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International Trade & Investment Practice

# Canadian Safeguard Measures



## TABLE OF ABBREVIATIONS

<b>CBSA</b>	Canada Border Services Agency
<b>CITT</b>	Canadian International Trade Tribunal
<b>FTA</b>	Free Trade Agreement
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>NAFTA</b>	North American Free Trade Agreement
<b>RFI</b>	Request for Information (CITT Questionnaire)
<b>SIMA</b>	Special Import Measures Act
<b>WTO</b>	World Trade Organization

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# Preface

Safeguards are exceptional measures intended to temporarily assist domestic producers that have suffered, or are threatened by serious injury from increased imports of specific goods. Unlike anti-dumping or anti-subsidy investigations, these subject goods may be fairly traded but nonetheless cause injury.

In Canada, safeguards can take the form of: (i) an import surtax under Division 4 of the *Canadian Customs Tariff*, or (ii) a restriction on import volumes, such as an import quota or tariff-rate quota, under the *Export and Import Permits Act*. The Governor-in-Council (i.e., federal Cabinet) has the authority to impose safeguards:

- i. on a provisional basis and only in the form of a surtax, after a report by the minister of finance, in “critical circumstances” for up to 200 days, or
- ii. following an inquiry by the Canadian International Trade Tribunal (“CITT”).

Safeguard inquiries by the CITT are governed by a set of complex legal rules and procedures set out in the *CITT Act*, *CITT Regulations* and the *CITT Rules*. This booklet provides a brief but thorough outline of the principal elements of Canada’s safeguards legislation. However, any person involved in a safeguard proceeding should seek the guidance of an experienced, Canadian trade lawyer regarding the application of the law and strategic options that optimize commercial outcomes.



# What is a Safeguard Measure?

Global safeguard actions are an authorized exception to the WTO's free trade principles, permitted under Article XIX of the *General Agreement on Tariffs and Trade*, 1994 (GATT). Article XIX provides that if any product is being imported into the territory of a GATT party "in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products", the party may suspend its GATT obligations as they concern the product in whole or in part, including tariff concessions, "to the extent and for such time as may be necessary to prevent or remedy such injury".

Safeguards must be implemented in accordance with the WTO *Agreement on Safeguards*, which sets out conditions to adoption of safeguard measures under WTO law. A party may only impose safeguards after determining, through economic investigation, that: (a) there has been a surge of imports of the product measured either on an absolute basis or relative to domestic production, and (b) the increased volume of imports has caused or threatens to cause "serious injury" to the domestic industry that produces like or directly competitive products. "Serious injury" is defined as "a significant overall impairment in the position of a domestic industry".<sup>1</sup> This threshold is slightly lower than the threshold required for anti-dumping and anti-subsidy measures, which require that injury or threatened injury be "material".

Under WTO law, safeguards must be imposed globally, meaning in respect of all imports of the subject product regardless of country of origin or export. In other words, safeguards cannot be used as a means to discriminate against, or award special preferences to, particular trading partners. Bilaterally negotiated voluntary export restraints are not a permissible form of safeguard under the *Agreement on Safeguards*.

WTO members may, however, enter into bilateral free trade agreements ("FTAs") that require that goods exported from the FTA partner be considered separately from other imported goods in the injury inquiry, and excluded from the global safeguard measure if exports from that partner alone do not meet the applicable injury test set out in the respective FTA. Another exception is China, which may be targeted for individual safeguard inquiries in accordance with its WTO accession protocol. Finally, a special safeguard mechanism may be invoked for certain agriculture products in accordance with the WTO *Agreement on Agriculture*.

In Canada, imports from FTA partners are excluded from the CITT's injury analysis in a global safeguard action if the CITT determines that the goods from that FTA partner alone were not an "important contributor" to the injury or threat of injury. An FTA party that is excluded from a global safeguard measure can only be subsequently included if it is determined that a surge in imports from that Party is undermining the effectiveness of the measure.

## What is a Safeguard Measure?

FTAs may also contain their own safeguard mechanisms that allow the signatories to consider whether the effect of the preferential treatment on goods imported from the bilateral trading partner only is causing or threatening to cause injury to the domestic industry. If injury is found, bilateral safeguards can be imposed that suspend the preferential treatment offered under the bilateral FTA and revert back to WTO most-favoured nation tariff rates.

Another key characteristic of safeguards is that, as extraordinary measures undertaken in “emergency” circumstances, they are time-limited and must only be imposed for the minimum amount of time required to prevent or remedy serious injury and to facilitate adjustment. In Canada, the CITT has typically recommended measures be put into place for a period of 3 years in previous safeguard inquiries (although not all of the recommendations resulted in the imposition of safeguard measures, since the ultimate decision is at the discretion of the Minister of Finance).<sup>2</sup> Under the *CITT Act*, the maximum amount of time that a safeguard measure can remain in effect is 4 years, and may be extended once for a total maximum of 8 years, which includes any time that a provisional measure was in effect. If the measure is imposed for a period of 3 years or more, a mid-term review inquiry must be conducted halfway through the period. (See mid-term reviews discussion below.)

Investigations must include reasonable public notice rights of participation for all interested parties in the country proposing to impose a safeguard measure. Members of the public may submit views on whether the application of a safeguard measure would be in the public interest. A party imposing a safeguard measure must also give notice to other WTO members before the action is taken, so that concerned members have an opportunity to consult with the party in respect of the proposed action. Safeguard measures may be imposed provisionally without consultation for up to 200 days where delay would cause damage to the domestic industry that would be difficult to repair (“critical circumstances”), but WTO consultation must take place immediately after the measure is imposed.

For consultation purposes, the state initiating a safeguard inquiry must file a formal notice with the WTO secretariat notifying other WTO members of the initiation. Although only domestic interested parties and foreign state governments receive direct personal notice, the notices are public and any person in any country has a right to participate in inquiry proceedings.

In Canada, the authority tasked with conducting safeguard investigations is the CITT. The CITT also has the authority to exclusion inquiries, mid-term reviews and extension inquiries in addition to safeguard inquiries, pursuant to the *CITT Act*, the *CITT Regulations* and the *CITT Rules*. In accordance with WTO requirements, the CITT conducts safeguard inquiries to determine if increased imports of goods into Canada are causing or are threatening to cause serious injury to domestic producers of like or directly competitive goods.

Under the *CITT Act*, the CITT may also conduct an inquiry into whether services provided by persons resident outside of Canada that may cause or threaten injury to, or that may retard (inhibit development of), the provision of services in Canada by Canadian residents.<sup>3</sup> This booklet focuses on safeguard inquiries in relation to imported goods.



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# Form of Safeguard Measures

In Canada, safeguard measures may be imposed in the following forms:

- a. a surtax order made under subsection 55(1), section 60 or subsection 63(1), or subsection 74(1) or (2) of the *Customs Tariff*, as appropriate.
- b. an import quota under subsections 5(3), (3.2) or (4.1) of the Export and Import Permits Act.

Surtaxes can be applied either as a flat rate as specified in the order, or at a rate that varies from time to time as the quantity of those goods imported during a period specified in the order equals or exceeds quantities specified in the order. The rate of surtax cannot exceed the minimum amount that is sufficient to prevent or remedy serious injury to domestic producers of like or directly competitive goods.

Import quotas are implemented by placing the goods on the Import Control List of goods that require an import permit from Global Affairs Canada to enter the country. Quotas can take the forms of either an absolute quota, which permits imports in a limited quantity after which no additional goods may enter, or a tariff rate quota, which allows imports in a specified quantity at the otherwise applicable tariff rate, after which the tariff rate applied is intended to serve as a restraint on imports.



# Initiation of Inquiry on Complaint

A safeguard action is normally launched after a domestic producer, or a person or association on behalf of a domestic producer(s), files a complaint with the CITT. A complaint must be supported by domestic producers that represent a “major proportion” of domestic production of the good. The Government may also self-initiate an inquiry.

The information that must be included in a safeguard complaint in order for the complaint to be “properly documented” is set out in subsections 23(2) and (3) of the *CITT Act* and in subrule 83(1) of the *CITT Rules*. The complaint must contain the facts that support its serious injury allegations in reasonable detail, and provide supporting evidence and documentation.

The CITT acknowledges receipt of the complaint the day after it is received, and has 21 days to review the complaint and confirm whether it is properly documented. The CITT may request supplemental information from the complainant within the 21 day time frame. If the CITT determines that the complaint is properly documented, it notifies the complainant and other interested parties, which may include exporters, importers, associations, or governments. If the CITT determines that the complaint is not properly documented, it notifies the complainant only. Either way, a notice of the decision is published in the *Canada Gazette*.

The CITT then has 30 days from the date that proper documentation was confirmed (i.e. by day 51 from the filing of the complaint) to decide whether it will initiate a safeguard inquiry. The CITT will initiate a safeguard inquiry if the three conditions in subsection 26(1) of the *CITT Act* are met:

a

**The information provided in the complaint presents a reasonable indication that the goods are being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers of like or directly competitive goods;**

b

**The complaint is made by or on behalf of domestic producers who produce a major proportion of domestic production of the like or directly competitive goods; and**

c

**There has been no similar safeguard inquiry related to the same goods in the previous 24 months before receipt of the complaint, or if there was, that the circumstances are sufficiently different to warrant a new inquiry.**

## Initiation of Inquiry on Complaint

If the CITT determines that an inquiry is warranted on the basis of the information provided in the complaint, it will initiate one. If the decision is that a safeguard inquiry is not warranted, the proceedings are terminated. The CITT sends notice of its initiation decision to the Government of Canada, the complainant, and any other interested parties, and a copy is published in the *Canada Gazette*.

The CITT will not initiate a safeguard inquiry if it believes that the alleged injury or threat of injury is caused by the dumping and/or subsidizing of imports. The appropriate mechanism for relief in such a case is an investigation by the Canada Border Services Agency (CBSA) under the *Special Import Measures Act* (SIMA), and the CITT will refer the matter to the CBSA accordingly. However, if the CBSA decides not to initiate a SIMA investigation or terminates its investigation, the CITT could resume the safeguard inquiry, if requested by the complainant.

The CITT may recommend that the Government of Canada impose provisional safeguard measures while the inquiry is conducted. In the case of an interim surtax, if it is determined at the end of the injury inquiry that safeguards are not warranted, any interim surtaxes collected are refunded to the importer with interest. Under Article 6 the WTO *Agreement on Safeguards*, the duration of provisional safeguards cannot exceed 200 days.





# Government Self-Initiation and Public Consultations

The CITT may also initiate a safeguard inquiry if instructed to do so by the Government of Canada. An instruction to initiate a safeguard inquiry would typically come from the Department of Finance and/or Global Affairs Canada.

Before the CITT initiates the inquiry, the Minister of Finance may hold public consultations in Canada to solicit input on the need for interim safeguard measures pending conclusion of the CITT proceeding. The Minister will judge the urgency of a safeguard inquiry based on the submitted comments and information.

If the need for an inquiry is determined to be urgent, the Minister may apply safeguards on a temporary basis and refer the matter to the CITT for a formal inquiry process. That process culminates in a recommendation to the Minister of Finance as to whether or not safeguard measures should be applied, and the nature of those measures. The Finance Minister will then make a final determination.

If the application of safeguard measures is judged not to be urgent, but nonetheless an option the Minister of Finance determines merits consideration, the matter will be referred to the CITT for its inquiry and recommendations. In this case, no interim safeguard measures are imposed.



# Inquiry Procedure

Safeguard inquiries are an expedited process appropriate to the emergency nature of the protective measures. A normal safeguard inquiry must be completed in 180 days, although this timeline can be extended to 270 days in complex cases that involve a wide scope of products or industries, or where hearings are expected to take several weeks due to a large number of participants. In addition to the overall statutory deadline, the CITT maintains a standard inquiry schedule that it endeavors to follow in all cases to ensure that it is able to meet the statutory deadline for its final report. A copy of a standard inquiry timeline is included as Appendix A.

## Notice of Participation and Appointment of Counsel

Parties interested in participating in the inquiry must submit notices of participation to the CITT. Parties are not required to be represented by counsel at the CITT, but a party who is not represented by counsel will not have the advantage of being able to access confidential information filed by other parties in preparing its submissions to the CITT.

Any person, other than a director, servant or employee of a party, may act as counsel in safeguard proceedings on behalf of a party. However, because safeguard inquiries are quasi-judicial proceedings, there are advantages to retaining lawyers to act as legal counsel: the application of solicitor client privilege, enhanced written and oral advocacy skills and experience in preparing and cross-examining witnesses, and the ability to continue representing the party in subsequent judicial review proceedings at the Federal Court or the Supreme Court of Canada.

## Designation of Information as Confidential

Information included in the complaint or filed in submissions by interested parties may be designated as confidential. In such case, the party claiming confidential treatment must provide a non-confidential, redacted version of the response filing that can be made available for public distribution. In addition, the party claiming confidentiality must provide a statement explaining why the information which has been redacted is confidential.

The *CITT Act* has elaborate rules designed to permit selective public disclosure. Every party to the proceedings has a right, on request, to examine and be provided with copies of documentary information unless it has been designated as confidential. Counsel for parties may enter into confidentiality undertakings with the CITT to access the confidential record, in order to allow them to make submissions on behalf of the parties whom they represent. Counsel may make arguments and submissions regarding the confidential information, but as a condition of the undertakings, counsel cannot share any confidential information with their clients.

## Questionnaires and CITT Investigation Report

At the commencement of a safeguard inquiry, the CITT issues requests for information (“RFIs”) in the form of questionnaires that must be completed by domestic producers, importers, foreign producers and purchasers who choose to participate in the proceedings. Parties are normally given approximately one month (30 days) to complete and file their questionnaire responses.

The questionnaires seek extensive public and confidential information dealing with factors relevant to the injury analysis. Although the content of the questionnaires varies in each case, they will normally request information on volumes and values of imports, domestic production and sales, and financial results of domestic producers. RFIs may request information covering a five year period. The CITT may request input from the parties and counsel on what should be included in the questionnaires before they are issued.

The CITT consolidates the information from the RFI responses into a summary “Tribunal Investigation Report” (also known as the Staff Report). This report and the rest of the CITT’s record is made available to the parties and their counsel in non-confidential and confidential form approximately 40 days after the questionnaire responses are due (around day 70 of the investigation).

## Case Submissions, Witness Statements and Oral Hearing

Parties are given approximately 40 days from the distribution of the record to prepare and submit written case briefs or submissions and witness statements in support of, or in opposition to, a determination of serious injury or threat thereof. Case briefs present a written summary of the case that will be made at the oral hearing along with supporting exhibits. Parties may also present witness statements containing evidence of party employees, or of experts or members of the industry who will testify at the hearing on the impact of fairly traded imports on the domestic producers.

An oral hearing before a panel of three CITT members is conducted about 10 days after the case briefs and witness statements, around day 120 of the inquiry. The hearing usually takes place at the CITT premises in Ottawa. At the hearing, the CITT will hear evidence in the form of witness testimony, cross-examination and oral arguments. Sessions can be either public or, if information from the confidential record must be discussed, *in camera* (i.e. open only to counsel who have signed confidentiality undertakings with the CITT, and the witness testifying if applicable). The length of the hearing varies, from a few days to several weeks depending on the complexity of the case and the number of parties participating in the proceedings..

After the hearing, the CITT deliberates and concludes the proceeding by issuing its report and recommendations to the Government of Canada on or before the 180 or 270 day statutory deadline.



# Injury Factors Considered by the CITT

In determining whether safeguard measures are warranted, the CITT must assess whether importations of goods into Canada in increased quantities have been or threaten to be a principal cause of serious injury to domestic producers of like or directly competitive goods. Section 19.01 of the *CITT Act* defines “principal cause” as “. . . an important cause that is no less important than any other cause of the serious injury or threat.”

Section 5 of the *CITT Regulations* enumerates factors that the CITT is to consider in its analysis, which include:

- a. the actual volume of the goods imported into Canada, including whether there has been a significant increase in the importation into Canada of the goods and, where there has been, the rate and amount of such increase, either absolutely or relative to the production in Canada of like or directly competitive goods.
- b. the effect of the imported goods on prices of like or directly competitive goods in Canada, including:
  - a. whether the prices of the imported goods have significantly undercut the prices of like or directly competitive goods produced and sold in Canada; and
  - b. whether the effect of the importation into Canada of the goods has been
    - iii. to depress significantly the prices of like or directly competitive goods produced and sold in Canada, or
    - iv. to limit to a significant degree increases in the prices of like or directly competitive goods produced and sold in Canada; and
- c. the impact of the imported goods on domestic producers of like or directly competitive goods in Canada, including all relevant economic factors that have a bearing on domestic producers of like or directly competitive goods, including the actual and potential changes in the level of production, employment, sales, market share, profits and losses, productivity, return on investments, utilization of production capacity, cash flow, inventories, wages, growth or ability to raise capital or investments.

Based on the CITT’s report, the Governor in Council, on recommendation from the Minister of Finance, will make a final decision about whether safeguard measures should be implemented. The form and length of time of the measures are determined based on economic analysis of the available evidence, and must be no more than sufficient to correct or prevent serious injury to the domestic industry.

# Safeguard Recommendations Report

The Government may also ask the CITT to provide recommendations regarding the most appropriate form of safeguard measures to relieve the injury and assist domestic producers. Under CITT policy, a recommendations report takes 90 days to prepare and can be conducted concurrently with the safeguard inquiry process.

## Exclusions and Exclusion Inquiries

If the CITT makes a finding of injury or threat in a global safeguard inquiry, it must also determine separately whether the goods being imported from certain FTA partners, specifically Chile, Israel or a North American Free Trade Agreement (NAFTA) country, are substantial and contribute to the serious injury. If imports from these partners are found to not “contribute importantly” to the serious injury, goods of these countries may be excluded from the global safeguard measure.

The CITT must also determine separately whether goods imported from each of FTA partners Colombia, Korea, Panama and Peru are themselves alone a “principal cause” of injury or threat of injury. Based on the CITT’s findings, the Minister may exclude certain from the safeguard measure if imports from that country are not found to be a “principal cause”, which is defined as “an important cause that is no less important than any other cause of the serious injury or threat thereof”.

A subsequent 90-day exclusion inquiry may be held in respect of goods from a country that was excluded from a global safeguard measure to determine whether that country’s exclusion should be revoked. An exclusion inquiry is initiated when a domestic producer of like or directly competitive goods files a complaint with the CITT that allege that a surge of imports of goods imported from an excluded country undermines the effectiveness of the safeguard measure. The CITT will initiate an exclusion inquiry within 30 days of the complaint if the complaint discloses a reasonable indication that its allegation is valid. The CITT’s report is due 60 days after the initiation of the inquiry.



# Mid-Term Reviews

If a safeguard measure remains in place for more than three years, the CITT must conduct a mid-term review before the mid-point of the safeguard period. The CITT reviews developments since the order was made respecting the goods that are subject to the order and like or directly competitive goods produced by domestic producers, prepares a report on the developments and provides advice to the Government of Canada on whether the order should remain in effect, be repealed or be amended. Notice of initiation of a mid-term review is provided to interested parties and published in the *Canada Gazette*, so that interested parties can participate and make submissions to the CITT for purposes of the review.

# Expiry and Extensions

Safeguard measures will expire automatically at the end of the pre-established term unless the Government of Canada decides that an extension is warranted. The CITT may conduct an extension review if a domestic producer of goods that are like or directly competitive with goods subject to the safeguard files an extension request within the time period specified in the CITT's expiry notice. Extension request inquiries follow a similar procedure to a primary safeguard inquiry, and the CITT's report is due to the Government no later than 45 days before the expiry of the safeguard measure. Safeguard measures may also be revoked at any time upon order by the Governor in Council.

# Enforcement

In Canada, the agency tasked with collection and enforcement of safeguard measures is the CBSA. Under Customs legislation, importers are required to self-assess whether goods they are importing are subject to safeguard measures. Importers must ensure that surtaxes are correctly calculated and declared in the customs accounting documentation and paid at time of entry or, in the case of an import quota or tariff rate quota, that appropriate import permits are obtained prior to entry.

Goods declared under HS codes subject to safeguard measures and the companies that import subject goods are subject to enhanced scrutiny at the border, and may be subject to verification (audits) by the CBSA.

Importers who fail to accurately self-assess and pay surtaxes or obtain necessary import permits are subject to penalties under the *Customs Act* or the *Export and Import Permits Act*, which may include administrative monetary penalties and punitive interest, or in egregious cases, suspension of import privileges and/or criminal prosecution.



# What Can Importers and Exporters Do to Protect Themselves?

When a safeguard action is initiated, it is critical that foreign manufacturers and exporters, Canadian importers and end-users of affected products review their current supply chains to determine the impact of proposed safeguard measures. Interested parties may file written submissions with the Department of Finance with respect to the proposed safeguard action during the consultation period, or participate in the CITT inquiry proceedings.

Effective consultation submissions would at a minimum address the following issues:

1. Whether or not safeguard measures merit application in connection with the imports (by category);
2. If safeguard measures should apply, whether exclusions are appropriate (by product sub-category);
3. Whether or not it is urgent that safeguard measures be applied, failing which that their application on an urgent basis should await either that time when the need for their application becomes apparent, or best case only after a hearing and recommendation by the CITT;
4. The length of time during which imports should be subject to safeguard measures; and
5. Conditions under which imports of non-safeguarded steel should be grand-fathered including those fulfilling pre-existing purchase orders or other forms of contractual commitments, goods in transit, or other conditions.

Effective participation in a CITT safeguard proceeding typically entails completing and filing a response to the questionnaire applicable to the company, preparing written submissions to the CITT and providing witness testimony and oral argument at the hearing.



## Appendix A:

# Critical Path Timeline of Canadian Safeguard Inquiry

Day	Key Event
-51	CITT receives written complaint
-30	CITT decides whether complaint is properly documented
0	CITT decides to initiate a safeguard inquiry; Schedule of events issued and participant questionnaires posted on CITT website
15	Notices of participation and representation, and declarations and undertakings of confidentiality due
16	Distribution of list of participants
30	Replies to CITT questionnaires are due
70	Distribution of CITT's official record, including its investigation report
85	Cases of parties that support a determination of serious injury or threat thereof are due
100	Cases of parties that oppose a determination of serious injury or threat thereof are due
110	Reply submissions of parties in support a determination of serious injury or threat thereof are due
120	Commencement of oral hearing (hearing length varies depending on how many products are involved – can vary from a few days to a few weeks)
180	Submission of CITT's report to the Government (for a standard case)
270	Submission of CITT's report to the Government (for a complex case or when the report includes recommendations on most appropriate safeguard measures)



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# Notes

1. This definition is reflected and adopted in Canada in subsection 2(1) of the *CITT Act*.
2. There have been only four Canadian safeguard inquiries in the last 25 years: Boneless beef (1993), Steel Goods (2001), Bicycles and bicycle frames (2005), and Barbeques from China (2005). Protection was recommended by the CITT in all four cases, but the Minister of Finance only decided to impose final safeguard measures in respect of boneless beef.
3. *CITT Act*, paragraph 20(b).
4. *CITT Act*, paragraph 20(a).



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## ***Canadian Safeguard Measures, September 2018***

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