

Williams Trade Law

International Trade Regulation / WTO Specialist
Sydney, Australia

19 April 2020

The Director
Investigations 2
GPO Box 2013
Canberra, ACT, 2601

By email to: Investigations2@adcommission.gov.au

Dear Mr./Ms. Director,

FOR THE PUBLIC RECORD

RE: Indah Kiat Objections to Accompany Response to Questionnaire re ADN2020/028

We act for PT Indah Kiat Pulp & Paper Tbk ('Indah Kiat').

Indah Kiat has received ADN2020/028 and the Exporter Questionnaire.

Indah Kiat has requested that we submit the attached document "Objections to accompany response to Questionnaire re ADN2020/028" for the public record.


Yours Faithfully,

Brett Williams

Dr Brett G Williams

Principal, Williams Trade Law

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PT Indah Kiat Pulp & Paper Tbk ('Indah Kiat') objects to the manner in which the Anti-Dumping Commission ("ADC") has implemented the Panel's decision in DS529, *Australia – A4 Copy Paper from Indonesia*. Indah Kiat understands that the ADC will be conducting a review of the anti-dumping measure and the review period is 2019. Indah Kiat further understands that the reason the ADC is conducting a review is because there is no provision of Australian law that permits the ADC to revisit the original determination. The ADC's approach is inconsistent with the Australia's WTO obligations.

Notably, but not exclusively, Article 5.8 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") requires investigating authorities to terminate an investigation if there is not sufficient evidence of dumping and injury. Here, the original investigation record indicates that if Australia had acted consistent with its WTO obligations, as decided by the Panel, there would not have been sufficient evidence of dumping requiring termination of the investigation. However, the procedure the ADC is following will not examine whether there was sufficient evidence of dumping in the original investigation but, instead, will ask whether there is evidence of dumping in 2019 – four years after the original period of investigation and without the use of actual export prices to compare because, as Indah Kiat has informed the ADC, it did not export to Australia in 2019.

The process the ADC is following appears to fall within Article 11.2 of the ADA. The WTO Appellate Body has ruled that exporters who have been found to have a zero or *de minimis* dumping margin in an original investigation cannot be subject to administrative and changed

circumstances reviews.¹ Consequently, the ADC is acting inconsistently with Australia's WTO obligations by failing to examine whether there was a WTO consistent basis for imposing the measures, without which, there is not a WTO consistent basis to conduct a review of the measures.

In addition to the WTO inconsistency of the process, Indah Kiat objects to the Exporter's Questionnaire as extraordinarily burdensome and without a corresponding justification. Indeed, the Exporter's Questionnaire is far more burdensome than the questionnaire in an original investigation. This is even more problematic and unreasonable because Indah Kiat fully responded to the Exporter's Questionnaire in the original investigation and the ADC verified that data and calculated a negative 1.4 percent dumping margin for Indah Kiat.² Indeed, the Verification Report answers two of the key questions posed by the Panel's ruling: 1) whether a proper comparison was possible and 2) whether the costs recorded in Indah Kiat's books and records were the actual costs incurred.

On the first point, the Verification Report states:

The verification team considers that the goods manufactured for domestic consumption are identical to, or have characteristics closely resembling, the goods export to Australia as they:

. . .

- are produced at the same facilities and with the same raw material inputs and manufacturing processes; . . .³

On the second point, the Verification Report states:

The verification team was able to trace Indah Kiat's CTMS data for pulp down to the purchase of pulpwood used in the pulp making process. The verification team

¹ See Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R, para. 305 (adopted 20 December 2005).

² Indah Kiat Exporter Verification Report, sec. 8.

³ Indah Kiat Exporter Verification Report, sec. 2.3.

was able to verify the accuracy of Indah Kiat's CTMS data for pulp by reconciling it to source documents in accordance with ADN No. 2016/30.

The verification team was able to ascertain that pulp is transferred to the photocopy paper manufacturing division at actual cost, and therefore, the verification team is satisfied that the pulp costs (as part of the raw material costs) recorded in Indah Kiat's CTMS spreadsheet for A4 photocopy paper reflect the actual costs incurred.⁴

The WTO Panel already has ruled the ADC's original determination was not consistent with Australia's WTO obligations, yet rather than responding to the Panel's specific rulings, the ADC has launched an entirely new proceeding that requires five years of data to be provided, despite the fact that Indah Kiat did not export to Australia during that period.

Finally, the ADC already has indicated that it intends to construct export price in the absence of an export price. Indah Kiat did not export to Australia during the period of review, a fact Indah Kiat has made known to the ADC. Based on what the ADC has informed the parties, the ADC will calculate a dumping margin based on a comparison of domestic price (or constructed normal value) to a constructed export price and based on data for 2019. This comparison will be a complete fiction that cannot reasonably reflect the margin of dumping for 2019 let alone for 2015.

Indah Kiat makes the above objections without prejudice to claims and arguments that may be made in a proceeding pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

⁴ Indah Kiat Exporter Verification Report, sec. 4.3.