

## Research Paper

### The Controversy of Determining a Developing Country under Safeguard Agreement

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#### 1. Introduction

Free trade is an issue that has gained strength in today's global society. Various multilateral treaties, regional and bilateral governing the suppression of trade barriers more. WTO as a central rule and is the main legal source of free trade has been running for more than a decade. Since the establishment of the WTO.

Based in Geneva, the WTO replaces check the previous international organization known as the General Agreement on Tariffs and Trade (GATT). GATT formed in 1948 it consisted of 23 countries who agreed to form a cooperation to reduce customs tariffs. The WTO has have a wider regulatory scope than on GATT. The GATT only regulates about trade in the goods sector while The WTO also covers trade in services and other issues including intellectual property rights lacteal. About two thirds of member countries WTO, is a developing country.

The developing countries play an important role in the WTO given its large number. The role of developing countries is also seen to be increasingly active. This is based on the awareness of the importance of trade as a vital tool in the development of the country. Developing countries are a very diverse group and have different problems.

The provision of specialty for the developing country can show on many agreements under the World Trade Organization (WTO). A developing country does not confirm their existences under the WTO. Since the WTO was established, the controversy of determining a developing country always upheld on it.

The one of specialty of a developing country is the exclusion of safeguard measures. This is what those WTO members need it. Article 9.1 of Safeguard Agreement mentioned it. The forms part of the special and differential treatment provisions of the Safeguard Agreement for the benefit of developing countries.

It is usually referred to as the *de minimis* rule in the application of a safeguard measure under safeguard agreement. The WTO does not clearly define what is meant by a developing country. This issue has created a polemic in each of its member countries. This paper discusses how each WTO member country determines which developing countries are excluded from the imposition of safeguards.

#### 2. Other Countries Practices

##### 2.1 European Union's Certain Steel Products

The following communication, dated and received on 26 May 2022, is being circulated at the request of the delegation of the European Union. Pursuant to Articles 12.1(c) of the Agreement on Safeguards, the European Union ('the Union') submits a notification of proposed adjustments to safeguard measures following a Review investigation. This

notification contains all pertinent information relating to the proposed adjustments to safeguard measures in accordance with Article 12.2 of the Agreement on Safeguards and an offer of consultations pursuant to Article 12.3 of the Agreement on Safeguards.

Following to the notification under article 9.1 of the safeguard agreement G/SG/N/10/EU/1/Suppl.15 and G/SG/N/11/EU/1/Suppl.10. The information remains that the data shows update of the list of developing WTO member countries excluded from the scope of the measure based on updated import statistics. Following the adoption of the definitive safeguard measure, the Commission committed to reviewing, on a regular basis, the list of developing countries potentially excluded from the scope of the measure based on updated import statistics. For updating the list of exclusions from the measure under the second Review, the Commission will use the more updated and representative set of consolidated statistics.

The problem arises how to determine representative set of consolidated statistics is. To solving the problem, we need to determine a developing country first and the determination of a member of the WTO that excluded from the list of developing countries under this notification.

## **2.2 South Africa's Threaded fasteners of iron and steel bolt ends & screw studs, screw studding and other hexagon nuts**

The following communication, dated 11 April 2019, is being circulated at the request of the Delegation of South Africa. Pursuant to footnote 2 of Article 9.1 of the Agreement on Safeguards, the Government of South Africa hereby gives notification on amendment of developing country members excluded from the safeguard measures by omission of Belarus, Indonesia and Turkey from the list. The subject product is described as bolt ends & screw studs (classifiable under tariff subheading 7318.15.41), screw studding (classifiable under tariff subheading 7318.15.42) and other hexagon nuts (classifiable under tariff subheading 7318.16.30) of iron and steel (excluding those of stainless steel and those identifiable for aircraft).

The Commission considered that the imports of the subject products from Belarus, Indonesia and Turkey for the period 25 July 2020-30 June 2021 were higher than 3% of total imports for the full year period considered in the investigation initiated on 01 March 2019.

South Africa was excluded on Belarus, Indonesia and Turkey from the list of developing countries was excluding of the duty. The way of south Africa did on the determination of a developing country member under the safeguard agreement is really broaden perspective itself. There is no domestic law that how to determine the list of developing countries.

### **2.3 Canada's Certain Steel Products (Heavy Plate and Stainless Steel Wire)**

The following communication, dated 11 May 2019, is being circulated at the request of the Delegation of Canada. Pursuant to article 9.1 footnote 2 of the Safeguard Agreement under G/SG/N/8/CAN/3/Suppl.1 G/SG/N/10/CAN/1 G/SG/N/11/CAN/1/Suppl.1.

Consistent with Canada's international commitments, special consideration is given to certain free trade agreement partners, as Canada's free trade agreements provide that certain trading partners be accorded preferential treatment when imposing safeguards. Therefore, the final safeguard measures do not apply to goods originating in the following countries, as per the relevant free trade agreement with Canada: Colombia, Chile, Israel, Korea, Mexico, Panama, Peru and the United States.

The Canadian authority has set the determination on developing country member under the WTO provisions. It sets to be declared that if the member joined the G20 member, it will be categorized on the developed country.

### **3. Determining a Developing Country**

Many members of WTO were a right to determine itself on how the each of Members under the Safeguard Agreement set to come into the list of developing countries or not. Any member of the WTO has a domestic regulation to determine whether such Members are declared to be a developing country member under the safeguard agreement. To achieve the goal of determining a developing country, the Member should follow the rules under the WTO safeguard agreement.

The problem arises that the WTO does not regulate a provision on how to determine a developing country member under the WTO provisions including the safeguard agreement. In Argentina-Footwear the panel dealt with the allegation that certain imports other than the investigated ones, also caused injury to the domestic industry. Article 9.1 of the Safeguard Agreement forms part of the special and differential treatment provisions of the Safeguard Agreement for the benefit of developing countries. The rationale for the provision is that imports from developing countries of no more than 3 per cent (individually) and 9 per cent (collectively) could not cause serious injury as they would be negligible.

However there could be situations in which a minimum amount of 3 per cent may cause serious injury to part of the industry. For the developing country that presents self-declaration by themselves can involve into the list of exempted from the safeguard measure.

### **4. Conclusion**

It may conclude that the WTO provision does not rule the determination of a developing country member. Article 9.1 of the Safeguard Agreement establishes a twofold assessment:

- a. An individual analysis of the import share of developing countries imports to determine whether individual shares are no more than 3 per cent of total imports. All developing countries accounting for no more than 3 per cent are eligible for exclusion. The others, which are above 3 per cent, must be included in the scope of the safeguard. This 3 per cent assessment would also include imports from the least developed countries.
- b. Once the individual imports shares of no more than 3 per cent have been identified, they have to be added up so as to verify whether they do not collectively exceed 9 per cent of total imports. If so, they all would be have to be included in the scope of the safeguard.

In the existence of provisions under article 9.1 of the safeguard agreement, the competent authority should establishes specific criteria to determine a member joining to developing countries for excluding on the safeguard duty. The specific criteria are defined to reaffirm the provision under safeguard agreement for restructuring an effect after safeguard duty is applied.

Furthermore, any member of the WTO has their own domestic regulations itself to determine a developing country under the safeguard agreement. For extension of safeguard, there are some conditions that relating to analysis after the measure is applied.

The controversy comes into the determination a developing country because in disciplines of WTO rules of law not setting out those regulations clearly. There is no regulation yet on rules under the WTO about the determination of a developing country under safeguard agreement.

## **5. Policy Recommendations**

The best way to determine a developing country member under the WTO is to examine all relevant factors including a self-declaration mechanism. Furthermore, such members of the WTO do not follow that rules. The WTO did not mentioned on how to determine the developing country member that have the right to exclude on the safeguard duty under safeguard agreement. At least, all members of the WTO do not violence the WTO agreement on safeguards on how to determine the developing country member on the proposing a safeguard measure under such products.

Indonesia also has the right to determine a developing country member under the safeguard agreement. The competent authority of Indonesia should follow the rules under article 9.1 of the safeguard agreement that mentioned on how the member determines a developing country to excluding on the safeguard measures. In additionally, nothing in the safeguard agreement does not comply with the Indonesian domestic regulation of safeguard.

The determination of a developing country is a must to prove it, either on the stage of after the measure is applied. The competent authority of safeguard investigation in each member of WTO should convince to the interested parties on how to prove an analysis of determining a developing country after the measure is applied. The problem arises on the time of evaluation of the developing country in the stage after the measure is applied. It might be after one year or two years that would be a subject to discuss.

The time after the measure is applied is really broaden. Any time is possible to define it. The measure is effecting to the import product if the condition of domestic industry was satisfying.

To determine a developing country under the safeguard agreement after the safeguard measure is applied, it should follow the recommendations on three factors:

- i. The effect of the safeguard on imports after the measure is applied from all members of WTO including developing countries which has an individual import below three per cent;
- ii. The effect of conditions of domestic industry after the measure is applied which had impacted on the increased imports; and
- iii. The effect of necessity of the measure.

Moreover, the competent authority of WTO member do follow any rules under the WTO that there is no regulation under the WTO on determination a developing country for the safeguard measures. It may effect on the developing country after the measure is applied to show that has been imported below 3 per cent will be excluded from the measure. Also, if the developing country has imported such a product more than 3 per cent after the measure is applied, it will be included on the measure.

In the light of competitiveness under the safeguard agreement, the meaning of “as long as” under article 9.1 of the safeguard agreement is a specific tool to determine a new safeguard investigation under the extension of safeguard for reviewing the developing countries that have been affecting on the initial of safeguard measure.

## **6. References**

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Notification under G/SG/N/8/EU/1/Suppl.2 and G/SG/N/10/EU/1/Suppl.11  
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