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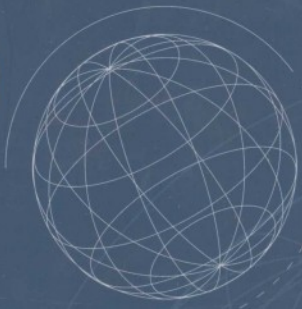

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The *Dispute Settlement Reports* of the World Trade Organization (the "WTO") include panel and Appellate Body reports, as well as arbitration awards, in disputes concerning the rights and obligations of WTO Members under the provisions of the *Marrakesh Agreement Establishing the World Trade Organization*. The *Dispute Settlement Reports* are available in English, French and Spanish. Starting with 1999, the first volume of each year contains a cumulative index of published disputes.

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Adopted by the Dispute Settlement Body
on 11 February 2000

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I. INTRODUCTION AND FACTUAL BACKGROUND

1.1 On 16 June 1999, the Dispute Settlement Body ("the DSB") adopted the report and recommendations of the Panel in the dispute *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather* (WT/DS126/R) (*"Australia - Automotive Leather"*). In that report, the Panel found that payments under a grant contract between the Government of Australia, and Howe and Company Proprietary Ltd. ("Howe") and Howe's parent company Australia Leather Holdings, Ltd. ("ALH") were subsidies within the meaning of Article 1 of the Agreement on Subsidies and Countervailing Measures ("the SCM Agreement") contingent upon export perform-

ance within the meaning of Article 3.1(a) of that Agreement[3], The Panel accordingly recommended, pursuant to Article 4.7 of the SCM Agreement, that Australia withdraw those subsidies without delay, which the Panel specified to be within 90 days.[4]

1.2 On 6 July 1999 Australia submitted a communication to the Chairman of the DSB pursuant to Article 21.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), regarding "surveillance of implementation of recommendations and rulings- time-period for implementation" (WT/DS126/6). In that communication, Australia stated that the United States had been informed at a bilateral meeting in Canberra on 25 June 1999 that Australia intended to implement the DSB recommendations, and that Australia intended to implement the DSB recommendations within the time-frame provided for in the panel report.

1.3 On 17 September 1999, Australia submitted to the Chairman of the DSB a "status report by Australia" to inform the DSB of Australia's progress in implementing the recommendations and rulings in the dispute (WT/DS126/7). In that communication, Australia stated that on 14 September 1999, Howe had repaid the Australian Government $A8.065 million, an amount which covered any remaining inconsistent portion of the grants made under the grant contract. Australia further stated that the Australian Government had also terminated all subsisting obligations under the grant contract. Australia concluded that this implemented the recommendations and rulings in the dispute to withdraw the measures within 90 days.

1.4 On 4 October 1999, the United States submitted a communication seeking recourse to Article 21.5 of the DSU (WT/DS126/8). In that communication, the United States indicated its view that the measures taken by Australia to comply with the recommendations and rulings of the DSB were not consistent with the SCM Agreement and the DSU. In particular, in the view of the United States, Australia's withdrawal of only $A8.065 million of the $A30 million grant, and Australia's provision of a new $A13.65 million loan on non-commercial terms to Howe's parent company, ALH, were inconsistent with the recommendations and rulings of the DSB and Article 3 of the SCM Agreement. The United States further stated that because there was "a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB" between the United States and Australia, within the terms of Article 21.5 of the DSU, the United States sought recourse to Article 21.5 in the matter and requested that the DSB refer the disagreement to the original panel, if possible, pursuant to Article 21.5.

1.5 At its meeting on 14 October 1999, the DSB decided, in accordance with Article 21.5 of the DSU, to refer to the original panel the matter raised by the United States in document WT/DS126/8. The DSB further decided that the Panel should have standard terms of reference as follows:

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* Please note that, due to a typographical error, there are no footnotes numbered 1 or 2 in the Panel's report, pages 1-21 of the document. Instead, the footnote numbering, which should have started with footnote 1, starts with footnote 3.

3 *Australia- Automotive Leather* WT/DS126/R, DSR 1999:III, 951, para. 10.1(b).

4 *Australia- Automotive Leather, supra,* footnote 3, paras. 10.3, 10.7.

"To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS126/8, the matter referred to the DSB by the United States in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.6 The Panel was composed as follows:

Chairperson: H.E. Carmen Luz Guarda

Members: Mr. Jean-François Bellis

Mr. Wieslaw Karsz

1.7 The European Communities ("the EC") and Mexico reserved their rights to participate in the Panel proceedings as third parties.

1.8 The Panel met with the parties on 23-24 November 1999, and with the third parties on 23 November 1999.

1.9 The parties having agreed to dispense with the interim review stage, the Panel submitted its report to the parties on 14 January 2000.

II. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

2.1 The **United States** requests the Panel to "determine that Australia has not withdrawn its illegal subsidy without delay, and thus has not complied with Article 4.7 of the SCM [Agreement] and the Panel's recommendations".

2.2 The United States also requests the Panel to make a preliminary ruling that Australia produce by 29 October 1999 authentic copies of certain documents, as well as certain information, for review by the Panel and the United States.

2.3 **Australia** requests the Panel to "find that in withdrawing $8.065 m. from Howe by 14 September 1999: Australia has fully implemented the recommendation of the DSB of 16 June 1999 (WT/DS126/5)".

III. PROCEDURAL MATTERS

A. Working Procedures Concerning the Descriptive Part of the Panel Report

3.1 The Panel adopted its working procedures for this dispute after consulting with the parties. With the agreement of the parties, these procedures provide that, in lieu of the traditional descriptive part of the Panel report setting forth the arguments of the parties, the parties' submissions will be annexed in full to the Panel's report. Accordingly, the submissions of the United States are set forth in Annex 1, and the submissions of Australia are set forth in Annex 2. The third party oral statement and the written submission of the EC containing answers to questions posed by the Panel are set forth in Annex 3. Mexico, the other third party, did not make a written submission nor did it present a written version of its oral remarks made at the third party session.[5]

[5] See para. 4.2 for a summary of Mexico's oral remarks.

B. Procedures Governing Business Confidential Information

3.2 As part of its working procedures, the Panel established, in consultation with the parties, additional procedures governing business confidential information "(BCI"). The BCI procedures are set forth in Annex 4. In the original dispute, the Panel had adopted similar procedures.

3.3 Under the BCI procedures, either party may designate as "business confidential" information that it submits. Only "approved persons" may have access to such information. "Approved persons" are those who have provided a signed "Declaration of Non-Disclosure" to the Chair of the Panel, and have thereby agreed to abide by the established BCI procedures. A party submitting business confidential information also must submit a non-confidential version or summary thereof, which can be disclosed to the public.

3.4 In a letter to the Panel dated 8 November 1999, the EC objected to the BCI procedures established by the Panel. In particular, the EC noted that the procedures provide that certain portions of the parties' written submissions can be withheld if they are considered to contain business confidential information, and if the relevant officials of the third party have not signed a Declaration of Non-Disclosure. In the view of the EC, this requirement is not in conformity with the DSU. The EC argued that EC officials are not allowed to enter into personal commitments to third country governments concerning the conduct of dispute settlement proceedings, and that such obligations may only be undertaken by the EC. The EC further argued that EC officials are bound by the EC Treaty and their terms of employment not to disclose confidential information, including business confidential information, and that the EC is bound to protect the confidentiality of such information under the DSU. The EC therefore requested that the Panel ensure that the EC received complete copies of the parties' written submissions, as requested by the DSU.

3.5 In a response to the EC dated 11 November 1999, the Panel noted that Australia had already submitted business confidential information, expressly on the basis of the procedures established by the Panel concerning such information (*see* para. 5.9, *infra*.), and that Australia also had submitted, and the EC had been provided with a copy of, a non-business confidential letter describing that information. The Panel recalled that the BCI procedures had been adopted by the Panel in consultation with the parties, in recognition of the parties' concerns over the protection of business confidential information, and that similar procedures had been adopted in the original dispute. The Panel indicated that, while respecting the obligations undertaken by EC officials with respect to confidentiality, it continued to conclude that in this case special procedures for the submission and handling of business confidential information were appropriate. The Panel concluded therefore that to obtain access to any business confidential information in this dispute, the EC would need to provide signed Declarations of Non-Disclosure, in accordance with the relevant procedures established by the Panel.

3.6 At the third party session, the EC reiterated its objection to this aspect of the Panel's working procedures.[6]

[6] Annex 3-1 at paras. 9-10.

C. Working Procedures as Regards Third Parties

3.7 The working procedures adopted by the Panel provide, *inter alia*, for only one meeting with the parties, in conjunction with which the third party session was held. The procedures also provide for third parties to receive only the first submissions, and not the rebuttal submissions, of the parties.

3.8 In its 8 November 1999 letter to the Panel, the EC objected to this aspect of the Panel's working procedures. The EC recalled that Article 10.3 of the DSU provides that:

> "Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel".

The EC stated that since in this case there was to be only one meeting of the Panel, at which the Panel would be considering both submissions of each party, the EC should, in accordance with Article 10.3 of the DSU, receive all of the parties' submissions. The EC claimed that it is only in this way that it would be able to make known its views on the issues that the Panel was actually considering at its meeting, rather than having to express views on the incomplete positions of the parties that would have been developed and might have changed in the further submissions that the Panel would have before it at the meeting. The EC therefore asked the Panel to clarify the working procedures so as to ensure that the EC received all written submissions made before the meeting of the Panel.

3.9 In its 11 November 1999 response to the EC, the Panel indicated that it had decided not to change the existing working procedures which provide for third parties to receive the first written submissions of the parties, but not the rebuttals. The Panel stated that if it had decided to hold two meetings with the parties, as is the normal situation envisioned in Appendix 3 of the DSU, third parties would have received only the written submissions made prior to the first meeting, but not rebuttals or other submissions made subsequently. Thus, in the more usual case, third parties would be in the same position as they were in this case with respect to their ability to present views to the panel. In the view of the Panel, the procedure it had established conformed more closely with the usual practice than would be the case if third parties received the rebuttals, and was in keeping with Article 10.3 of the DSU in a case where the Panel holds only one meeting.

3.10 At the third party session, the EC reiterated its objection to this aspect of the Panel's working procedures.[7]

IV. THIRD PARTY STATEMENTS

4.1 As indicated, the full text of the EC's oral statement is attached at Annex 3. In addition, the Panel had invited third parties to answer several questions, should they choose to do so. The EC's written answers to those questions are also attached at Annex 3.

4.2 In its oral remarks at the third party session, **Mexico** regretted that there had been no translation of the submissions and stated that the lack of translation made it

[7] Annex 3-1 at paras. 2-8.

impossible for Mexico to react in a prompt manner to the parties' arguments, and that Mexico was therefore not in a position to make a submission. Mexico noted that under the Panel's working procedures, Mexico had no further opportunity to present its views. Mexico had a systemic interest in how Article 21.5 panels are carried out in practice. Mexico stated that it had sent the Panel's written questions to its capital, but noted that the Chair had recalled that third parties are not obliged to answer such questions.

V. REQUEST BY THE UNITED STATES FOR PRELIMINARY RULING CONCERNING INFORMATION FROM AUSTRALIA

5.1 In its first written submission,[8] the United States asked the Panel to request that Australia produce, by 29 October 1999, authentic copies of the following documents, as well as the following information, for review by the Panel and the United States:

"1. Any agreement, whether by formal agreement or by correspondence with Howe or its related entities, under which Howe agreed to repay, or repaid, $A8.065 million of the $A30 million provided in 1997 and/or 1998.

2. Any correspondence between the Government of Australia and Howe or its related entities that refers to the agreement to repay, or to the repayment of, the $A8.065 million referred to in request 1 above.

3. (a) Any written calculation of the $A8.065 million communicated to or by Howe or its related entities to or by the Australian Government.

(b) An explanation of how the $A8.065 million was calculated.

4. Any document by which the Grant Contract was terminated and any document terminating any performance requirements by Howe pursuant to that Grant Contract.

5. The loan contract between the Australian Government and Australia Leather Holdings providing for the "additional loan of $13.65 million" to Australian Leather Holdings referred to in Australia's Joint Media Release 99/291, dated September 15, 1999.

6. Any documents referring to or related to the loan contract or the loan referenced in request 5 above, including but not limited to any correspondence between Howe or its related entities and the Australian Government.

7. (a) Any written calculation of the amount of the $A13.65 million loan communicated to or by Howe or its related entities to or by the Australian Government.

(b) An explanation of how the $A13.65 million was calculated or determined.

[8] Annex 1-1 at para. 54.

8. Any documents created by the Australian Government related to the authorization of the Australian Government to (a) issue a new $A13.65 million loan referenced in request 5 above, and/or (b) terminate the Grant Contract and request repayment of $A8.065 million of the subsidy".

5.2 The United States argued that this information and documentation were crucial to the Panel's determination under Article 21.5 of the DSU. The United States had relied in its first submission on published statements and submissions of the Australian Government to establish that (a) Australia's method of determining the prospective portion of the grant was arbitrary and resulted in inappropriately putting most of the grant beyond the reach of the SCM Agreement remedies; and (b) the loan was simply a reimbursement on non-commercial terms of the purported withdrawal of the $A8.065 million repaid by Howe.

5.3 According to the United States, the information and documents requested contained facts and information with a direct bearing on the issues in this proceeding; they should reveal in detail the circumstances under which the repayment by Howe was made, how that amount was agreed to or calculated, and whether there was any reimbursement or *quid pro quo* for the repayment. Similarly, given that the loan was obviously linked to the partial repayment of the grant, documentation and information pertaining to the loan were critical to a clear understanding of its relationship to the grant and grant repayment at issue. In addition, the exact terms of the loan, and the conditions for its issuance, were highly relevant to whether, and the extent to which, Australia was simply funding Howe's reimbursement out of its own pocket.

5.4 The United States recalled that it had requested these documents and information of Australia at the first organizational meeting of the Panel, on 18 October 1999, but had received nothing as of the filing deadline for the United States' first submission. In the view of the United States, therefore, the request should have come as no surprise to Australia, and Australia should have no trouble meeting the deadline proposed by the United States. It was important that these documents and information be provided on this schedule to permit the United States to review them prior to Australia's first submission, so that relevant information could be incorporated into the United States' second submission.

5.5 The **Panel** sought the views of Australia with regard to the United States' request for preliminary ruling concerning its information request. The Panel stated that if Australia did not object to providing some or all of that information, it should so indicate, and that in that case, the Panel would request that any such documents be submitted no later than the deadline for Australia's first written submission. If Australia objected to the United States' request or any part thereof, its response should set forth the basis for any such objection.

5.6 **Australia** replied that, as a general point, the United States had laid no foundation for most of the putative material, in particular about the 1999 loan, sought in its request for a preliminary ruling. However, according to Australia, most of the material did not exist. Australia noted that it had informed the United States orally about the details of both the withdrawal and the loan prior to 14 September 1999 and had told the United States that a media release was being issued on the matter. Nonetheless, during the six weeks between 14 September and the 18 October organizational meeting of the Panel, the United States had not requested any documents or

any further explanation or details. While, at the behest of the United States, Australia had waived the normal requirement for consultations prior to establishment of the Panel, the United States had had plenty of time and opportunity to approach Australia about the matter, but had chosen not to. As a normal procedure, Australia considered that the United States should have to lay some foundation for requiring specific information, rather than launching such a request through seeking an immediate ruling by the Panel.

5.7 Regarding the withdrawal of subsidies required by the DSB, Australia indicated, in response to the United States' requests 1 and 4, that it would include the Deed of Release and confirmation of payment of the $A8.065 million in the context of Australia's first submission. In response to request 2, Australia indicated that the letter from the Government to ALH could be provided, although no foundation had been laid about its relevance to the dispute. In response to request 3 (a), Australia stated that there was no written calculation of the $A8.065 million communicated to or by Howe or its related entities to or by the Australian Government, and that the issue had been resolved at meetings. In response to request 3 (b), Australia indicated that the explanation of how the $A8.065 million had been calculated would be provided in its first submission.

5.8 Regarding the 1999 loan generally, Australia indicated that the Australian Government was entitled to provide new subsidies, including in the form of an unconditional concessional loan to ALH, and was not constrained in this by the DSB recommendation on automotive leather. Australia therefore considered that the matter was not before the Panel and that the United States had not laid the necessary foundation for using this Panel process for seeking such information. Australia stated that, based on the argument at paragraph 50 of the US first submission,[9] the United States was not arguing that the loan was WTO inconsistent, which it could hardly do given the Panel's finding on the 1997 loan, which was for automotive leather purposes, while the 1999 loan was unconditional to ALH. According to Australia, there was nothing covert about the 1999 loan except that it dealt with the business of a single, small company. Rather than going on a fishing expedition, the United States should first have to establish the need for such additional information to argue its case, which appeared on the basis of its first submission to be one of trade effect rather than WTO rules.

5.9 Regarding the United States' request 5, Australia indicated that, if the Panel considered that it needed to see the Loan Agreement, Australia was willing to provide it, so long as there was an assurance from other parties that the BCI procedures set out by the Panel would be adhered to. In this regard, Australia requested the Panel to inform the United States and the third parties that, as a condition for receiving business confidential information, consistent with paragraph XII:1(i) of the BCI procedures, Australia required that all business confidential information, including notes taken under paragraph VII:2 of the BCI procedures, be returned promptly to Australia.

5.10 Regarding the United States' request 6, Australia indicated that the letter from the Government to ALH could be provided. Regarding request 7, Australia indicated

[9] Annex 1-1 at para. 50.

that there was no written calculation of the amount of the $A13.65 million loan communicated to or by Howe or its related entities to or by the Australian Government, and that there were lengthy consultations with ALH about the size of a new concessional loan. A wide range of options in respect of ALH and its shareholders had been considered. The decision in favour of a loan had been based solely on the Panel's finding in favour of the 1997 loan to ALH and Howe for automotive leather purposes. The terms of the loan had been derived from those in the 1997 loan, but without any connection to automotive leather. The final amount had been accepted by ALH in the context of its assessment of all factors, including resolving the case, the effect on ALH's balance sheet, tax implications for ALH, and ALH's judgement of future interest rates. Regarding request 8, Australia indicated that these documents were referred to in its response concerning requests 1 and 6.

5.11 The **Panel** concluded that, based on Australia's comments on the United States' request, Australia was willing to submit all of the information either on its own, or in the event that the Panel considered it necessary, to the extent that documents existed and subject to proper handling in accordance with the BCI procedures. The Panel observed that it had every expectation that parties and third parties would abide by the relevant procedures established by the Panel, if they wished to have access to such information. In this regard, the Panel had requested the United States and the third parties to sign and return to the Panel Secretary the non-disclosure forms, so that a list of approved persons could be established to enable the parties and third parties to provide only approved persons with copies of business confidential information. The Panel informed Australia that it did consider necessary the submission of all of the information requested by the United States, and therefore expected Australia to submit all relevant information in conjunction with Australia's first written submission.

5.12 In conjunction with its first submission, Australia submitted certain documents and information requested by the United States.

VI. FINDINGS

A. Is the 1999 Loan within the Panel's Terms of Reference?

6.1 Australia argues that the 1999 loan is not within the scope of the Panel's terms of reference. In this regard, Australia argues that the 1999 loan is not part of the implementation of the DSB's ruling and recommendation, noting that it was not notified to the DSB in the document submitted in this regard by Australia (WT/DS126/7). In Australia's view, the Panel's terms of reference "relate to the implementation of the recommendation of the Report, i.e. to withdraw the grant payments from Howe".[10]

6.2 The United States argues that, under Article 21.5 of the DSU, the Panel's task is to determine the existence or consistency of measures taken to comply with the DSB's ruling. In the United States' view, it is clear that if the Panel can determine the

[10] Annex 2-1 at para. 51.

"existence" of measures taken to comply with the ruling, it can consider whether the measures purportedly taken to comply were effectively rendered non-existent.[11]

6.3 We note that this Panel is operating under standard terms of reference, which authorize the Panel

> "To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS126/8, the matter referred to the DSB by the United States in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".[12]

Consequently, as in the original dispute, the Panel's terms of reference are defined by the "request for establishment", that is, document WT/DS126/8. That document provides, in pertinent part:

> "On 15 September 1999, the Australian government announced in a media release that it had implemented the Panel report's recommendation by terminating the grant contract with Howe and that Howe had repaid $A8.065 million of the $A30 million grant. Australia stated that this repayment constituted the "prospective element" of the grant because it was "the proportion of grant monies found to be applied to the sales performance targets contained in the Grant Contract for the period from 14 September 1999 until the end of the Grant Contract on 30 June 2000".
>
> Australia further stated in the same media release that it was providing a new loan of $A13.65 million to Howe's parent company, Australian Leather Holdings Ltd. The United States understands that this loan was granted on non-commercial terms.
>
> The United States believes that **these measures** taken by Australia to comply with the recommendations and rulings of the DSB are not consistent with the SCM Agreement and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In particular, **Australia's withdrawal of only $A8.065 million** of the $A30 million grant, and **Australia's provision of a new $A13.65 million loan** on non-commercial terms to Howe's parent company, are inconsistent with the recommendations and rulings of the DSB and Article 3 of the SCM Agreement". (emphasis added).

6.4 In general, it is the complaining Member in WTO dispute settlement which establishes the scope of the measures before a panel. A "matter" before a panel consists of the "measure(s)" at issue, and the claims relating to those measures, as set out in the request for establishment.[13] In this case, the United States' request for establishment clearly identifies both the repayment by Howe and the 1999 loan as the

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[11] Annex 1-2 at para. 30.

[12] WT/DS126/9 (1 November 1999).

[13] *See, Guatemala - Anti-Dumping Investigation regarding Portland Cement from Mexico* (*Guatemala-Cement*), WT/DS60/AB/R (*Guatemala-Cement AB Report*), adopted 25 November 1998, para. 76.