If you don’t Like the Answer, Just Ignore the Rules: Government of Canada Intends to Disregard WTO Rules Limiting Repetitive Use of Safeguard Measures

June 04, 2019

On Monday, June 3 the Government of Canada introduced amendments to Canadian law to eliminate, for two years, limitations on Canada’s ability to re-impose safeguard measures on imported goods. View the Notice of Ways and Means Motion (Motion) tabling the amendments.

The amendments introduced on June 3 are in response to intensive public and private lobbying by domestic steel producers, after the CITT concluded on April 3 that safeguards were not warranted on five of the seven steel categories (and not warranted for certain countries such as Korea on the remaining two categories) on which the Government applied provisional safeguards last October 25.

Safeguards are trade restrictions that can be applied to address a sharp increase in imports that is causing or threatening to cause serious injury to a domestic industry. Because safeguards are imposed on fairly traded goods rather than on goods that are being dumped or subsidized, international trade rules strictly limit their use.

Under the WTO *Agreement on Safeguards*, a country may impose a safeguard measure provisionally for up to two hundred days during which it must ask an independent investigating authority to determine whether the safeguard measure is justified. If the investigating authority concludes that it is not justified, the measure must be removed. In Canada, that investigating authority is the Canadian International Trade Tribunal (CITT). As a result of the CITT’s decision the Government was forced earlier this spring to remove the safeguard quotas and surtaxes that it had imposed on those steel categories.

To prevent countries from promptly re-imposing another provisional safeguard measure after the initial measure has been rejected by the investigating authority, the WTO rules specifically prohibit the re-imposition of a safeguard on the same products for a certain period. In the case of Canada’s steel safeguards, which were in place for more than 180 days, that period is at least two years under WTO rules. The June 3 amendments would

repeal the provisions of Canadian law that give effect to the WTO rules prohibiting the re-imposition of safeguards on the same goods within two years.

That is, the Government is enabling itself to disregard its WTO commitments by re-imposing safeguards on the same steel products for which the CITT, following a months'-long inquiry that included two weeks of hearings, dozens of witnesses and over 38,000 pages of evidence and argument, concluded could not be justified. This is unprecedented in Canada and likely any other WTO Member.

The Motion leaves unchanged subsection 5(3.1) of the *Export and Import Permits Act*, which prohibits the addition to the Import Control List of any goods subject to a re-imposed safeguard before the period required by the WTO rules has elapsed. As a result, any safeguard that is re-imposed on the steel products that were the subject of the October 25, 2018 safeguard order would have to take the form of a straight surtax rather than a quota or tariff-rate quota, because quotas are administered through the Import Control List.

Despite its professed commitment to a rules-based trading system sustained by the WTO, the Government has implicitly acknowledged that the amendments are so it can break those rules: it has structured the repeal of the relevant law to last for two years, after which the current prohibitions would be reinstated.

In the trade law world, this is known as a "hit and run" measure because as a practical matter it likely will expire before any challenge to it by trading partners can run its course through the WTO's dispute settlement system. This is a particularly discouraging approach from Canada given that it has played a leading role advocating WTO reforms intended to strengthen a rules-based trading system with robust and meaningful disciplines on WTO non-compliant behaviour.

That does not mean, however, that Canada will not face a backlash if it re-imposes safeguards that fly in the face of its WTO commitments and thus harm the legitimate trading interests of other WTO Members – the same interests that Canada vigilantly protects for its exporters. As Canada itself demonstrated when it imposed unilateral tariffs in response to the US sec. 232 tariffs on steel and aluminum, trading partners may decide that they too can disregard their commitments and retaliate immediately without waiting for authorization through the WTO dispute settlement process. Canadian exporters vulnerable to such retaliation, in the agri-food and other sectors, therefore should be deeply concerned by these impending changes to Canadian law, as they face being sacrificed to the interests of Canada's foreign owned steel producers.

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