

GUIDELINE TO MAKING REQUESTS FOR PRODUCT EXCLUSIONS

(Injury inquiries under section 42 and reviews under sections 76.01 and 76.03 of the *Special Import Measures Act*)

INTRODUCTION

If the Tribunal determines, in an injury inquiry under section 43 of the *Special Import Measures Act* (*SIMA*), that dumped or subsidized imports have caused or threaten to cause material injury to a domestic industry or, in an expiry review under section 76.03 of *SIMA*, that the continuation or resumption of dumping or subsidizing is likely to result in material injury to a domestic industry, the Tribunal has, pursuant to *SIMA*,¹ the discretion to exclude products which would otherwise be subject to a finding or an order. It may act on its own initiative or at the request of a party. The Tribunal may also exclude a product from a finding or an order following a request for exclusion in the context of an interim review under section 76.01 of *SIMA*.²

This guideline and related forms are intended to facilitate the filing of requests for specific product exclusions in Tribunal inquiries and expiry reviews, and to ensure that the Tribunal has all the relevant information needed to make a decision on an exclusion request, or to make a decision on whether to commence an interim review.

Those who wish to request an exclusion, and those who wish to respond to an exclusion request, must be a party to the proceeding and have filed a Notice of Participation (Form I). This form can be found on the Tribunal's Web site at <https://www.citt-tcce.gc.ca/en/forms/forms.html>. A party may be represented by counsel or may act on its own behalf.

PROCEDURE TO REQUEST A PRODUCT EXCLUSION

Requesters should make their request(s) using the Product Exclusion Request Form, a copy of which can be downloaded from the Tribunal's Web site. A separate form should be filed for each product in respect of which an exclusion is being sought. All exclusion requests should be provided electronically in accordance with the Guideline on Filing of Documents. Requesters may also include more information than is requested in the Product Exclusion Request Form.

Those requesting a product exclusion through an interim review should provide a completed Product Exclusion Request Form along with the other information described in the Tribunal's *Guideline on Interim Reviews*.

Requests for product exclusions are circulated to all parties to the inquiry or review, or in the case of requests for interim reviews, to all parties in the inquiry or review that resulted in the finding or order in respect of which the interim review is sought.

1. R.S.C. 1985, c. S-15.

2. See the Tribunal's *Guidelines on Interim Reviews* at <https://www.citt-tcce.gc.ca/en/resource-types/interim-review-guidelines.html>.

PROCEDURE TO REPLY TO A REQUEST FOR A PRODUCT EXCLUSION

If any party, including a domestic producer, is opposed to the request for product exclusion in whole or in part, they should complete the Domestic Producer's Response to Product Exclusion Request Form which can be downloaded from the Tribunal's Web site.³ An electronic copy of the request should be provided in accordance with the Guideline on Filing of Documents. Responses by opposing parties are circulated to all parties, including the requester.

If domestic producers consent to or do not oppose the request, they should so inform the Tribunal in writing.

Separate and apart from their views on the merits of the request, any party opposing a request for product exclusion should comment on the proposed wording of the requested exclusion.

DEADLINES

The deadlines for the filing of a request for product exclusion, the responses to requests and any replies by the requester are set out in the Tribunal's notice of commencement of inquiry or notice of expiry review for each particular case. These case-specific notices are available on the Tribunal's Web site. In the case of requests for interim reviews to exclude a product, the deadlines for filing the responses and replies are established in accordance with the *Guideline on Interim Reviews*.

CONFIDENTIALITY

If the request, the response or any reply by the requester contains *confidential* information, it should be so designated and accompanied by a public summary in sufficient detail to convey a reasonable understanding of the substance of the information.⁴

OTHER INFORMATION

The Tribunal may require parties to file additional information, or appear at a hearing to present evidence and argument, with respect to their support for or opposition to an exclusion request.

LEGAL CONSIDERATIONS

Clarity of the Proposed Exclusion

A requester should make every effort to provide the Tribunal with the necessary information that describes the product that is the subject of the product exclusion request.

While the Tribunal will afford other parties the opportunity to comment on the proposed wording of the requested exclusion and may also invite the Canada Border Services Agency to comment on its enforceability, the onus is on the requester to demonstrate that the wording of the proposed exclusion is

³ Responses may be made using a different format, provided that all the information and evidence requested in the Domestic Producer's Response to Product Exclusion Request Form is included.

⁴ For more information, see section 46 of the *Canadian International Trade Tribunal Act* (Designation of information as confidential), rule 15 of the *Canadian International Trade Tribunal Rules* and the Tribunal's *Confidentiality Guidelines* (<https://www.citt-tcce.gc.ca/en/resource-types/confidentiality-guidelines.html>).

clear and practical. The parameters of the proposed exclusion must be clearly expressed in the request and worded in a manner that permits practical and ready enforcement.

Trademarks and brand-specific terminology

While the product for which exclusion is being sought must include sufficient details as to its characteristics in order to allow for a proper assessment of the request and the enforceability of any resulting exclusion order, the description of the proposed exclusion should not normally be expressed with reference to trademarks and brand-specific or proprietary terminology. Rather, the meaning of the words must be clear in either their ordinary sense or having regard to terminology or standards that are recognized in the applicable industry.

Criteria for Granting Exclusions

Exclusions are exceptional discretionary measures. The Tribunal excludes products from its findings or orders if it concludes that their exclusion will not cause material injury to the domestic industry.

In considering a request for the exclusion of a product from a finding or an order, the Tribunal typically looks at whether the domestic industry produces, actively supplies, or is capable of producing the product, or a substitutable or competing product. The weight to be given to each factor will vary from case-to-case.

Evidentiary Onus

There is an evidentiary burden on the requester to file evidence in support of its request. The Tribunal will generally reject product exclusion requests where there is a lack of documentary evidence in support of the requesters' claims. Indeed, a failure to provide sufficient information prevents the parties opposing the request from adequately responding and leaves the Tribunal in a position where it lacks evidence to find that imports of particular products for which exclusions are requested are not likely to cause injury to the domestic industry.

However, there is also an evidentiary burden on the domestic producers to file evidence in order to rebut the evidence filed by the requester. A failure to do so could result in the requested exclusions being granted.

In any case, much like its conclusion on the issue of whether the expiry of the findings in respect of the subject goods considered as a whole is likely to result in injury to the domestic industry, the Tribunal's decision on exclusion requests must be based on positive evidence, irrespective of the party that filed it.

Therefore, each party ought to put forward its best evidence either in support of or against the granting of exclusions, so that the Tribunal can have all the evidence necessary to reach an informed decision on the issue of whether the importation of particular products covered by the definition of the subject goods for which exclusions are requested is likely to cause injury to the domestic industry.

In other words, the evidentiary burden is shared by all parties and, ultimately, the Tribunal must determine whether it will exercise its discretion to grant product exclusions on the basis of its assessment of the totality of the evidence on the record.

Consent to Request

A product exclusion may be granted with or without the consent of a domestic industry. Such consent may make it easier for the requester to persuade the Tribunal that a product exclusion is warranted; however, it does not ensure that the exclusion will be granted. The decision to grant an exclusion lies with the Tribunal.

Requests for product exclusions, domestic producer responses to requests, and any replies by requesters should be addressed to the Registrar, who will also be prepared to answer any questions about this guide and the accompanying forms.

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