

**Before a Panel Established Under the Dispute Settlement Understanding of the
World Trade Organisation**

Australia – Anti-Dumping Measures on A4 Copy Paper (DS529)

Written Submission of Non-Participant *Amicus Curiae*

Environmental Investigation Agency and Kaoem Telapak

22 January 2019

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Introduction

1. This *amicus curiae* submission addresses the way in which Indonesia's log export ban was used to justify the anti-dumping duties imposed by Australia on Indonesian paper imports. The log export ban is an important policy in the fight to prevent illegal logging in Indonesia. Environmental Investigation Agency (EIA) and Kaoem Telapak (KT) are concerned that Australia has imposed anti-dumping duties in response to the log export ban, punishing Indonesia for an environmental policy that should be protected by international trade law.
2. This submission argues that anti-dumping duties cannot be imposed in response to measures that are covered by Article XX of the General Agreement on Tariffs and Trade (GATT). The approach of Australia's Anti-Dumping Commission in the investigation subject to this dispute was such that they imposed duties partly in response to Indonesia's log export ban.¹ Indonesia's log export ban is both "necessary to protect plant life and health" and "related to the conservation of exhaustible natural resources" and therefore counts as an Article XX measure. As a result, the Anti-Dumping Commission's decision to impose duties was in breach of the GATT insofar as it reflected a response to the log export ban.
3. The right of a panel to accept *amicus* briefs, as a consequence of their right to seek information from any relevant source under Article 13 of the Dispute Settlement Understanding and their

¹ The Anti-Dumping Commission's Final Report: Anti-Dumping Commission, Report No. 341, "Alleged Dumping of A4 Copy Paper from the Federative Republic of Brazil, The People's Republic of China, The Republic of Indonesia and the Kingdom of Thailand and Alleged Subsidisation of A4 Copy Paper Exported From the People's Republic of China and The Republic of Indonesia", 17 March 2017 (ADC Report), available at <https://www.adcommission.gov.au/cases/EPR%20301%20%20350/EPR%20341%20-%20archived%2018%20October%202017/221%20-%20Report%20-%20Final%20Report%20-%20REP%20341.pdf>.

right to depart from the Working Procedure in Appendix 3 to the DSU under Article 12.1, is well established.²

4. EIA and KT are not aware of any other Non-Governmental Organisations participating in this dispute, or of any Additional Procedure for written briefs by Non-Governmental Organisations specific to this case. This brief provides the information required by the Additional Procedure set out by the Appellate Body in *EC – Asbestos* for amicus submissions in that dispute,³ and serves as both an application for leave to file a brief and a brief itself.

About Environmental Investigation Agency and Kaoem Telapak

5. Environmental Investigation Agency has investigated and campaigned against environmental crime and abuse for over three decades, with a focus on forest crimes such as illegal logging and deforestation for cash crops such as palm oil, as well as similar work in relation to wildlife, oceans and climate. We have offices in London and Washington, D.C. and employ investigators and campaigners in continental Europe and East and South-East Asia. EIA International, the branch responsible for this brief, exists as EIA UK (not for profit company 7752350, registered in the UK), and EIA Trust (registered charity 1145359 and Ltd company 7844550).
6. EIA receives funding from a mixture of private donations, grants from private foundations and grants from government departments in the United Kingdom and Europe.⁴ The EIA has no direct or indirect relationship with any party to this dispute, and will not receive any financial assistance from any party or third party to this dispute.
7. Kaoem Telapak was founded in 2016 by the former member and founder of Telapak.⁵ Kaoem Telapak is working on cooperation with local communities, indigenous peoples and other stakeholders towards equitable natural resource management in Indonesia.

² Appellate Body Report, US – Shrimp WT/DS58/AB/R, paras 105-108.

³ Appellate Body Report, EC – Asbestos WT/DS135/AB/R, para 52.

⁴ Information about EIA's funding is available at <https://eia-international.org/about-eia/how-we-are-funded/>.

⁵ Telapak pursued the same objectives as Kaoem Telapak for many years previously. Before the founding of Kaoem Telapak, EIA and Telapak were partners.

Interest in this Case, Specific Issues Addressed, and Why This Brief Will Contribute to the Resolution of the Dispute

8. EIA and KT (previously Telapak) have conducted campaigns on deforestation in Indonesia for nearly 20 years. In 1998, EIA released a report entitled *The Politics of Extinction*, detailing the threats to biodiversity in Indonesia due to the destruction of its forests.⁶ In 2000 EIA and Telepak released a joint report after an investigation into illegal logging in Indonesia's national parks called *The Final Cut*.⁷ In 2003, EIA and Telepak released a report titled *Profiting from Plunder* on illegal smuggling of ramin timber from Indonesia through Malaysia.⁸
9. In 2005, EIA and Telepak published a report titled *The Last Frontier*, which set out the findings of an investigation conducted in West Papua, where rampant illegal logging was resulting in 300,000 cubic metres of merbau timber being smuggled out of the region at massive cost to the local forests and indigenous peoples.⁹ The report included information on substantial breaches of Indonesia's log export ban by criminal syndicates.¹⁰ Two follow-up reports, *Behind the Veneer* and *The Thousand-Headed Snake*, also reported on investigations revealing breaches of the log export ban.¹¹ EIA and KT have subsequently campaigned for the retention of the log export ban, being quoted in 2017 in the *The Jakarta Globe* defending the policy as an important mechanism for preventing illegal logging.¹²
10. This background displays a long-term, continuing interest on the part of EIA and KT in investigating breaches of the log export ban and defending it as a critical part of Indonesia's

⁶ EIA, *The Politics of Extinction* (1998), available at <https://eia-international.org/report/the-politics-of-extinction/>.

⁷ EIA and Telepak Indonesia, *The Final Cut* (1999), available at <https://drive.google.com/viewerng/viewer?url=https://eia-international.org/wp-content/uploads/The-Final-Cut.pdf>. This was followed up with a further report, EIA and Telepak, *Above The Law* (2003), available at <https://eia-international.org/report/above-the-law/>.

⁸ EIA and Telepak, *Profiting from Plunder* (2004), available at <https://eia-international.org/report/profitting-from-plunder/>.

⁹ EIA and Telepak, *The Last Frontier* (2005) [Exhibit 1].

¹⁰ At page 17.

¹¹ EIA and Telepak, *Behind the Veneer* (2006), available at <https://eia-international.org/report/behind-the-veneer/> and <https://eia-international.org/report/thousand-headed-snake/>.

¹² Dames Alexander Sinaga, "Activists Urge Gov't to Uphold Log Export Ban", *Jakarta Globe* (online ed. December 14, 2017) <https://jakartaglobe.id/news/activists-urge-govt-uphold-log-export-ban/>.

environmental policy. The log export ban is at issue in the dispute between Australia and Indonesia, meaning EIA and KT have an interest in the outcome of the dispute.

11. The specific issue EIA and KT are addressing in this dispute is the way in which the Australian Anti-Dumping Commission took into account the log export ban in concluding that Indonesian paper was being dumped on the Australian market. EIA believes the Anti-Dumping Commission was in breach of the GATT in doing so, and submits solely on this issue. In submitting this brief EIA and KT seek to represent the environmental interest in this case and only submits in relation to the log export ban. However, if this argument is accepted it will mean the Australian anti-dumping investigation has breached the GATT and therefore this submission is pertinent to the result of the dispute.
12. EIA and KT have not viewed the submissions of the parties and third parties to this case, but believe the submission will add to them by solely addressing the log export ban, why it constitutes a general exception under Article XX of the GATT, and why this means anti-dumping duties cannot be imposed in response to it. The factual information supporting the arguments in this brief also derive from investigations conducted by EIA and KT, meaning we are uniquely well-placed to use it as the basis for arguments in this case.

Argument

13. This brief makes three points:
 - a. In using the log export ban to justify finding a “particular market situation” in Indonesia, the Australian Anti-Dumping Commission was committing itself to finding dumping was occurring partially due to the ban;
 - b. Measures that fall under Article XX of the GATT cannot be used to justify the imposition of anti-dumping duties;
 - c. Indonesia’s log export ban is a measure “necessary to protect plant life” and “relating to the conservation of exhaustible natural resources” and fits within Article XX of the GATT.
14. These points lead to the conclusion that Australia’s Anti-Dumping Commission was wrong when it stated it could consider Indonesia’s log export ban in a market situation assessment for anti-

dumping purposes.¹³ The anti-dumping duties were imposed partially due to this error, and therefore they have been imposed in breach of the GATT insofar as they derive from the log export ban.

The Australian Anti-Dumping Investigation Penalised Indonesia's Log Export Ban

15. In the Australian Anti-Dumping Commission's investigation into alleged dumping of A4 Copy Paper by Indonesia, they found that there was a "particular market situation" in Indonesia.¹⁴ This finding allowed the Commission to not use the domestic price of paper in Indonesia when determining if paper had been dumped on the Australian market.¹⁵
16. The applicant in the Australian investigation likely asked for a finding of a "particular market situation" because paper prices in Indonesia are low. As "dumping" is defined by reference to price at *less than* normal value,¹⁶ low prices in Indonesia presented a barrier to a finding that dumping had occurred. Finding that there was a "particular market situation" allowed the Anti-Dumping Commission to set aside these low prices in Indonesia and use a higher benchmark for a price comparison.¹⁷ A significant factor in determining the existence of a "particular market situation" was the existence of the log export ban in Indonesia.¹⁸
17. Having set aside the actual prices of paper in Indonesia and used an alternative benchmark to determine a "normal price", the Anti-Dumping Commission then compared this benchmark with actual Australian prices, not considering if there was also a "particular market situation" in Australia due to Indonesia's log export ban.¹⁹
18. If the log export ban does cause lower prices for paper,²⁰ the approach taken by the Anti-Dumping Commission could only conclude in finding that paper has been dumped. The log export ban would have the same impact on paper prices in both Indonesia and Australia, as it does not restrict the sale of paper in either country. Under the approach of the Commission,

¹³ ADC Report, page 171.

¹⁴ ADC Report, page 169-188.

¹⁵ ADC Report, page 50-51.

¹⁶ General Agreement on Tariffs and Trade (GATT), Article VI(1).

¹⁷ ADC Report, page 50-51.

¹⁸ ADC Report, page 170-171.

¹⁹ ADC Report, page 50-65.

²⁰ EIA and KT do not concede that the log export ban causes lower paper prices, however the argument made in this brief can proceed on the assumption that it does.

the existence of the log export ban meant those lower prices could be removed from consideration when it came to determining “normal” prices in Indonesia, but not when it came to observing prices in Australia. As a finding of dumping depends on prices in Australia being lower than “normal”, there is a direct connection between the use of the log export ban to set aside Indonesia’s prices for paper and the eventual finding that paper has been dumped on the market. As anti-dumping tariffs were then imposed, Indonesia has been penalised for its log export ban through the reasoning process adopted by the Commission.

Article XX GATT Applies to Anti-Dumping Investigations Under Article VI GATT and the Anti-Dumping Agreement

19. Article XX of the General Agreement on Tariffs and Trade Relevantly Provides (emphasis added):

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, **nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:**

(a) ...

(b) necessary to protect human, animal or plant life or health;

...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

20. According the Anti-Dumping Agreement, anti-dumping duties are only to be imposed “under the circumstances provided for in Article VI of the [GATT]” and the terms of that Agreement.²¹

Article VI of the GATT provides:

²¹ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Article 1.

The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, **is to be condemned** if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.

21. According to the express wording of Article XX, this language cannot be read in such a way to prevent the adoption of measures that meet the general exceptions requirements.
22. If a measure which protected plant life or health could be found to cause dumping, it would be expressly condemned under Article VI of the GATT. Condemnation of a measure cannot reasonably be viewed as anything other than a prevention of that measure's adoption.
23. In addition, the knowledge that anti-dumping duties may be imposed by another party in response to an Article XX measure would act as a disincentive for a country considering whether to introduce that measure. Therefore, if Article VI allowed such duties to be imposed it would be acting to "prevent the adoption" of Article XX measures.
24. As the GATT cannot be read to condemn policies that fall within the General Exceptions under Article XX, the most reasonable reading of the GATT is that the definition of dumping under the Agreement cannot enable parties to use Article XX policies as a justification for imposing antidumping duties. Circumstances where an Article XX measure leads to dumping cannot be "circumstances provided for" in Article VI of the GATT.
25. As a consequence, a party cannot find a "particular market situation" exists preventing a proper price comparison under Article 2.2 of the Anti-dumping Agreement because of a measure that fits under Article XX, where that finding leads to the imposition of an antidumping duty.
26. If Australia had chosen to challenge the log export ban as an export restriction under Article XI of the GATT, the export ban would not have been in breach of the law if it was shown to fit in the Article XX exceptions. By imposing an antidumping duty, the Australian Anti-Dumping Commission has taken a different route to impose a trade remedy on the log export ban through the GATT. Australia should not be able to impose this trade remedy if the policy in question fits into the Article XX exceptions. Otherwise the purpose of Article XX to allow certain policies

to be implemented would be thwarted, as it simply allows a different route to the imposition of trade remedies by a party in response to Article XX measures.

27. EIA and KT note that this situation should not arise frequently, as policies that fit under the general exceptions in Article XX, in particular the log export ban, should not be expected to have a different impact on domestic prices and export prices of downstream products. If the log export ban does have the effect of suppressing prices of wood pulp with the downstream effect of lowering the price of paper, it should do that to the same degree in both Indonesia's domestic market and in the export market to Australia. Therefore the log export ban could not be expected to prevent a proper comparison between prices in Indonesia and prices in Australia. Despite this, the Anti-Dumping Commission's approach to determining there was a "particular market situation" in Indonesia has led to the outcome of finding a difference in prices between the "normal value" of paper and the prices in Australia, further leading to finding that dumping had occurred.

Indonesia's Log Export Ban is a measure "necessary to protect plant health or life" and "relating to the conservation of exhaustible natural resources" under Article XX(b) and (g) of the GATT

28. To be an Article XX measure under the GATT, a policy both has to fit one of the purposes set out in paragraphs (a) to (j) of the Article and also meet the requirements of the Article's chapeau.²² The chapeau requires that a measure not be "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade".
29. The log export ban, by definition, is a restraint that can only apply to wood produced in Indonesia, and therefore imposes no obligations on producers from other countries attempting to sell products in Indonesia. Because of this, it is not a policy that discriminates in any way between different countries. There is therefore no possibility that this policy constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", as it is not a discriminatory policy. This lack of restraint on producers importing into Indonesia

²² Appellate Body Decision, US – Shrimp, para 147.

also means the measure is not a “disguised restriction on international trade”. The measure therefore passes the requirements of the Article XX chapeau.

30. The chapeau test is also met for the same reasons the measure is “necessary” to protect plant life or health, explained below.

“Necessary to protect plant life or health”

31. The purpose of preventing illegal logging is clearly to protect plant life or health. According to the WTO Appellate Body, a panel must do the following to determine if a measure is “necessary”:²³

In order to determine whether a measure is “necessary” within the meaning of Article XX(b) of the GATT 1994, a panel must assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure’s objective and its trade restrictiveness, in the light of the importance of the interests or values at stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued.

32. Indonesia’s Log Export Ban was enacted with the express purpose of combatting illegal logging.²⁴ It was introduced shortly after a Mission from the International Tropical Timber Organization recommended a ban be introduced.²⁵ There is no doubt that the protection of the environment through the prevention of illegal logging is very important objective: In *Brazil – Retreaded Tyres*, the Appellate Body declared that the protection of the environment is an important objective,²⁶ and illegal logging is a serious threat to the environment of Indonesia.²⁷

33. As the measure is an export ban, it is trade restrictive, however such a measure can be justified where it makes a material contribution to the stated objective.²⁸ The log export ban combats illegal logging by reducing the capacity for illegal loggers to smuggle wood out of the country

²³ Appellate Body Decision, *US – Gambling*, para 305.

²⁴ Joint Decision, The Minister of Forestry of the Republic of Indonesia No. 1132/KPTS-II/2001 and The Minister of Industry and Trade No. 292/MPP/KEP/10/2001 [**Exhibit 2**].

²⁵ “ITTO Mission ‘recommended Indonesian log export ban’” (October 30, 2001)
https://www.itto.int/news_releases/id=2610000.

²⁶ *Brazil – Retreaded Tyres*, Para 179.

²⁷ See for example the explanation of the extent of illegal logging in Exhibits 1 and 3.

²⁸ *Brazil – Retreaded Tyres*, para 150.

and thereby reducing the viability of their operations. It also assists in the enforcement of other illegal logging laws.

34. In the last two decades, Indonesia's illegal logging industry has been conducted to provide large amounts of timber for export to the Chinese market. In EIA's report *The Last Frontier*, EIA estimated from Chinese customs data and illegal timber estimates that China was importing 2.3 million cubic metres round wood equivalent of illegal timber from Indonesia as at 2004.²⁹ A further 2.3 million cubic metres were imported from Malaysia, where EIA had revealed Indonesia wood was being masked as originating in Malaysia in order to avoid legal problems.³⁰ The statistics revealed that most of this illegal wood was merbau from Papua.³¹
35. The role of the log export ban in relation to this wood is to cut off the capacity for illegal logging to profit from smuggling wood to countries where there is high demand. Given the size of demand outside Indonesia, in China and in the sawmilling trade in Malaysia, cutting off the capacity for loggers to legally export illegally logged wood has the effect of making it more difficult to profit from illegal forestry operations.
36. Illegal log exports are also typically conducted by the same criminal syndicates that engage in illegal logging. Therefore identifying violations of the export ban is a mechanism for identifying which wood is illegally logged and how much of it is illegally logged, by observing illegal export flows out of the country. This information can and has been used to better enforce laws against illegal logging in Indonesia.
37. An example this impact can be seen in the response to EIA and Telepak's report *The Last Frontier*. After the log export ban went into force, an EIA investigation was able to observe the degree of illegal logging of merbau occurring in West Papua by identifying where merbau was being imported into other parts of the world, in particular the extent of imports into China, and making inquiries as to the source of the wood.³² As exports of logs were illegal, the same criminal syndicates logging illegally in Indonesia were responsible for exporting the logs.³³ This

²⁹ Exhibit 1, page 22.

³⁰ Exhibit 1, page 22.

³¹ Exhibit 1, page 23.

³² Exhibit 1.

³³ Exhibit 1, page 9-10.

investigation revealed the scale of illegal logging in merbau, leading to a broad enforcement action by the Indonesian government against illegal logging in the region. 1500 personnel were sent into the region and 400,000 cubic metres of timber was confiscated.³⁴ The prices for merbau in Shanghai doubled in six months, and EIA investigators found traders in China reporting they were priced out of merbau from Indonesia and were pursuing other sources.³⁵

38. These contributions to the goal of reducing illegal logging are specific and would be difficult to replicate with other measures. Both of them relate specifically to the trade in timber, and as a result require a measure that impacts upon that trade.

39. Any alternative measures that may perform the same functions as the log export ban are not reasonably available to the central government of Indonesia. Following decentralisation reforms conducted in the early 2000s, significant discretion over the enforcement of environmental policy was handed to local governments.³⁶ West Papua, where a significant amount of illegal logging in Indonesia has occurred, was handed even greater autonomy over its budgetary decisions, and exists as an autonomous state within the Indonesian republic. Successful prosecution for illegal logging has also proved difficult. EIA and Telepak's report *The Thousand-Headed Snake* detailed problems in the criminal justice system allowing those responsible for illegal logging to escape punishment.³⁷

40. With this limited authority over day to day enforcement of illegal logging laws, the central government of Indonesia is better placed to control the capacity of illegal loggers to smuggle wood out of the country, and to identify illegal logging operations via tracing illegal exports of wood. The log export ban acts to restrict illegal logging in these specific ways, and no reasonably available alternative would have the same specific impact.

³⁴ Exhibit 3, page 10.

³⁵ Exhibit 3, page 10.

³⁶ See generally Exhibit 4.

³⁷ Exhibit 3.

“Relating to the Conservation of Exhaustible Natural Resources”

41. After the *US – Turtle Shrimp* decision, which held that living resources are included in Article XX(g) of the GATT, there is no doubt that timber, and the trees felled for it, constitute “exhaustible natural resources”.³⁸
42. The same reasons given above as to why the measure is necessary to protect plant life or health show why the measure functions as a conservation measure. As the ban plays a key role in combatting illegal logging in Indonesia, it functions to conserve forests that would otherwise be logged illegally, and therefore has a “close and genuine relationship” with the conservation of protected forests and trees in Indonesia.³⁹ The ban works in conjunction with Indonesia’s other laws outlawing illegal logging, including those restricting logging in particular areas, requiring permits to conduct logging, and restricting the logging of particular species.⁴⁰
43. The measure is a restriction on domestic producers of wood who would export it, so there is no doubt the log export ban occurs “in conjunction with restrictions on domestic consumption or production”. Its role is to aid in preventing breaches of Indonesia’s other forestry laws, which act as restrictions on domestic consumption and production of timber.

All of which is respectfully submitted this day 22 January 2019

London, United Kingdom

³⁸ *US – Shrimp*, para 128.

³⁹ Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Feb. 22, 2012), para 355.

⁴⁰ Information about Indonesia’s forest laws is available at <https://forestlegality.org/risk-tool/country/indonesia>.