly verified by Customs and Border Protection and reconciled to audited accounts, which Customs and Border Protection has explained within SEF148A holds a high probative value).<sup>29</sup>

In terms of comparisons between Customs and Border Protection's findings and those of the USA and Canada, Customs and Border Protection notes that there is little value in making such comparisons for various reasons, including:

- significant differences in the legislative frameworks between the USA, Canadian and Australian anti-dumping and countervailing administrations;
- the differing investigation periods between each investigation (and market conditions within these periods); and
- Tai Ao's classification as a non-cooperating exporter or 'all other' exporter for both the USA and Canadian investigations (i.e. Tai Ao was not individually investigated by either the USA or Canada and attributed dumping and countervailing margins based on less favourable information).

Customs and Border Protection therefore does not consider it reasonable to question its findings in relation to Tai Ao based on a comparison with the findings of these other administrations.

Consequently, for the purposes of this investigation and in calculating Tai Ao's final cost to make and sell aluminium extrusions in constructing normal values for Tai Ao under s.269TAC(2)(c), Customs and Border Protection has summed:

- the revised monthly cost of production for the exported goods (adjusting Tai Ao's domestic primary aluminium costs and adding these to Tai Ao's actual verified costs to manufacture the goods);
- the actual selling, general and administration costs incurred on domestic sales of like goods, and

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<sup>29</sup> See SEF148A at Section 5.2.

- a reasonable amount for profit by reference to the profit achieved on domestic sales of like goods after comparing domestic ordinary course of trade selling prices to the revised cost to make and sell during the investigation period.

It is noted that the TMRO recently considered this matter within his review of the decision to publish a dumping duty notice and a countervailing duty notice in respect of all exporters excluding Tai Ao, and considered it to be a matter that required reinvestigation by Customs and Border Protection in relation to the other exporters (similar to the TMRO's referral of these issues for reconsideration in the resumed investigation insofar as they related to Tai Ao).

Customs and Border Protection considers this matter is adequately considered in relation to Tai Ao within this termination report, and SEF148A.

## **4.5 Subsidy investigation and verification**

### **4.5.1 Background and submissions**

Within SEF148A, Customs and Border Protection outlined the verification process undertaken for each of the two subsidy programs found to have been received by Tai Ao during the investigation period (*Program 13 - Exemption on Tariff and Import VAT for imported technologies and equipment* and *Program 15 - Primary aluminium provided by Government at less than fair market value*).

In response to SEF148A, Capral has submitted that:

- Customs and Border Protection have failed to carry out completeness verification tests for Program 13 (suggesting approaches that could have been taken to undertake these tests);
- it is possible that Customs and Border Protection has not included purchases of primary aluminium by Tai Ao from Chalco (Aluminium Corporation of China Limited) in its calculations of Program 15, as the GOC may not have classified Chalco as an SOE within its submitted list of Chinese SOEs involved in the production and/or sale of primary aluminium (Government Questionnaire Response Confidential Attachment 66);<sup>30</sup> and
- Customs and Border Protection have not outlined its verification of any other subsidy programs.

Capral further contrasts Customs and Border Protection's findings with those of the USA in its recent investigations.

In addition to Capral's submission noted above, PanAsia Enterprises Group Limited (PanAsia) has submitted in response to SEF148A, that the determination made in SEF148A and in REP148 that State-Owned Enterprises (SOEs) in China are 'public bodies' for the purposes of finding that the sale of primary aluminium by these SOEs for less than fair market value constitutes a countervailable subsidy (i.e. Program 15),

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<sup>30</sup> Capral also queries the confidential nature of this attachment. Customs and Border Protection is satisfied that the attachment, which concerns the ownership of numerous Chinese entities, should remain confidential.

is inconsistent with the requirements of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement).<sup>31</sup>

PanAsia submits that the recent WTO Appellate Body findings in the *United States – Anti-Dumping and Countervailing Duties on Certain products from China* (WT/D379) (the US-China dispute) does not support Customs and Border Protection's findings that SOEs are public bodies.

PanAsia has further submitted that, in light of additional findings within the US-China dispute, when using a benchmark that departs from an in-country (i.e. in-China) benchmark to determine the level of any subsidy, Customs and Border Protection must 'have a solid and substantial basis' for doing so.

#### **4.5.2 Customs and Border Protection's assessment**

##### Capral's submissions

Customs and Border Protection notes that it has already examined the value in comparing the findings of other administrations with its findings at Section 4.5 of this report.

Customs and Border Protection notes Capral's concerns regarding the completeness checks undertaken for Tai Ao's receipt of Program 13. Customs and Border Protection did undertake completeness checks throughout Investigation 148 by:

- querying with the GOC which exporters received benefits under this program<sup>32</sup> as outlined in the GOC visit report<sup>33</sup> at Section 6.1; and
- general observation of Tai Ao's equipment and accounts throughout the verification visit.

Customs and Border Protection is thereby satisfied that its calculations of Program 13 do cover all imported equipment exempted from VAT by Tai Ao that conferred benefits to Tai Ao during the investigation period.

Regarding Program 15, Customs and Border Protection is satisfied that Chalco was properly classified by the GOC within its listing of SOEs, and that Tai Ao's calculations of Program 15 encompass all purchases of primary aluminium produced by enterprises that should be classified as SOEs.

In terms of outlining the verification of other subsidy programs, Customs and Border Protection notes that no 'verification' of these programs occurred with Tai Ao as no evidence was presented or encountered during its investigation of Tai Ao that indicated that Tai Ao received benefits under any subsidy programs other than Program 13 and Program 15.

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<sup>31</sup> Minter Ellison (on behalf of PanAsia) *Response to Statement of Essential Facts 148A Concerning Certain Aluminium Extrusions Exported to Australia from the PRC*. Investigation 148A Public Record, File 2010/040180-02, Folios 209 to 212.

<sup>32</sup> Noting that the GOC was unable to provide sufficient records of benefits conferred under this program.

<sup>33</sup> *Government of the People's Republic of China Visit Report*, Investigation 148 Public Record, File 2009/039048-06, Folios 14-116.

This is noted within SEF148A at Section 6.7.2, which states:

*...throughout its verification, the Verification Team examined Tai Ao's accounting records in detail, and assessed these records for any further evidence of additional subsidy programs that may have been received by Tai Ao.*

#### PanAsia's submissions

Customs and Border Protection observes PanAsia's submissions, as well as the comments by the Appellate Body within the US-China dispute.

Customs and Border Protection considers that its classification of Chinese SOEs as 'public bodies' may indeed warrant further consideration in light of these findings, which may in turn lead to a determination that Program 15 was not a countervailable subsidy program.

It is noted that the TMRO recently considered this matter within his review of the decision to publish a dumping duty notice and a countervailing duty notice in respect of all exporters excluding Tai Ao, and referred it back to Customs and Border Protection as a matter that warranted reinvestigation.

Despite this, as Customs and Border Protection has not recommended that any countervailing measures be imposed on Tai Ao's exports (including measures to countervail Program 15) in this case, it is considered that no such re-assessment of the countervailability of Program 15 is required within this resumed investigation.

Customs and Border Protection notes that, as it has calculated that Tai Ao's subsidy rate under Program 15 during the investigation period was 0.56%, if it were to find that Program 15 was not a countervailable subsidy program, Tai Ao's subsidy margin for the investigation period would be calculated as between **0.82% and 1.17%**.<sup>34</sup>

If it were to conclude that Program 15 was a countervailable subsidy program, Tai Ao's subsidy margin would be calculated as between **1.38% and 1.73%**.

In any case, Tai Ao's subsidy margin is calculated as **below 1.73%** and does not exceed the negligible level for China of 2%.

In terms of departing from an in-country price when ascertaining a benchmark to compare Tai Ao's purchases of domestic primary aluminium purchases to (in ascertaining the level of subsidy received under Program 15), it is considered that Customs and Border Protection has provided sufficient justification for this departure within its analysis of the Chinese domestic primary aluminium market in China. Specifically, it was noted within SEF148A that:

*...Customs and Border Protection considers these purchases (by the China State Reserve Bureau or CSRB) to be merely one of a combination of GOC interventions that affected the domestic primary aluminium market in China,*

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<sup>34</sup> See above, note 15.

*which operated throughout the duration of the investigation period, making Tai Ao's cost of domestic primary aluminium in the company's records not reasonably reflective of competitive market costs for the entire investigation period (and not only after the CSRB purchases), at one stage being artificially suppressed by GOC interventions, and at others artificially inflated by GOC interventions.*

*...it is not the relationship between the domestic price of primary aluminium and LME primary aluminium prices that is relevant to the determination to use the LME price, but rather the determination that the LME price reflects a competitive market cost throughout the entire investigation period, and that domestic prices in China throughout the entire period do not reasonably represent competitive market prices, irrespective of whether they are higher or lower than the corresponding LME price.<sup>35</sup>*

In other words, Customs and Border Protection has determined that the entire domestic Chinese market for aluminium extrusions throughout the entire investigation period was not reasonably reflective of a competitive market, due in part to GOC interventions, and hence data from that market was at no stage suitable for use in establishing a competitive market price for primary aluminium.

It is noted that the TMRO recently considered this matter within his review of the decision to publish a dumping duty notice and a countervailing duty notice in respect of all exporters excluding Tai Ao, and did not consider it to be a matter that required reinvestigation by Customs and Border Protection.

## **4.6 Inclusion of metal premiums and import taxes**

### **4.6.1 Background and submissions**

#### Metal premiums

During Investigation 148 and the resumed investigation into Tai Ao, Capral submitted that, when calculating an LME-based proxy price to adjust Tai Ao's actual costs of domestic primary aluminium, an additional premium (identified by Capral under several different titles including 'ingot premium', 'casting premium', 'metal premium' and 'international premium'), which does not apply to domestic primary aluminium purchased in China, must be added to the LME-based price for primary aluminium.

In SEF148A, it was accepted that the price of primary aluminium in China is for the primary aluminium in ingot form, and that:

*... if such a premium exists to cast the LME to ingot form for use in manufacturing aluminium extrusions, it would be reasonable to attach this premium to the LME price substituted in the records of exporters when calculating normal values.<sup>36</sup>*

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<sup>35</sup> SEF148A at Section 4.4.2.

<sup>36</sup> SEF148A at Section 4.5.3.

However, within SEF148A it was determined:

*...the LME price for primary aluminium is for aluminium in ingot (and other cast) form, as are the domestic purchase prices of primary aluminium made by Tai Ao during the investigation period - an additional metal premium is not required to be added to the LME price in substituting Tai Ao's costs.<sup>37</sup>*

Consequently, in calculating the LME-based proxy for the purposes of applying it to Tai Ao's domestic purchase prices for SEF148A (which did not change from the original approach of Investigation 148) Customs and Border Protection stated the following:

*...as outlined in Section 6.5.1 of REP148, additional expenses incurred in purchasing domestic primary aluminium have been added to the LME price in substituting it for domestic prices, to ensure similar delivery and payment terms to the exporter's actual purchase costs of primary aluminium in the domestic market during the investigation period (to construct what Customs and Border Protection considers to be a competitive market cost in China). These additional expenses are trader premiums (including the trader's margin), delivery charges and interest charges (where applicable). It is considered that these additions to the LME price made during Investigation 148 were reasonable and appropriate (and reasonably reflected competitive market costs – see Chapter 5 of this SEF), and these have again been included in the resumed investigation's calculations.*

In its response to SEF148A, Capral has again submitted that an additional premium needs to be applied to the LME-based price that Customs and Border Protection has used as a surrogate, to account for a premium that is charged on top of the LME to purchase the metal in a physical form. To support its contentions as to the existence of this premium, Capral has submitted an extensive report by Europe Economics that examines the LME market in detail.<sup>38</sup>

#### Import taxes

In addition to adding a metal premium on to the LME-based proxy price used by Customs and Border Protection, Capral has submitted that it is also necessary to include import duty in the calculation of the proxy price applied to exporters' actual costs of domestic primary aluminium.

This notion was considered in SEF148A, and it was determined that:

*The aim in substituting the LME price as the basis for domestic primary aluminium purchases (and then including domestic charges such as delivery and trader premiums) was to arrive at a reasonable market price for domestic primary aluminium in China during the investigation period, rather than a price at which imported primary aluminium would have been sold at during*

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<sup>37</sup> SEF148A at Section 4.5.5.

<sup>38</sup> Europe Economics, *A Review of the possible consequences of a change in contract terms from "in warehouse" to "FOT basis", with respect to all metals traded on the London Metal Exchange*, 20 February 2007. Located on Investigation 148A Public Record, File 2010/040180-03, Folios 54-164.

*the period (which would then likely need to include import taxes) or some other competitive market proxy (i.e. primary aluminium sold in another competitive market).*

*In doing so, it is reasonable to consider that a competitive market price for domestic primary aluminium in China should have been at least at the LME level throughout the investigation period, which Customs and Border Protection has determined was an objective, globally-recognised competitive market price for primary aluminium (see Section 4.3).*

*Using the LME price, plus actual costs incurred on domestic primary aluminium (having determined that these costs themselves are reasonable – see REP148 at Section 6.5.3), meets Customs and Border Protection’s aim of arriving at a reasonably competitive substitute price for Chinese domestic primary aluminium during the investigation period.<sup>39</sup>*

Consequently, Customs and Border Protection did not consider it appropriate to include import duties in its calculation of its LME-based proxy.

In response to SEF148A, Capral has submitted<sup>40</sup> that it does not agree with Customs and Border Protection’s assessment as to the applicability of import premiums, and re-submitted a chart showing global average cash costs of primary aluminium (sourced from HARBOR Intelligence and previously submitted by Capral on more than one occasion<sup>41</sup>), which reports that Chinese primary aluminium producers have the highest production costs of aluminium smelters throughout the world.

#### HARBOR Intelligence chart

In its response to SEF148A, and when originally submitting this information during Investigation 148, Capral has highlighted that this chart displays that the average cash cost to produce primary aluminium by Chalco and other Chinese primary aluminium producers (non-Chalco) from the third quarter of 2008 to the second quarter of 2009, was considerably above the global average cost costs for that period, and roughly equal to the average LME sell price of primary aluminium.

*Note: during Investigation 148, Capral originally submitted this evidence in support of its contention that a metal premium should be included in the LME-based proxy used. Within its submission in response to SEF148A, Capral has submitted this information in support of its contention that import taxes should be included in the proxy price.*

*Consequently, Customs and Border Protection has considered the information in relation to each matter (noting that it considers they are conceptually related – see below) in making its final determinations within this report.*

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<sup>39</sup> SEF148A at Section 4.5.4.

<sup>40</sup> Capral Limited, *Case 148A, Capral Submission on Statement of Essential Facts No 148A* at Paragraphs 53.

<sup>41</sup> Including within its *Capral Supplementary Submission on Metal Premiums – Post SEF* (Investigation 148 Public Record, File 2009/039051-02, Folios 1-11) and its *Submission on Customs Review of Preliminary Dumping and Subsidy Margins for Exporters Selected for Further Investigation - Supplementary paper - Metal Premiums* (Investigation 148 Public Record File 2009/039048-05, Folios 101 to 112).

On the basis of this evidence, Capral has submitted that, even if Chinese primary aluminium producers were to sell their primary aluminium at the LME, they would still be unable to recover their cash costs and hence ‘would still not be acting in a commercial manner – as the LME was not adequate remuneration’.<sup>42</sup>

Consequently, Capral has submitted that the LME alone is not a competitive market substitute for primary aluminium in China, and the ‘only available market proxies’ are:

- aluminium from an overseas smelter; or
- aluminium from an overseas LME warehouse.

Capral has submitted that both of these substitutes would attract import duties, and hence these should be applied to Customs and Border Protection’s LME-based substitute price.

Capral has also submitted that Customs and Border Protection could instead use the actual Chinese smelter costs of production for the purchase price of domestic primary aluminium as a substitute for Tai Ao’s actual costs.<sup>43</sup>

In support of its claim that import duties should be added to the proxy price, Capral further submitted excerpts from the United States Department of Commerce’s Preliminary Countervailing Determination in its investigation into certain aluminium extrusions from China, outlining the USA’s approach in calculating a benchmark price for primary aluminium in determining whether the price paid for primary aluminium in China by aluminium extruders was for less than adequate remuneration, and the difference between the two.

Furthermore, Customs and Border Protection considers that the premium that Capral has requested be applied to account for physical differences is in fact one related to the cost to import primary aluminium, as opposed to a cost to account for physical differences (see Section 4.6.2 below). Accordingly, it is considered that, if Customs and Border Protection were to adopt the approach of calculating its LME-based proxy with references to an import price, this premium would also likely need to be added (along with other charges).

Consequently, these matters haven been considered collectively within this report below.

#### **4.6.2 Customs and Border Protection’s assessment**

The limited value of comparing the approach taken by the USA to Australia’s approach in undertaking dumping and countervailing investigations has previously been discussed in this report at Section 4.4.2, and has not been readdressed in relation to this matter.

#### **Consideration of HARBOR Intelligence information**

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<sup>42</sup> Capral Limited, *Case 148A, Capral Submission on Statement of Essential Facts No 148A* at Paragraph 59.

<sup>43</sup> Capral Limited, *Case 148A, Capral Submission on Statement of Essential Facts No 148A* at Paragraphs 59-61.

In reviewing Capral's claims supported by the HARBOR Intelligence data, Customs and Border Protection considers that, if it is accepted that:

- Chinese aluminium smelters' costs were significantly higher than other global producers during the investigation period; and
- if these Chinese smelters were to sell at a cost price (as a bare minimum), this would still result in their selling prices being significantly higher than the price of imports (based on the LME price plus inclusions contended by Capral to apply – namely import tax and premiums)

it is reasonable to determine that Chinese aluminium extruders would not have purchased domestic primary aluminium (or purchased it in significantly smaller quantities) but instead purchased imported primary aluminium.<sup>44</sup> This is evidenced by the fact that, during the investigation period, exporters (including Tai Ao) began purchasing imported primary aluminium when the LME price dropped below the SHFE price in the second half of the investigation period.

Customs and Border Protection considers that this behaviour of switching to imports when it is more economically viable to do so shows that it is at no time appropriate to introduce a proxy price that accounts for the differences between what exporters paid for domestic primary aluminium, and the costs as reported by HARBOR Intelligence.

However, Customs and Border Protection considers that, if Capral's contention is accepted, it may be reasonable to determine the competitive market proxy price used by Customs and Border Protection to adjust exporters' primary aluminium costs should be determined having regard to the price that it would cost Chinese aluminium extruders to purchase imported primary aluminium during the investigation period.

Having observed this, Customs and Border Protection considers that the evidence submitted by Capral in the form of the HARBOR Intelligence chart does not lead it to conclusively determine that Chinese aluminium smelters' costs are significantly higher than the LME price, and that subsequently a proxy price should be used that reflects the price it would cost exporters to purchase imported aluminium at the LME.

It is noted that this information submitted by Capral is based on 'best estimates' by HARBOR Intelligence, and does not include information as to what data the provided chart is based upon, which would allow a more accurate assessment by Customs and Border Protection of its veracity. Consequently, Customs and Border Protection considers that further investigation (and possible verification) would be required in order to reliably determine the accuracy of the information contained within the submitted chart, in order to place further reliance on Capral's submissions on this point.

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<sup>44</sup> However, Customs and Border Protection does consider it is possible that there is likely some intrinsic value applied by aluminium processors to domestic primary aluminium to account for the relative ease and speed of supply attributable to purchasing raw materials domestically rather than imports, which would mean that domestic extruders could reasonably be considered to achieve a price higher than the price of imported primary aluminium to a certain extent.

Furthermore, Customs and Border Protection has not encountered other evidence within its investigation that adds sufficient weight to the HARBOR Intelligence chart, such that it could conclusively rely on the assertions made by Capral.

When the above is considered alongside the fact that HARBOR Intelligence information was submitted by Capral considerably late within Investigation 148<sup>45</sup> (limiting Customs and Border Protection's ability to undertake further investigation relating to this evidence), Customs and Border Protection considers it prudent that limited weight be placed on the submitted information, and its approach to calculating the LME-based proxy (outlined in SEF148A at Section 6.4.2) remain unaltered.

Consequently, Customs and Border Protection again determines that its approach in calculating the LME-based competitive market proxy to apply to Tai Ao's actual costs of domestic primary aluminium remains to calculate a cost includes:

- the applicable LME price of primary aluminium;
- domestic trader premiums; and
- domestic delivery charges.

Despite this finding, the merits and applicability of including import taxes and metal premiums within Tai Ao's LME-based competitive market proxy is outlined in the below discussion.

#### Import taxes

Customs and Border Protection considers that, in light of the above discussion, import taxes should not be included in the competitive market proxy calculations.

Regardless, in terms of the application of import taxes, Customs and Border Protection considers that, if it were to take the approach of calculating an LME-based market proxy for Tai Ao that included such taxes, this would not alter the outcome of this resumed investigation as, import taxes should not be included in the proxy used in Tai Ao's case (and possibly in the case of all exporters, depending on their circumstances).

Customs and Border Protection notes that the reason for this finding is based on confidential information provided by Tai Ao, discussed within **Confidential Attachment 1** of this report.

It is noted that the TMRO recently considered this matter within his review of the decision to publish a dumping duty notice and a countervailing duty notice in respect of all exporters excluding Tai Ao, and did not consider it to be a matter that required reinvestigation by Customs and Border Protection.

#### Metal premiums

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<sup>45</sup> Originally in February 2010, while SEF148 was published on 1 March 2010

Within SEF148A, Customs and Border Protection considered Capral's claims that a premium needs to be applied to the LME-based proxy price to account for the fact that the price of primary aluminium purchased in China is for the metal in a cast form (i.e. in ingot form), while metal purchased based on the LME price is un-cast, and that a premium needs to be added to the LME price to account for its casting into aluminium ingot.

As outlined above, SEF148A concluded at Section 4.5.5 that no such premium is required, based on the evidence available at the time of writing SEF148A (including information gathered from the official LME website that indicates that the LME price for primary aluminium is for aluminium in ingot and other cast form). SEF148A also concluded that if such a premium existed, it would be reasonable to attach it to the LME price to ensure a comparison between the LME and domestic Chinese aluminium prices in the same physical state.

In response to SEF148A, Capral has again submitted that a premium does exist on top of the LME price, which it has identified as a 'physical premium' to purchase primary aluminium in a 'physical market', noting that the LME market is not a physical market. However, in making this submission, Capral has indicated that these premiums are likely not referred to as 'casting' premiums, as previously submitted.

Capral has further submitted that it has provided evidence in relation to examples of these premiums, particularly relating to the Major Japanese Port premium (MJP premium), which it submits is the physical market premium used widely in Asia and Australia.<sup>46</sup> On other occasions, Capral has submitted that the applicable premium is in fact a 'C&F China LME premium'<sup>47</sup> and not the MJP premium, and thus Customs and Border Protection considers there is some inconsistency between Capral's submissions on this point.

In support of its post-SEF148A submission on this matter, Capral has provided a report by Europe Economics, containing discussion of the LME and the premiums applicable to purchase primary aluminium at the LME price.

Customs and Border Protection notes that this report has not been supplied by Capral prior to its response to SEF148A, and that the length (in excess of 100 pages long) and timing of this report<sup>48</sup> has not enabled it to undertake detailed analysis of the information contained therein prior to making the final determinations within this report. Customs and Border Protection also notes the confusion in terminology, descriptions and quantifications of the claimed premiums, and methodologies of applying any such premium to an LME-based proxy within Capral's various submissions on this matter during Investigation 148 and the resumed investigation.

However, Customs and Border Protection considers that the recently-submitted Europe Economics report does indicate the existence of certain premiums placed on

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<sup>46</sup> Capral Limited, *Case 148A, Capral Submission on Statement of Essential Facts No 148A* at Paragraph 41.

<sup>47</sup> Capral Limited, *Submission on Customs Review of Preliminary Dumping and Subsidy Margins for Exporters Selected for Further Investigation - Supplementary paper - Metal Premiums* Investigation 148 Public Record File 2009/039048-05, Folios 101 to 112

<sup>48</sup> 27 April 2011, with the final decision for the Tai Ao resumed investigation due on or by 19 May 2011.

the LME price of primary aluminium when purchasing the primary aluminium in the physical market.<sup>49</sup>

In light of the information within this report, as well as various other information submitted by Capral and gathered throughout its investigations, Customs and Border Protection concludes there is evidence to suggest that premiums such as the MJP premium and the C&F China LME premium do exist in the global primary aluminium market.

However, as Customs and Border Protection does not consider that there is sufficient verified evidence to determine that, if the Chinese domestic primary aluminium market was competitive, that Tai Ao would have paid a premium higher than the premium already included in the LME-based primary aluminium proxy used (which reflects actual premiums found by Customs and Border Protection to have been paid by exporters in China during the investigation period), or, if so, what the quantum of that premium would be.

It is noted that the TMRO recently considered this matter within his review of the decision to publish a dumping duty notice and a countervailing duty notice in respect of all exporters excluding Tai Ao, as well as within his review of the delegate of the CEO's decision to terminate investigations into Tai Ao, and did not consider it to be a matter that required further consideration by Customs and Border Protection.

## **4.7 Process of applying aluminium price proxy to Tai Ao's cost data**

### **4.7.1 Background and submissions**

In SEF148A, Customs and Border Protection noted that, in adjusting Tai Ao's primary aluminium costs, it has:

- applied the LME-based monthly competitive market proxy percentage to the total value of all of Tai Ao's in-house smelted billet;
- applied the LME-based monthly competitive market proxy percentage to the total value of Tai Ao's domestically-purchased billet; and
- not adjusted Tai Ao's imported primary aluminium billet costs.

In response to SEF148A, Capral has submitted that:

*The application of Customs "competitive market proxy" to Tai Ao's in-house smelted billet, which includes imported ingot, effectively reduces the actual buy price of the aluminium - as the imported aluminium would have had metal premiums and import taxes attached.*

*It is also unclear, where Customs state that they have "not adjusted Tai Ao's imported primary aluminium billet costs", as to whether these primary aluminium billet costs correctly accounted for import taxes.<sup>50</sup>*

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<sup>49</sup> Europe Economics, *A Review of the possible consequences of a change in contract terms from "in warehouse" to "FOT basis", with respect to all metals traded on the London Metal Exchange*, 20 February 2007. Located on Investigation 148A Public Record, File 2010/040180-03, Folios 54-164.

#### **4.7.2 Customs and Border Protection's assessment**

Customs and Border Protection notes Capral's concerns relating to the adjustment of the purchase price of Tai Ao's imported primary aluminium ingot within Tai Ao's adjusted aluminium billet.

The accuracy and reasonableness of the method of applying the LME-based competitive market proxy to Tai Ao's actual aluminium costs was considered and discussed in great detail in SEF148A (see Section 4.6.2). However, it was determined that it was not possible to accurately isolate Tai Ao's imported ingot within its consumed aluminium billet, and hence all consumed billet (excluding billet that was itself imported) was adjusted in line with the proxy.

Having regard to the:

- proportion of Tai Ao's purchases of imported aluminium ingot;
- timing of these purchases; and
- value of the adjustment in line with the competitive market proxy price;

Customs and Border Protection is confident that its method of applying the proxy (and hence adjusting the price of imported ingot) is reasonable, and does not serve to lower Tai Ao's normal value.

#### **4.8 Related company issues**

##### **4.8.1 Background and submissions**

During the resumed and original investigations, Capral submitted that Customs and Border Protection should investigate all entities legally related to an exporter, to assess whether any inter-company dealings have any impact on that exporter's dumping and/or countervailing margins.

Within SEF148A, Customs and Border Protection found that sufficient evidence was not provided or encountered during the investigation to cause it to extend investigations into entities legally related to Tai Ao (other than Tai Ao itself and Tai Ao Aluminium (Australia) Pty Ltd, the Australian importer of the goods).

Following SEF148A, Capral has again submitted that it considers that it provided sufficient evidence to Customs and Border Protection that 'should have prompted Customs to investigate this matter more deeply'.<sup>51</sup>

Capral further questions the redaction of the Public Record version of a report commissioned by Customs and Border Protection from the accounting firm KPMG,<sup>52</sup> which considered this matter in a broad context, and also notes a potential conflict of interest on the part of KPMG in this case.

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<sup>50</sup> Capral Limited, *Case 148A, Capral Submission on Statement of Essential Facts No 148A* at Paragraphs 18-22.

<sup>51</sup> Capral Limited, *Case 148A, Capral Submission on Statement of Essential Facts No 148A* at Paragraph 85.

<sup>52</sup> Investigation 148A Public Record, File 2010/040180-01, Folios 58-69.

#### **4.8.2 Customs and Border Protection's assessment**

Customs and Border Protection notes that Capral has provided no new evidence following SEF148A that would cause it to further investigate the role of entities legally related to Tai Ao and any impact this may have on that company's dumping or subsidy margins. These investigations have thus not been pursued.

Customs and Border Protection notes Capral's concern over the redaction of text within the KPMG report, but considers that careful consideration was paid when determining what text should be redacted from the Public Record version of this report, and that the report still contains sufficient detail to enable interested parties to understand the main points of the report.<sup>53</sup>

In terms of the potential conflict of interest of KPMG, Customs and Border Protection considers that, as:

- KPMG's involvement in Investigation 148 on behalf of PanAsia was relatively minor; and
- the significant differences between the subjects of advices provided by KPMG to PanAsia (and submitted by PanAsia to Investigation 148) and to Customs and Border Protection<sup>54</sup>

any concern as to this potential conflict of interest is minor.

In any case, Customs and Border Protection also notes that it has placed limited reliance on this KPMG report in coming to its conclusions within this investigation.<sup>55</sup>

### **4.9 Verification of differences - domestically sold and exported models**

#### **4.9.1 Background and submissions**

During Investigation 148, Customs and Border Protection determined that normal values for Tai Ao should be constructed under s.269TAC(2)(c), as significant differences between Tai Ao's domestically-sold and exported aluminium extrusions meant that there were insufficient sales of like goods in China that would be relevant for determining Tai Ao's normal values under s.269TAC(1).<sup>56</sup>

The verification of these differences was questioned by Capral in its application to the TMRO, and this was referred back to Customs and Border Protection by the TMRO for reconsideration during Investigation 148A.

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<sup>53</sup> Noting also that Customs and Border Protection is not restricted by the provisions of s.269ZJ of the Act (the section that requires the CEO to maintain a public record and mandates the contents of this public record) as to the redaction of information it places on this record.

<sup>54</sup> The KPMG advice to PanAsia examining Customs and Border Protection's Preliminary Affirmative Determination findings, PanAsia's exporter visit report, GOC policies and subsidy findings, and the report for Customs and Border Protection examining broader issues relating to the impact of related party transactions, differences between financial and tax accounting, and Customs and Border Protection's treatment of Tai Ao's metal accounting area.

<sup>55</sup> Customs and Border Protection has considered and discussed this report throughout SEF148 as supporting its own analysis on certain matters, rather than the main reason for its conclusions on certain points.

<sup>56</sup> Having determined that it was not possible to ensure a fair comparison between the goods and like goods through the process of making adjustments to the selling price of like goods to account for these differences.

Within SEF148A, Customs and Border Protection preliminarily concluded that it was satisfied that:

*...differences between domestic and exported aluminium extrusions (of Tai Ao) were extensive enough to affect domestic selling prices to such an extent that it would not be possible for Customs and Border Protection to make adjustments to these prices paid under s.269TAC(8) and still ensure a fair comparison between these sales and export prices, and that it is thus reasonable to find that domestic sales of aluminium extrusions by Tai Ao are unsuitable for calculating normal values under s.269TAC(1).<sup>57</sup>*

Customs and Border Protection also concluded:

*Customs and Border Protection is satisfied that the verification of Tai Ao's claims that domestically-sold aluminium extrusions differ significantly from aluminium extrusions exported to Australia was sufficient and appropriate.<sup>58</sup>*

Following SEF148A, Capral has again submitted its objections to Customs and Border Protection's verification of these differences, noting that the verification 'does not pass any reasonable audit standard or reasonable person test'.<sup>59</sup>

Capral further submits that:

*Even if Customs was justified in accepting Tai Ao's assertions, there is no rationale given as to why these differences were so great that it was simply not fair to compare these goods even after adjustments were made.<sup>60</sup>*

Capral has included excerpts of the Federal Court's findings in the case of *Al Abdullatif Industrial Group Co Ltd v Minister for Justice & Customs* [2000] FCA 758 (*Al Abdullatif*) in support of its contentions on this matter, as well as highlighting aspects of Customs and Border Protection's position taken within the recent case of *Thai Pineapple Canning Industry Corp Ltd v Minister for Justice and Customs* (2008) FCA 443 (*pineapples case*).

#### **4.9.2 Customs and Border Protection's assessment**

Customs and Border Protection notes Capral's comments, the verification it undertook of the differences between Tai Ao's domestically-sold and exported aluminium extrusions (outlined in SEF148A at Section 6.3.2), and the findings and discussion in the court cases referred to by Capral.

In particular, Customs and Border Protection notes the extract from *Al Abdullatif* provided by Capral within its submission, and the emphasis placed on certain aspects of the discussion, but considers that the judgement in fact supports its conclusions as to the unsuitability of Tai Ao's domestic sales in this case.

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<sup>57</sup> SEF148A at Section 6.3.3.

<sup>58</sup> SEF148A at Section 6.3.3.

<sup>59</sup> Capral Limited, *Case 148A, Capral Submission on Statement of Essential Facts No 148A* at Paragraph 90.

<sup>60</sup> Capral Limited, *Case 148A, Capral Submission on Statement of Essential Facts No 148A* at Paragraph 99.

Specifically, Capral has reproduced and emphasised (underlined) the following excerpts from Al Abullatif:

The second respondent said its approach was to make adjustments only when there was a real difference between products, supported by some evidence to establish a basis on which the difference could be quantified. It gave as an example the kind of material required namely, exporters' accounts or other relevant and reliable records. In particular, they wanted evidence that the differences had impacted on the exporters' prices or costs. In GTE (Aust) Pty Ltd v Brown (1986) 14 FCR 309 Burchett J considered that the nature of the adjustment to be made under this section flows from its purpose: that is to prevent differences affecting its comparison with export price. Adjustment is to allow proper comparison so that it can be ascertained whether dumping has occurred or is occurring and without factual material that proper comparison can not be made.

ACS argues that the correct approach in circumstances such as these is not to recommend an adjustment in respect of differences in pick unless satisfied, on the basis of some probative material, provided to it at the appropriate time, that the differences claimed had had an impact not only on the cost of producing the product but also on the prices charged for the product.<sup>61</sup>

Customs and Border Protection notes that the above case refers to a situation where it declined to make an adjustment to an exporter's normal values for differences in characteristics between exported and domestically-sold goods, where the information for the adjustment was not provided at the time of the verification visit, and the data for making the adjustment was not provided until much later in the investigation.

Once provided, the reliability and sufficiency of this data itself was questioned by Customs (as it was then known), but disregarded in any event as it was considered to have been provided too late in the investigation, and Customs thus exercised its discretion under s.269TEA(4)).

In Tai Ao's case, the decision that Capral has questioned was not regarding whether a particular adjustment be made or not, but that domestic sales were unsuitable for adjustment to ensure a fair comparison with export sales (and hence should not be used in dumping calculations). Additionally, this claim was made by Tai Ao prior to and during Customs and Border Protection's verification of the company, and the claims verified during the verification visit itself.

Despite these differences, Customs and Border Protection acknowledges that it considers similar principles apply in making such a determination to some extent, in that it must be shown that there is a 'real difference' between the exported and domestic products, supported by sufficient evidence.

The evidence provided by Tai Ao and the verification of this evidence is explained in detail within SEF148A at Section 6.3.2. As explained in SEF148A, Customs and

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<sup>61</sup> Al Abdullatif Industrial Group Co Ltd v Minister for Justice & Customs [2000] FCA at 19 and 20.

Border Protection is satisfied with the verification undertaken of these differences, noting the focus placed on the differences between reject and recovery rates, both of which were verified to documentary evidence.

Within SEF148A, it is noted that Tai Ao was unable to quantify the impact of these verified differences in its actual costs data, but also that it is considered that the majority of aluminium extruders would also not keep records detailed enough to provide such quantification.

Customs and Border Protection notes its position in Al Abdullatif was that, for an adjustment to be made, there should be some evidence to establish how these differences can be quantified.

However, it is not considered that this quantification, in all circumstances, is required to be a financial quantification. In certain circumstances, as was the case with Tai Ao, in making the decision to not use domestic sales Customs and Border Protection considers it sufficient that it be established, using adequate evidence, that there are significant differences between the products that, on the balance or probabilities, were likely to effect the prices or costs of the products in such a way that a proper comparison cannot be made between the two, even when adjustments to attempt to account for these differences have been made.

Customs and Border Protection considers that in the case of Tai Ao, sufficient evidence was collected and verified to lead to this conclusion, noting that it is considered that evidence in these circumstances does not necessarily have to be financial data (though it is considered this would have a high probative value), but that other 'relevant and reliable records' may also be sufficient to support these claims. It is considered that Tai Ao provided such relevant and reliable records, and that these were adequately verified by the verification team.

Customs and Border Protection thereby determines that, on the balance of probabilities and having regard to the verified evidence, there are significant differences between Tai Ao's sales of domestic like goods and the goods exported, such that these domestic sales are not suitable to determine normal values under s.269TAC(1). Customs and Border Protection has therefore constructed normal values for Tai Ao under s.269TAC(2)(c).

In noting the above, Customs and Border Protection highlights the distinction here between Tai Ao's circumstances, and cases where the decision is to apply a specific adjustment or not. In these cases, as the adjustment must be of an ascertained amount in order to account for the differences adjusted for, Customs and Border Protection considers that quantification of the adjustment would likely need to be established as a specific and set quantifiable amount (e.g. a certain percentage or amount per unit).

## **4.10 Adjustments for differences between theoretical and actual weight**

### **4.10.1 Background and submissions**

In undertaking Tai Ao's dumping calculations for SEF148A, an adjustment was made for the fact that Tai Ao's domestic sales were made based on the actual weight of the aluminium extrusions, while the goods were exported on a theoretical weight basis.

Capral has submitted,<sup>62</sup> in response to SEF148A, that:

- the verification process of this adjustment described by Customs and Border Protection is unclear;
- Customs and Border Protection observed within Tai Ao's export sales contracts that there were a 'range of tolerances on quantity' and that this differences from a range of tolerance on weight;
- it is not clear when verification of this adjustment occurred or how the actual weights were verified; and
- if it is accepted that Tai Ao's domestically-sold products are fundamentally different from exports, how is the adjustment relevant.

#### **4.10.2 Customs and Border Protection's assessment**

Customs and Border Protection considers that the verification process for this adjustment has been sufficiently detailed within SEF148A at Section 6.8.2.

Customs and Border Protection considers that there has been some confusion raised by the use of the term 'range of tolerances on quantity', which Capral has interpreted to mean units sold. Customs and Border Protection confirms that this tolerance range is on weight and not on unit quantities.

It is observed that the claim for adjustment by Tai Ao was requested by Tai Ao following the verification visit, but was made within a sufficient time for it to be considered by Customs and Border Protection during Investigation 148. Regardless, the data relied upon had already been verified by Customs and Border Protection during the verification visit with Tai Ao.

Customs and Border Protection considers this adjustment to be relevant and appropriate to account for the differences between Tai Ao's domestic and export sales.

### **4.11 Dumping calculations – establishing normal values**

#### **4.11.1 Background and submissions**

In response to SEF148A, PanAsia has submitted<sup>63</sup> that the reasoning relied upon by Customs and Border Protection in adjusting exporters' data in line with a competitive market proxy is erroneous, referring to a previous submission lodged by PanAsia during Investigation 148 which outlines its reasoning on this point.<sup>64</sup>

Within this previous submission, PanAsia contended that, in calculating costs for the purpose of constructing normal values under s.269TAC(2)(c) (and Article 2.2.1.1 of the Anti-Dumping Agreement), the cost of production that must be established is that

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<sup>62</sup> Capral Limited, *Case 148A, Capral Submission on Statement of Essential Facts No 148A* at Paragraphs 117 to 130.

<sup>63</sup> Submission lodged by Minter Ellison (on behalf of PanAsia) *Response to Statement of Essential Facts 148A Concerning Certain Aluminium Extrusions Exported to Australia from the PRC*. Investigation 148A Public Record, File 2010/040180-02, Folios 209 to 212.

<sup>64</sup> Minter Ellison (on behalf of PanAsia) *Submission of 21 March 2010*, Investigation 148 Public Record, File 2009/039051-01, Folios 119-135.

cost in the country of export.<sup>65</sup> PanAsia thus contends that Customs and Border Protection's approach of adjusting exporters' actual cost of primary aluminium to align it with a surrogate price in an external market (the LME) is not authorised.

In addition, PanAsia has contended that, in calculating production costs when constructing normal values, the cost that is required to be calculated under s.269TAC(2)(c)(i) is the cost associated with producing the exported goods and not like goods.

PanAsia submits that Regulation 180 (which Customs and Border Protection has adhered to in calculating costs for constructed normal values) relates only to like goods and hence there is no regulation applicable to the calculation of the cost of the goods for the purposes of s.269TAC(2)(c). As a result, PanAsia considers constructed normal values under s.269TAC(2)(c) must involve using the actual verified exporters' cost of exported goods (i.e. there is no provision for adjusting exporters' cost of primary aluminium when it is considered to not reasonably reflect competitive market costs).

#### **4.11.2 Customs and Border Protection's assessment**

Customs and Border Protection notes this submission by PanAsia was considered previously in formulating its conclusions within REP148, and in making the original decisions to terminate the investigation into Tai Ao (within TER148A).

The consideration of these submissions within REP148 (at Section 6.5.2) states:

*PanAsia submitted that the construction of Regulation 180(2) relied upon by Customs and Border Protection to reject PanAsia's verified costs is contrary to both subparagraph s269TAC(2)(c)(i) and Australia's obligations under Article 2.2.1.1 of the Anti-Dumping Agreement (ADA). It considers that in constructing a normal value, the Act requires the cost of production of the goods be established in the country of export.*

*PanAsia also contends that as its costs have been verified as reasonably reflecting the actual costs associated with production, and Article 2.2.1.1 of the ADA does not suggest that Authorities may have regard to surrogate costs in an external market, PanAsia's verified actual costs should be used for ordinary course of trade purposes.*

*Customs and Border Protection agrees with PanAsia's interpretation of s.269TAC(2)(c)(i) which requires the cost of production to be based on the costs of goods in the country of export. As noted in SEF 148, Customs and Border Protection found that the selected exporters made their purchasing decisions regarding primary aluminium by comparing domestic prices and equivalent import prices based on the LME. This is supported by the shift to imported primary aluminium from early 2009. Accordingly, Customs and Border Protection considers that LME prices are indicative of competitive*

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<sup>65</sup> Minter Ellison (on behalf of PanAsia) *Submission of 21 March 2010*, Investigation 148 Public Record, File 2009/039051-01, Folios 119-135 at Paragraphs 3.1 – 3.7.

*market costs in China and therefore appropriate in determining the cost of production of the goods in the country of export.*

*Customs and Border Protection rejects PanAsia's statement that Customs and Border Protection had verified its costs as reasonably reflecting the actual costs associated with production. Whilst Customs and Border Protection was satisfied that the costs presented for verification represented the actual cost of production as recorded by the company, it made no finding that the verified costs reasonably reflected competitive market costs associated with the production or manufacture of like goods.*

*PanAsia further submitted that Regulation 180 is only applicable to like goods and not to exported goods which are the goods referred to in s.269TAC(2)(c)(i). It therefore considers that the methodology set out in Regulation 180 is not appropriate for determining the costs of production of 'the goods' as required for the purposes of a constructed normal value.*

*Where the normal value of an export model has been constructed, Customs and Border Protection has determined the costs of production of the exported good using the same approach to establishing costs for the purposes of assessing ordinary course of trade. As noted in PanAsia's submission, it is Customs and Border Protection's view that this approach is supported by s.269TAC(5A) which requires that the determination of costs:*

*'must be worked out in a manner, and taking account of such factors, as the regulations provide for the respective purposes of paragraphs 269TAAD(4)(a) and (b).'*

In making its final determinations within this report, Customs and Border Protection agrees with the reasoning set out in REP148 regarding these matters raised by PanAsia.

It is noted that the TMRO considered this matter<sup>66</sup> within his review of the decision to publish a dumping duty notice and a countervailing duty notice in respect of all exporters excluding Tai Ao, and did not consider it to be a matter that required reinvestigation by Customs and Border Protection.

## **4.12 China State Reserve Bureau purchases**

### **4.12.1 Background and submissions**

Within its investigation into aluminium extrusions from China, Customs and Border Protection identified specific GOC interventions within the Chinese primary aluminium market that it determined<sup>67</sup> rendered that market to be not a competitive market during the investigation period.

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<sup>66</sup> Which the TMRO considered related to the main question 'did Customs and Border Protection properly apply regulation 180 in constructing a normal value' – see Trade Measures Review Officer, *Certain Aluminium Extrusions exported from The People's Republic of China - Tai Ao Aluminium (Taishan) Co Ltd*, 24 August 2010, at Paragraph 115.

<sup>67</sup> Within SEF148, REP148 and in terminating investigations into Tai Ao originally.

Specifically, these interventions were purchases by the China State Reserve Bureau (CSRB) of primary aluminium during the investigation period, and GOC taxation measures on the exportation of primary aluminium in the years prior to and during the investigation period.

Within SEF148A, this finding was affirmed by Customs and Border Protection, which observed:

*...Customs and Border Protection has identified direct and indirect GOC interventions in the Chinese domestic market for primary aluminium. Customs and Border Protection considers that these interventions have influenced the operation of supply and demand in the Chinese primary aluminium market during the investigation period, and therefore served to set in place parameters for competition in the domestic market for domestic primary aluminium in China. While the price setting for domestic sales of primary aluminium in China may have responded in some way to various market signals, these responses were still constrained to the parameters in place. In this market environment, Customs and Border Protection remains satisfied that the prices paid by manufacturers of aluminium extrusions for primary aluminium purchased from Chinese producers of primary aluminium do not reasonably reflect competitive market costs.<sup>68</sup>*

Following SEF148A, the GOC has submitted its objections to this finding, focussing on the CSRB purchases of primary aluminium, which it considers has been identified as the 'key' intervention by Customs and Border Protection to indicate the Chinese primary aluminium market was not competitive.<sup>69</sup>

In relation to these CSRB purchases, the GOC has submitted:

- the purchases were a component of a GOC stimulus package in response to the global financial crisis (GFC), with the intention to restore some normalcy to Chinese markets and safeguard the economy rather than to subsidise the market;
- the size of the purchases were not 'significant', as Customs and Border Protection had determined them to be;
- the proposition that the purchases could have caused all of the primary aluminium costs of exporters for the entire period to not be reflective of competitive market costs (noting that they did not commence until half-way through the period), is not sustainable; and
- when the purchases are considered alongside 'wider market considerations', it is evident that the price trends for primary aluminium experienced after the CSRB purchases cannot be attributed to these purchases.

Consequently, the GOC considers that the CSRB purchases should not lead Customs and Border Protection to find that the domestic market for primary aluminium in China during the investigation period was not a competitive market.

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<sup>68</sup> SEF148A at Section 4.2.2

<sup>69</sup> GOC, *Submission concerning Statement of Essential Facts No 148A*, Investigation 148A Public Record, File 2010/013579-05, Folios 2-13.

#### 4.12.2 Customs and Border Protection's assessment

Customs and Border Protection disagrees with the GOC's submission on this point, and considers that:

- the CSRB purchases of primary aluminium in China during the investigation period were significant - particularly when regard is had to the volume of the purchases compared to the estimated total market size over the short period of time these purchases were made (late 2008 to early 2009);
- the CSRB purchases had observable effects on the primary aluminium market during the investigation period,<sup>70</sup> and
- it is reasonable to conclude that this intervention by the GOC altered the competitive conditions of the domestic primary aluminium market.

Further to the above, Customs and Border Protection highlights the fact that, in making its findings that the domestic primary aluminium market in China was not a competitive market during the investigation period, it has not only focussed on the CSRB's purchases of primary aluminium, but also considered the taxation measures imposed by the GOC on the export of primary aluminium prior to and during the investigation period.

This is outlined in SEF148A at Section 4.2.2:

*Customs and Border Protection has also paid particular consideration to the likely effect of GOC export taxes on domestic primary aluminium in the Chinese market, which were set at significant levels, while no VAT export rebates were in place for primary aluminium in the years prior to and including the investigation period. Conversely, processed aluminium products (such as aluminium extrusions) attracted lesser export taxes and considerable VAT export rebates at times (prior to and during the investigation period).<sup>71</sup>*

*As noted in Appendix 2 of REP148, these measures indicate a GOC policy aim to minimise exports of domestic primary aluminium and encourage exports of processed aluminium products, the apparent outcome of this is reflected by the fact that only a small fraction of domestic primary aluminium produced in the investigation period was exported.<sup>72</sup>*

As noted within SEF148, it is considered that these taxation measures influenced the market throughout the entirety of the investigation period (and indeed prior to the period as well).

It is thus considered that it was a combination of these GOC measures that have contributed to the domestic primary aluminium market in China during the investigation period not being reasonably competitive, such that Tai Ao's purchases of domestic primary aluminium during the entirety of the investigation period did not reasonably reflect competitive market costs for the purposes of Subregulation 180(2).

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<sup>70</sup> As evidenced by the fact that the Shanghai Futures Exchange (SHFE) price of primary aluminium increasing shortly after the first purchase, surpassing the LME price for the first time in several years, and the fact that aluminium extruders increasingly began purchasing imported primary aluminium after this occurred.

<sup>71</sup> See GOC Confidential Attachments 198 and 229.

<sup>72</sup> See GOC Response to the Government Questionnaire, Section C.2.2(d), Page 23.

### 4.13 Other issues

Following SEF148A, Capral has submitted its concerns with:

- the level of the ascertained export price that has been set for the in-place measures for exports of certain aluminium extrusions from China by exporters other than Tai Ao; and
- the definition of 'kits' that has been developed by Customs and Border Protection to determine whether imports fall within the description of the goods or not.

It is noted that the TMRO considered the matter of what ascertained export price has been set by Customs and Border Protection within the current measures within his review of the decision to publish a dumping duty notice and a countervailing duty notice in respect of all exporters excluding Tai Ao, and considers it to be a matter that warrants reinvestigation by Customs and Border Protection.

However, Customs and Border Protection notes that neither of these issues are relevant to Tai Ao, as it is exempt from the current measures, and no anti-dumping or countervailing measures have been recommended to be imposed on Tai Ao's exports of certain aluminium extrusions from China as a result of this resumed investigation. These issues are thus not further considered within this report.

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## **5 FINAL FINDINGS AND CONCLUSION**

### **5.1 Summary**

Customs and Border Protection has considered the information contained within all submissions received in repose to SEF148A, and has determined that the approach taken to calculating Tai Ao's dumping and subsidy margins should not be altered (noting the comments made in relation to subsidy Program 15 at Section 4.5.2 of this report).

Consequently, Customs and Border Protection affirms the preliminary findings within SEF148A as its final findings within the resumed investigation into Tai Ao, that:

- the dumping margin for Tai Ao's exporters of aluminium extrusions to Australia from China during the investigation period was de minimus; and
- the subsidy margin for Tai Ao's exporters of aluminium extrusions to Australia from China during the investigation period was negligible.

The particulars of these findings are outlined below.

### **5.2 Dumping**

#### **5.2.1 Export price**

Customs and Border Protection found the producer, Tai Ao, to be the exporter of the goods during the investigation period.

For a number of export sales Tai Ao was also found to be the beneficial owner of the goods at the time of their arrival in Australia and was therefore considered to also be the importer.

For remaining export sales, the Australian customer was found to be the importer of the goods. Exports by Tai Ao during the investigation period were to Australian customers reflecting arms length transactions.

For exports where Tai Ao was also found to be the importer, export prices have been determined under s.269TAB(1)(c), using Tai Ao's invoiced prices to arm's length customers less amounts for prescribed deductions.

For exports where Tai Ao's Australian customer was determined to be the importer, Customs and Border Protection was satisfied that the requirements of s.269TAB(1)(a) were met and calculated export prices using Tai Ao's invoiced prices less amounts for ocean freight and marine insurance where applicable.

#### **5.2.2 Normal value**

Tai Ao sold like goods on the domestic market during the investigation period in what were found to be arms length transactions.

However, Customs and Border Protection considers these like goods to be sufficiently different in terms of physical characteristics, end-use applications, production process

and overall cost of production such that it was not possible to reasonably work out the amount the amount of any adjustment to account for those differences and fair comparison could not be ensured. Therefore Tai Ao's domestic sales are not considered suitable for establishing normal values under s.269TAC(1).

Consequently, Customs and Border Protection has determined normal values for Tai Ao under s.269TAC(2)(c) by summing:

- the revised monthly cost of production for the exported goods;
- the actual selling, general and administration costs incurred on domestic sales of like goods; and
- a reasonable amount for profit by reference to the profit achieved on domestic sales of like goods after comparing domestic ordinary course of trade selling prices to the revised cost to make and sell during the investigation period.

The constructed normal values incorporate the following adjustments made under s. 269TAC(9) to ensure they were fairly comparable to export prices:

- upward adjustment for export inland freight;
- upward adjustment for export handling and other FOB charges;
- upward adjustment for export credit terms;
- upward adjustment for Australian intermediary expenses;
- upward adjustment for VAT liability on exports;
- upward adjustment for export financing charges; and
- downward adjustment for difference in theoretical and actual weights.

### 5.2.3 Dumping margin

In accordance with s.269TACB(2)(a), Customs and Border Protection has calculated a dumping margin for the investigation period by comparing weighted average export prices with the corresponding weighted average normal values.

The product dumping margin for exports by Tai Ao was found to be de minimus (**below -0.10%**).

Calculation of Tai Ao's dumping margin is contained in **Confidential Appendix 1**.

## 5.3 Subsidies

Customs and Border Protection found that during the investigation period Tai Ao had received financial contributions that conferred benefits to the exported goods under two subsidy programs.

The amount of subsidisation attributable to the benefit under each of the subsidy programs was:

- Program 13: Exemption of tariff and import VAT for imported technologies and equipment - **between 0.82% and 1.17%**;<sup>73</sup> and

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<sup>73</sup> See above note 15

- Program 15: Primary aluminium provided by Government at less than fair market value - **0.56%**.

The total subsidy rate applicable to Tai Ao during the investigation period was calculated at **between 1.38% and 1.73%** (and in any case, **below 1.73%**), when measured as a percentage of the export price.

*Note: if it is considered that Program 15 is not a countervailable subsidy program, Tai Ao's subsidy rate would be calculated as between 0.82% and 1.17%.*

Calculation of Tai Ao's subsidy margin is contained in **Confidential Appendix 1**.

## **5.4 Conclusion**

Under s.269TDA(1) of the Act, if the CEO is satisfied that there has been no dumping by the exporter of any of those goods or the dumping margin is less than 2%, the CEO must terminate the investigation so far as it relates to the exporter.

Under s.269TDA(2) of the Act, if the CEO is satisfied that there has been no or negligible level of countervailable subsidy received by an exporter, the CEO must terminate the investigation so far as it relates to the exporter.

Section 269TDA(16) sets out the negligible level of countervailable subsidisation for goods exported from China as 2%.

Therefore, the Delegate of the CEO must terminate both the resumed dumping and countervailing investigations into Tai Ao.

**6 LIST OF APPENDICES AND ATTACHMENTS**

Confidential Attachment 1	Note for file - Consideration of applicability of primary aluminium import duties and other import-related charges to Tai Ao
Confidential Appendix 1	Tai Ao dumping and subsidy calculations summary

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