



Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

This is the approved¹ form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 2 March 2016 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party² may lodge an application for review to the ADRP of a review of a ministerial decision.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Time

Applications must be made within 30 days after public notice of the reviewable decision is first published.

Conferences

You or your representative may be asked to attend a conference with the Panel Member appointed to consider your application before the Panel gives public notice of its intention to conduct a review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. The Panel may also call a conference after public notice of an intention to conduct a review is given on the ADRP website. Conferences are held between 10.00am and 4.00pm (AEST) on Tuesdays or Thursdays. You will be given five (5) business days' notice of the conference date and time. See the ADRP website for more information.

¹ By the Acting Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.

² As defined in section 269ZX *Customs Act 1901*.

Further application information

You or your representative may be asked by the Panel Member to provide further information to the Panel Member in relation to your answers provided to questions 10, 11 and/or 12 of this application form (s269ZZG(1)). See the ADRP website for more information.

Withdrawal

You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

If you have any questions about what is required in an application refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name: [Global Vietnam Aluminium Company Limited](#)

Address: [My Xuan B1-Conac Industrial Zone, My Xuan Town, Tan Thanh District, BR-VT Province, Vietnam](#)

Type of entity (trade union, corporation, government etc.): [Corporation](#)

2. Contact person for applicant

Full name: [Mr Patrick Huang](#)

Position: [Deputy Director](#)

Email address: patrick@gva.com.vn

Telephone number: [+84 947 835 193](#)

3. Set out the basis on which the applicant considers it is an interested party

[Global Vietnam Aluminium Company Limited](#) (herein referred to as "GVA") is an exporter of aluminium extrusions exported from Vietnam.

4. Is the applicant represented?

[Yes](#)

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

****It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.****

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under:

Subsection 269TG(1) or (2) – decision of the Minister to publish a dumping duty notice

Subsection 269TH(1) or (2) – decision of the Minister to publish a third country dumping duty notice

Subsection 269TJ(1) or (2) – decision of the Minister to publish a countervailing duty notice

Subsection 269TK(1) or (2) decision of the Minister to publish a third country countervailing duty notice

Subsection 269TL(1) – decision of the Minister not to publish duty notice

Subsection 269ZDB(1) – decision of the Minister following a review of anti-dumping measures

Subsection 269ZDBH(1) – decision of the Minister following an anti-circumvention enquiry

Subsection 269ZHG(1) – decision of the Minister in relation to the continuation of anti-dumping measures

6. Provide a full description of the goods which were the subject of the reviewable decision

The goods subject of the reviewable decision are:

- are produced by an extrusion process;
- are 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).

Finish Types

- as extruded (mill);
- mechanical;
- anodized; or
- painted or otherwise coated, whether or not worked;

Sizes

- have a wall thickness or diameter greater than 0.5 mm;
- have a maximum weight per metre of 27 kilograms; and
- have a profile or cross-section fitting within a circle having a diameter of 421 mm.

7. Provide the tariff classifications/statistical codes of the imported goods

The imported goods are classified using the tariff sub-headings and associated statistical codes below:

Tariff subheading	Statistical code
7604.10.00	06
7604.21.00	07, 08
7604.29.00	09, 10
7608.10.00	09
7608.20.00	10
7610.10.00	12
7610.90.00	13

8. Provide the Anti-Dumping Notice (ADN) number of the reviewable decision

If your application relates to only part of a decision made in an ADN, this must be made clear in Part C of this form.

Anti-Dumping Notice 2017/72 is attached at **Attachment A**.

9. Provide the date the notice of the reviewable decision was published

The attached ADN 2017/72 was published on 27 June 2017.

****Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application****

PART C: GROUNDS FOR THE APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the grounds that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so:

- 10. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision.**

Please refer at **Attachment B**.

- 11. Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10.**

Please refer at **Attachment B**.

- 12. Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.**

Do not answer question 12 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.

Please refer at **Attachment B**.

PART D: DECLARATION

The applicant/the applicant's authorised representative [*delete inapplicable*] declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* it gives public notice of its intention to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected;
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature:



Name: JOHN BRACIC

Position: DIRECTOR

Organisation: J.BRACIC & ASSOCIATES PTY LTD

Date: 27th July 2017

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question 4.

Provide details of the applicant's authorised representative

Full name of representative: [Mr John Bracic](#)

Organisation: [J.Bracic & Associates Pty Ltd](#)

Address: [PO Box 6203, Manuka, ACT 2603](#)

Email address: john@jbracic.com.au

Telephone number: [+61-0499056729](tel:+61-0499056729)

Representative's authority to act

****A separate letter of authority may be attached in lieu of the applicant signing this section****

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature: 

Name: [Mr Jacky Cheung](#)

Position: [General Director](#)

Organisation: [Global Vietnam Aluminium Company Limited](#)

Date: [26 July 2017](#)



J.BRACIC & ASSOCIATES
TRADE REMEDY ADVISORS

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27 July 2017

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

Review of a Ministerial decision – Aluminium extrusions exported from the Socialist Republic of Vietnam.

1. INTRODUCTION

On 28 June 2016, Capral Limited (Capral) lodged an application for the imposition of interim dumping duties and interim countervailing duties on exports of aluminium extrusions from Malaysia and Vietnam. The Anti-Dumping Commission (the Commission) notified on 16 August 2016 of its decision to not reject the application.

On 22 June 2017, following the Commission's investigation, the Assistant Minister for Industry, Innovation and Science (Assistant Minister) made the decision under subsections 269TG(1) and 269TG(2) of the *Customs Act 1901* (the Act) to impose interim dumping duties in accordance with Section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* on like goods exported from Vietnam. Notification of the Assistant Minister's decision was made on 27 June 2017.

Final Report No. 362 (Report 362) contains the material findings of fact and reasoning that forms the basis for the Assistant Minister's decision to impose duties.

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

GVA seeks a review of the following findings and conclusions which led to the decision of the Assistant Minister to publish a dumping duty notice against aluminium extrusions exported from Vietnam:

- **Ground 1:** The Commission erred in determining normal value pursuant to subsection 269TAC(1) of the Act, on the basis of domestic sales by other sellers of like goods; and

- **Ground 2:** The Commission erred by not considering and making appropriate adjustment for factors known to affect price comparability between export price and corresponding normal values.

Ground 1: The Commission erred in determining normal value pursuant to subsection 269TAC(1) of the Act, on the basis of domestic sales by other sellers of like goods.

In submitting its completed exporter questionnaire response, GVA reported that it had no domestic sales of like goods in the country of export. As explained to the Commission, GVA is an export-oriented company [REDACTED]. As such, all inputs and sales are [REDACTED]. [Confidential details regarding GVA's manufacturing operations]

In the absence of domestic sales of like goods, the Commission determined GVA's normal value on the basis of other seller's domestic sales of like goods. Specifically, the normal values relied on domestic sales information submitted by the cooperating exporters East Asia Aluminium Company Ltd (EAA) and Mien Hua Precision Mechanical Co., Ltd (Mien Hua).

GVA submits that the Commission erred in relying on domestic sales by other sellers as it did not undertake a proper examination and assessment as to whether such sales by EAA and Mien Hua were both suitable and relevant, as per its own stated policy. The Dumping and Subsidy Manual³ makes clear that:

Where an other-seller's prices are being considered for normal values, the Commission will, subject to confidentiality, seek to provide the exporter with information about the other seller's sales so that the exporter in question might defend its interests. Generally, this will involve identifying that other seller, providing information on the type of products being sold on the domestic market, and the other seller's domestic distribution methods for level of trade comparisons.

This requirement is mandated by Article 2.4 of the Anti-Dumping Agreement which requires that '[t]he authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those Parties.' This obligation is further supported by the findings of Anti-Dumping Review Panel (ADRP) which highlighted in its request for reinvestigation of hot rolled structural steel sections from Japan, Korea, Taiwan and Thailand⁴, that:

In conducting the reinvestigation, I request that you take cognisance of Article 2.4 of the WTO Anti-Dumping Agreement (which is the provision that s269TAC(8) enacts

³ ADC Dumping and Subsidy Manual, April 2017, page 38.

⁴ http://adreviewpanel.gov.au/HRSSS_Reinvestigation.pdf; page 2.

into Australian legislation). In particular, the requirement in Article 2.4 that, “Due allowance shall be made in each case, on its merits, for differences which affect price comparability”. In addition to an illustrative list of possible such differences, Article 2.4 also requires allowances for “any other differences which are also demonstrated to affect price comparability” (emphasis added).

While there is clearly a burden on the claimant to provide evidence of the claimed adjustment it should also be noted that there is an affirmative information-gathering burden on the investigating authority, that it “shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties”.

During the investigation, GVA brought to the Commission’s attention a number of factors which would account for differences between the other seller’s domestic sales and GVA’s export sales, and which would require adjustment to ensure proper comparison. These factors include:

- i) order volumes and associated discounts;
- ii) complexity of profiles and associated higher production costs;
- iii) overall cost structures due to location of operations;
- iv) differences in payment terms;
- v) differences in selling costs in the domestic and export markets;
- vi) different VAT implications in the domestic and export markets; and
- vii) sales made at different levels of trade.

In REP 362, the Commission responded to GVA’s request for clarity on the characteristics, terms and circumstances of the domestic sales by highlighting that the names of the exporters and the quarterly weighted average ex-works selling prices were provided to GVA. It also highlighted that the questionnaire responses and verification reports for the other sellers were placed on the public record.

The identified information does not provide a sufficient understanding of the relevant factors which are considered to impact on price comparability between the normal values and corresponding export prices. For example, selling prices of powder coated products vary according to the colour groupings due directly to the variation in costs for such colours. None of the information on the public record informs of the colour groups sold domestically by EAA and/or Mien Hua to enable GVA to properly claim adjustment for differences to its export sales to Australia.

Likewise, the Commission has established that aluminium extrusion producers add additional premiums to their selling prices for customers requesting non-base grade alloys. As GVA’s exports of mill finish extrusions were all base grade alloys, no additional premiums were incorporated into the export prices. Again, none of the information on the

public record provides insight into whether the domestic sales by EAA or Mien Hua included such alloy premiums, and therefore impacted on the price comparability.

Therefore, GVA submits that the use of the other seller's domestic sales pursuant to subsection 269TAC(1) of the Act to be inappropriate. This is consistent with the Commission's policy interpretation:

Where sufficient information cannot be provided to the exporter without disclosing confidential information on such matters, the Commission may be constrained in pursuing an examination of adjustment claims and as a result may be hindered in establishing the necessary facts to ensure fair comparison. As fair comparison is a fundamental principle in the determination of whether goods are dumped, where the Commission considers that a fair comparison cannot be achieved, domestic sales of like goods by an other-seller may not be suitable for determining a normal value.

In the absence of any understanding of the types of products sold on the domestic market by EAA and Mien Hua, or the nature of those domestic sales in terms of the level of trade, delivery terms, credit terms, complexity of profiles, volumes, etc, GVA was unable to meaningfully identify and quantify due allowance claims. In these circumstances, it was inappropriate for the Commission to determine GVA's normal value on the basis of other seller's domestic sales.

GVA again reiterates its view that where the Commission experiences difficulties in making adjustments for fair comparison, it is compelled to reject those other seller's domestic sales. This is supported by the Commission's previous findings in its investigation into canned mushrooms exported from China⁵:

Customs examined the other sellers sales and sought at length to use those sales with appropriate adjustments under the provisions of subsection 269TAC(1) and subsection 269TAC(8). However, the results generated appeared to Customs to be significantly inaccurate or unreasonable because of the difficulties experienced in making the adjustments for fair comparison.

Among the differences that made these adjustments necessary were the following:

- *the producer from whom the goods were sourced and its cost structure;*
- *the grade of mushrooms used by the producer;*
- *the type of container (glass jars and cans);*
- *the size of the container;*
- *the style (whole, sliced or pieces and stems) of the mushroom in the container;*
- *the manufacturing process;*
- *whether the container was purchased, or manufactured by the producer;*
- *whether the container was pre labelled or labelled just prior to sale;*

⁵ [Review of decision to publish dumping duty notice in respect of preserved mushrooms from China](#), para 35.

- the delivery and payment terms relating to the purchase of the goods by the exporter;
- the delivery and payment terms relating to the sale of the goods by the exporter;
- the delivery and payment terms relating to domestic sales;
- the volume of preserved mushrooms purchased by: domestic customer from domestic seller; exporter from producer; and Australian customer from the exporter;
- loyalty relationships between the respective parties;
- packing costs (eg packs of 12 versus packs of 24);
- selling costs in the domestic and export markets;
- exhibition/promotional costs in the domestic and export markets;
- different VAT implications in the domestic and export markets; and
- level of trade. [Emphasis added]

Likewise the Commission's manual reinforces this key principle that sales by other seller's would not be suitable without fair comparison:

Sales of like goods by other sellers may not be relevant if a fair comparison cannot be achieved. The following examples illustrate situations where a fair comparison may not be possible because:

- there is a difference in the level of trade between the other seller's domestic sales and the exporter/producers' export sales, and there is no meaningful way of making the level of trade adjustment, or
- there are differences in characteristics (e.g. raw materials, specifications, production methods, performance and costs, etc.) between the other seller's domestic goods and the goods exported to Australia by the exporter, and it is not possible to reasonably work out the amount of any adjustment to account for those differences, or
- there is a difference in the time of sale between the other seller's domestic sales and the exporter/producer's export sales, and there is no meaningful way of working out the adjustment. [Emphasis added]

To that end, GVA notes:

- the credit terms of its export sales were by [REDACTED], whereas it is expected that other domestic seller's will be offering extended payment terms to domestic customers;
- EAA's identification of different levels of volume based discounts offered to export and domestic customers;
- EAA's identification of end-user and distributor domestic customers confirming that sales at different levels of trade exist to GVA's export sales; and
- the expected disparity in volume between GVA's exports (approximately [REDACTED] metric tonnes) and the corresponding domestic volume by EAA and Mien Hua.

On the question of respective volumes in circumstances where other seller's domestic sales were used to determine normal values, Buchanan J⁶ in *Thai Pineapple Canning Industry Corp Ltd v Minister for Justice & Customs*, noted that:

...the disproportion in volume between TPC's export sales and the sales proposed to be used to establish normal value for these export sales was so great, both in percentage and absolute terms, as to raise significant questions about the validity and reliability of such a comparison.

GVA contends that the Commission was obliged to consider and assess such differences in deciding whether the other sellers' sales were appropriate for determining GVA's normal value.

Finally, in GVA's submission to the statement of essential facts report it again highlighted that unlike other domestic sellers, it is [REDACTED]

[REDACTED] In addition, [REDACTED] [REDACTED] which is expected to differ to other domestic sellers which are understood to have fully acquired the land used for their manufacturing operations.

GVA contends that the Commission's determined normal value is flawed as it assumes that irrespective of GVA's actual costs relative to other domestic producers, GVA could and would automatically achieve a significantly higher domestic rate of profit than the other sellers. In effect, it disregarded any association and correlation between an exporter's cost to make and sell and its selling price. This is a plainly flawed assumption as demonstrated in the example below.

In the circumstance where GVA unit costs are lower than other domestic sellers, attributing the domestic selling prices from the other domestic sellers results in a normal value which incorporates a substantially higher rate of profit than that actual realised by the other domestic sellers. It is an accepted principle that an exporter's costs will affect corresponding selling prices and therefore in the example below, proper comparison can only be achieved by either:

- a) making a downward adjustment to the domestic selling price for the identified cost difference plus actual rate of profit by the other domestic seller; or
- b) constructing normal values using GVA's CTMS plus the actual amount of profit realised by the other domestic seller

⁶ *Thai Pineapple Canning Industry Corp Ltd v Minister for Justice & Customs* [2008] FCA 443, para 56.

	GLOBAL VIETNAM ALUMINIUM	OTHER DOMESTIC SELLER
CTMS	\$65	\$80
SELLING PRICE	\$100	\$100
PROFIT	35	\$20
PROFIT (%)	35%	20%

For these reasons, GVA submits that the Commission's determination of normal value pursuant to subsection 269TAC(1) of the Act, using domestic sales of like goods by other sellers, to not be correct or preferable.

Ground 2: The Commission erred by not considering and making appropriate adjustment for factors known to affect price comparability between export price and corresponding normal values.

As explained in ground 1 above, GVA contends that the Commission erred in determining normal values on the basis of domestic sales by other sellers in Vietnam. Notwithstanding this flawed approach, GVA submits that the Commission did not then make relevant and necessary adjustment to the normal values to ensure proper comparison with the export prices.

This issue was considered by Buchanan J⁷ in *Thai Pineapple Canning Industry Corp Ltd v Minister for Justice & Customs*,

Under s 269TAC(1) a comparison of 'like goods' was required. Unless the like goods were identical, an adjustment was required by s 269TAC(8) to remove the effect of any differences as well as to address other matters affecting a proper comparison. That was a statutory obligation which lay on the Minister and Customs...

During the course of the investigation, GVA had raised the following likely factors that were considered to affect price comparability between normal values and corresponding export prices:

- a) different physical characteristics between GVA's exported aluminium extrusions which are simple profiles characterised by having greater wall thickness and wider overall tolerances. This compares to the aluminium extrusions sold domestically in Vietnam which are predominantly focused on small orders by end-users and original equipment manufacturers of custom and complex profiles with very tight tolerances. The complexity of the domestic profiles and the small production volumes required by domestic customers results in higher manufacturing overheads due to the lower productivity and efficiency;
- b) [REDACTED]
[REDACTED]
[REDACTED]. By contrast, the other sellers are [REDACTED]
[REDACTED], and would likely have residual Customs duty on any

⁷ *Thai Pineapple Canning Industry Corp Ltd v Minister for Justice & Customs* [2008] FCA 443, para 74.

- imported machinery, equipment and raw materials used in the production of domestic products.
- c) different delivery and payment terms;
 - d) disparate sales volumes between GVA's exports and the other sellers' domestic sales. Confirm by EAA's adjustment claim for differences quantity discounts between its export and domestic customers;
 - e) differing selling costs incurred on GVA's export sales and the other sellers' domestic sales including a sales staff, wages, etc; and
 - f) different levels of trade between GVA's export sales to distributors compared to the other sellers' domestic sales to end-users and original equipment manufacturers.

Of relevance to GVA's claims to the Commission, Buchanan J⁸ concluded:

However, the statutory obligation to make appropriate adjustments lay squarely on the Minister. Although it may be accepted that he was not obliged to accept every adjustment claimed or independently (through Customs) investigate every suggestion if there was not adequate material to do, the content of the statutory obligation did not depend on an onus on TPC to prove a case. That was particularly so when TPC's capacity to address the issues had been severely curtailed by the lack of information provided to it (whatever might be the justification for that course) and when the identity of the 'other seller' had been systematically kept from it. The examination carried out by Customs should have been directed to establishing, so far as it could, that there was, in fact, no basis for concern that any lack of identity of product or other relevant factor, led to a price differential.

GVA therefore contends that the Commission erred and did not make the correct or preferable decision, as it did not consider and make appropriate adjustment for factors known to affect price comparability between export price and corresponding normal values.

3. THE CORRECT AND PREFERABLE DECISIONS

GVA contends that the correct and preferable decisions to the challenged findings are:

Ground 1: The correct and preferable decision was to conclude that the use of other sellers' domestic sales could not ensure fair comparison. As such, the domestic sales of like goods by the other sellers were not suitable for determining GVA's normal value. The correct and preferable approach to determining GVA's normal value would have been to construct normal values pursuant to subsection 269TAC(2)(c) of the Act using the following:

- i) GVA's cost of production of the exported goods;
- ii) plus the weighted average of the actual amounts of administrative, selling and general costs incurred by the other sellers in the production and sale of like goods in the domestic market;

⁸ Thai Pineapple Canning Industry Corp Ltd v Minister for Justice & Customs [2008] FCA 443, para 99.

- iii) plus the weighted average of the actual amounts realised by the other sellers from the sale of like goods in the domestic market.

Ground 2: The correct and preferable decision was to make adjustment for all and any factors which were found to cause differences in the domestic and export prices such that proper comparison affected. The factors highlighted by GVA should have been individually considered and addressed by the Commission.

4. REASONS WHY THE PROPOSED DECISIONS ARE MATERIALLY DIFFERENT FROM THE REVIEWABLE DECISION.

The Commission's decision to establish GVA's normal value on domestic sales of like goods by other sellers resulted in the highest dumping margin (18.0%) amongst the cooperating exporters in Vietnam, being substantially higher than the margin of dumping found for the other sellers – EAA (7.7%) and Mien Hua (11.6%). GVA considers that its higher dumping margin is a result of the lack of proper comparison between its export prices and the other sellers' domestic sales.

Ground 1: The correct and preferable decision would have been to construct GVA's normal value. This would have resulted in a substantially lower normal value as:

- GVA's costs are expected to have been lower;
- the calculation of the weighted average profit would have required including the actual amount realised on all domestic sales of like goods and not only sales found to be sold in the ordinary course of trade. This is expected to result in a lower rate of profit and hence lower normal value.

Ground 2: Where differences were found to exist between GVA's export sales and the other sellers' domestic sales, the Commission would have made the necessary adjustment to normal values to ensure proper comparison. The value of the adjustments would result in a commensurate change in the normal value and as a consequence the dumping margin. On the basis that GVA expects the adjustments to be largely favourable, the correct and preferable decision would have led to a lower dumping margin.