

April 28, 2005

Mr. Peter Palecka
Chairman
*United States – Anti-Dumping Measures on
Cement from Mexico (DS281)*
World Trade Organization
Centre William Rappard
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Dear Mr. Chairman:

This letter responds to the Panel’s request, dated April 27, 2005, for comments on its proposed “Additional Procedures for the Protection of Business Confidential Information Submitted by the United States in Response to the Panel’s Request of 17 March 2005.”¹ The United States is grateful for the Panel’s careful consideration of the U.S. proposal for additional procedures regarding business confidential information (“BCI”). The Panel’s proposed BCI procedures incorporate many of the elements that will provide greater assurance to the private companies that submitted the BCI that their sensitive company-specific information would be protected if they permitted the United States to release it, under the applicable BCI procedures, to the Panel and to Mexico in this proceeding.² The United States does, however, have some comments regarding the Panel’s proposed procedures that the United States respectfully requests the Panel to take into account in formulating its final additional BCI procedures.

(1) Definition of “Representative”: The Panel’s proposed BCI procedures prevent “employees, officers, or agents” of any “private company engaged in the manufacture or sale of gray portland cement or cement clinker” from gaining access to BCI in the Panel proceeding, but they exclude from the scope of this prohibition “outside legal counsel who has represented a

¹ Hereinafter referred to as “Panel’s proposed BCI procedures.”

² The United States wishes to address, in this regard, the Panel’s statement in its April 27, 2005 communication that “[t]he Panel notes the United States’ confirmation of its readiness to supply the information in question provided there are sufficient procedures in place, such as the procedures set out in Exhibit US-139.” The United States reiterates that it, indeed, stands ready to submit to the Panel any BCI for which it receives the necessary authorization from the private companies that submitted the BCI. However, the decision whether to grant such authorization rests exclusively with the submitting companies. Nonetheless, as the United States explained in its April 26, 2005 letter, it has already received authorization from a number of companies and many more have indicated that they would be willing to authorize disclosure if sufficient additional protections are provided.

cement producer in connection with these WTO dispute settlement proceedings.”³ Neither the United States or Mexico has requested that an exception be made for such outside legal counsel;⁴ for example, Mexico did not include such an exception in the BCI procedures that it proposed at the beginning of this process.⁵ Moreover, such a distinction between “outside legal counsel” and other “employees, officers, and agents” was not made in *US - Wheat Gluten*, which involved similar types of BCI.⁶

In addition, the Panel’s proposed BCI procedures allow the United States to object to the designation of a person as an “approved person” on the ground that the person has a conflict of interest.⁷ There is a great potential for a conflict of interest if outside counsel for cement producers are given access to the highly sensitive BCI of companies that are, most often, the business competitors of their clients.⁸ Although these outside counsel, if they represented the cement producers in the underlying ITC sunset review, may have had access to the same BCI in the course of the ITC proceeding,⁹ that access was provided pursuant to a strict administrative protective order that would subject the counsel to extremely severe sanctions in the event of unauthorized disclosure.¹⁰ Such sanctions are not available in WTO dispute settlement. The private companies that submitted the BCI are unlikely to consent to the disclosure of this information to outside counsel for their competitors in situations where such safeguards do not exist. For these reasons, the United States respectfully requests that the Panel modify the

³ Panel’s proposed BCI procedures at para. 9.

⁴ See Mexico’s Comments on BCI Procedures (April 20, 2005).

⁵ See Mexico’s Proposed BCI Procedures (September 22, 2004) (defining “representative” as “any person that a Member selects to act as its representative, counsel or consultant during the dispute and whose selection as such has been notified to the Chairman of the Panel and to the other party, but in no circumstances shall this definition include an employee, officer or agent of a private company engaged in cement production.”)

⁶ See e.g., “Procedures Governing Private Confidential Information” provided in Attachment 4 to panel report in *US - Wheat Gluten (Panel)* (providing that “‘representative’ means any person that a Member selects to act as its representative, counsel or consultant during the dispute and whose selection as such has been notified to the Chairman of the Panel and to the other party, but in no circumstances shall this definition include an employee, officer or agent of a private company engaged in wheat gluten production.”)

⁷ Panel’s proposed BCI procedures at para. 12.

⁸ The *Thailand - H-Beams* dispute provides an example of the risks involved when access to BCI is provided to outside legal counsel who may also represent a foreign or domestic stakeholder. In that case, different representatives of the same law firm represented the government and the private sector association. Despite the fact that the law firm, as a representative or counsel to the government, was bound by the same confidentiality obligations under the DSU as Poland, the private sector association somehow came into possession of Thailand’s brief. See *Thailand - H-Beams (AB)*, paras. 62-78

⁹ The United States notes, however, that no legal counsel for any cement producer is currently under a protective order granted by the ITC that permits use of any confidential information in connection with this WTO dispute settlement proceeding.

¹⁰ As the United States has explained, under U.S. law, sanctions for breach of the ITC’s administrative protective orders include: 1) disbarment from practice in any capacity before the ITC; 2) referral to the United States Attorney; 3) referral to the ethics panel of the appropriate professional organization; and 4) such administrative sanctions as the ITC deems appropriate, including, but not limited to, issuance of public or private letters of reprimand, striking from the record information or briefs submitted by the offender, denying access to business proprietary information, or issuance of a warning letter. See 19 U.S.C. 1677f(c)(1)(B) and 19 C.F.R. 207.7(d). (Exhibits US-108 and US-112).

definition of “representative” in paragraph 9 of its proposed BCI procedures to eliminate the exception for “outside legal counsel who has represented a cement producer in connection with these WTO dispute settlement proceedings.”

(2) Application of Procedures Governing “Access to, and Use and Disclosure of, 17 March 2005 BCI” to Representatives of the United States: Many of the procedures in Section VI of the Panel’s proposed BCI procedures (“Access to, and Use and Disclosure of, 17 March 2005 BCI”) apply to both “approved persons” and “representatives of the United States.” As explained in the U.S. letter dated April 26, 2005, however, the Panel’s BCI procedures already include overarching confidentiality requirements that apply equally to both disputing parties.¹¹ Therefore, the only question is whether there is any need for the additional BCI procedures governing access, use, and disclosure to be applied to the United States. As the United States has explained, there is no such need as the BCI at issue is already in the possession of the United States and has been, and will continue to be, safeguarded in accordance with normal procedures in the United States. Further, the additional BCI procedures adopted in prior disputes have not imposed such requirements on the party submitting the information.¹²

Indeed, application of these procedures to U.S. “representatives”¹³ may have what the United States believes is the unintended effect of rendering the United States in breach of the Panel’s proposed BCI procedures because “representatives of the United States” or other U.S. government officials must continue to access and use the BCI in other domestic proceedings in which the same information is involved. For example, paragraph 16(a) provides that “[a]pproved persons and representatives of the United States shall use 17 March 2005 BCI only for the purposes of this dispute and for no other purpose.” However, the same BCI is also part of the record in a concurrent NAFTA proceeding involving the same ITC sunset review and must be available to U.S. officials in that context. These unintended consequences can be avoided by striking the references to “representatives of the United States” from paragraphs 15(a), 16(a), 16(b),¹⁴ and 16(c) in its proposed BCI procedures. In the same regard, the United States also urges the Panel to adopt the modification to its existing BCI procedures as requested by the

¹¹ The Panel’s existing BCI procedures provide that “[a]s required by Article 18.2 of the DSU, a party or third party having access to BCI shall treat it as confidential, i.e., shall not disclose that information without the formal authorization of the party submitting it to the Panel. The parties and third parties shall have the responsibility for all members of their delegations, and in particular shall ensure that all members of their delegations maintain the confidentiality of any BCI to which they have access in the context of these proceedings.”

¹² For example, in the *US - Wheat Gluten* dispute, the confidentiality procedures clearly stated that “[t]hese procedures apply to all private confidential information submitted during the Panel process, *but do not apply to a party with respect to private confidential information first submitted by that party, including in derivative form.*” See “Procedures Governing Private Confidential Information” provided in Attachment 4 to panel report in *US - Wheat Gluten (Panel)*.

¹³ The definition of “representative” is limited to any individual selected as “a representative, legal counsel, or other advisor of a party, who has been authorized by a party to act on behalf of such party *in the course of the dispute.* . . .” See Panel’s proposed BCI procedures at para. 9.

¹⁴ In this case, only the first reference to “representative of the United States” should be struck.

United States in its April 26, 2005 letter.¹⁵

(3) Deadline for Submission of Non-confidential summaries of BCI: The United States understands that the Panel's proposed BCI procedures are intended to "supplement the Panel's working procedures and, in their scope and application, the BCI Procedures adopted by the Panel on 19 October 2004." However, there appears to be an inconsistency between the two sets of BCI procedures with respect to the deadline for submission of non-confidential versions of submissions containing BCI. As explained in the U.S. letter dated April 26, 2005, the Panel's existing BCI procedures provide for three working days, but the proposed BCI procedures provide for two working days, for submission of such non-confidential versions. The Panel should consider reconciling the two sets of procedures to avoid unnecessary confusion regarding which deadline applies.

(4) Destruction or return of written summary notes: Paragraph 19 of the Panel's proposed BCI procedures requires the return or destruction of "any documents or other recordings containing 17 March 2005 BCI." The United States respectfully requests that the Panel clarify in its proposed BCI procedures that this obligation also applies to any written summary notes taken pursuant to paragraph 16(c).¹⁶ Such a clarification has been included in the additional BCI procedures considered in prior disputes, such as *US - Wheat Gluten*.¹⁷

(5) Retention of BCI by Secretariat: Paragraph 19 of the Panel's BCI procedures would permit the Secretariat to retain one copy of all "documents and other recordings containing . . . BCI for the archives of the WTO." This proposal would inject a great deal of uncertainty into the process. Among other things, the BCI procedures do not specify how the BCI will be handled and stored while it is in the archives of the WTO, how long it will be maintained in the archives, who would have access to the information while it is in the WTO archives, or when, or even if, it would ever be returned or destroyed. The United States anticipates that many of the companies that submitted the BCI will be hesitant to authorize disclosure with such long-term uncertainty about access by others to their BCI and how their BCI might be used. The United States notes, in this regard, that such a provision was not included in *US - Wheat Gluten*, in which similar types of BCI were at issue.¹⁸ Thus, the United States respectfully requests that the Panel strike the last sentence of paragraph 19 from its final additional BCI procedures.

¹⁵ The United States requested that, in the last sentence of paragraph 5, the Panel add "by the other party, the Panel, and the Secretariat" and strike "submissions and argumentation in" to avoid suggesting that investigating authorities in the United States may not continue to use the BCI at issue in other proceedings in which that information is involved.

¹⁶ One way to implement this may be to include the following – "(including any written summary notes taken of the information pursuant to paragraph 16(c))" – in the first sentence of paragraph 19 after "BCI".

¹⁷ See "Procedures Governing Private Confidential Information" provided in Attachment 4 to panel report in *US - Wheat Gluten (Panel)*.

¹⁸ See "Procedures Governing Private Confidential Information" provided in Attachment 4 to panel report in *US - Wheat Gluten (Panel)*; see also "Procedures Governing Business Confidential Information" provided in Annex 1 to panel report in *Brazil - Aircraft (Panel)*; and "Procedures Governing Business Confidential Information and Declaration of Non-Disclosure" provided in Annex 1 to panel report in *Canada - Aircraft (Panel)*.

(6) Transmission of BCI Separately from Other Information on Record: Paragraph 20 of the Panel’s BCI procedures requires the Secretariat, if the report of the Panel is appealed, to “transmit such information [BCI] to the Appellate Body separately from the rest of the record, whenever reasonably possible.” To minimize the risk of unintended but unauthorized disclosure, the United States respectfully requests that the Panel’s procedures require that BCI be transmitted to the Appellate Body separately from the other information on the record in all situations, not just “whenever reasonably possible.” This is the approach that has been taken in other disputes, such as *US - Wheat Gluten*, *Canada - Aircraft*, and *Brazil - Aircraft*, in which the additional BCI procedures provided that “[t]he Secretariat shall transmit such information to the Appellate Body separately from the rest of the record and shall inform the Appellate Body of the special procedures that the Panel has applied with respect to such [business] confidential information.”¹⁹ The United States requests that the same language be adopted in this dispute as well.

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The United States thanks the Panel for its consideration of these comments. The United States is providing a copy of these comments directly to Mexico.

Sincerely,

Stephen Kho
Legal Advisor

cc: H.E. Mr. Fernando de Mateo y Venturini, Permanent Mission of Mexico

¹⁹ See “Procedures Governing Private Confidential Information” provided in Attachment 4 to panel report in *US - Wheat Gluten (Panel)*; “Procedures Governing Business Confidential Information” provided in Annex 1 to panel report in *Brazil - Aircraft (Panel)*; and “Procedures Governing Business Confidential Information and Declaration of Non-Disclosure” provided in Annex 1 to panel report in *Canada - Aircraft (Panel)*.