

7.7.3 Whether the US "tie vote" provision is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement

7.349. Indonesia's argument that the US tie vote provision is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement is premised on its interpretation of the "special care" obligation. We have rejected Indonesia's interpretation of Articles 3.8 and 15.8, concluding that these provisions establish no disciplines on Members' decision-making procedures in determining whether a domestic industry is threatened with injury and whether to apply measures. The US tie vote provision is a procedural mechanism to establish an outcome based on the votes of individual Commissioners in the event of a tied vote on whether there is injury caused by subject imports. Consequently, we conclude that Indonesia has failed to establish the inconsistency of the US tie vote provision with the special care requirement under Articles 3.8 and 15.8.

7.350. Finally, we note that the parties also disagree as to the significance, for Indonesia's claims, of the fact that under US law⁶¹⁸ the USDOC has no discretion not to issue an anti-dumping or countervailing duty order following affirmative determinations by the USDOC and the USITC. In particular, the parties disagree whether this means that under US law, an affirmative USITC decision constitutes a decision to apply duties.⁶¹⁹ In light of our conclusions regarding the scope of application of Articles 3.8 and 15.8, we see no need to address the parties' arguments in this respect.

7.351. In light of the foregoing, we find that Indonesia has failed to establish that Section 771(11)(B) of the US Tariff Act of 1930, as amended (codified at Title 19 of the United States Code, Section 1677(11)(B)), as it applies to threat of injury determinations, is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement and reject Indonesia's "as such" claims under these provisions.

8 CONCLUSIONS

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

- a. With respect to Indonesia's claims concerning the USDOC's subsidy determination:
 - i. Indonesia has failed to establish that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by not using private prices for standing timber in Indonesia as the basis for establishing the benchmark for the provision of standing timber;
 - ii. Indonesia has failed to establish that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by not using private prices for logs in Indonesia as the basis for establishing the benchmark for the log export ban;
 - iii. Indonesia has failed to establish that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement in its determination that Orleans was affiliated with APP/SMG;
 - iv. Indonesia has failed to establish that the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to determine or identify the relevant subsidy programmes in connection with the provision of standing timber, the log export ban, or the debt forgiveness;
 - v. Indonesia has failed to establish that the USDOC acted inconsistently with the chapeau of Article 2.1 of the SCM Agreement by failing to identify the granting authority that forgave debt in favour of APP/SMG or the jurisdiction of that granting authority.

⁶¹⁸ See above, para. 7.336.

⁶¹⁹ United States' first written submission, paras. 319 and 333-336; second written submission, para. 153; response to Panel question No. 102(a); Indonesia's response to Panel question Nos. 59 (a), (b), and (c); and comments on the United States' response to Panel question No. 102(a).

- b. With respect to Indonesia's claims concerning the USITC's threat of injury determination:
 - i. Indonesia has failed to establish that the USITC's threat of injury determination is inconsistent with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement because the USITC attributed to the subject imports adverse effects caused by other factors;
 - ii. Indonesia has failed to establish that the USITC's findings that in the imminent future subject imports would gain market share at the expense of the domestic industry and would have adverse effects on US prices are based on conjecture and remote possibility, and therefore that the USITC's threat of injury determination is inconsistent with Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement;
 - iii. Indonesia has failed to establish that the USITC's threat of injury determination is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.
- c. With respect to Indonesia's "as such" claims concerning Section 771(11)(B) of the US Tariff Act of 1930 (the "tie vote" provision):
 - i. Indonesia has failed to establish that Section 771(11)(B) of the US Tariff Act of 1930, as amended (codified at Title 19 of the United States Code, Section 1677(11)(B)), as it applies to threat of injury determinations, is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.

8.2. In light of these conclusions, the Panel makes no recommendation under Article 19.1 of the DSU.
