Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

GUIDELINE

DESIGNATION, PROTECTION AND USE OF CONFIDENTIAL INFORMATION

INTRODUCTION

This guideline addresses the designation, protection and use of confidential information in proceedings before the Canadian International Trade Tribunal (the Tribunal).

The Tribunal's mandate is to carry out its legislative responsibilities in a fair, informal and transparent manner. In order to do so, the Tribunal has developed procedures to ensure, to the greatest extent possible, that its proceedings are open and accessible to parties, their counsel and the public at large. Given the kinds of issues that arise during its proceedings, the Tribunal often requires access to commercially sensitive information submitted by persons,[1] which, if disclosed to a business rival, could have significant adverse financial consequences. Therefore, protecting commercially sensitive information against unauthorized disclosure has been, and continues to be, of paramount importance to the Tribunal. With the cooperation of counsel, the Tribunal has developed a solid reputation for protecting confidential information in all its proceedings.

The *Canadian International Trade Tribunal Act* (*CITT Act*) provides that certain information is confidential and must be protected. However, complete and well-documented public reasons are essential to the transparency of the Tribunal's decision-making process. Also, in the case of advisory reports, complete and well-documented public reasons are essential to fully inform the Minister of Finance, the Government and Parliament with respect to the issues under review.

The need for transparency in Tribunal proceedings requires that the public record contain a non-confidential summary or non-confidential edited version of all information on the record. The designation of information as confidential is subject to review by the Tribunal to ensure that it is warranted and that non-confidential edited versions or non-confidential summaries of confidential information contain sufficient information to allow non-represented parties to present their cases and to permit the Tribunal to provide meaningful reasons for its decisions. Large volumes of confidential information or the excessive use of a confidential designation may undermine the Tribunal's ability to issue reasons for its decisions that publicly disclose all the relevant information upon which it based its decisions.

This guideline sets out the measures that the Tribunal has put in place to control access to, and to protect, properly designated confidential information. This includes a discussion of the following topics:

- Manner in which information is designated as confidential
- Restricted access by counsel and experts
- Use of *in camera* proceedings
- Preparation of Tribunal documents
- Separate public and protected files
- Destruction of copies of confidential information after completion of proceedings

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1. In this document, the term "persons" includes all individuals, companies and parties involved in any way in a Tribunal proceeding.

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- Handling of confidential electronic information
- Obligation of Tribunal members and staff
- Sanctions for the breach of confidentiality undertakings
- Reason for single-copy exhibits
- Requests for the filing of documents of which only a small part may be relevant to a proceeding
- Information that is typically considered public by the Tribunal
- Information that is typically considered confidential
- Account-specific injury allegations in proceedings under the *Special Import Measures Act* (*SIMA*)
- Reference to confidential information in closing arguments before the Tribunal
- Example of how confidential information may be presented (Annex)

TRIBUNAL MEASURES TO PROTECT CONFIDENTIAL INFORMATION

Designations

The statutory provisions governing the designation of confidential information in the Tribunal's proceedings are found in sections 43 to 48 of the *CITT Act*. Requests that certain information be designated as confidential usually come from the person submitting the information, although the Tribunal may, on its own initiative, designate as confidential information received at any time during the course of proceedings. Where information that has already been accepted or designated as confidential by the Canada Customs and Revenue Agency is filed with the Tribunal in a proceeding under *SIMA*, the Tribunal continues to treat it as confidential.

A party wanting information to be designated as confidential must submit two versions of the information to the Tribunal: a confidential version containing all the confidential information and labelled "Confidential", and a non-confidential version with the confidential information excluded. The confidential version should delineate all confidential portions of the document by using shading, bold or square brackets (see the Annex to this Guideline for an example).

Even though a party may submit documents marked "Confidential", this does not mean that the information is automatically given confidential status. The Tribunal may consider the designation of information as confidential to be unwarranted, in whole or in part. If the Tribunal so decides, the party providing the information will be given an opportunity to withdraw the designation or provide an acceptable explanation of why the designation is appropriate. Once an adequate summary and explanation is provided, the information will be treated as confidential in the Tribunal's administrative record for the case. Where an adequate summary or explanation is not provided, however, the Tribunal will notify the party that the requested designation is denied and that the information submitted as confidential will not be taken into account by the Tribunal and will not be made part of the administrative record (unless it is received from some other source).

Access by Counsel

According to the *Canadian International Trade Tribunal Rules* (*Rules*), "counsel" includes any person who acts in a proceeding on behalf of a party. Before giving a counsel access to confidential information, the Tribunal must receive a Declaration and Undertaking (of confidentiality) signed by that

counsel. In essence, the Declaration and Undertaking is a binding commitment by counsel not to disclose any confidential information received, except to a person granted access by the Tribunal to such information. Under no circumstances may counsel obtain such access if they are a director, servant or employee of a party. Counsel are not allowed to make copies of any confidential information without the express permission of the Tribunal.

Before accepting the undertakings of counsel who have not previously appeared before the Tribunal, the Secretary will circulate their résumés to other counsel in the case and ask for their comments. Parties may object to a request by counsel for access to confidential information. The Tribunal has the responsibility to grant or deny the request, on such terms as it considers appropriate. It needs to be assured that any counsel signing the undertaking will respect its terms.

Where counsel who request access to confidential information are not residents of Canada, and the Tribunal is persuaded that such access is warranted, the Tribunal will attach additional restrictions to their access. Such additional restrictions will require that access by non-resident counsel take place under the direction and control of Canadian counsel and that the information remain in Canada at all times.

Access by Experts

The *CITT Act* provides for the disclosure of confidential information to experts who are acting under the control or direction of counsel, or who are retained by the Tribunal. Under no circumstances may experts obtain access to confidential information if they are a director, servant or employee of a party. Any information disclosed to experts would be made available only for use in proceedings before the Tribunal and for no other purpose. It would also be subject to any conditions that the Tribunal considers reasonably necessary or desirable to protect the confidential information.

The status of a person as an expert is determined in each instance by the Tribunal. The *CITT Act* also recognizes as experts "persons whose duties involve the carrying out of responsibilities under the *Competition Act* and who are referred to in section 25 of that Act, other than persons authorized by the Governor in Council to exercise the powers and perform the duties of the [Commissioner of Competition]", as well as persons employed in a government institution involved in the determination of damages and costs in procurement review proceedings.

Experts who testify before the Tribunal or provide submissions often have a specialized knowledge in specific areas. In order to perform their expert analysis and give evidence, experts may not need access to the entire confidential record. When parties submit the notice of an expert witness and make a request for access to confidential information, they should specify what areas of the record their expert will need to access. If counsel consider that an expert does not need access to the entire confidential record, counsel may request the Tribunal, with explanations, to make a direction on what confidential information should be made available to that expert. Counsel may also request that experts be permitted to view confidential information only at the offices of the counsel who have retained them and from whom they receive direction. These procedures are outlined in the *Rules* (rule 16).

In Camera Proceedings

Where the Tribunal holds oral hearings, it normally conducts them in public to the greatest extent possible. This practice is designed to facilitate transparency, openness and accessibility of the Tribunal's

proceedings. The *CITT Act* provides that hearings before the Tribunal shall be conducted as informally and expeditiously as the circumstances and considerations of fairness permit (section 35).

The exception to this practice is where a witness believes that confidential information will be disclosed in testimony. In such a case, the Tribunal will request that all persons who are not authorized to hear confidential evidence leave the hearing room. The hearing will then continue *in camera* until non-confidential information is once again being addressed. The only persons who may remain in the hearing room, besides the panel members, are the Tribunal's staff, representatives of the party providing the confidential testimony, including witnesses who are testifying, counsel for the other parties who have signed a Declaration and Undertaking and court reporters who have signed confidentiality undertakings.

All transcripts of *in camera* proceedings are under the Tribunal's control and subject to the same protective measures as all other confidential information. The Tribunal's staff prepares public summaries of *in camera* proceedings and places those summaries on the public record. To the extent that any public testimony is given *in camera*, the Presiding Member may direct that it be placed on the public record, with the consent of the witness.

Tribunal Documents

The Tribunal ensures that any public documents that it produces present only information that has been put in the public domain by parties or that contains a publicly disclosable aggregation of confidential party-specific information. Where it is necessary to prepare a report containing confidential information, the confidential version of that report is available only to counsel and experts who have signed a Declaration and Undertaking. The public version of that report will have all confidential information blanked out, but will contain either a summary or a general indication of the nature of the confidential information.

Separate Files

The official record of Tribunal proceedings is segregated into two sections: public and protected. No confidential information is contained in public files. Confidential information would include, for example, confidential submissions by parties, such as confidential written witness statements, confidential responses to questionnaires, transcripts of *in camera* testimony, confidential versions of staff reports and confidential exhibits.

Destruction of Copies After Completion of Proceedings

After the completion of proceedings in a case, the Tribunal's registrar ensures that all confidential case information provided to counsel, including their notes, is either returned to the Tribunal for destruction or destroyed by counsel, who will provide the Tribunal with a certificate of destruction or a letter attesting that the documents have been destroyed. This ensures that there are no copies of commercially sensitive information stored indefinitely outside the Tribunal.

Handling of Electronic Information

The Tribunal does not send out any confidential information to counsel by facsimile or e-mail. In addition, the Tribunal maintains a secure computer network behind a state-of-the-art firewall. It does not allow any external access to its internal network. When the Tribunal makes confidential information

available in electronic form (e.g. on diskette) to counsel or experts who have filed a Declaration and Undertaking, those individuals are required to sign a supplementary undertaking relating to the protection of that information.

Obligation of Tribunal Members and Staff

Tribunal members and staff are under a statutory obligation not to disclose knowingly, or allow to be disclosed, confidential information that comes into their possession while holding office or being employed in the public service to any other person in any manner that is calculated or likely to be made available for the use of any business competitor or rival of a person to whose business or affairs the information relates. This statutory obligation continues to bind Tribunal members and staff after they cease to hold office or be employed by the Tribunal.

Penalties for the Breach of Confidentiality Undertakings

The *CITT Act* provides for fines of up to $1 million and potential prohibition from appearing before the Tribunal in any future proceedings for anyone (counsel or expert) who breaches his/her confidentiality undertakings given to the Tribunal.

SINGLE-COPY EXHIBITS

According to the Tribunal's *Rules* and practice, parties are required to file both public and confidential versions of exhibits and documents, with sufficient copies for the use of the Tribunal and counsel for other parties. From time to time, counsel have requested permission to file a single copy of an exhibit that would only be available for viewing at the Tribunal's offices. This has been referred to as a "single-copy" exhibit. The usual reason for requesting permission to file a single-copy exhibit is the large volume of material that it contains. A party wishing to file a document as a single-copy exhibit must first obtain the Tribunal's permission to do so. In its request, the party (or its counsel) must explain why the circumstances of the case warrant the filing of a single-copy exhibit. Taking those and any other relevant views into account, the Tribunal decides whether to grant the request.

Aside from voluminous materials, a single copy is also warranted where a document is on the public record and is readily available to parties and counsel (e.g. reports of the World Trade Organization, prior decisions issued by the Tribunal or the United States International Trade Commission).

As for other types of sensitive commercial information, the Tribunal is not persuaded that it should create two classes of confidential information by permitting a party to designate and file a commercially sensitive document as a single-copy exhibit.

FILING OF DOCUMENTS THAT FORM PART OF A LARGER SET

Parties may sometimes be asked to produce documents of which only a small portion may be either relevant or necessary in a particular case. The Tribunal wants to ensure that information placed on the record is, in fact, relevant and necessary and that parties are not needlessly required to reproduce a large number of documents, particularly where they contain confidential information. In some cases, requesting counsel will be asked by counsel representing the party that has control of the documents (responding counsel) to examine the set of documents to determine which ones, if any, are needed. This examination may take place

at an agreed location, such as responding counsel's office. Once requesting counsel have examined the set of documents, they can decide which ones, if any, should be filed. This "sifting" process greatly aids the Tribunal and parties by keeping the size of the record manageable and the related costs to a minimum.

To the greatest extent possible, counsel are urged to work out an agreement among themselves to provide reasonable access to documents for purposes of selecting only the relevant and necessary information. Where such an agreement is not possible and a party (or counsel) so requests, the Tribunal will decide whether (and under what conditions) an examination by requesting counsel should be undertaken before any of the documents are filed.

Where the request for documents comes from the Tribunal and the responding party feels that not all the documents are relevant, the party may request that the Tribunal (or its staff) view the documents before deciding which parts should be filed.

TYPICAL PUBLIC INFORMATION

The following is a non-exhaustive list of the type of information that the Tribunal typically considers to be *public*:

- Aggregated data, including industry association data, where specific company data cannot be identified or deduced
- "Rate-of-change" information for a country, a company, a market or an industry relating to various performance indicators, *except* for
  - company-specific financial information that is not in the public domain
  - information that could, when combined with other information available to a party, disclose confidential "level" information about another party
- General views and opinions on the state of the market, including market competition, on consumer behaviour and preferences, on future market demand and on product trends
- Information available through public sources, including data relating to production, imports and other market indicators
- Qualitative descriptions of market factors
- Published price lists and discounts
- Products produced and production processes, excluding proprietary processes
- Published financial statements, annual reports or other published information
- Portions of customer-specific injury allegations submitted in response to the Tribunal's questionnaires, including
  - name of company or party making the allegation
  - specific type(s) of product in question
  - nature of alleged injury (e.g. lost sales, price suppression, price erosion)
  - date of event
  - source of product (i.e. country, exporter or importer against whom the allegation is being made)
- Descriptions of company history, ownership (if a public company), and marketing and distribution channels
- Samples of products offered for sale
- Solicitation documents in bid disputes
- Grounds of procurement complaints and responses thereto

CONFIDENTIAL INFORMATION

The following types of information are typically considered to be *confidential* by the Tribunal:

- Information requested (and designated as confidential) by the Tribunal via questionnaires or requests for information (e.g. company- and product-specific quantitative data, including production costs, sales, investments, employment, profits, business plans, contractual agreements, bids)
- Information designated as confidential by the Commissioner of the Canada Customs and Revenue Agency under *SIMA*
- Information designated as confidential by the supplier and accepted as such by the Tribunal

ACCOUNT-SPECIFIC INJURY ALLEGATIONS

In an inquiry or review, customer-specific injury allegations may occasionally be made by domestic producers to bolster their arguments that imported products are causing or threatening to cause injury. Domestic producers are under **no obligation to provide** this type of information and, while it may be helpful in certain cases, it is not essential to the conduct of an inquiry or review. The Tribunal recognizes that some of the information in these allegations may be sensitive and may need to be treated as confidential by the Tribunal, subject to certain conditions. If, however, a party wishes to make any allegations, it must in all fairness provide opposing parties (against whom it is making the allegations) with enough information to defend themselves in a timely manner.

In its questionnaires,[2] the Tribunal will request, as indicated in the following table, different types of information on account-specific injury allegations (if a party wishes to make such allegations and subject to the availability of the information). This table indicates whether the information should be categorized as public or confidential (and, if the information is confidential, whether part of it could be subject to limited disclosure as discussed below).

2. Questionnaires are normally customized for each case to take into account the special circumstances of the product and the market. In developing these customized questionnaires, the Tribunal's staff may modify slightly the type of information requested from parties in support of any account-specific injury allegations.

Information	Public	Confidential[3]	Limited Disclosure
Producer Making the Allegation	X		
Account or Customer		X	X
Specific Product Offered for Sale by Producer	X		
Nature of Alleged Injury	X		
Date of Alleged Injury	X		
Producer's Own Information			
Price Offered		X	
Actual Selling Price		X	
Volume Offered		X	
Volume Sold		X	
Information About Alleged Competitor			
Name		X	X
Source of Product (country or exporter)	X		
Type of Product Offered	X		
Price Offered by Competitor		X	X
Actual Selling Price		X	X
Volume Offered		X	X
Volume Sold		X	X

Where a producer chooses to submit account-specific allegations, it is a matter of fairness and natural justice that sufficient details be disclosed, on a limited basis, to the party against which the allegations are made, to enable it to respond effectively. In order to ensure that the confidential information is not disclosed to parties that are not directly involved in the allegations, and to prevent misuse of this limited disclosure, a party that wishes to receive information about an account-specific injury allegation made against it must sign an Undertaking and Acknowledgement, a sample of which is provided on the Tribunal's Web site.[4] The Tribunal considers that a party giving limited disclosure to this otherwise confidential information should provide, in addition to the public information identified in the table above, at least the following additional information, to the extent that it is available:

- Name of competitor
- Name of customer, client or account in question
- Price offered by competitor
- Competitor's actual selling price (if competitor made the sale)
- Volume of product offered for sale by competitor
- Volume of product actually sold by competitor (in the case of allegations of lost sales)

If the party making the allegations refuses to provide this limited disclosure, this may affect the weight that the Tribunal will give to the allegations.

3. Parties may wish to put some or all this information in the public portion of their questionnaire responses.
4. The Undertaking and Acknowledgement is intended only for parties and is different from the Declaration and Undertaking signed by counsel in order to have access to confidential information.

Similarly, details of any **responses** to allegations should be disclosed (to the party making the original allegations) under the same general terms and conditions as the original allegations.

REFERENCE TO CONFIDENTIAL INFORMATION IN CLOSING ARGUMENTS

It is the Tribunal's desire that, to the extent possible, its hearings be held in public and that argument be made in public. This can be achieved by counsel making references in their arguments to the location of confidential information in the confidential record, while refraining from revealing actual confidential information in public. In this regard, counsel may find it useful to prepare and file brief confidential aids to argument that contain the confidential material or precise references to the location of confidential information in the record.

CONCLUSION

The Tribunal is proud of its record of protecting confidential information. At the same time, however, it recognizes that it must remain vigilant to ensure that the procedures dealing with access to confidential information and its use continue to provide effective protection. The Tribunal will continue to review the effectiveness of its approach to the protection of confidential information and, if circumstances warrant, will improve its procedures from time to time.

For additional information, please contact:

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ANNEX

SAMPLE CONFIDENTIAL DOCUMENT AND NON-CONFIDENTIAL EDITED VERSION

CONFIDENTIAL DOCUMENT

During the period from 2000 to 2002, Company A's net profits (as a percentage of sales) declined from 17.8 to 10.2 percent. During the first quarter of 2003, profitability showed improvement, increasing from 5.6 to 12.6 percent.

Table 1 reports Company A's standard costs for domestic sales of Product X on a dollar per unit basis. Total standard costs increased by 1.5 percent in 2001 and then rose by a further 1.1 percent in 2002. Comparing the first quarter of 2002 with that of 2003, total standard costs declined by 17 percent.

During the period of inquiry, material costs represented close to 50 percent of total standard costs. Material costs showed the widest fluctuations among the standard cost components. In 2001, the 2 percent drop was followed by a 16 percent increase in 2002 and a 22 percent decline in the first quarter of 2003, when compared to the first quarter of 2002.

Table 1

COMPANY A

STANDARD COST BREAKOUT—DOMESTIC SALES
($/unit)

				January to March	
	2000	**2001**	**2002**	**2002**	**2003**
LEVELS					
Volume of Goods Sold (net tons)	4,339	4,926	4,291	953	1,575
Materials	1,595	1,571	1,816	1,525	1,183
Labour	781	782	599	834	652
Overhead	491	558	529	542	586
Total Standard Costs	**2,867**	**2,911**	**2,944**	**2,901**	**2,421**

Source: Producers' Questionnaire, Question 25.

During the period of inquiry, export sales represented between 11 and 26 percent of total company sales. The contribution of exports to total company gross margins far exceeded their contribution to total company sales.

NON-CONFIDENTIAL EDITED VERSION

During the period from 2000 to 2002, Company A's net profits (as a percentage of sales) declined from to percent. During the first quarter of 2003, profitability showed improvement, increasing from to percent.

Table 1 reports Company A's standard costs for domestic sales of Product X on a dollar per unit basis. Total standard costs increased by percent in 2001 and then rose by a further percent in 2002. Comparing the first quarter of 2002 with that of 2003, total standard costs declined by percent.

During the period of inquiry, material costs represented close to percent of total standard costs. Material costs showed the widest fluctuations among the standard cost components. In 2001, the percent drop was followed by a percent increase in 2002 and a percent decline in the first quarter of 2003, compared to the first quarter of 2002.

Table 1

COMPANY A

STANDARD COST BREAKOUT—DOMESTIC SALES
($/unit)

				January to March	
	2000	**2001**	**2002**	**2002**	**2003**
LEVELS					
Volume of Goods Sold (net tons)					
Materials					
Labour					
Overhead					
Total Standard Costs					

Source: Producers' Questionnaire, Question 25.

During the period of inquiry, export sales represented between and percent of total company sales. The contribution of exports to total company gross margins their contribution to total company sales.