



April 11, 2003

Denyse Mackenzie  
Director General and Counsel  
and  
Matthew Kronby  
Deputy Director and Counsel  
Department of Justice  
Trade Law Bureau (JLT)  
Lester B Pearson Building, Tower C  
125 Sussex Drive, 7th Floor  
Ottawa, ON K1A 0G2

Dear Ms. Mackenzie and Mr. Kronby:

**Re: Proposed Amendments to the Disputes Settlement Understanding — Strictly Confidential Information**

I write on behalf of the Canadian Bar Association's National Section of International Law (the CBA Section) to comment on potential changes to the World Trade Organization's *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). Thank you for the opportunity to comment on the ongoing DSU negotiations. The issues arising from the negotiations continue to attract the attention of the CBA Section, which sees them as a highly important matter.

In light of continuing negotiations, our understanding of current JLT priority issues and the Chair's activity in developing a text as a template for further commentary, we limit our current observations to the European Community's "Non-Paper" on Strictly Confidential Information (SCI):

1. As a general comment, nothing in the proposal appears to deal with the circumstance in which an "approved person" fails to keep SCI confidential. Paragraph 2(b) of the "Decision on Procedures Governing SCI" prohibits disclosure by approved persons but there is no consequence provided for a breach. In anti-dumping and countervailing duty work, Canada solves this problem through sanctions that can be levied against practitioners who breach the obligation to maintain confidentiality. The "Decision" could

require that the law of each Member provide appropriate sanctions in the event of a breach of confidentiality by an “approved person” under the control of that Member. (Note that Article 61 of the TRIPS Agreement requires that Members provide criminal sanctions in certain instances.) The provision could go on to say that SCI need not be disclosed to any Member that does not have sanctions in effect that have been approved by the DSB. There should also be some means for sanctioning panel members, Secretariat employees and experts.

2. Also as a general comment, the wording is awkward, and appears to have been composed by someone whose first language is not English.
3. Paragraph 4 of the proposed definition of “strictly confidential information” should clarify to whom “serious prejudice” must be caused or threatened.
4. In the “Decision on Procedures Governing SCI”
  - II:1. Last line. “a spread exhibit on annex”? This seems incorrect. The last sentence should be redrafted. As far as the second last sentence is concerned, Canada’s CITT practice requires that a person claiming protection for information give reasons.
  - II:3 Last two sentences. It should be clearer that if the panel does not consider the information as SCI, the party has a choice between withdrawing the designation or withdrawing the information.
  - III:2(b). First line. The word “perceive” here and elsewhere is awkward and unclear. It would be better to make reference to “persons who are allowed access to SCI”.
  - III:3. The obligation to return or destroy SCI should extend to approved persons.
5. The third sentence of the first paragraph in the addition to Article 18.2 refers to treating as confidential anything designated as SCI by a party. It would be more accurate to refer to anything designated as “strictly confidential information, unless and until the panel decides the information does not satisfy the criteria set out in Art. 18(2) DSU”.
6. The definition of SCI and the sentence that follows seems to suggest that solicitor-client privileged opinions to private companies cannot be considered SCI unless they also constitute business confidential information, which does not appear to be defined. In our view, privileged information should not be subject to disclosure. If, however, privileged information is subject to disclosure, then the DSU rules should specifically protect it with rules allowing, for example, a claim that privilege has not been waived by any requirement that privileged documents be supplied.
7. Under III. Treatment of SCI, 1. Storage, SCI must be stored in a secure location. We wonder whether there is a need to expand on what is meant by a secure location.

8. The definition of “conclusion of the panel process” suggests that the process continues where a party agrees to pay compensation rather than bring its measures into compliance as well as where retaliatory duties are imposed for failure to comply. It is not clear whether it is intended that, in these situations, SCI would not be returned or destroyed.
9. We wonder whether the definition of “representative” would encompass private counsel retained by private companies who assist government lawyers in preparing their case. In the past, such counsel have signed non-disclosure agreements prohibiting their disclosure of confidential information even to their own clients. If it is intended that they would not have access to such information, this would severely limit their ability to aid government counsel. It should be made clear that this is not the intent.
10. Should there be any formal procedure for challenging a party’s designated “approved persons”? Possible grounds for doing so could include their connection to persons or entities that stand to benefit commercially or the simple fact that an unnecessarily large number of persons have been designated, undermining the effectiveness of the protection afforded.

We thank you for the opportunity to provide input. Should you have any questions, please do not hesitate to contact me directly or through Tamra L. Thomson, Director, Legislation and Law Reform, at CBA’s National Office.

Yours very truly,

*Original signed by Tamra Thomson for Clifford Sosnow*

Clifford Sosnow  
Chair, DSU Committee  
National Section of International Law

c.c. DSU Committee Members  
Simon V. Potter, CBA President  
Milos Barutciski, Past Chair, National Section of International Law  
Richard Dearden  
Serge Frechette  
Jon Johnson  
Kenneth Purchase  
Gregory Somers