

Canberra
6/2 Brindabella Circuit
Brindabella Business Park
Canberra International Airport
Australian Capital Territory 2609

Canberra +61 2 6163 1000
Brisbane +61 7 3367 6900
Melbourne +61 3 8459 2276

www.moulislegal.com

Brisbane
Level 4, Kings Row Two
235 Coronation Drive
Milton, Brisbane
Queensland 4064

Melbourne
Level 39, 385 Bourke Street
Melbourne
Victoria 3000

Australia



commercial + international

8 September 2017

Mr Paul O'Connor
Panel Member
Anti-Dumping Review Panel
c/- Legal Audit and Assurance Branch
Department of Industry, Innovation and Science
10 Binara Street
Canberra
Australian Capital Territory 2601

By email

Dear Panel Member

Review of Ministerial decision – aluminium road wheels Interested party submission of Zhejiang Jinfei Kaida Wheel Co., Ltd

On behalf of our client Zhejiang Jinfei Kaida Wheel Co., Ltd ("Jinfei Kaida"), we welcome the decision of the Anti-Dumping Review Panel ("the Review Panel") to accept Jinfei Kaida's review application, and to initiate this review.

This is Jinfei Kaida's interested party submission to the Review Panel, made in accordance with Section 269ZZJ of the *Customs Act 1901* ("the Act").

We feel that Jinfei Kaida's review application ("the Review Application") provides a quite detailed explanation of the grounds of this review. It is not our intention to recite those grounds in this letter.

However, it has come to our attention that the Review Panel held a conference ("the Conference") with officers from the Anti-Dumping Commission ("the Commission") to clarify certain aspects of Jinfei Kaida's application, and to "*obtain further information in relation to the review*".¹ Based on the information placed on the public record of the review, those discussions appear to have been constructive and helpful. Nonetheless, we would like to take this opportunity to provide further comments concerning the topics discussed in the Conference, in order to assist the Review Panel's consideration of the issues involved.

We note that two WTO Appellate Body reports were cited in the Conference summary, namely *Mexico - Definitive Anti-Dumping Measures on Beef and Rice* (Mexico - Rice)² and *United States - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* (US - Hot Carbon Steel (India)).³

The Appellate Body report in *Mexico - Rice* ruled that the investigating authority must use the most appropriate information available - when it is required to do so under Article 6.8 of the Anti-Dumping Agreement for the purpose of determining dumping margin - which requires an evaluative, comparative assessment of the information at hand. The report specifically states:

¹ See, Anti-Dumping Commission – Conference Summary, at page 1.

² WT/DS295 (29 November, 2005)

³ WT/DS436 (19 December, 2014)

289. With respect to the facts that an agency may use when faced with missing information, the agency's discretion is not unlimited. First, the facts to be employed are expected to be the "best information available". In this respect, we agree with the Panel's explanation:

The use of the term "best information" means that information has to be not simply correct or useful per se, but the most fitting or "most appropriate" information available in the case at hand. Determining that something is "best" inevitably requires, in our view, an evaluative, comparative assessment as the term "best" can only be properly applied where an unambiguously superlative status obtains. It means that, for the conditions of Article 6.8 of the AD Agreement and Annex II to be complied with, there can be no better information available to be used in the particular circumstances. Clearly, an investigating authority can only be in a position to make that judgement correctly if it has made an inherently comparative evaluation of the "evidence available".

Secondly, when culling necessary information from secondary sources, the agency should ascertain for itself the reliability and accuracy of such information by checking it, where practicable, against information contained in other independent sources at its disposal, including material submitted by interested parties. Such an active approach is compelled by the obligation to treat data obtained from secondary sources "with special circumspection".⁴ [underlining supplied]

Similarly, and perhaps of even more relevance to the issues before the Review Panel, the Appellate Body report in *US - Carbon Steel (India)* commented on the need to consider all substantiated facts on record, noting that determinations may not be based on *non-factual assumptions* or *speculation*. Specifically, it stated,

4.428. We begin with an assessment, in general terms, of whether the Panel's approach to Article 12.7 of the SCM Agreement comports with the Appellate Body's findings in Mexico – Anti-Dumping Measures on Rice as discussed above, before turning to India's specific allegation of error. The Panel first noted that Article 12.7 refers to the available "facts", and thus determinations made under its auspices must have a factual foundation. We find this statement to be unobjectionable. In particular, we have found that, as determinations made under Article 12.7 are to be on the basis of the "facts available", they may not be made on the basis of non-factual assumptions or speculation.⁵ [underlining supplied, footnotes omitted]

In our view, the Review Panel conference summary correctly concludes that these WTO authorities establish that:⁶

- *facts available, as used in terms of the agreement, are those which reasonably replace the information that interested party failed to provide and that the investigating authorities cannot resort to non-factual assumptions or speculation and must take into account all substantiated facts on the record; and*
- *there needs to be a process of reasoning and evaluation of all substantiated facts on the record and suggests that in the event that the investigating authority must choose among several facts available, the process of reasoning and evaluation would involve a degree of comparison in order to arrive at an accurate determination.*

⁴ See Appellate Body Report, *Mexico - Rice*, DS295 (29 November, 2005), paragraph 289.

⁵ See Appellate Body Report, *US - Carbon Steel (India)*, DS436 (19 December, 2014), paragraph 4.424 and 4.428.

⁶ See Anti-Dumping Commission – Conference Summary, at page 1.

In this regard, we remind the Review Panel of Jinfei Kaida's claim that the Minister's decision failed to adhere to the requirement regarding the use of "relevant information" in relation to two aspects.

Firstly, we recall that it is Jinfei Kaida's position that the Minister's use of the *export price* based indexing, for the purpose of determining *normal value*, involved a use of information which is not relevant information. This is because any inferences drawn from an analysis of Jinfei Kaida's Australian sales prices between two periods, or any indexing derived from such an analysis, has nothing to do with the information required to determine Jinfei Kaida's normal value during the inquiry period. Jinfei Kaida's Australian sales prices are relevant information with respect to export price, not relevant information regarding normal value. In our view, the Minister's approach towards normal value calculation, based on the export price indexing, amounts to a determination based on speculation, non-factual assumptions, and not substantiated facts. The Appellate Body's report in US - Hot Carbon Steel (India) denounced such an approach.

Secondly, we pointed out in the Review Application that there are indeed relevant and substantiated facts which were available to the Minister during the inquiry, for the purpose of calculating Jinfei Kaida's normal value based on all relevant information, namely:

- the movement in the major raw material costs as reflected in LME benchmark aluminium cost movement between Review 263 and the inquiry; and
- the verified information from a selected exporter, which the Commission had accepted as being relevant, sufficient and accurate.

In relation to the movement in major raw material costs, we take note of the following discussion in the Conference summary:

The reasons why reliance was not placed on the London Metal Exchange or on the Shanghai Exchange was because ADC officers said the movements in those exchanges were examined but they did not observe a correlation between movements in raw material costs and export prices to Australia. This was said to be consistent with the claims by JINFEI KAIDA to the effect that price movements are generally reflected in the outcomes of negotiations with particular customers rather than in raw material cost movements.

We kindly remind the Review Panel that the issue at question is the determination of normal value, not export price. In the present case the normal value is closely connected to the cost of production and sale of the relevant goods. This is especially the case because the Commission has determined that the exporters' domestic sales prices of like goods have not been suitable for the purpose of normal value determination, and has relied on cost of production benchmarked to LME aluminium prices in the calculation of normal value, in each of the investigation, review and continuation inquiries it has conducted concerning ARW exported from China. Accordingly we respectfully submit that the Commission's observation regarding the correlation or the lack of correlation between raw material cost and export prices cannot inform or distract the relevance of the LME or Shanghai Exchange information to the determination of cost of production, and ultimately the determination of normal value.

In relation to the use of verified information from other exporters, we note the following discussion in the Conference summary:

ADC officials also made the point that CITIC produced wheels for the original equipment market whereas Jinfei Kaida and Yueling predominantly produced wheels for sale to wholesalers and retailers in the aftermarket.

We note that this comment appears to confirm that the relevant circumstances of Jinfei Kaida and Yueling's sales were more comparable, as compared to the circumstances relating to CITIC. In any case, we submit that the Commission is required to work out the normal value based on relevant information. This means the Commission, and ultimately the Minister, are required to be satisfied that

the information is based on substantiated facts and that “there can be no better information available to be used in the particular circumstances”. This is not a requirement for the Commission to try to precisely recreate or reconstruct a set of facts which would fit perfectly with Jinfei Kaida’s situation, and to eliminate every possible difference between the source of the fact and the exporter to which such “relevant information” would be applied to. The Commission only needs to make sure such information is indeed relevant information (ie. information regarding normal value), for the relevant purpose (ie. normal value), and has been reasonably adopted and adapted to Jinfei Kaida’s circumstances.

In our view the discussions between the Review Panel and the Commission concerning the issues raised in Jinfei Kaida’s Review Application, as reflected in the summary placed on the public record, can only have served to confirm and support Jinfei Kaida’s grounds of review.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Charles Zhan', with a large initial 'C' and a stylized 'Z'.

Charles Zhan
Senior Associate