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International Trade & Investment Practice

Canadian Safeguard Measures

Executive Summary



TABLE OF ABBREVIATIONS

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

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Introduction

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.

In Canada, safeguards can take the form of: (i) an import surtax, or (ii) a restriction on import volumes, such as an import quota or tariff-rate quota. 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”).

This guide is for importers and exporters involved in Canadian safeguard proceedings. It outlines the legal rules, procedures and key considerations relating to safeguard proceedings. Bennett Jones LLP has experienced, Canadian trade lawyers to advise on safeguards law and strategic options that optimize commercial outcomes.



What is a Safeguard Measure?

Global Safeguards

Global safeguard actions are an authorized exception to the WTO's free trade principles implemented in Canadian law. The *CITT Act* 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 in respect of 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."

Under the *WTO Agreement on Safeguards*, a party may only impose safeguards after conducting an inquiry into whether:

- 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."¹

Global safeguards generally apply to all goods regardless of country of origin.² 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 be excluded from the global safeguard measure in certain circumstances.

CANADA FTA PARTNERS WITH GLOBAL SAFEGUARD EXCLUSIONS PROVISIONS

United States	Mexico	Israel	Chile
Panama	Peru	Korea	Colombia

Other Safeguards

FTAs also contain bilateral safeguard mechanisms that apply only between the parties to the FTA. Bilateral safeguards permit a Party to suspend preferential treatment under the FTA to protect its domestic industry if goods imported from the other Party cause or to threaten to cause injury to the domestic industry.

Canadian law provides for two other types of safeguards. China may be targeted for individual safeguard inquiries in accordance with its WTO accession protocol, while a special safeguard mechanism may be invoked for certain agriculture products in accordance with the *WTO Agreement on Agriculture*.

What is a Safeguard Measure?

Duration of Safeguards

As extraordinary measures undertaken in “emergency” circumstances, safeguards are time-limited.

- Provisional safeguards are limited to a maximum of 200 days.
- A “final” safeguard measure is limited to up to 4 years, including any 200 day provisional safeguard period.
- A measure can be extended once for a maximum of up to 8 years.³
- 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.⁴

Form of Safeguard Measures

In Canada, safeguard measures may take one of three forms:

- Surtaxes, which are effectively tariffs, and apply to all imports subject to a safeguard order.
- Tariff rate quotas, which impose different tariff rates below and above a predetermined import volume threshold and require importers to obtain import permits before importation.
- Quotas, which establish an upper limit on the absolute volume of imports that can enter the market within a given period and require importers to obtain import permits before importation.⁵





The Imposition of Safeguards

The decision to impose safeguards proceedings has three stages:



Initiation of Safeguard Proceedings

A safeguard action is initiated either by the CITT in response to a complaint filed by one or more domestic producers or by the Government of Canada.

CITT-Initiated Safeguard Action

When a producer files a complaint requesting the imposition of safeguards, the CITT has 21 days to determine if the complaint is properly documented. If so, the CITT must notify interested parties (importers, exporters and purchasers of the goods), and has 30 days decide whether to initiate a safeguard inquiry. If the CITT determines that the complaint is not properly documented or that a safeguard inquiry is not warranted, it terminates the proceedings.

If the CITT initiates an inquiry, it may recommend that the Government impose provisional safeguard measures before the inquiry commences or while it is in progress.

Government-Initiated Safeguard Action

The Governor in Council may order the CITT to initiate a safeguard inquiry at any time.

When directing the CITT to initiate an inquiry, the Government may impose provisional safeguard measures based on “critical circumstances”. The Minister’s practice is to hold public consultations to determine the need for provisional safeguard measures pending the conclusion of the CITT inquiry. The Government’s decision to impose provisional safeguards does not affect its decision to direct the CITT to initiate a safeguard inquiry.

Inquiry by the CITT

Safeguard inquiries are an expedited process.

- A safeguard inquiry must be completed in 180 days from initiation of the inquiry.
- The CITT can extend the deadline to 270 days in complex cases that involve a wide scope of products or industries, or where hearings may take several weeks due to a large number of participants.

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. See Appendix A for a copy of the typical schedule in a safeguards hearing.

During the inquiry, parties who choose to participate complete detailed questionnaires issued by the CITT, file evidence and legal argument, and attend a CITT hearing, usually held in Ottawa, Ontario. At the hearing, participants conduct cross-examinations of witnesses and make oral arguments.

Information included in the complaint or in submissions filed by interested parties may be designated as confidential. This information may only be accessed by the CITT and its staff, and counsel to interested parties who have given a confidentiality undertaking not to disclose the information to their clients or anyone else.

Decision to Impose Safeguards

Following the hearing, the CITT must report and recommend on the following:

- Whether safeguard measures are warranted because import volumes have been or threaten to be a principal cause of serious injury to domestic producers of like or directly competitive goods.⁶
- The most appropriate form of safeguard measures (surtax, quota, or tariff rate quota) to protect domestic producers from serious injury.
- Whether to exclude the goods of free trade partners from the safeguards in accordance with the terms of the FTAs.⁷
- Whether to exclude goods within the scope of the safeguards order because they are not produced in Canada.

The CITT reported recommendations are not binding on the Government. Based on the CITT's report, the Governor in Council, on the recommendation of the Minister of Finance, makes a final decision about whether to order safeguard measures.

A safeguard order specifies the goods subject to the safeguard measures, any country or product exclusions, and the form and duration of the measures.



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How are Safeguards Enforced?

The CBSA enforces safeguards according a self-assessment regime. Importers must ensure that surtaxes are correctly calculated and declared in the customs accounting documentation and paid at time of entry. In the case of an import quota or tariff rate quota, the importer must also obtain import permits from Global Affairs Canada before entry.

Importers who fail to accurately 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 or imminent, exporters, importers and end-users of affected products should review their current supply chains to determine the impact of proposed safeguard measures.

Effective participation in a safeguard proceeding typically entails developing a legal strategy, completing and filing a response to a CITT questionnaire, preparing legal submissions, providing witness testimony and making oral arguments at the CITT hearing.



Appendix

Day	Key Event
-51	CITT receives written complaint
-30	CITT decides whether complaint is properly documented
0	CITT decides, or is directed 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. Article 9.1 of the Agreement on Safeguards provides that “safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 percent, provided that developing country Members with less than 3 percent import share collectively account for not more than 9 percent of total imports of the product concerned.”
3. Expiry and Extension: Safeguard measures expire automatically at the end of the pre-established term unless the Government 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.
4. Mid-term Review: 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.
5. See e.g., Safeguard Inquiry into the Importation of Certain Steel Goods, GC-2001-001, (C.I.T.T.) at 241.
6. CITT Act, paragraph 20(a). 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.”
7. 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 alleges that a surge of imports of goods imported from an excluded country undermines the effectiveness of the safeguard measure.



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In keeping with this standard, our international trade and investment lawyers are practice leaders, known for their extensive industry experience and excellence. They are trusted advisors to our clients, which include companies of all sizes across many sectors, including mining and metals, oil and gas, manufacturing, agriculture and agri-food, consumer goods, retail, e-commerce, investment banks and investors, among others.

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their perspective *across sectors, industries and borders.*