



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

CUSTOMS ACT 1901 - PART XVB

INTERNATIONAL TRADE REMEDIES BRANCH

REPORT No. 175

**REINVESTIGATION OF CERTAIN FINDINGS
IN REPORT No. 148**

CERTAIN ALUMINIUM EXTRUSIONS

EXPORTED FROM

THE PEOPLE'S REPUBLIC OF CHINA

15 AUGUST 2011

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1 SUMMARY AND RECOMMENDATIONS

This report provides the results of the reinvestigation by the Chief Executive Officer (CEO) of the Australian Customs and Border Protection Service (Customs and Border Protection) of certain findings in Trade Measures Report No. 148 (**REP 148**), which resulted in the imposition of dumping and countervailing duties on certain aluminium extrusions (aluminium extrusions) exported to Australia from the People's Republic of China (China).

1.1 Recommendation

The delegate of the CEO (**the delegate**) recommends that, in accordance with s.269ZZM(1)(a), the Attorney-General affirm his decision to publish dumping and countervailing duty notices in respect of certain aluminium extrusions exported to Australia from China.

The delegate further recommends that, in accordance with s.269ZZM(3)(b), the Attorney-General vary the dumping and countervailing duty notices in respect of aluminium extrusions exported to Australia from China as follows:

- (a) ascertain separate variable factors (export price, normal value and non-injurious price) for each finish, being 'mill finish', 'powder coated', 'anodised' and, where appropriate, 'other';
- (b) correct two administrative errors in the notices in relation to the listing of residual exporters and naming of countervailable subsidy programs. Amending these errors has no effect on the amount of dumping or countervailing duty paid or payable by exporters; and
- (c) correct an error in the calculation of the normal value for Zhaoqing New Zhongya Aluminium Co Ltd, which results in a dumping margin of less than 2%.

The effect of (c) above, is an increase in the rate of interim dumping duty (**IDD**) for residual exporters of aluminium extrusions with 'mill' and 'anodised' finish, and the removal of IDD for Zhaoqing New Zhongya Aluminium Co Ltd. The rate of interim countervailing duty (**ICD**) remains unchanged.

As a result of the reinvestigation, the revised product dumping margins and subsidy margins for Chinese exporters are:

Exporter	Product dumping margins	Subsidy margins
Tai Shan City Kam Kiu Aluminium Extrusion Co Ltd	3.1%	3.8%
Tai Ao Aluminium (Taishan) Co Ltd	<i>de minimis</i>	<i>de minimis</i>
PanAsia Aluminium (China) Ltd	10.1%	6.1
Zhaoqing New Zhongya Aluminium Co Ltd	<i>de minimis</i>	7.6
Residual exporters	7.5%	6.4
Selected non-cooperating exporters	25.7%	18.4

Copies of the varied notices, as a result of the above recommendations, are at **Attachment A1**.

Copies of the confidential tables to the varied notices are at **Confidential Attachment A2**.

1.2 Reasons

Division 9 of Part XVB of the *Customs Act 1901* (the Act)¹ sets out procedures for review by the Trade Measures Review Officer (TMRO) of certain decisions made by the Attorney-General.

1.2.1 The role of Customs and Border Protection

Where the Attorney-General has accepted a recommendation by the TMRO that a finding or findings should be reinvestigated, the Attorney-General must, in writing, require the CEO of Customs and Border Protection to reinvestigate a finding or findings.

The delegate is required to:

- make further investigation of the finding or findings, having regard only to the information and conclusions to which the Review Officer was permitted to have regard;
- within a specified period, to report the result of the further investigation to the Attorney-General affirming the finding or findings; and
- set out any new finding or findings and the evidence or other material on which the new finding or findings are based and the reasons for that decision.

1.2.2 The role of the Attorney-General

Division 9 empowers the Attorney-General (acting as the Minister responsible for the Act for the purposes of the reinvestigation), after receiving the delegate's reinvestigation report, to:

- affirm the reviewable decision concerned; or
- revoke that decision and substitute a new decision.

Depending on the Attorney-General's decision², the Attorney-General may³:

- publish a dumping duty notice or countervailing duty notice; or
- vary a dumping duty notice or countervailing duty notice; or
- revoke a dumping duty notice or countervailing duty notice and substitute another dumping or countervailing duty notice.

1.2.3 The reviewable decision

In the original investigation, the delegate found that the dumping and subsidisation of aluminium extrusions exported to Australia from China caused material injury to the Australian industry producing like goods. The delegate therefore recommended that the Attorney-General publish dumping and countervailing duty notices⁴.

The Attorney-General accepted the recommendations contained in REP 148, including the reasons for the recommendations, the material findings of fact on which the recommendations were based and the evidence relied on to support those findings. To

¹ A reference to a division, section or subsection in this report is a reference to a provision of the *Customs Act 1901*, unless otherwise specified.

² Under s269ZZM(1).

³ Under s269ZZM(3).

⁴ Under s269TG(2).

give effect to these recommendations, a dumping duty notice and a countervailing duty notice were respectively published on 28 October 2010 imposing dumping duties and countervailing duties on aluminium extrusions exported to Australia from China.

The Attorney-General's decision to publish dumping and countervailing duty notices is the reviewable decision.

1.2.4 What must be reinvestigated

On 18 April 2011, the Attorney-General directed the CEO to reinvestigate certain findings⁵ made in REP 148 and to report the results of the reinvestigation by 15 August 2011. The findings in the following areas are to be reinvestigated:

- whether primary aluminium producers identified as state-owned enterprises qualify as 'public bodies' under the Act by reference to whether such bodies possess, exercise, or are vested with governmental authority;
- the information contained in paragraph 3.8 of the submission of PanAsia Aluminium (China) Ltd (**PanAsia**) in response to the Statement of Essential Facts (**SEF**) insofar as it relates to whether the factors listed may displace the ordinary 5 per cent low volume rule;
- PanAsia's submission on exchange rates dated 19 March 2010 and the exchange rate evidence submitted by Capral Limited (**Capral**);
- the information provided by Zhaoqing New Zhongya Aluminium Co Ltd (**New Zhongya**) in a submission on 29 March 2010;
- the finding on the non-injurious price, in particular the appropriate weighting to be given to the estimated shorter delivery timeframes and associated lower inventory carrying costs for customers for the domestic industry, as well as 'increased production and sales volumes leading to reduced unit costs through economies of scale';
- the most appropriate ascertained export price, having regard to the differences between the separate mill and other finishes; and
- the reliability of exporter cost-to-make-and-sell information.

In the report to the Attorney-General, the Review Officer commented on specific issues in each of these areas. These issues are identified and addressed in the relevant sections of this report.

1.2.5 Reinvestigation findings and conclusions

The delegate has considered all relevant information and conclusions based on relevant information.⁶

⁵ Section 269ZX of the *Customs Act 1901* defines findings as "a finding on a material question of fact or on a conclusion based on that fact in relation to reviewable decisions under Subdivision 3 [Review of Attorney-General decisions]".

⁶ Under s269ZZL(2)(a)(i) the reinvestigation can only have regard to the information and conclusions to which the Review Officer was permitted to have regard. Section 269ZZK(4) states that the Review Officer 'must only have regard to the relevant information [as defined] and conclusions based on relevant information that are contained in the application for the [Review Officer] review, or in any submissions received from interested parties within 30 days' of the publication the dumping duty notice. Section 269ZZK(6)(a) defines relevant information as '... the information to which the CEO had had regard, or was... required to have regard, when making findings set out in the report... to the Attorney-General in relation to the making of the reviewable

The delegate is of the view that the reviewable decision to publish a dumping duty notice and countervailing duty notice be affirmed.

The delegate is also of the view that the following findings should be affirmed:

- that primary aluminium producers identified as state-owned enterprises (**SOEs**) qualify as 'public bodies' under the Act;
- that there were insufficient volumes of domestic sales in the ordinary course of trade to determine PanAsia's normal value under s269TAC(1);
- that Program 15 applies to New Zhongya's primary aluminium producers;
- that the costs of obtaining domestically produced primary aluminium did not reasonably reflect competitive market costs;
- the original investigation's finding on the non-injurious price (**NIP**);
- that there is no basis to fix an exchange rate for the purpose of converting currencies under s269TAF(4); and
- that the verified exporters' cost to make and sell information is reliable.

The delegate makes the following new findings:

- that import prices for primary aluminium do not reasonably reflect competitive market costs and therefore should not be used as a basis for constructing costs for the purpose of establishing normal values; and
- that ascertained export prices, ascertained normal values and ascertained non-injurious prices for the purpose of calculating interim dumping duty should be set by finish type.

In the course of reviewing New Zhongya's cost-to-make-and-sell (**CTMS**) information, the delegate became aware of an error in the calculation of that exporter's normal value. As a result of correcting that error, the delegate became satisfied that the dumping margin is a *de minimis* rate of less than 2%.

During the course of the reinvestigation the delegate also became aware of two administrative errors in the dumping and countervailing duty notices signed by the Attorney-General as follows:

- Guang Ya Aluminium Industries Co Ltd was incorrectly omitted from the list of residual exporters in the confidential tables to the s269TG(2) dumping duty notice and s269TJ(2) countervailing duty notice; and
- countervailable subsidy Program 21 was incorrectly listed in the s269TJ(1) and TJ(2) notices as Program 13.

Neither of these errors has any effect on the amount of dumping and/or countervailing duty paid or payable.

decision'. The "conclusions" which the Review Officer could consider were set out in the application for review to the Review Officer and submissions to the review.

2 BACKGROUND

2.1 Original Investigation

2.1.1 The application

On 24 June 2009, following assessment of an application⁷ made by Capral, an investigation was initiated into the alleged dumping of aluminium extrusions exported to Australia from China. Notification of the commencement of the investigation was published in *The Australian* newspaper⁸. Australian Customs Dumping Notice (ACDN) 2009/20⁹ was issued on the same day.

2.1.2 The goods under consideration

The goods under consideration (the goods) are aluminium extrusions produced via an extrusion process, of alloys having metallic elements falling within the alloy designations published by The Aluminium Association commencing with 1, 2, 3, 5, 6 or 7 (or proprietary or other certifying body equivalents), with the finish being as extruded (mill), mechanical, anodized or painted or otherwise coated, whether or not worked, having a wall thickness or diameter greater than 0.5 mm., with a maximum weight per metre of 27 kilograms and a profile or cross-section which fits within a circle having a diameter of 421 mm.

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

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

Additional information to assist in understanding the goods is included in ACDN 2009/20 and issues paper 2009/148 – available at www.customs.gov.au.

The goods may be classified to the following subheadings in Schedule 3 of the *Customs Tariff Act 1995*:

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

In most cases where goods are correctly classifiable to tariff codes with the prefix 7604 or 7608, those goods would be the goods subject of this investigation and subject to any resulting securities or duties.

⁷ Lodged under s269TB(1).

⁸ Under s269TC(4).

⁹ All ACDNs are available on the internet at www.customs.gov.au by following the anti-dumping links.

2.1.3 Preliminary affirmative determination

On 3 November 2009 the delegate made a preliminary affirmative determination that there appeared to be sufficient grounds for the publication of a dumping duty notice and countervailing duty notice in relation to aluminium extrusions exported from China.

2.1.4 Statement of essential facts

On 1 March 2010, SEF 148 was placed on the public record. The report set out the facts on which the delegate proposed to base his recommendations to the Attorney-General.

2.1.5 The Attorney-General's decision

The Attorney-General accepted the recommendations contained in REP 148 including the reasons for the recommendations, the material findings of fact on which the recommendations were based and the evidence relied on to support those findings.

The Attorney-General published a dumping duty notice¹⁰ and countervailing duty notice¹¹ imposing dumping duties and countervailing duties on the goods exported to Australia from China from 28 October 2010. Notice of the Attorney-General's decision was published in *The Australian* on 28 October 2010. ACDN 2010/40 was issued on that day.

2.2 Review of Attorney-General's decision by the Review Officer

The Review Officer may review certain decisions made by the Attorney-General, including decisions to publish a dumping duty notice and countervailing duty notice. These reviews are conducted only as a result of an application from relevant interested parties.¹²

In making a recommendation to the Attorney-General, the Review Officer is only to have regard to "relevant information"¹³ and any conclusions in applications and submissions to the Review Officer based on the relevant information. The Review Officer must only have regard to the information available to Customs and Border Protection during the course of the original investigation, information contained in REP 148 and applications and submissions to the Review Officer's review¹⁴. The information in the application for review and submissions to the review to which the Review Officer may have regard is also limited to conclusions based on the relevant information.

2.2.1 Applications to the Review Officer

Interested parties had until 30 days after the review notice to lodge an application for review of the Attorney-General's decision with the Review Officer. The notice was published on 28 October 2011. The Review Officer received applications for review from six applicants:

- New Zhongya;
- PanAsia;
- Press Metal Aluminium (Australia) Pty Ltd;
- Abra Metal Pty Ltd;
- Guang Ya Aluminium Industries Co Ltd, Foshan Guang Cheng Aluminium Co Ltd, and Trango Aluminium Pty Ltd, jointly represented by Moulis Legal; and
- Capral.

¹⁰ Under s269TG(2).

¹¹ Under s269TJ(2).

¹² As defined in s269ZX.

¹³ In accordance with s269ZZK(6).

¹⁴ In accordance with s269ZZK(4).

2.2.2 Review Officer review process and decision

The Review Officer published a notice¹⁵ in *The Australian* on 20 December 2010, advising that he would conduct a review and inviting interested parties to make submissions to the review within 30 days from that notification.

The Review Officer received four submissions, one each from: the Government of China (Chinese Government), PanAsia, Capral, and New Zhongya.

The Review Officer recommended that certain findings in REP 148 be reinvestigated. A finding¹⁶ in relation to a reviewable decision means a finding on a material question of fact or on a conclusion based on that fact.

Copies of the Review Officer's report and public applications and submissions to the review are available from the Review Officer. However, as arrangements concerning the Review Officer have recently undergone changes in response to the Australian Government's announcement of improvements to the anti-dumping and countervailing system¹⁷, copies may be obtained by contacting the International Trade Remedies Branch, Customs and Border Protection, Canberra¹⁸.

On 18 May 2011, the Attorney-General accepted the Review Officer's recommendations and directed the CEO to reinvestigate certain findings in REP 148 and to report by 15 August 2011.

On 18 May 2011, a notice¹⁹ was published in *The Australian* newspaper advising the Attorney-General's acceptance of the Review Officer's recommendations and the reinvestigation requirements.

2.3 Reinvestigation by Customs and Border Protection

ACDN 2011/21 was published 18 May 2011. The ACDN advised that:

- the reinvestigation could only have regard to the information and conclusions to which the Review Officer was permitted to have regard;
- no new information or conclusions could be considered in a reinvestigation;
- all relevant information was in the public domain and available to interested parties through the public record of the original investigation or the public record of the review maintained by the Review Officer; and
- the report of the reinvestigation had to be provided to the Attorney-General by 15 August 2011.

2.3.1 The reviewable decision

The reviewable decision is the Attorney-General's decision to publish a dumping duty notice²⁰ and a countervailing duty notice²¹.

¹⁵ Under s269ZZI.

¹⁶ As defined under s269ZX.

¹⁷ "Streamlining Australia's anti-dumping system", *Australian Customs and Border Protection Service*, June 2011.

¹⁸ Copies of the Review Officer's report, public applications and submissions to the Review Officer are available on request from International Trade Remedies Office Management, by telephone (02) 6275 6547 or facsimile (02) 6275 6888.

¹⁹ Under s269ZZL(2)(b).

²⁰ Under s269TG(2).

2.4 The reinvestigation report

The following sections of this report set out:

- the reinvestigation methodology;
- further investigation of the information and conclusions to which the Review Officer was permitted to have regard;
- reinvestigation of the findings central to the original recommendation to the Attorney-General;
- conclusions on whether the original findings should be affirmed or new findings made;
- evidence or other material on which the findings of the reinvestigation are based; and
- the reasons for the recommendation to the Attorney-General in relation to the reviewable decision.

2.5 The reinvestigation framework

In conducting a reinvestigation, the delegate must have regard only to information and conclusions to which the TMRO was permitted to have regard²². That is, relevant information and conclusions based on relevant information.

Relevant information is from the original investigation and includes information such as the original application, submissions to the original investigation, visit reports, SEF 148, submissions to SEF 148 and REP 148.

Conclusions based on relevant information are conclusions based on the relevant information contained in applications to the Review Officer and submissions received by the Review Officer within 30 days of notification of the review.

The findings in REP 148 in the following areas are to be reinvestigated:

- whether primary aluminium producers identified as state-owned enterprises qualify as 'public bodies' under the Act by reference to whether such bodies possess, exercise, or are vested with governmental authority;
- the information contained in paragraph 3.8 of PanAsia's submission in response to the SEF insofar as it relates to whether the factors listed may displace the ordinary 5 per cent low volume rule;
- PanAsia's submission on exchange rates dated 19 March 2010 and the exchange rate evidence submitted by Capral;
- the information provided by New Zhongya in a submission on 29 March 2010;
- the finding on the non-injurious price, in particular the appropriate weighting to be given to the estimated shorter delivery timeframes and associated lower inventory carrying costs for customers for the domestic industry, as well as 'increased production and sales volumes leading to reduced unit costs through economies of scale';
- the most appropriate ascertained export price, having regard to the differences between the separate mill and other finishes; and
- the reliability of exporter cost-to-make-and-sell information.

The delegate examined documents from the original investigation (relevant information) and applications and submissions to the Review Officer received within the specified

²¹ Under s269TJ(2)

²² Section 269ZZL(2)(a)(i).

timeframes (conclusions based on relevant information) for the purposes of conducting the reinvestigation.

2.6 Submissions to the reinvestigation

ACDN 2011/21 advised interested parties that no new information or conclusions may be considered in a reinvestigation. Therefore, interested parties wishing to lodge submissions in response to the findings the subject of this reinvestigation, were advised to make their comments on the information contained on the public record maintained by Customs and Border Protection, or the public record of the review maintained by the Review Officer, and not reproduce that information, but rather refer to it by its public record folio reference.

Several submissions were received in response to the reinvestigation, and non-confidential versions are attached to this report. The submissions received and considered are listed below:

Entity	Date received	Non-Confidential Attachment	Confidential Attachment
PanAsia Enterprises Group Limited and related companies	8/06/2011		B
Capral Limited	14/07/2011	C	
JELD-Wen Australia Pty Ltd	22/07/2011	D1	D2
Ministry of Commerce, Government of the People's Republic of China	13/07/2011	E	

3 BACKGROUND INFORMATION FROM REP 148

The following information is provided as background to the matters under reinvestigation.

The Applicant

The applicant for dumping and countervailing duties was Capral.

The goods under consideration

The goods under consideration (the goods) are aluminium extrusions.

Aluminium extrusions are produced via an extrusion process, of alloys having metallic elements falling within the alloy designations published by The Aluminium Association commencing with 1, 2, 3, 5, 6 or 7 (or proprietary or other certifying body equivalents), with the finish being as extruded (mill), mechanical, anodized or painted or otherwise coated, whether or not worked, having a wall thickness or diameter greater than 0.5 mm, with a maximum weight per metre of 27 kilograms and a profile or cross-section which fits within a circle having a diameter of 421 mm.

The Australian industry

There is an Australian industry producing like goods. There are eight Australian producers of aluminium extrusions.

The Australian market

There is an Australian market for aluminium extrusions, which Customs and Border Protection estimates to be approximately 195,000 tonnes per year. The market is supplied by Australian producers, and by importers of goods exported from China or other countries.

Exporter and importer

Customs and Border Protection identified 306 importers, of which seven were classified as 'major' importers of the goods.

Investigation period

The investigation period used to determine whether dumping and subsidisation has occurred was from 1 July 2008 to 30 June 2009.

Injury analysis period

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.

Dumping outcome

In REP 148, Customs and Border Protection found that:

- with the exception of one exporter, Tai Ao (Taishan) Co Ltd (Tai Ao), aluminium extrusions exported from China to Australia were:
 - dumped with margins ranging from 2.7% to 25.7%; and
 - subsidised with margins ranging from 3.8% to 18.4%;
- the dumped and subsidised exports from China caused material injury to the Australian industry producing like goods; and
- continued dumping and subsidisation may cause further material injury to the Australian industry.

Particulars of the dumping and countervailing margins established for each of the exporters and an explanation of the methods used to compare export prices and normal values to establish the dumping margins are set out in ACDN 2010/40 available at www.customs.gov.au .

4 DO PRIMARY ALUMINIUM PRODUCERS QUALIFY AS 'PUBLIC BODIES' UNDER THE ACT?

4.1 Summary of reinvestigation findings

The delegate recommends the Attorney-General affirms the finding of the original investigation that primary aluminium producers identified as SOEs qualify as 'public bodies' under the Act. The reinvestigation is satisfied that the policies of, and level of control exercised by, the Chinese Government in relation to primary aluminium producers who were also *enterprises with state investment* (formerly known as SOEs), was such as to cause these entities to possess, exercise or be vested with, government authority, and those primary aluminium producers exercise such authority in the performance of governmental functions, specifically, the performance of the Chinese Government's industrial development policies.

4.2 The original investigation

Section 7.2.3 of REP 148 identified that primary aluminium producers that were SOEs, were also 'public bodies' within the meaning of section 269T of the Act.

This conclusion was reached in the context of a finding that a benefit to the Chinese exporter of aluminium extrusions was conferred by primary aluminium (the main input used in the manufacture of aluminium extrusions), being produced and supplied by Chinese Government owned enterprises at less than adequate remuneration. The original investigation identified this subsidy program as 'Program 15'.

Following initiation of the investigation into the alleged dumping and subsidisation of certain aluminium extrusions exported to Australia from China, the original investigation commenced its inquiries into the alleged subsidies by providing the Chinese Government with a subsidies questionnaire for completion. The original investigation then provided the Chinese Government with a supplementary questionnaire in relation to additional programs to be investigated. Following receipt of Government Questionnaire responses, the original investigation undertook a verification visit to the Chinese Government. The purpose of the verification visit was to verify information submitted and identify whether countervailable subsidies existed, and had been received in respect of the goods the subject of the application in accordance with relevant provisions of the Act.

At the commencement of its inquiries, the original investigation sought preliminary information from identified suppliers of aluminium extrusions from China to determine the likely number of Chinese exporters. An assessment of responses to the request for information revealed that the number of exporters was so large that it was not practicable to work out whether a benefit had been conferred, and the amount of subsidy received by them. In response to this difficulty, the original investigation selected four exporters for further investigation who were responsible for the largest volume of exports to Australia. The four exporters were Tai Shan City Kam Kiu, Tai Ao Aluminium Taishan Co. Ltd, Zhaoqing New Zhongya Aluminium Co., Ltd. and PanAsia Aluminium (China) Limited.

On 19 February 2010, the original investigation published a *Preliminary Report on existence of Countervailable Subsidies* (Preliminary Report). In this report Customs and Border Protection set out its preliminary findings concerning the existence of countervailable subsidies. Section 2 of the report addresses Customs and Border Protection's analysis of Program 15.

In response to the Preliminary Report, the original investigation received submissions from various interested parties. In relation to Program 15, submissions were received

from PanAsia and the Chinese Government concerning the status of state-owned domestic suppliers of primary aluminium as 'public bodies'.

The Chinese Government questioned the preliminary finding by Customs and Border Protection that SOEs were public bodies, given that it considers SOEs to be commercial bodies that are not engaged in performing public functions. It drew attention to one of the major aluminium producers in China, Aluminium Corp of China Ltd (CHALCO), which it considers to be a privately invested company that does not carry out any public function, and operates commercially.

The original investigation considered that some of the relevant factors to determine whether an enterprise is a public body included, information concerning ownership, management structures and the functions and objectives performed by that enterprise. However, the original investigation also considered that the level of government ownership alone may be sufficient to make such a finding, if the government holds a majority share in an enterprise. In that case, other factors such as management structures and functions are less determinative.

In the Chinese Government's response to the questionnaire, the original investigation was advised that the *Chinese State-owned Assets Supervision and Administration Commission (SASAC)* had redefined the previous description of SOEs to "*enterprises with state investment*", of which there were four types:

- wholly state-owned enterprises;
- wholly state-owned companies;
- majority holding companies (where the government owns more than 50% of the company); and
- minority state-holding companies.

In the case of *enterprises with state investment* engaged in the production of primary aluminium, Customs and Border Protection requested each selected exporter to identify whether the producers of their purchased primary aluminium were SOEs or private enterprises. Where the producer was identified as a SOE or where insufficient information was presented to identify the producer as a private enterprise, the original investigation determined those enterprises to be SOEs.

The original investigation's reasons for doing so may be summarised by the following extract²³:

"... information submitted in the Government of China questionnaire response, also supports the view that a significant proportion of Chinese aluminium producers are government-owned enterprises and that their proportion of total domestic production is substantial.

"In the absence of reliable information provided by ...[exporters] about the SOE status of aluminium ingot manufacturers, and on the basis of information provided by other selected exporters and the Government of China, Customs and Border Protection considers it reasonable to regard all unidentified manufacturers as SOEs."

The information submitted in the Chinese Government questionnaire response relates to a confidential document titled, "List of Subsidiary and Associated Companies under the supervision of the national State-owned Assets Supervision and Administration

²³ "Review of preliminary dumping and subsidy margins for exporters selected for further investigation", *Trade Measures Branch*, 21 January 2010, p. 9 [Public file no. 2009/039048-01, folio 61]

Commission of the State council that are involved in the production or sale of aluminium and/or aluminium extrusions”²⁴.

The original investigation did not find that any of the Chinese primary aluminium producers were minority state-holding enterprises. Therefore, Customs and Border Protection determined that all state-owned primary aluminium producing enterprises were either majority or wholly state-owned and therefore ‘public bodies’.²⁵

4.3 Issues identified by the Review Officer

In considering the meaning of the term ‘public bodies’, the Review Officer acknowledged that the term was not expressly defined under the Act. To resolve this issue of statutory interpretation, the Review Officer referred to the decision of the WTO Appellate Body in *US – Certain products from China*²⁶ (Appellate Body Report), noting that the term is derived from the *WTO Agreement on Subsidies and Countervailing Measures* (SCM Agreement).

The Review Officer noted that the Appellate Body report, defined a ‘public body’, as:

“an entity that possesses, exercises or is vested with government authority”²⁷

The Review Officer contrasted the test applied by the Appellate Body, to the approach of the original investigation; namely that, majority ownership is a *prima facie* indicator of a ‘public body’. The Review Officer noted that the Appellate Body rejected this ‘broader interpretation’, and recommended that Customs and Border Protection reinvestigate the following issues:

- its findings that producers and suppliers of primary aluminium were ‘public bodies’ for the purposes of *Program 15*; and
- whether producers and suppliers of primary aluminium “were in fact in possession of, exercising, or vested with governmental authority, as opposed to merely being majority-owned by the Government of China”.²⁸

The Review Officer considered that the Appellate Body decision imposes an obligation on Customs and Border Protection to “seek out positive evidence that an entity is a ‘public body’”, which at a minimum, would have involved Customs and Border Protection contacting potential ‘public bodies’ and requesting that they return a tailored questionnaire on whether they manufacture or supply primary aluminium to the selected exporters, and if so, whether they possess, exercise or are vested with government authority. Therefore, the Review Officer concluded that in conducting the reinvestigation, Customs and Border Protection should actively gather evidence as to the manufacturers’ and suppliers’ status.

²⁴ Response, *Government Questionnaire, Certain Aluminium Extrusions exported from China*, Government of China, Confidential Attachment 66

²⁵ Australian Customs and Border Protection Service, *Report to the Minister No 148 – Certain Aluminium Extrusions exported to Australia from the People’s Republic of China* dated 15 April 2010, available on www.customs.gov.au, (REP 148) p. 59

²⁶ Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R adopted 25 March 2011. (Appellate Body report)

²⁷ TMRO, Report 11/2372, *Certain Aluminium Extrusions exported from The People’s Republic of China – review of a decision to publish a dumping and countervailing duty notice*, 18 April 2011, (TMRO report) at [116]

²⁸ TMRO report, *ibid*, at [118]

4.4 The reinvestigation

4.4.1 Reinvestigation framework, constraints and the Review Officer's recommendations

At the outset, it is noted that in conducting a reinvestigation, the delegate must have regard only to information and conclusions to which the TMRO was permitted to have regard²⁹. This constraint is outlined in section 2.5 of this report. It is repeated here, in response to the Review Officer's recommendations that, "in conducting the reinvestigation, Customs and Border Protection actively gather evidence as to the status of manufacturers and suppliers of primary aluminium as 'public bodies'". Accordingly, it is not open to the delegate upon reinvestigation to consider additional information or to actively seek out the 'positive evidence' referred to by the Review Officer.

4.4.2 Consideration of the Appellate Body report

In conducting the reinvestigation, the delegate had regard to the decision of the Appellate Body, as an expression of the definition of the term 'public bodies'. The reinvestigation agrees with the view of the Review Officer, that in the case of the term 'public bodies' it is permissible to have regard to the term's meaning under the SCM Agreement, which was considered in the Appellate Body Report. This approach is consistent with the response of Customs and Border Protection to the Appellate Body finding contained in ACDN 2011/27. As such the Appellate Body Report does not constitute information to which the Review Officer was not permitted to have regard under s269ZZK(4), but instead it represents WTO jurisprudence concerning the expression.

According to the Appellate Body, a 'public body' may possess, exercise or be vested with government authority, in the following circumstances³⁰:

- where a *statute or other legal instrument* expressly vests government authority in the entity concerned;
- evidence that an entity is, *in fact, exercising governmental functions* may serve as evidence that it possesses or has been vested with governmental authority; and
- evidence that a government exercises *meaningful control* over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions.

The Appellate Body considered³¹ that the existence of *mere formal links* (i.e. majority government ownership) between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority, because this does not automatically demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority.

The Appellate Body further advised that in all cases, an investigating authority must give due consideration to all relevant characteristics of the entity and avoid focussing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant.³²

²⁹ Section 269ZZL(2)(a)(i).

³⁰ Appellate Body report, *ibid*, at [318]

³¹ Appellate Body Report, *ibid*, at [318]

³² Appellate Body Report, *ibid*, at [319]

4.4.3 Analysis

In light of the Appellate Body's decision, the reinvestigation commenced its analysis by considering the response of the Chinese Government to the *Government Questionnaire* issued by the original investigation. The Chinese Government asserted that Program 15 did not exist and further rejected the inference that SOEs could be considered to be 'public bodies' for the purposes of the investigation. In particular the government referred to Customs and Border Protection's definition of SOEs in the glossary to the *Government Questionnaire*, namely, that a SOE is any company or enterprise which, inter alia:

"is operating in a partnership or joint venture capacity with the GOC [as defined]; or whose shares, whether or not they are publicly traded, are wholly or majority owned by the GOC".

The Appellate Body report clarifies the position concerning 'public bodies' and government ownership. To the extent that the Chinese Government asserts that ownership alone does not determine the existence of 'public bodies', it is consistent with WTO jurisprudence. Therefore, the reinvestigation reconsidered the following materials as they related to reassessing whether or not primary aluminium manufacturers and suppliers are 'public bodies':

- The original application for countervailing measures;
- The response of the Chinese Government to the "*Government Questionnaire*" issued by the original investigation (including all attachments);
- The response of the Chinese Government to the "*Second Supplemental Government Questionnaire*" issued by the original investigation (including all attachments);
- The Chinese Government's submission titled, "*Notes concerning countervailability of alleged subsidy programs verified by Customs*"; and
- The Chinese Government's submission titled, *Submission of the Government of China concerning "market situation" finding under Preliminary Affirmative Determination No. 148.*

4.4.4 Submissions to the reinvestigation

Submissions were received on this issue from the following interested parties:

- PanAsia Enterprises Group Limited and related companies (PanAsia);
- Government of the People's Republic of China, through its Ministry of Commerce; and
- JELD-WEN Australia Pty Ltd (Jeld-Wen).

The reinvestigation had regard to each of the submissions received. A summary of the respective interested parties' submissions on the issue of public bodies is provided.

4.4.5 Submission of PanAsia

PanAsia submitted that it was unaware of any information collected by the original investigation that was pertinent to this issue. There being no information on this point, PanAsia asserts that the reinvestigation is therefore precluded from having regard to new information.

4.4.6 Submission of Government of the People’s Republic of China, through its Ministry of Commerce

In its submission to the reinvestigation, the Chinese Government repeated its objection to the “automatic assimilation of state-invested enterprises and ‘public bodies’”. Further, it submitted that the original investigation ought to have sought out relevant information with conclusions based on “positive evidence”. The government then repeated earlier submissions on the nature of enterprises with state investment, and the reasons why they did not qualify as public bodies and referred to CHALCO as an example of a commercial enterprise producing primary aluminium. Emphasis was then placed on the separation of ownership of enterprises with state-investment from public administration.

4.4.7 Submission of JELD-WEN

JELD-WEN submitted that the overwhelming majority of primary aluminium producers were non-state owned enterprises. Further, it submitted that the Chinese Government did not impose any restrictions on the means or costs of production. The company then differentiated the roles and functions of CHINALCO, on the one hand, and SASAC on the other. JELD-Wen considered only the latter (SASAC) to be a ‘public body’, and responsible for managing SOEs in China. It considered CHINALCO to be an investment management and holding company, a “wholly state-owned enterprise” or SOE, but *not* a ‘public body’.

The company referred the reinvestigation to the separation of the ownership interests in an SOE from the management of the commercial operations of the enterprise, under Chinese law.

4.4.8 Assessment

At the outset, it is important to note that the reinvestigation’s consideration of whether or not certain primary aluminium producers and suppliers qualify as ‘public bodies’ under the Act, applies only to those producers and suppliers that were identified by the original investigation as “*enterprises with state investment*”. This is because Program 15 was claimed to relate to a benefit to the Chinese exporter of aluminium extrusions conferred by primary aluminium (being produced and supplied by Chinese Government owned enterprises at less than adequate remuneration). Therefore, primary aluminium producers and suppliers not identified broadly as “SOEs”, or “*enterprises with state investment*” do not come within the scope of the claimed subsidy program, and their status as ‘public bodies’ does not need to be considered.

Further, the reinvestigation rejects the assertion contained in the submission of PanAsia, that there was no relevant³³ factual basis on which to conclude that the relevant primary aluminium producers and suppliers do qualify as ‘public bodies’. As indicated in section 4.4.3 (Analysis) above, there was information available on the public record maintained in the course of the original investigation, containing sufficient detail to allow a reasonable understanding of the substance of the information³⁴.

The significance of CHALCO

In the original investigation, both the applicant and the Chinese Government provided evidence of the involvement of “*enterprises with state investment*” in the primary aluminium industry, either as producers or suppliers to Chinese exporters of aluminium extrusions. CHALCO was identified by the applicant and the Chinese Government as a primary aluminium producer. Both the applicant and the Chinese Government supplied

³³ Relevance here refers to evidence which satisfies the test under section 269ZZL of the Act.

³⁴ As required by section 269ZJ

extracts of CHALCO's United States (US) corporate returns³⁵. From the materials provided, the reinvestigation determined that CHALCO was a subsidiary (41.82%³⁶) of a wholly-state-owned company, CHINALCO. The reinvestigation was also able to determine from the US corporate returns³⁷ provided during the original investigation that CHALCO held a direct or indirect interest in the following primary aluminium producers and suppliers:

Name	Primary Aluminium		Identified supplier to selected exporter	Equity Interest held	
	Manufacturer	Distributor		Direct	Indirect
Baotou Aluminium	✓	✓		100%	
Longxing Aluminium	✓	✓		100%	
Chalco Ruimin	✓			75%	
Huaxi Aluminium	✓	✓		56.86%	
Chalco Southwest Aluminium	✓	✓		60%	
Henan Aluminium	✓	✓	✓	84.02%	
Chalco Foshan Trading Co., Ltd		✓	✓		89.6%
Chalco Chongqing Trading Co., Ltd		✓			90.05%
Shanghai Chalco Kailin Aluminium Co., Ltd		✓			89.6%
Shenyang China Aluminium Trading Co., Ltd		✓			90.5%
Chalco Wuhan Kaihua Aluminium Trading Co., Ltd		✓			90.5%
Chalco Foshan Aluminium Trading Co., Ltd		✓			90.5%
Chalco Chengdu Aluminium Trading Co., Ltd		✓			90.5%
Shanghai Chalco Kaihua Aluminium Trading Co., Ltd		✓			90.5%
Chalco Kaihua (Beijing) Aluminium Trading Co., Ltd		✓			90.5%

³⁵ Form 20-F return of Aluminium Corp of China Ltd (CHALCO) [Public file 2009/015199-04, folio 097]; 2007 Interim Report of CHALCO [Public file no. 2009/015199-05, folio 084]; and 2008 Annual Report of CHALCO (2008 Annual Report) [Public file no. 2009/049307 - Parts 02 & 03]

³⁶ 2008 Annual Report, ibid at p. 29 [Public file no. 2009/049307, Part 02]

³⁷ 2008 Annual Report, ibid [Public file no. 2009/049307 – Parts 02 & 03]

Shanxi Longmen Aluminium Co., Ltd	✓	✓		55%	
China Aluminium Nanhai Alloy Co., Ltd		✓	✓	100%	
Shanxi Huashen Aluminium Co., Ltd.	✓	✓		51%	
Shanxi Huaze Aluminium and Power Co., Ltd	✓	✓	✓	60%	
Fushun Aluminium Co., Ltd	✓	✓	✓	100%	
Zunyi Aluminium Co., Ltd	✓	✓		61.29%	
Chongqing Qianbei Aluminium Trading Co., Ltd.		✓			N/A
Shandong Huayu Aluminium and Power Co., Ltd	✓	✓		55%	
Gansu Hualu Aluminium Co., Ltd.	✓	✓		51%	
Baiyin Ruiyuan Metal Co., Ltd.		✓			48.87%
Qingdao Light Metals Co., Ltd.		✓		100%	
Qingdao Huaye Industrial and Trading Co., Ltd.		✓			100%
Jiaozuo Wanfang	✓	✓	✓	29%	
Wanfang Trading		✓			26.10%

Information concerning CHINALCO and CHALCO was of interest to the reinvestigation, as CHINALCO, via its subsidiary, CHALCO (and in turn, its subsidiaries), represented the largest producer of primary aluminium in China³⁸, and was the subject of commentary submitted by the Chinese Government in its submissions, and by evidence produced by the applicant in its application for measures.

Primary aluminium producers identified in the original investigation

As indicated in section 4.2 above, the original investigation requested each selected exporter to identify whether the producers of their purchased primary aluminium were SOEs or private enterprises.

Where the producer was identified as a SOE, or where insufficient information was presented to identify the producer as a private enterprise, the original investigation determined those enterprises to be SOEs. The above table also indicates whether any of the above identified CHALCO subsidiaries, were also identified primary aluminium suppliers to selected exporters. The reinvestigation notes that CHALCO was also identified as a primary aluminium supplier by all selected exporters³⁹.

³⁸ 2008 Annual Report, ibid at p.2 [File no. 2009/049307, Part 2]

³⁹ PanAsia Aluminium (China) Limited Submission - 'Preliminary Information Request' [Public file no. 2010/023375-01, folio 88-92]; Zhaoqing New Zhongya Aluminium Co Ltd Submission -

Do “enterprises with state investment” qualify as ‘public bodies’?

For the reasons outlined in section 4.4.2, the reinvestigation considered the question of whether *enterprises with state investment* qualify as ‘public bodies’. The reinvestigation had regard to the indicia established by the Appellate Body as supporting such a conclusion. Each of the indicia are examined in turn below:

Indicator 1: The existence of a “statute or other legal instrument” which “expressly vests government authority in the entity concerned”

The *Interim Report 2007* of CHALCO (contained in the applicant’s application) provided the reinvestigation with one source of evidence of the existence of a “statute or other legal instrument” vesting government authority in CHINALCO⁴⁰.

The reinvestigation contends that the following agreements constitute *legal instruments* that ‘vest’ CHINALCO with the authority to impose on its subsidiaries (including the CHALCO group of companies) state-prescribed pricing policies:

- the general agreement on *Mutual Provision of Production Supplies and Ancillary Services*;
- *Provision of Engineering, Construction and Supervisory Services Agreement*;
- *Mineral Supply Agreement*; and
- *Comprehensive Social and Logistics Services Agreement*.

The *Interim Report 2007* examined the operation of each of these agreements in relation to transactions entered into between CHINALCO and CHALCO:

- General transactions are covered by the general agreement on *Mutual Provision of Production Supplies and Ancillary Services*, which subjects transactions to the following pricing policy hierarchy:
 - (i) adoption of prices prescribed by the Chinese Government (state-prescribed price);
 - (ii) in the absence of a *state-prescribed price*, then adoption of a ‘*state-guidance price*’;
 - (iii) if there is neither a *state-prescribed price*, nor a *state-guidance price*, then adoption of the market price (being the price charged to and from independent third parties); and
 - (iv) If none of the above are available, then adoption of a contractual price (being reasonable costs incurred in providing the relevant services plus not more than 5% of such costs).

The reinvestigation notes that although the original investigation did not obtain direct evidence of the exercise of this pricing regime, it notes that the pricing hierarchy is prescriptive and CHALCO considers itself bound by it.

‘Preliminary Information Request’ [Public file no. 2010/023375-01, folio 93-98]; and Taishan City Kam Kiu Aluminium Extrusion Co. Ltd Submission - ‘Preliminary Information Request’ [Public file no. 2010/023375-01, folio 99-103]

⁴⁰ Aluminium Corp of China (CHALCO), *2007 Interim Report of Aluminium Corp of China Ltd* [File No. 2009/015199, Part 5 at p. 84]

Transactions for the supply of specialist or specific goods and services are subject to the following pricing prescriptions:

- utility services, including electricity, gas, heat and water, are supplied at the *state prescribed price*,
- engineering, project construction and supervisory services are covered by the *Provision of Engineering, Construction and Supervisory Services Agreement*, which prescribed the *state-guidance price* or prevailing market price,
- purchases of key and auxiliary materials (including bauxite, limestone, carbon, cement, coal) from the CHINALCO Group are covered by the *General Agreement on Mutual Provision of Production Supplies and Ancillary Services* and the *Mineral Supply Agreement*, with the effect that the pricing policy set out in the pricing hierarchy above is prescribed, and
- social services and logistics services provided by the CHINALCO Group were covered by the *Comprehensive Social and Logistics Services Agreement*, which prescribes the pricing hierarchy above.

The above agreements vest CHINALCO with government authority to impose state mandated pricing policies on its subsidiaries.

Indicator 2: Evidence that an entity is, in fact, exercising governmental functions may serve as evidence that it possesses or has been vested with governmental authority

A further indicator that an entity possesses, exercises or is vested with government authority arises where the entity is, in fact, exercising governmental functions.

In support of this view, the reinvestigation considered a translated version of a *Guiding Opinion* of SASAC of the State Council about *Promoting the Adjustment of State-owned Capital and the reorganization of State-owned Enterprises*⁴¹. At the outset, the reinvestigation acknowledges the comments of the Chinese Government to the original investigation in its response to the *Government Questionnaire*, namely that, the expression of such guiding opinions are not uncommon for monitoring agencies in most countries⁴². The Chinese Government therefore considered the position of the *Guiding Opinion* as having the status of a research and discussion paper.

The reinvestigation observed the following comments as evidence of the outcomes of enterprises with state investment exercising governmental functions:

- The document advised of the outcome of ‘state-owned asset management system reform’, such as, “significantly improved economic effects, which play an important role for perfecting socialist market economic system and promoting sustained, fast and sound development of national economy”⁴³,
- The documents identified the role played by SOEs in order to “execute the spirits of the Third and Fifth Plenary Sessions of the Sixteenth CPC Central Committee, and the Opinions of the State Council about Deepening the Economic System Reform in 2005 (No. 9 [2005 of the State Council]), namely:

⁴¹ *Guiding Opinions of the SASAC of the State Council about Promoting the Adjustment of State-owned Capital and the reorganization of State-owned Enterprises* (December 5, 2006, General Office of the State Council) (**SASAC Guiding Opinion**)[Public File No. 2009/038684, Part 2 at 848]

⁴² See [File No. 2009/038681, Part 1 at p. 50]

⁴³ SASAC Guiding Opinion, *ibid*

- "...enhance the state-owned economy's controlling power, influence, driving force, bring the leading role of state-owned economy into play..."⁴⁴;
- "...persist in strengthening supervision over state-owned assets, rigidly enforce the procedures for property right transactions and equity transfer, promote orderly flow, prevent the loss of state-owned assets and ensure the value maintenance and increase of state-owned assets"⁴⁵;
- "... persist in safeguarding the legitimate rights and interests of workers, protect the workers' rights to enterprise reorganisation, restructuring and other kinds of reform, and fully mobilize and protect the initiatives of the vast majority of workers to participate in the reform and reorganisation of state-owned enterprises"⁴⁶;
- "promote state-owned capital to concentrate on major industries and key fields relating to national security and national economic lifelines... and accelerate the formation of a batch of predominant enterprises with independent intellectual property rights, famous brands and strong international competitiveness"⁴⁷;
- "enhancing the controlling power of state-owned economy, and bringing its leading role into play"⁴⁸.

Indicator 3: Evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions

The reinvestigation observes the evidence provided by the Chinese Government in its response to the *Government Questionnaire* on this indicator of whether or not the entity possesses governmental authority and exercises such authority in the performance of governmental functions.

The Chinese Government provided a translated version of *Interim Measures for the Supervision and Administration of State-Owned Assets of the Enterprises* (Guidelines), and explained that this provided guidance on the government's role as an owner of *enterprises with state investment*:

"The People's governments at various levels shall strictly execute the laws and regulations on the administration of state-owned assets, shall stick to the separation of the government's function of administration of public affairs and the function as the contributor of state-owned assets, and stick to the separation of government bodies and enterprises and the separation of ownership and management power."⁴⁹

According to the Chinese Government's response, the *Guidelines* provide for the separation of ownership from management. The following evidence of this position was also provided:

"In other words, the government is directed not to interfere with the company's commercial activities through its asset ownership. Companies enjoy separate

⁴⁴ *ibid*

⁴⁵ *ibid*

⁴⁶ *ibid*

⁴⁷ *ibid*

⁴⁸ *ibid*

⁴⁹ *Interim Measures for the Supervision and Administration of State-Owned Assets of the Enterprises* (27 May 2003) (**Interim measures**) [File No. 2009/038684, Part 2 at p. 1578]

legal personality, and this is protected by the *Company Law*⁵⁰, in general, and by other laws governing SOEs”⁵¹.

However, when the main functions and responsibilities of SASAC are outlined in the *Guidelines*, then, evidence of the extent of the control of the Chinese Government, albeit via SASAC, becomes relevant to the consideration of this indicator⁵²:

- “(a) [SASAC] performs the responsibility of investor, and guides and pushes forward the reform and restructuring of SOEs; supervises the preservation and increment of the value of state-owned assets for enterprises under its supervision, and enhances the management of state-owned assets; advances the establishment of modern enterprise system in SOEs, and perfects corporate governance; and propels the strategic adjustment of the structure and layout of the State economy;
- “(b) despatches supervisory panels to some large enterprises on behalf of the State; takes charge of daily management of the supervisory panels;
- “(c) appoints and removes top executives of enterprises, and evaluates their performances through legal procedures, either grants rewards or inflicts punishments based on their performances; establishes corporate executives selection system in accordance with the requirements of socialist market economy system and modern enterprise system, and perfects incentives and restraints system for corporate management; and
- “(d) supervises and administers the preservation and increment of the value of state-owned assets under the supervision of SASAC through statistics and auditing; establishes and perfects the index system of the preservation and increment of the value of state-owned assets, and works out assessment criteria; safeguards the rights and interests of the investor of state-owned assets.”

The reinvestigation acknowledges that the power to appoint and remove “top executives of enterprises”, and evaluate their performance through legal procedures, is a power of owners of enterprises, it is the additional criteria applied by SASAC in executing this responsibility that amounts to conduct which ***may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions.*** Applied here the reinvestigation had regard to references suggesting the selection of corporate executives “in accordance with the requirements of socialist market economy system and modern enterprise system...” In particular, the express power vested in SASAC, to:

- “(e) [draft] laws and administrative regulations of the management of the state-owned assets and draws up related rules; directs and supervises the management work of local state-owned assets according to law”⁵³,

suggests that the level of the control over the entity is significant.

The reinvestigation considered the *Guidelines for accelerating the restructuring of the Aluminium Industry*⁵⁴ (*Accelerating Guidelines*), as evidence of the Chinese Government exercising meaningful control over primary aluminium producers and suppliers, whether or not they were *enterprises with state investment*. The scope and degree of this control,

⁵⁰ *Interim Measures*, *ibid*, p.277

⁵¹ *Guidelines for Accelerating the restructuring of the Aluminium Industry* (Fa Gai Yun Xing [2006] No. 589) (**Accelerating Guidelines**) [File no. 2009/038681, Part 1 at 64

⁵² SASAC Guidelines, *ibid*

⁵³ *Interim Measures* (27 May 2003) [File no. 2009/038684, Part 1 at 277]

⁵⁴ *Accelerating Guidelines*, *ibid*, [File no. 2009/038681, Part 1 at 45]

in the circumstances, amounts to evidence that primary aluminium producers and suppliers, possess governmental authority and exercises such authority in the performance of governmental functions, namely the achievement of the Chinese Government's industrial development policy. The Chinese Government provided a translated copy of the *Accelerating Guidelines* in its response to the original investigation's *Government Questionnaire*⁵⁵. The government explained that the *National Development and Reform Commission* (NDRC) is responsible for the *Accelerating Guidelines*.

The government explained that the *Accelerating Guidelines* are a broad review of the performance of the aluminium sector in respect of the commitments made by the Chinese Government concerning the reduction of waste and pollution from industrial operations, and aspirational statements about the goals of the aluminium industry. Accordingly, the government submitted that the *Accelerating Guidelines* review the past performance of the Chinese Government and of enterprises in achieving structured and sustainable performance.

Of relevance to its inquiries, the reinvestigation reviewed the *Accelerating Guidelines*, and observed that they were prescriptive in their policy direction. The *Accelerating Guidelines* prescribe which aluminium industry participants should be supported by Chinese Government departments and entities. The *Accelerating Guidelines* prescribed that:

“financial departments should continue providing financial support to ... aluminium enterprises which are conformed to the state industrial policy, credit policy and the industrial access conditions. As to the enterprises, which are not conformed to the industrial policy and market access conditions, or which have been eliminated by the laws or regulations due to backward technology or techniques, the financial departments should not provide any support in any form. If any support has been provided to the enterprises by mistake, the financial departments should withdraw it to avoid financial risk.”⁵⁶

The reinvestigation considers the directions highly prescriptive and designed to achieve compliance by primary aluminium producers and suppliers, with the consequence of a withdrawal of support for non-compliance.

Finally, the reinvestigation considered the following statements contained in the *Form 20-F return* of CHALCO⁵⁷:

“The central and local PRC governments continue to exercise a substantial degree of control and influence over the aluminium industry in China and shape the structure and characteristics of the industry by means of policies in respect of major project approval, preferential treatments such as tax incentives, electricity pricing, and safety, environmental and quality control...”

“Under current PRC regulatory requirements... the expansions of primary aluminium plants ... require Chinese Government approval.”

“Substantially all of our business, assets and operations are located in China... the PRC government continues to play a significant role in regulating industry by imposing industrial policies. It also exercises significant control over China's economic growth through the allocation of resources, controlling payment of foreign currency-denominated obligations, setting monetary policy and providing preferential treatment to particular industries or companies.”

⁵⁵ *ibid*

⁵⁶ *ibid*

⁵⁷ *Form 20-F return* at p. 7 [File No. 2009/015199, Part 4, at 97]

The reinvestigation considers that these statements by CHALCO support the view that the level of control and regulation by the Chinese Government in the aluminium industry in China is so significant, that primary aluminium producers and suppliers are in fact responding to the Chinese Government's industrial development policy. The reinvestigation views the operations of primary aluminium producers and suppliers as inextricably tied to the implementation of government industrial and macro-economic functions.

4.5 Conclusion

The reinvestigation observes that when the program of Chinese Government policies, guidelines and directions applicable to both primary aluminium producers and suppliers, and *enterprises with state investment* are considered as a whole, then it is reasonable to conclude that the government exercises meaningful control over the conduct of such entities, to the extent that the government has bestowed them with governmental authority. As such, the reinvestigation considers that primary aluminium producers and suppliers, not identified as private enterprises without government investment, do qualify as 'public bodies' under the Act. The reinvestigation has considered the reasons of the original investigation concerning the status of primary aluminium producers and suppliers, where the existence of government investment is not known, and considers it reasonable to conclude in those circumstances that the primary aluminium producer or supplier is a 'public body'.

5 PANASIA'S SUBMISSION REGARDING LOW VOLUME RULE

5.1 Summary of reinvestigation findings

The delegate recommends the Attorney-General affirm the finding of the original investigation that there was an insufficient volume of domestic sales in the ordinary course of trade (**OCOT**) to determine normal values under s269TAC(1). The reinvestigation is satisfied that the volume of PanAsia's 'mill finish' domestic sales, within the OCOT (as a percentage of its mill finish export sales) did not pass the low volume test. Further, the reinvestigation considers that it was reasonable for the original investigation to be satisfied that the volume of PanAsia's 'mill finish' domestic sales, within the OCOT, as a proportion of its total domestic 'mill finish' sales is not sufficiently large enough to be representative of its total domestic sales of mill finish goods.

5.2 The original investigation

In determining PanAsia's normal value, the original investigation considered verified information provided by PanAsia, including its CTMS and domestic sales data.

In respect of 'mill finish' goods, the original investigation found that:

- the volume of domestic sales that were *not in the OCOT* as a percentage of total domestic sales exceeds 20%; and
- the volume of domestic OCOT sales as a percentage of total export sales was less than 5%.

As a result, the original investigation found, pursuant to s269TAC(2)(a)(i), that there was an insufficient volume of domestic OCOT sales to determine normal values under s269TAC(1), and therefore, constructed a normal value under s269TAC(2)(c).

In paragraph 3.8 of PanAsia's submission in response to the SEF⁵⁸, it argued that the total number of transactions, quantity and value of domestic OCOT sales were still large enough to permit a proper comparison for the purposes of assessing a dumping margin. Therefore, PanAsia submitted that the Attorney-General should have exercised his discretion under s269TAC(14) to exempt PanAsia from the 5% sufficiency test.

5.3 Issues identified by the TMRO

The Review Officer noted that PanAsia's submission contained factors that may displace the 5% sufficiency test and considered that the original investigation should have addressed these factors. Therefore, the Review Officer recommended that Customs and Border Protection reinvestigate whether the factors in paragraph 3.8 of PanAsia's submission would cause the Attorney-General to be satisfied that the volume of domestic OCOT sales is still large enough to permit a proper comparison for the purposes of assessing a dumping margin.

5.4 The reinvestigation

The reinvestigation understands that the factors referred to by the Review Officer are:

- the total number of transactions, and

⁵⁸ PanAsia, 'Submission in response to SEF', 21 March 2010 [Public File no. 2009/039051-01, folios 119-135]

- quantity and value of domestic OCOT sales.

In determining whether the exemption to the 5% sufficiency test under s269TAC(14) should be applied, the relevant factor is the *relative volume* of OCOT sales rather than the *absolute volume*.

The reinvestigation considered whether the volume of PanAsia's domestic OCOT sales is large enough to permit a proper comparison for the purposes of assessing a dumping margin by having regard to the following relevant factors:

- the degree to which PanAsia's 'mill finish' domestic sales, within the OCOT, failed the 5% low volume test; and
- the relative volume of PanAsia's 'mill finish' domestic sales that were in the OCOT.

The degree to which PanAsia's 'mill finish' domestic sales, within the OCOT, failed the 5% low volume test, was *not* significant. Domestic sales in the OCOT, as a percentage of its 'mill finish' export sales, was between 4% and 5%.

However, the relative volume of PanAsia's 'mill finish' domestic sales that were in the OCOT, as a proportion of its total domestic sales of mill finish, was not significant. In this case, more than 50% of PanAsia's 'mill finish' domestic sales, as a proportion of total domestic 'mill finish sales were not in the OCOT. Therefore, there was not a sufficiently representative volume of 'mill finish' domestic sales in the OCOT. The volume of 'mill finish' domestic sales in the OCOT is not large enough to permit a proper comparison for the purposes of assessing a dumping margin.

Therefore, the reinvestigation considers that it was reasonable for the original investigation to conclude that there were insufficient volumes of domestic OCOT sales to determine normal values under s269TAC(1).

The calculations supporting the reinvestigation's conclusions are contained at **Confidential Attachment F**.

6 PANASIA'S SUBMISSION ON EXCHANGE RATES AND THE EXCHANGE RATE EVIDENCE OF CAPRAL

6.1 Summary of reinvestigation findings

The delegate recommends the Attorney-General affirms the finding of the original investigation that there were no grounds to use a fixed exchange rate for the purpose of converting currencies under s269TAF(4). There is insufficient information to determine whether the pre-conditions of s269TAF(1) have been met to allow a departure from using the rate of exchange on the date of the transaction.

6.2 The original investigation

6.2.1 PanAsia's submission

In PanAsia's submission of 19 March 2010⁵⁹, it argued that there was a sustained movement in the Australian dollar (AUD) against the Chinese Renminbi (RMB) commencing on 30 July 2009 until 27 November 2009. PanAsia claimed that as a result of this sustained movement, the Attorney-General must exercise his powers under s269TAF(4) and fix the exchange rate for two, sixty (60) day periods.

The original investigation stated in REP 148⁶⁰ that in considering whether to use a fixed exchange rate for the purpose of converting currencies, the relevant factors include, inter alia, whether an exporter used any forward exchange rate management instruments. The original investigation rejected the claims put forward in PanAsia's submission citing that there was not sufficient time or opportunity to properly examine it.

6.2.2 Capral's submission

Capral's submission of 23 March 2010⁶¹ provided evidence of exchange rate movements to the original investigation. This evidence was not dissimilar to the evidence provided by PanAsia.

6.3 Issues identified by the Review Officer

The Review Officer considered that the original investigation was required, under s269TEA(3)(iii), to have regard to PanAsia's submission of 19 March 2010 on exchange rates⁶² as it was received within 20 days after the placing of the SEF on the public record.

The Review Officer considered that without further investigation into issues including, inter alia, whether PanAsia used any forward exchange rate management instruments, it was not possible to assess the merits of PanAsia's submission⁶³. Accordingly, the Review Officer recommended that the reinvestigation further assess PanAsia's submission.

6.4 The reinvestigation

If comparing export price and normal values requires a conversion of currencies, s269TAF(1) directs that the conversion is to be the exchange rate on the date that best establishes the material terms of the sale, which is usually the invoice date.

⁵⁹ PanAsia, 'Submission on movements in exchange rates', 19 March 2010 [Public File no. 2009/039051-01, folios 117-118]

⁶⁰ REP 148, *ibid*, p.48

⁶¹ Capral - Submission on Market Situation - CTMS' [Public File no. 2009/039051-02 Folio 52-90]

⁶² TMRO, Report *ibid*, p.35

⁶³ *ibid*, p.35

However, if:

- a forward contract is used, then under s269TAF(2), the forward exchange rate on that contract may be used;
- the exchange rate has undergone a short-term fluctuation, then under s269TAF(3), the fluctuation may be disregarded; or
- the exchange rate has undergone a sustained movement, then under s269TAF(4), the exchange rate on a day specified day may be used for a period of 60 days from that day by publishing a notice in the *Gazette*.

The reinvestigation notes that evidence of a forward exchange rate contract is required to use a fixed exchange rate under s269TAF(2). Further, the reinvestigation considers that it would be necessary to consider whether export prices have responded to the exchange rate movements, in order to offset the short-term fluctuation under s269TAF(3), or the sustained movement under s269(4). In this regard, the original investigation noted that

*'In examining whether a fixed exchange rate should be used for the purposes of converting currencies, Customs and Border Protection would typically examine such issues as whether the exporter used any forward exchange rate management instruments and whether export prices have been adjusted in line with exchange rate movements, as well as the nature of the exchange movements'*⁶⁴

The reinvestigation has examined the information obtained in the original investigation in relation to PanAsia's pricing arrangements and determined that there is insufficient information to be able to verify whether or not a forward rate of exchange was used by the parties to the transaction, or examine whether there was an attempt by the exporter to adjust export prices in line with exchange rate movements. In relation to this latter point, the reinvestigation has reviewed movements in the exporter's export price (refer **Confidential Attachment G**), however, the circumstances surrounding the observed export price movements are not known. Therefore, the reinvestigation considers it unsafe to speculate as to the reasons for these price movements. In this regard, the reinvestigation notes that the inter-relationship between the exporter, PanAsia, and its Australian customers would potentially assist the exporter's ability to adjust prices for sustained exchange movements.

The reinvestigation is constrained in its ability to gather new information. As a result, the reinvestigation finds that there is insufficient reliable and credible information available to warrant revoking the original investigation's finding on this issue.

⁶⁴ REP 148, *ibid*, p.48

7 SUBMISSIONS RECEIVED IN RESPONSE TO SEF BY NEW ZHONGYA

7.1 Summary of reinvestigation findings

The delegate recommends the Attorney-General affirms the finding in the original investigation that Program 15 applies to New Zhongya's primary aluminium producers.

The delegate also recommends the Attorney-General affirms the approach applied in the original investigation concerning the use of the actual daily exchange rate to calculate New Zhongya's final dumping margin calculation

The delegate further recommends the Attorney-General affirms the finding in the original investigation that the costs of obtaining domestically produced primary aluminium did not reasonably reflect competitive market costs and affirms the original investigation's use of primary aluminium costs based on London Metal Exchange (**LME**) data.

7.2 The original investigation

Although the due date for submissions in response to the SEF was 21 March 2010, New Zhongya lodged a submission in response to the SEF on 29 March 2010 after the delegate stated in an email that he was prepared to consider additional submissions provided they were lodged by 29 March 2010.

Although the original investigation had regard to New Zhongya's submission, it was unable to verify its data, due to there being insufficient time to do so.

7.3 Issues identified by the Review Officer

The Review Officer considered that the original investigation was required to have regard to New Zhongya's submission in response to the SEF. It is of the view that regardless whether or not the email from the delegate is considered an extension provided under s269TC(6), the email itself is evidence that the original investigation considered that submissions lodged by 29 March 2010 would not prevent the timely preparation of the report to the Attorney-General.

Accordingly, the Review Officer recommends that Customs and Border Protection reinvestigate the information provided by New Zhongya in a submission on 29 March 2010.

7.4 The reinvestigation

New Zhongya's submission provided comment on:

- Program 15;
- Exchange rate use for export price; and
- Ingot prices for CTMS.

The confidential version of the submission is at **Confidential Attachment H** and a non-confidential version is at **Attachment I**.

7.4.1 Program 15

As noted in section 4.4.8 above, Program 15 only relates to primary aluminium being produced and supplied by enterprises with state [Chinese Government] investment at less than adequate remuneration. Therefore, primary aluminium producers not identified broadly as "SOEs", or "enterprises with state investment" do not come within the scope of the claimed subsidy program (Program 15).

In the original investigation, Customs and Border Protection assessed whether primary aluminium producers were “enterprises with state investment” as follows:

- selected exporters were required to provide information relating to their purchases of aluminium ingot during the investigation period, including supplier details; whether the supplier is a state-owned enterprise (as then defined), and volumes/values of the purchased input, as part of the Exporter Questionnaire response; and
- during the verification visits to each of the selected exporters, visit teams requested further detailed transactional information of aluminium ingot purchases during the investigation period. Where a supplier of aluminium ingot was not the manufacturer of the input, the exporters were asked to identify the manufacturer and also indicate whether that manufacturer was a state-owned enterprise.

New Zhongya responded to the Exporter Questionnaire, and during the verification visit, provided a schedule of aluminium ingot purchases during the investigation period. For transactions where New Zhongya was aware that the supplier was also the manufacturer, it was able to identify whether the manufacturer was a SOE. Where the supplier was not the manufacturer, New Zhongya provided mill certificates to identify the manufacturers but was unable to identify whether these manufacturers were SOEs or not. Following publication of the SEF, New Zhongya provided a submission in response on 29 March 2010. That submission is the subject of the Review Officer’s comments.

In its 29 March 2010 submission, New Zhongya claimed that a number of its ingot suppliers are not SOEs. In support of this claim, the company purported to provide evidence in the form of the business licences and mill certificates of its aluminium ingot suppliers.

Upon considering the 29 March 2010 submission, the original investigation concluded that in the absence of reliable information provided by New Zhongya about the ‘SOE’ status of aluminium ingot manufacturers, and on the basis of information provided other selected exporters and the Government of China, it was reasonable to regard all unidentified manufacturers as SOEs⁶⁵.

The reinvestigation reviewed and considered the 29 March 2010 submission, and the supporting evidence attached to it. The reinvestigation makes the following observations concerning the submission:

- the SOE status of certain manufacturers of New Zhongya’s primary aluminium is an assertion; and
- the evidence advanced in support of the assertion was unverified information, and given the lack of timeliness of that submission, was incapable of being verified, as the information was provided in an untranslated format, and there was insufficient time to obtain a reasonable translation of the materials.

Further, the reinvestigation refers to its acceptance, as reasonable, of the original investigation’s treatment of unsubstantiated claims of primary aluminium producers as private, or enterprises without government investment (Section 4) above. Applied here, given that the original investigation was unable to verify New Zhongya’s unsubstantiated claims concerning the status of its primary aluminium producers, the reinvestigation considers it reasonable to treat such producers as ‘public bodies’ (refer section 4).

⁶⁵ “Review of preliminary dumping and subsidy margins for exporters selected for further investigation”, *Trade Measures Branch*, 21 January 2010, p. 9 [Public file no. 2009/039048-01, folio 61]

In the circumstances, the reinvestigation considered it reasonable for the original investigation to treat all unidentified manufacturers as SOEs. The reinvestigation considers the original investigation's approach to be reasonable, as the probative value of unverified information does not have the same force as information and conclusions based on the verified data available to the original investigation.

7.4.2 Exchange rate use for export price

New Zhongya claimed that the original investigation used an USD/RMB exchange rate of USD/RMB 6.8000 in calculating its export price, and that the actual exchange rate fluctuated between USD/RMB 6.8216 and 6.8845. Although not specifically stated, it seems that New Zhongya submits that the actual exchange rate, rather than a single exchange rate, should have been used in its export price calculation.

The reinvestigation notes that the original investigation acknowledged and agreed with New Zhongya's claim that the actual daily exchange rate should be used for the purpose of comparing export prices and normal values⁶⁶. The reinvestigation reviewed New Zhongya's dumping margin calculation spreadsheets and observed that while a single exchange rate was used for the SEF, it was revised to reflect actual exchange rates to calculate New Zhongya's final dumping margin in REP 148. These spreadsheets are at **Confidential Attachment J** and **Confidential Attachment K** respectively.

7.4.3 Ingot prices for CTMS

The original investigation determined that although no 'market situation' under s269TAC(2)(a)(ii) was found, the costs of obtaining domestically produced primary aluminium did not reasonably reflect competitive market costs.⁶⁷ As a result, the original investigation substituted the prices of domestic ingot with prices listed on the LME, adjusted to ensure similar delivery and payment terms to the exporter's actual purchase costs of primary aluminium in the Chinese domestic market during the investigation period.⁶⁸ The adjusted LME price was considered an appropriate surrogate competitive-market price, and the arguments for this were discussed in REP 148 at Chapter 6.5. The adjusted LME primary aluminium prices substituted in place of domestic market prices were used to assess whether sufficient domestic sales were made in the OCOT, and to construct a CTMS under s269TAC(2)(c).

New Zhongya claimed that the original investigation should not have substituted the LME price to the proportion of its aluminium ingot purchases that were imported or supplied by non-SOEs. New Zhongya provided a spreadsheet with calculations of its ingot purchase volume and prices to support its claim.

The reinvestigation has considered domestic non-SOE ingot purchases and imported ingot purchases separately.

Domestic non-SOE ingot

New Zhongya argued that the domestic primary aluminium it purchased, other than those from a SOE, should not have an adjusted LME price substituted for the actual price paid when determining CTMS.

REP 148 sets out findings that interventions by the Chinese Government in the Chinese domestic aluminium market distorted prices such that throughout the investigation period, they did not reflect reasonably competitive market costs. The reinvestigation finds that the *market*, rather than SOEs – which make up only one type of enterprise

⁶⁶ REP 148, *ibid*, p.49

⁶⁷ REP 148, page 38

⁶⁸ REP 148, page 39

within the broader domestic primary aluminium market – was providing primary aluminium at a cost that did not reasonably reflect competitive market costs. Accordingly, the competitive nature or otherwise of individual domestic primary aluminium sales (in the context of the application of regulation 180) is not affected by the status of a domestic producer as SOE or non-SOE.

The reinvestigation therefore affirms the original investigation's decision in respect to substitution of an adjusted LME price in place of all domestically purchased primary aluminium.

Imported ingot

The original investigation 'agrees with New Zhongya that actual import prices of primary aluminium reflect competitive market costs'⁶⁹ but decided not to use the actual prices of New Zhongya's imported ingot and instead used the same approach applied to domestic purchases of primary aluminium, that is, to substitute actual prices paid with LME prices. This approach was taken because although regulation 180(2) is satisfied to the extent that records for imported ingot 'reasonably reflect competitive market costs', the original investigation considered that:

- a. *"there is insufficient verified or otherwise reliable information to enable those prices to be used as a substituted cost for primary aluminium";⁷⁰ and*
- b. *"Customs and Border Protection is unable to rely on actual costs in those months where the exporter has only purchased imported primary aluminium as it cannot know whether any domestic aluminium was nonetheless used in production".⁷¹*

The reinvestigation does not agree with the reasons for substituting the LME prices with the actual price paid for purchases of imported primary aluminium contained in the submission of New Zhongya.

The original investigation's analysis indicates that the Chinese market for primary aluminium is so distorted as a result of the Chinese Government's involvement in the market, that it is reasonable to conclude that the prices of goods that are imported into the domestic market are also significantly distorted as a result of the government's involvement in the market. The reinvestigation found evidence that imports were affected by the distortions in the primary aluminium market, in the decision of the Canada Border Services Agency's *Statement of Reasons concerning Certain Aluminium Extrusions originating in or exported from the People's Republic of China*⁷² (attached to the Applicant's application), where the Trade Program's Directorate found:

"The cooperative exporters' aluminum purchase data also confirms that the low level of aluminum import penetration in the Chinese market applies to aluminum extruders' purchases. In 2006, the cooperative extruders sourced 22% of their purchased aluminum from imports. In 2007 the cooperative extruders sourced only 3% of their aluminum from imports, and there were virtually no imports of aluminum by the cooperative extruders during the Dumping POI".

Verification by the original investigation of the cooperative exporters confirmed low-penetration of the Chinese market for primary aluminium by imports.

⁶⁹ REP 148, page 41

⁷⁰ REP 148, page 41

⁷¹ REP 148, page 41

⁷² 3 March 2009 at p. 96

The reinvestigation considers that the absence of imported sources of primary aluminium suggests the Chinese market to be distorted. When the company-specific prices are compared to the comparable LME price at that time, the reinvestigation observed significant margins between them. This supports the view that the prices of imported primary aluminium were necessarily distorted in order to trade within the Chinese market.

Therefore, the reinvestigation finds that the conditions of regulation 180(2) are not satisfied for New Zhongya's imported ingot purchases, and does not consider it reasonable to determine New Zhongya's CTMS data using the information set out in that exporter's records. The reinvestigation affirms the approach of the original investigation.

In reviewing the original investigation's CTMS worksheets for New Zhongya, an error in the allocation of costs was detected by the reinvestigation. When the error was corrected, a new normal value was calculated for the exporter, together with a revised product dumping margin of less than 2%. This has resulted in the removal of IDD for New Zhongya. The correction to the exporter's normal value has no effect on the rate of ICD applicable to New Zhongya, which remains at 7.6%. However, the *de minimis* product dumping margin for New Zhongya has resulted in an increase in the product dumping margin for residual exporters⁷³, from 6.1% to 7.5%. This is because the residual rate is based on a weighted average calculation of the respective cooperative exporters' rates, to which measures apply.

The calculations supporting the revised normal value and product dumping margins for New Zhongya are contained at **Confidential Attachment L**.

The revised product dumping margin calculations applicable to residual exporters are contained at **Confidential Attachment N** (refer section 9, below).

⁷³ Pursuant to s.269TG(3C)(a).

8 THE NON-INJURIOUS PRICE

8.1 Summary of reinvestigation findings

The delegate recommends the Attorney-General affirms the finding of the original investigation on the non-injurious price (NIP).

8.2 The original investigation

The original investigation calculated the unsuppressed selling price (USP) based on Capral's cost-to-make-and-sell (CTMS) data with no profit. However, PanAsia submitted that Capral's CTMS data (as the basis of the USP), contains "an element that compensates for the impact on profit of causative factors other than dumping and subsidisation" and that the USP should be based on calculated undumped and unsubsidised prices.

The original investigation⁷⁴ rejected the view expressed in PanAsia's submission that the USP based on Capral's CTMS incorporates a value affected by factors other than dumping and subsidisation. The original investigation concluded that as the Australian industry (when compared with exporters) provides its customers with shorter delivery timeframes, and therefore, lower inventory carrying cost, an USP, based on Capral's CTMS, incorporates a reasonable price premium that the Australian industry should expect to achieve in a market unaffected by dumping. The original investigation also considered that an outcome of imposing measures to remedy the effects of dumping and subsidisation is that the Australian industry may experience increased production and sales volumes. In turn, the original investigation surmised that this would lead to reduced unit costs through economies of scale.

8.3 Issues identified by the Review Officer

In reviewing the original investigation's calculation of the NIP, the Review Officer observed that regard was had to the following:

"201. ... In making its assessment, Customs and Border Protection considered the following:

- a comparison between a notional free-into-store undumped and unsubsidised selling price and Capral's cost-to-make-and-sell for each selected exporter;
- appropriate deductions for overseas freight, insurance, in store costs and amounts for importer expenses and profits;
- the shorter delivery timeframes and associated lower inventory carrying costs for customers for the domestic industry; and
- increased production and sales volumes which may lead to reduced unit costs through economies of scale in a situation of an unsuppressed market price"

In assessing, the original investigation's response to PanAsia's submissions, the Review Officer observed the following⁷⁵:

"203. It appears Customs and Border Protection considered that, although prices for Chinese exporters may still be below Capral's cost-to-make-and-sell on undumped and unsubsidised calculations, there are counterweighing factors that mitigate a gap. PanAsia states that the potential for Chinese exporters' undumped and unsubsidised prices to be below Capral's cost-to-make-and-sell

⁷⁴ REP 148, *ibid*, Section 11.3.1,

⁷⁵ TMRO report, *ibid*, p. 47.

makes it *unreasonable* to expect that Capral will experience increased production and sales volume. However, even if undumped and unsubsidised prices for Chinese exports are below Capral's cost-to-make-and-sell, the gap between these prices will have narrowed, which may make Capral more competitive (emphasis added).

"204. It appears that Customs and Border Protection adopted an approach that included the consideration advocated by PanAsia as a component of its assessment, being the unsubsidised and undumped calculations for Chinese exporters. Customs and Border Protection considered there to be *additional important factors* that affected the minimum price necessary to prevent the injury and I do not consider these factors to be unreasonable (emphasis added)."

The *additional important factors* referred to by the Review Officer relate to the original investigations comments concerning "shorter delivery timeframes and associated lower inventory carrying costs for customers for the domestic industry". The Review Officer then continued to assess the original investigation's treatment of such factors:

"205. However I cannot see that Customs and Border Protection has evaluated the weighting that should be accorded to such factors vis-à-vis the gap between Capral's cost-to-make-and-sell price and an undumped and unsubsidised Chinese exporter price. I do not consider that Customs and Border Protection must calculate a precise weighting of these factors, however I would consider it appropriate to make a broad assessment of the extent to which these factors offset such a gap. Accordingly, I recommend that Customs and Border Protection reinvestigate its finding on the non-injurious price, in particular the appropriate weighting to be given to the factors listed in paragraph 201 above."

8.4 The reinvestigation

The reinvestigation notes that REP 148 outlined Customs and Border Protection's policy⁷⁶ on establishing an USP, namely by observing the following hierarchy:

1. industry selling prices at a time unaffected by dumping;
2. constructed industry selling prices; or
3. selling prices of undumped imports.

Working through the hierarchy to establish an USP, the original investigation first considered a USP based on the Australian industry's prices in 1998, but deemed that this approach did not reflect contemporary market conditions.

The original investigation then considered an USP based on Capral's CTMS and considered this approach to be appropriate. Once it was deemed appropriate to base the USP on constructed industry prices, the original investigation considered that it was not obliged to have regard to the third approach.

The review officer correctly observed [at 201⁷⁷] that the original investigation then calculated the NIP, by deducting the costs incurred in getting the goods from the export FOB point to the relevant level of trade in Australia. The deductions included overseas freight, insurance, into-store-costs and amounts for importer expenses.

⁷⁶ Australian Customs and Border Protection Service, *Dumping and Subsidy Manual*, Chapter 23, June 2009

⁷⁷ TMRO report, *ibid*, p. 47.

However, it was the difference between the applicant's CTMS and the "undumped and unsubsidised Chinese exporter price" that caused the Review Officer to seek some attempt to "weight" the factors that appear to have caused this gap, namely, the :

"reasonable price premium that local manufacturers should be expected to achieve in a market unaffected by dumped and subsidised imports... given the shorter delivery timeframes and associated lower inventory carrying costs for customers [of Australian producers]⁷⁸.

In relation to the second factor identified by the Review Officer concerning "increased production and sales volumes leading to reduced unit cost through economies of scale", this was also advanced in the original investigation in response to the PanAsia submission⁷⁹. Again, the reinvestigation notes that the original investigation did not adjust the USP by this factor in calculating the NIP.

The reinvestigation considers the original investigations finding on the NIP to be reasonable. The difference between the original investigation's USP and the proposed undumped and unsubsidised Chinese exporter prices was less than 15%. Therefore, the reinvestigation considers it reasonable for the original investigation to attribute this difference to factors such as the "shorter delivery timeframes and inventory carrying costs", which resulted in a price premium to the domestic industry.

Further, the reinvestigation considers there was sufficient evidence to support an attempt to assess a weighting of these factors in order to explain the difference between the applicant's CTMS and the lower undumped and unsubsidised Chinese exporter prices.

The calculations supporting the reinvestigation's conclusions are contained at **Confidential Attachment M**.

⁷⁸ REP 148, *ibid*, p.88

⁷⁹ *ibid*

9 ASCERTAINED EXPORT PRICE

9.1 Summary of reinvestigation findings

The delegate recommends the Attorney-General revoke the finding of the original investigation that the ascertained export price be established as the same value for all finishes. Based on the observed differences between the prices of the various finishes, it is reasonable to establish an ascertained export price separately for each finish. It follows that it is also reasonable to establish ascertained normal values and non-injurious prices separately for each finish.

9.2 The original investigation

In determining provisional measures, the original investigation imposed dumping securities on the importation of aluminium extrusions. The dumping security amount imposed was the same *ad valorem* rate applied to all exporters and all finishes. Following further enquiries, the original investigation imposed countervailing securities at the same *ad valorem* rate to all exporters and all finishes.

In determining final measures, the original investigation calculated a separate interim countervailing duty and dumping duty *ad valorem* rate for each of the selected exporters, residual exporters and all other exporters. As with the provisional measures, the amount imposed was the same *ad valorem* rate applied to all finishes.

9.3 Issues identified by the Review Officer

In considering this issue in Capral's application for review, the Review Officer appeared to have held the belief that provisional measures were applied on a differentiated basis between mill, anodised, and powder coated finishes. As noted in section 9.2 above (The Original Investigation) above, this was not the case. Accordingly, this error left the Review Officer in some doubt as to the original investigation's perceived rationale.

Notwithstanding this, whether or not the Review Officer correctly interpreted the original investigation's approach to applying provisional and final measures, the Review Officer nevertheless considered the issue of whether or not final measures should apply by finish.

The Review Officer considered that because different finishes have different costs and pricing, there may be an unduly low ascertained export price for certain 'high-value' finishes. Therefore, the Review Officer recommends that Customs and Border Protection reinvestigate the most appropriate ascertained export price, having regard to the different finishes.

9.4 The reinvestigation

The reinvestigation observes that each finish has different export prices, normal values and costs. The reinvestigation also observes that the original investigation correctly derived the product margins by comparing the normal values and the export prices of each finish. However, REP 148 did not provide reasons for not imposing interim dumping and countervailing measures by finish, even though there is a clear distinction in terms of price and costs between finishes.

Where there are distinct subcategories of the goods with different variable factors, the reinvestigation considers it reasonable and appropriate to impose measures by the distinct subcategories. This is to ensure that measures are effective in providing relief from the effects of dumping and subsidisation across the category of the goods. Therefore, the reinvestigation considers that it is more appropriate to impose the same interim measures to all finishes. Accordingly, the reinvestigation recommends that the

Attorney-General vary the dumping duty and countervailing notices having regard to the variable factors of the different finishes.

The revised ascertained export prices, non-injurious prices, interim dumping duty rates and interim countervailing duty rates are at **Confidential Attachment N**.

10 THE RELIABILITY OF EXPORTER COST-TO-MAKE-AND-SELL INFORMATION

10.1 Summary of reinvestigation findings

The delegate recommends the Attorney-General affirms the finding of the original investigation that the verified exporters' CTMS (cost-to-make-and-sell) information is reliable.

10.2 The original investigation

In its application for anti-dumping and countervailing duties, Capral provided a cost model for the purpose of calculating a 'prima facie' normal value. At the time of the application, this cost model was considered to be sufficient for the purposes of initiating the original investigation. Following initiation, Capral provided an updated cost model for consideration, which was supported by presentations made by Capral on 9 October 2009 and 8 February 2010.

During the original investigation, Customs and Border Protection officers conducted extensive verification of selected exporters' questionnaire responses, including CTMS data, namely from the following exporters:

- Kam Kiu Aluminium Products Sdn Bhd (**Kam Kiu**);
- PanAsia;
- New Zhongya; and
- Tai Ao Aluminium (Taishan) Co Ltd (**Tai Ao**)⁸⁰.

On completion of the verification visits, a visit report for each selected exporter was prepared and a non-confidential version was placed on the public record.

In response to the verification reports, Capral made submissions questioning the reliability of the selected exporters' verified CTMS data and, in some cases, referring to its updated cost model. Section 6.4.1 of SEF 148 noted that Capral had, on numerous occasions, been requested to provide a non-confidential summary of its updated cost model in order for affected parties to have a reasonable understanding of the substance of the information presented. However, this was not provided.

Nonetheless, in response to Capral's submissions, the original investigation conducted a comparison between Capral's cost model and the selected exporters' CTMS data. In section 6.5.4 of REP 148, the original investigation found that estimates contained in Capral's cost model did not align with the verified CTMS data. The original investigation concluded that although some of the evidence supporting Capral's cost model appeared to be reliable, it did not necessarily render the exporters' cost data to be unreliable.

10.3 Issues identified by the Review Officer

The Review Officer noted that the original investigation found that some of the evidence provided by Capral to support its updated cost model was reliable, and that it appeared that the verified information diverged from that reliable evidence. However the original investigation did not explain why this divergence did not cast doubt over the reliability of the verified cost data.

⁸⁰ The investigation so far as it relates to Tai Ao was terminated due to negligible dumping and subsidy margins under 269TDA(1) and (2) of the Act.

The Review Officer considered that where a prima facie case is raised that may cast some doubt over the reliability of the data, there is a corresponding need to make further assessments to allay any doubt. Therefore, the Review Officer concluded that Customs and Border Protection should reinvestigate the reliability of the selected exporters' CTMS data.

In addition, the Review Officer made three further recommendations that fall within the scope of reinvestigating the reliability of the selected exporters' CTMS data, which are to:

1. reinvestigate the exporters' information provided on capital investment, depreciation and interest costs (TMRO Report [246] refers);
2. obtain tax records from relevant authorities to verify financial statements (TMRO Report [249] refers); and
3. Review the reliability of cost evidence provided as CTMS information (TMRO Report [254] refers).

10.4 The reinvestigation

The reinvestigation had regard to the visit reports that detailed the extensive verification of the selected exporters' questionnaire responses and noted that the respective visit teams were satisfied that the verified CTMS data were accurate, complete and relevant for all selected exporters. Consequently, the original investigation relied on this verified data. The reinvestigation considers that it was reasonable for the original investigation to do so.

The reinvestigation was not satisfied that Capral's cost model invalidated the verification of the CTMS data conducted by the various visit teams during the original investigation. The reinvestigation considers that Capral's cost model is ancillary to the verified data. The reinvestigation was not satisfied that Capral's cost model displaces the original investigation's conclusion that verified CTMS data is reliable and the best information available.

The reinvestigation notes that Capral's cost model is not specific to any Chinese aluminium extrusion manufacturer, and contains several assumptions. In addition, Capral's cost model did not undergo any verification process and was not placed on the public record for examination by other interested parties.

The reinvestigation considers that those undertaking the verification of CTMS data are in the best position to assess the accuracy, completeness and relevance of the data. The reinvestigation considers it unreasonable to depart from this data and to rely on an unverified cost model instead that was not subject to public exposure or comment.

The reinvestigation observes that the original investigation thought it appropriate to undertake a comparison between Capral's cost model and the exporters' CTMS data, and this analysis did not cause it to find that the selected verified exporters' costs to be unreliable.

Regardless, any divergence between Capral's cost model and the verified CTMS data is a reflection of the quality of the assumptions and data used by Capral, rather than the reliability of the verified information. Verified information has a higher probative value, is more reliable and would take precedence over generic cost models. Therefore, the reinvestigation is satisfied that the selected exporters' verified CTMS data is reliable and that it was reasonable and appropriate for the original investigation to rely on it as the best available information.

In relation to the three further recommendations by the TMRO, the reinvestigation team firstly notes that it is not possible to consider new information in a reinvestigation, therefore the TMRO's recommendation to obtain tax records cannot be followed. Notwithstanding this, the reinvestigation team has reviewed the verification process undertaken by the original investigation team and found that the process was sufficient to conclude that the selected exporters' cost and sales data for the investigation period is

complete, relevant and accurate. Furthermore, the reinvestigation team notes that the cost data was reconciled up to audited financial accounts and the accounts were kept in accordance with the Chinese Generally Accepted Accounting Principles. As stated in SEF148A⁸¹, it is Customs and Border Protection's view that:

- where the opinion of a qualified local auditor exists that states an exporter's audited accounts are prepared in accordance with the relevant GAAP; and
- Customs and Border Protection is able to verify the cost records of an exporter to these audited accounts to its satisfaction;

Customs and Border Protection is able to determine that the exporter's cost records have been kept in accordance with the relevant GAAP, for the purposes of subregulations 180(2) and 181(2).

For these reasons the reinvestigation team considers there is no reason to depart from the original investigation's findings in relation to the reliability of cost to make and sell information.

⁸¹ In relation to the resumed investigation of exports of aluminium extrusions by Tai Ao Aluminium (Taishan) Co Ltd

11 OTHER MATTERS

11.1 Summary of other matters

During the course of its review of the original investigation, the reinvestigation became aware of two administrative errors in the dumping and countervailing duty notices signed by the Attorney-General. In the absence of a reinvestigation Customs and Border Protection would have advised the Attorney-General to correct these errors in any case. Therefore, for administrative convenience, the delegate recommends the Attorney-General:

- amend the confidential tables to the s269TG(2) dumping duty notice and s269TJ(2) countervailing duty notice to include Guang Ya Aluminium Industries Co Ltd (Guang Ya) on the list of residual exporters. This will have no effect on the amount of duty paid or payable by Guang Ya; and
- amend the countervailing duty notices to replace the subsidy program listed as 'Program 13' with 'Program 21'. This will have no effect on the amount of duty paid or payable by exporters.

11.2 Guang Ya

During the course of its review of the original investigation, the reinvestigation became aware of an administrative error involving Guang Ya. REP148 listed Guang Ya as a residual exporter, which resulted in Guang Ya being eligible for a lower rate of interim dumping and countervailing duty than if classified as an 'other exporter'. In implementing the measures, Customs and Border Protection similarly recorded Guang Ya as a residual exporter in its Integrated Cargo System, the mechanism by which importers enter goods for home consumption and record a duty liability. Therefore, goods exported by Guang Ya have been, and are, incurring the correct amount of interim duty.

However, the confidential tables that form part of the dumping and countervailing duty notices signed by the Attorney-General⁸² omitted Guang Ya's name from the list of residual exporters. By implication any exporter not assigned its own dumping and/or countervailing duty rate, or listed as a residual exporter, is assigned the 'all other' exporter rate of duty.

Making this correction to the notice will have no impact on the amount of duty paid or payable by Guang Ya.

11.3 Program 13 / Program 21

In the original investigation it was found that subsidy Program 13 "Exemption of tariff and import VAT for imported technologies and equipment" and subsidy Program 21 "Tariff and VAT exemptions on imported materials and equipments" were duplicate programs⁸³. Only Program 21 was ultimately found to be countervailable in Report 148.

However, in the countervailing duty notices signed by the Attorney-General, Program 13 was incorrectly included as the countervailable subsidy and not Program 21. This is purely an administrative error.

Making this correction to the notice will have no impact on the amount of countervailing duty paid or payable in relation to this program.

⁸² s269TG(2) and s269TJ(2)

⁸³ REP 148, *ibid*, p. 22 and REP 148 Appendices

12 EVIDENCE OR OTHER MATERIAL RELIED ON

In making its findings, the reinvestigation had regard to the following material or other evidence:

- REP 148 and TMRO Report 11/2372 and appendices;
- relevant information provided to Customs and Border Protection's original investigation by Australian industry, importers, exporters, manufacturers, other parties and Customs and Border Protection's commercial database; and
- submissions to the TMRO and to the reinvestigation as far as they relate to the relevant information or conclusions based on the relevant information.

13 ATTACHMENTS

NON-CONFIDENTIAL ATTACHMENT A1	Varied dumping and countervailing duty notices
CONFIDENTIAL ATTACHMENT A2	Varied confidential tables to the varied dumping and countervailing duty notices
CONFIDENTIAL ATTACHMENT B	Confidential submission to the reinvestigation of PanAsia Enterprises Group Limited (and related companies) (PanAsia)
NON-CONFIDENTIAL ATTACHMENT C	Non-Confidential submission to the reinvestigation of Capral Limited (Capral)
CONFIDENTIAL ATTACHMENT D1	Confidential submission to the reinvestigation of JELD-Wen Australia Pty Ltd (JELD-Wen)
NON-CONFIDENTIAL ATTACHMENT D2	Non-Confidential submission to the reinvestigation of JELD-Wen
NON-CONFIDENTIAL ATTACHMENT E	Non-Confidential submission to the reinvestigation of Ministry of Commerce, Government of the People's Republic of China (MOFCOM)
CONFIDENTIAL ATTACHMENT F	Calculations supporting the reinvestigation's conclusions concerning PanAsia's low volume submission
CONFIDENTIAL ATTACHMENT G	Export price movements of PanAsia
CONFIDENTIAL ATTACHMENT H	Confidential submission of New Zhongya dated 29 March 2010
NON-CONFIDENTIAL ATTACHMENT I	Non-confidential submission of New Zhongya dated 29 March 2010
CONFIDENTIAL ATTACHMENT J	Original verified spreadsheets submitted by New Zhongya
CONFIDENTIAL ATTACHMENT K	Revised verified spreadsheets of New Zhongya
CONFIDENTIAL ATTACHMENT L	Calculations supporting the revised normal value and product dumping margins for New Zhongya
CONFIDENTIAL ATTACHMENT M	Calculations supporting the reinvestigation's conclusions concerning the difference between the original investigation's USP and an undumped/unsuppressed export selling price
CONFIDENTIAL ATTACHMENT N	Revised ascertained export price, non-injurious price, interim dumping duty rate and interim countervailing duty rate calculated by finish



Australian Government
Australian Customs and
Border Protection Service

Customs Act 1901 – Part XVB
Certain Aluminium Extrusions
Exported from
The People’s Republic of China
Reinvestigation findings:
Variation of decision to impose measures

Public notice under subsection 269ZZM(4)

The Australian Customs and Border Protection Service (Customs and Border Protection) has completed the reinvestigation into certain findings made in Trade Measures Report No. 148 in respect of aluminium extrusions exported to Australia from the People’s Republic of China.

International Trade Remedies Report No. 175 (REP 175) sets out the findings affirmed and new findings made by Customs and Border Protection as a result of the reinvestigation.

I, Robert McClelland, Attorney-General, have considered and accepted the recommendations provided by Customs and Border Protection in REP 175, the reasons for these recommendations, and the material findings of fact or law on which the recommendations are based.

I have therefore decided to:

- (a) affirm my decision to publish dumping duty notices and countervailing duty notices;
 - (b) vary the dumping and countervailing duty notices published on 28 October 2010, with effect from the date of publication of this notice, so that the dumping and countervailing duty notices are to be taken to have had effect as if different variable factors had been fixed, relevant to the determination of duties as set out in the confidential tables to this notice (tables 1 to 4 under s.269TG(2) and tables 1 to 5 under s.269TJ(2));
 - (c) vary the dumping duty notice published on 28 October 2010, with effect from the date of publication of this notice, so that the dumping duty notice is to be taken to have had effect as if it applies in relation to all exporters of the goods and like goods from China to Australia other than Tai Ao
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Aluminium Tai Shan Co Ltd and Zhaoqing New Zhongya Aluminium Co Ltd; and

- (d) vary the countervailing duty notice published on 28 October 2010, with effect from the date of publication of this notice, so that the countervailing duty notice is to be taken to have had effect as if references to 'program 13' were references to 'program 21'.

The new fixed export prices, non-injurious prices, normal values, interim dumping duty and interim countervailing duty will not be published in this notice as they may reveal confidential information.

Interested parties may seek a review of this decision by lodging an application with the Federal Court of Australia, in accordance with the requirements in the *Administrative Decisions Judicial Review Act 1975*, within 28 days of the publication of this notice.

Copies of REP 175 are available on the internet at www.customs.gov.au. Alternatively, REP 175 is available on request from International Trade Remedies Office Management, Customs and Border Protection, Canberra, by telephone (02) 6275 6547 or facsimile (02) 6275 6888.

Enquiries about this notice may be directed to Director Operations 2 on telephone number (02) 6275 6393, fax number (02) 6275 6990 or email tmops2@customs.gov.au.

Dated this *22nd* day of *August* 2011



ROBERT McCLELLAND
Attorney-General