

UNFORESEEN DEVELOPMENT AS A DEVICE TO ASSESS SAFEGUARD INVESTIGATION

Abstract

Unforeseen Development requirement is indeed essential for the World Trade Organization (WTO) member countries to make safeguard investigations in their own country, this study has analysed the affecting unforeseen development requirement in safeguard investigations. Additionally, this study examined how an unforeseen development affects safeguard investigations in Indonesia. The method of this study is qualitative research, and descriptive research is to analyze the data by using case analyses. The author presents major findings by subject on unforeseen development covers increased imports, the stages of an investigation, and determination of safeguard measures. The results further confirm that this study shows policy implications to elaborate the effect of unforeseen developments for safeguard investigations and after a measure taken. Also, this study shows policy recommendations as added value on this study to improving standard quality. For addition, this study provides a new theory that calls three fresh arguments¹. The reader would be get the fruitful discussions and recommendations on safeguard basis especially to the unforeseen developments requirements under safeguard investigations.

Key words: Unforeseen development, Safeguard Investigation, Safeguard Measures, Trade Policy Measures, Trade Remedy Measures under WTO.

1. Introduction

In the multilateral trading system, many imported goods can be produced and introduced to other countries. Furthermore, many states have undertaken free trade agreements with each other to gain freedom from import tariffs. Therefore, there is increasing trade activity, as a result of market liberalisation among WTO member countries. However, there are positive and negative impacts. The positive effect is the possibility of creating new jobs and improving the economy of the country, while the negative impact is more significant numbers of imported products coming into a country to the point when the domestic industry sustains a serious injury or threat of serious injury. Members should prove that there is a causal link between increased imports and the threat of serious injury or serious injury when imposing safeguard measures.

However, a problem arises when there are many factors behind the safeguard investigations. Safeguards are a tool of the WTO rules to protect domestic industries from increases in imports. Indonesia as WTO member has the authority to protect its local industries. The effect of safeguards is to restrict trade and increase the level of protection afforded to local products². In a safeguard investigation, there may be an unforeseen development requirement. In article XIX of the GATT 1994 (1a),

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting 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 contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or

¹ Zhou Weihuan, Fang Mandy Meng. 'Unforeseen Developments' Before and After US – Safeguard Measure on PV Products: High Standard or New Standard?

² Pierola, Fernando. 2014. *The Challenge of Safeguards in The WTO*. London: Cambridge University Press.

remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

Unforeseen development means “unexpected” at the time of the negotiations³. Furthermore, the unforeseen developments requirement plays a role similar to that of an option clause in a contract. Under Article XIX, WTO members have acquired the right to suspend obligations or modify or withdraw concessions if there is a certain anomaly in the ordinary course of business. Finally, given the difficulties in its practical implementation, as explained below, the requirement plays the de facto the role of a “safeguard” against the abusive use of safeguard measures⁴.

Many requirements are mandatory in a safeguard investigation, such as the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment regarding the Agreement on Safeguards. Moreover, an analysis of domestic industry represents an analysis of the import surge, an analysis of the threat or serious injury, analysis of unforeseen development, analysis of other factors, and analysis of the causal links between the threat of serious injury or serious injury to the domestic industry and increased imports.

There are arguments about unforeseen development in safeguards. These arguments relate to unforeseen development resulting increased imports which must demonstrate for each safeguard measure at issue, that the safeguard action is still required to show that the damaging imports are the result of unforeseen developments, and that unforeseen development involves an inquiry of additional causality⁵. The Appellate Body has breathed life back into the concept by requiring governments to produce findings on the matter⁶. Increased imports have been the result of unforeseen developments⁷, and the primary purpose of the clause is to help countries nurture their infant industries by providing a set of examples of what would constitute unforeseen developments that would make the concept workable for the types of situations likely to arise⁸. The GATT’s unforeseen developments clause has been called back into service although it does not feature in the Agreement on Safeguards and although it has not been conceived as a general compensation mechanism⁹. It is to be employed only when unforeseen developments have led to import-

³ **WTO Appellate Body.** 1999. Argentina – Safeguard Measures on Imports of Footwear (WT/DS121/AB/R Date: 14 December 1999).

⁴ **Pierola, Fernando.** 2014. *The Challenge of Safeguards in The WTO*. London: Cambridge University Press.

⁵ **Nakagawa, Junji.** 2002. “Lessons from the Japan-China “Welsh Onion War.” *Journal of World Trade* 36 (6): 1019-1036. London: Kluwer Law International, Ltd.

⁶ **Pelc, Krzysztof J.** 2009. “Seeking Escape: The Use of Escape Clauses in International Trade Agreements.” *International Studies Quarterly*: 53, 349–368.

⁷ **Rai, Sheela.** 2007. “Imposition of Safeguard Measures and Unforeseen Development.” *Foreign Trade Review* Vol 41 No. 4.

⁸ **Stewart, Terrence P., McDonough, Patrick J and Prado, Marta M.** 2000. “Opportunities in the WTO for Increased Liberalization of Goods: Making Sure the Rules Work for All and That Special Needs are Addressed.” *Fordham International Law Journal*: Volume 24.

⁹ **Pelc, Krzysztof J.** 2009. “Seeking Escape: The Use of Escape Clauses in International Trade Agreements.” *International Studies Quarterly*: 53, 349–368.

related dislocation¹⁰, but no guidance has been given as to what constitutes an unforeseen development. It has also led to increased imports for each industry covered by a safeguard measure, and it is often called forth to demonstrate the existence of unanticipated developments¹¹.

This paper focuses on the effect on “unforeseen developments” for safeguard investigations in Indonesia. The author is required to determine policy implications for the Indonesian Safeguard Committee as the competent authority with particular regard for the unforeseen developments requirement and its role in securing a fair investigation. To analyze this requirement, the author has applied a multiple case analysis (four industry cases) approach in Indonesia. These cases have been selected in representative sectors in Indonesia, and Indonesia itself has been chosen because it is one of the countries in the world which is most actively imposing safeguard measures.

The author uses descriptive research in a qualitative method and a case analysis approach. The author analyses four cases which have applied definitive safeguard measures in Indonesia. These cases are paper, textiles, sugar, and steel. These cases have different characteristics and categorize the main industry sectors in Indonesia. The advantage of dealing with main industry sectors is that they can provide and cross-industry analysis and can provide definitive safeguard measures as a policy product in Indonesia to create policy recommendations. The subjects name are coated paper and paperboard, not including cast coated paper and banknote paper, as a representative of paper sector, tarpaulins made from synthetic fibres apart from awning and sunblinds as a representative of the textiles sector, dextrose monohydrate as a representative of the sugar sector, and iron or steel wire as a representative of the steel sector. The author requires the guidelines of unforeseen development requirement per each industry because it may be that the unforeseen conditions have been influenced by increased imports depend on specific industries or products.

These cases can provide definitive safeguard measures as a policy product for the government; therefore, the author has examined these cases for the explicit purpose of creating policy implications and policy recommendations for the Indonesian Safeguard Committee as the competent authority in Indonesia on safeguard investigations. The investigator has jurisdiction to investigate the safeguards and shall include a reasonable public notice to all interested parties such as importers, exporters, consumers, and other interested parties. This paper may assist in the creation of a relevant document on safeguard measures as a policy product and on safeguard investigations as a tool to apply safeguard measures. Data on the cases has been collected from the WTO. The data deals with notifications 12.1(b) on findings on threats of serious injury or serious injury on safeguard measures. The Indonesian Safeguard Committee website provides an unconfidential final report on these cases, and government publications data provides specific import data of cases from foreign countries.

2. Literature Review

This section briefly reviews the previous studies relating to unforeseen development resulting in increased imports that must be demonstrated for each safeguard measure at issue. The safeguard action is still required to show that damaging imports were the result of unforeseen developments and, unforeseen development involves an inquiry of additional

¹⁰ **Sykes, Alan O.** 2003. “The Safeguards Mess: A Critique of WTO Jurisprudence.” Chicago: John M. Olin Program in Law and Economics Working Paper No. 187.

¹¹ **Rogowsky, Robert A.** 2001. “WTO Disputes: Building International Law on Safeguards.” Virginia: International Law Section.

causality. Moreover, the Appellate Body has breathed life back into the concept by requiring governments to make a finding on the matter, and increases in imports have been the result of unforeseen developments with its primary purposes to help countries nurture their infant industries.

In addition to confirming the standard of review that requires a reasoned and adequate explanation, unforeseen development resulting in increased imports must be demonstrated for each safeguard measure at issue, rather than for overall economic circumstances¹². Ahn, however, does not include the term unforeseen development as a part of safeguard investigations. The legal basis of the condition of safeguard measures as an escape clause is to allow member countries to include unforeseen development requirements that are caused by increased imports from certain foreign countries. One of the problems that has been determined in the literature is conflict between the GATT and the Agreement on Safeguards that has created doubt as to whether a member implementing a safeguard action under the Agreement on Safeguards is still required to demonstrate that the damaging imports are the result of unforeseen developments¹³. From a legal standpoint, it is necessary provide guidelines to break down the complicated explanation of unforeseen developments. Despite the fact that most of the GATT, now the WTO, members have viewed the unforeseen developments provision of Article XIX of the GATT 1947 and the GATT 1994 to have been end-stage cancer and avoided in the Agreement on Safeguards, the Appellate Body has given effective medicine by requiring governments to make a finding on the matter¹⁴. However, in practice, conflict may arise between the Appellate Body and government regarding this requirement.

Scholars have thus concluded that the unforeseen development clause requires further investigations into its factors. In comparison with other trade remedy laws such as anti-dumping and countervailing duty laws, Nakagawa¹⁵ says that unforeseen developments require an inquiry of additional causality. There is no equal comparison between anti-dumping and countervailing laws, and safeguard laws because there are differences in their investigations which have developed from different trade whereas safeguards arise from the global fair trade, dumping and countervailing derived from unfair global trade. Actions needed by the WTO include a reopening of the Safeguards Agreement to clarify the requirements to be sure that the agreement can be used when it should be available. But this may require clarification that "unforeseen developments" are not needed going forward or a set of examples of what would constitute unforeseen developments that would make the

¹² **Ahn, Dukgeun.** 2005. "Restructuring The WTO Safeguard System." 2005 International Conference on Trade Remedy System: East Asian Perspectives. Seoul: Seoul National University.

¹³ **Pickard, Daniel B, and Kimble, Tina P.** 2007. "Can U.S. Safeguard Actions Survive WTO Review: Section 201 Investigations in International Trade Law". Los Angeles: Loyola of Los Angeles International and Comparative Law Review.

¹⁴ **Stewart, Terrence P., McDonough, Patrick J and Prado, Marta M.** 2000. "Opportunities in the WTO for Increased Liberalization of Goods: Making Sure the Rules Work for All and That Special Needs are Addressed." Fordham International Law Journal: Volume 24.

¹⁵ **Nakagawa, Junji.** 2002. "Lessons from the Japan-China "Welsh Onion War." Journal of World Trade 36 (6): 1019-1036. London: Kluwer Law International, Ltd.

concept workable for the types of situations likely to arise¹⁶. Safeguards come from trade in goods. Trade in services is not included. Most importantly, Pelc¹⁷ says that the GATT's unforeseen developments clause has been called back into service though it does not feature in the Agreement on Safeguards and is stringently enforced by the Appellate Body in a way that it never was under the GATT. Pelc ensures the relationship between these two rules of law to determine the unforeseen development.

There is a causal link between a threat of serious injury or a serious injury and increased imports in the safeguard investigation, and this threat or serious injury should be to the domestic industry. The Appellate Body also concurred with the panel that a member proposing to invoke safeguards must demonstrate that unforeseen developments have led to increased imports for each sector covered by a safeguard measure¹⁸.

The unforeseen developments can be characterized as coming from import-related dislocation. It seems clear from the text of Article XIX that safeguards were not conceived as a general compensation mechanism and were to be employed only when "unforeseen developments" led to import-related dislocation¹⁹. This distinction may create conflict among the members of the safeguarding authority when investigating factors behind an import surge.

Members must demonstrate the existence of unanticipated developments, persuade that they were unforeseen, convincingly trace their impact on increased imports, demonstrate that multiple of the import surge is recent, showing the relation among the increased imports and serious injury to domestic industry, that have not caused the injury contained to increased imports²⁰. It depends on the situation of the domestic industry, but it should be analysed in greater depth by the competent authorities. The unforeseen developments problem is two-fold. First, Article XIX of the GATT 1994 requires for a safeguard measure that the competent national authority demonstrate the existence of unforeseen developments; but, in contrast, Article 2.1 in Agreement on Safeguards makes no mention of it, If unforeseen developments create conditions for imposing a safeguard remedy, the two provisions are in conflict. Second, no guidance is given as to what constitutes an unforeseen development²¹.

¹⁶ **Stewart, Terrence P., McDonough, Patrick J and Prado, Marta M.** 2000. "Opportunities in the WTO for Increased Liberalization of Goods: Making Sure the Rules Work for All and That Special Needs are Addressed." *Fordham International Law Journal*: Volume 24.

¹⁷ **Pelc, Krzysztof J.** 2009. "Seeking Escape: The Use of Escape Clauses in International Trade Agreements." *International Studies Quarterly*: 53, 349–368.

¹⁸ **WTO Appellate Body.** 2003. *United States – Definitive Safeguard Measures on Imports of Certain Steel Products (WT/DS251/AB/R Date: 10 November 2003)*.

¹⁹ **Sykes, Alan O.** 2003. "The Safeguards Mess: A Critique of WTO Jurisprudence." Chicago: John M. Olin Program in Law and Economics Working Paper No. 187.

²⁰ **Grossman, Genem and Sykes, Alan O.** 2007. "United States – Definitive Safeguard Measures on Imports of Certain Steel Products." *The American Law Institute Reporters. World Trade Review: Dispute Settlement Corner*: 89.

²¹ **Rogowsky, Robert A.** 2001. "WTO Disputes: Building International Law on Safeguards." Virginia: International Law Section.

Unforeseen development is a requirement to determine increased imports in the safeguard investigation. Furthermore, as held by the Appellate Body, it needs to be proved that an increase in imports has been the outcome of unforeseen developments²². Rai focuses on the difference between Article XIX of the GATT 1994 and the Agreement on Safeguards and together provide provisions for the imposition of safeguard measures. This paper focuses on the period after the imposition of safeguard measures as the unforeseen development period must be analyzed in the safeguard investigation period before the imposition of safeguard measures. This paper covers unforeseen development and explains the other relevant factors relating to increased imports that have created threats of serious injury or serious injury to the domestic industry. This paper may contribute to an understanding of unforeseen development held by the Appellate body and can help to clarify differences between the Agreement on Safeguards and Article XIX of the GATT 1994 in the imposition of safeguards. A further contribution of this research is its focus on the imposition of safeguards and unforeseen development from the Appellate Body perspective, which has not received enough attention in the literature.

This study also includes within its scope a brief analysis of more significant points such as the political and economic rationale behind safeguard measures, and in particular what Raychaudhuri²³ has described as how ambiguities in the Agreement on Safeguards can destabilize the discipline of safeguards and defeat one of its significant purposes to help countries nurture their infant industries

This scholar discusses the unforeseen development requirement in the Agreement on Safeguards and expands the scope of his analysis to the more significant issues such as the political and economic rationale behind the safeguard measures. However, it is not appropriate to describe unforeseen development as a political term. In the WTO Appellate Body report²⁴ in dairy cases, unforeseen development means unexpected situations of increased imports; it is not used as a political term in this paper. Instead, this paper emphasizes any reason such as political or technological behind the safeguard measures and attempts to clarify our understanding of the unforeseen development requirement from the legal basis of safeguards.

3. Discussion and Results

This chapter briefly explains that the major findings cover the determination of unforeseen development and major findings by subject and the different reasons were used to determine the unforeseen development and different effects produced in proposing safeguard measures. Major findings by subject explain the increased imports, the stages of the investigation, and determination of safeguard measures.

3.1 Major Findings by Subject on Unforeseen Development Requirements

This section briefly explains major findings by subject on unforeseen developments and covers increased imports, the stages of an investigation, and the determination of safeguard measures. Increased imports show that an effect of unforeseen development contained an increase in imports. The stages of investigation describe each stage of

²² **Rai, Sheela.** 2007. "Imposition of Safeguard Measures and Unforeseen Development." Foreign Trade Review Vol 41 No. 4.

²³ **Raychaudhuri, Tilottama.** 2010. "The Unforeseen Developments Clause in Safeguards under the WTO: Confusions in Compliance." The Estey Centre Journal of International Law and Trade Policy. Volume 11 Number 1 2010/p. 302-320.

²⁴ **WTO Appellate Body.** 1999. Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products (WT/DS98/AB/R Date: 14 December 1999).

investigation to determine unforeseen development. The determination of safeguard measures is a policy product that has implications for gaining value and creating balance in the domestic market.

3.1.1 Increased Imports

Another concern arises that the competent authority does not build a link between absolute and relative terms of the increased imports and unforeseen developments. The investigator has made separated sections as a part of the investigation. The investigator ensures a connection between increased imports and unforeseen developments as a part of the investigation. The surge in imports of the product concerned in absolute and relative terms is mandatory to determine the unforeseen development as stated in Article 4.2(a) Agreement on Safeguards in the investigation. Unforeseen developments must be identified (necessary) regarding the investigative process as a cause of the imports surge in absolute and relative terms. It can show that these two subjects are essential in a fair investigation following the WTO rule of law. It may be concluded that the unforeseen developments requirement should have caused the increased imports of the product concerned in absolute and relative terms in the process of the investigation. As a follow-up from these requirements, the competent authority shall evaluate all relevant factors between these two subjects and their relationship.

The unforeseen development assesses the increased imports in the safeguard investigation. The safeguard investigation is to determine a causal link between the threat of serious injury or serious injury caused by increased imports. Therefore, the unforeseen development determines whether the increase in imports is viable. It means that unforeseen development is a "screening device" to determine whether an increase in imports requires a safeguard investigation. The safeguard investigation has different stages done by a competent authority, and its final authority is to make recommendations to the minister of trade. Other ministers undertake the process of applying safeguard measures, and in deciding to implement them, the minister of finance has the authority to implement the safeguard measures in the form of tariffs and quotas by the minister of trade.

3.1.2 The Stages of the Investigation

In the safeguard investigation, there are many qualifications including unforeseen development. Unforeseen development is a requirement when considering to impose or not to impose safeguard measures. There are two distinct requirements under Article XIX: 1(a) to be fulfilled before the imposition of safeguard measures: (i) demonstration of increased imports and (ii) demonstration of unforeseen developments (WTO Panel 2003). Before imposing safeguard measures, these two requirements must be fulfilled which may define how important the standing of unforeseen development is in the safeguard investigation. There are two general requirements in safeguard investigations: first, there should be increased imports, and second, there should be a threat or serious injury to the domestic industry. Unforeseen developments must cause an increase in imports. Matsushita, Schoenbaum, and Mavroidis (2006) note, "A literal interpretation of this phrase suggests that a safeguard measure may not be applied unless the injury to a domestic industry was caused by developments that not foreseen at the time of the latest trade negotiation." Actually, in the phase before imposing safeguard measures, there is a consultation stage. In the consultation stage, usually, the importer's countries try to talk with the competent authority to reduce the tariff or other concessions.

Safeguard measures are categorized as an emergency action²⁵. A safeguard measure under GATT Article XIX and the Safeguards Agreement is an emergency measure to deal

²⁵ **General Agreement on Tariff and Trade.**1994.

with an increased import that is not necessarily unfair²⁶. There are several stages of the investigation to determine serious injury or threat of serious injury caused by increased imports which contain unforeseen development. In the first stage, the competent authority may receive an application from the domestic industry, and these qualified in a major proportion requirement. The major proportion may be defined as more than 50% of the total domestic production. In the second stage, preliminary evidence with proper documentation shows the existence of an increased import volume of products equivalent with a like product or a directly competitive product. When these conditions are present, the competent authorities may initiate an investigation process for that specific product. The competent authority shall immediately notify to Committee on Safeguards as Notification 12.1(a) on launching an investigatory process relating to serious injury or threat thereof and the reason for it.

In the investigation period, the competent authority makes a public notice concerning the imposition of the safeguard measure. Moreover, the competent authority shall conduct a hearing to provide opportunities to exporters, exporter's producers, the petitioners or the local industry, importers, the government of particular exporting countries and other interested parties. These interested parties may present their evidence, views and responses in written submission format. In light of the investigation, after a hearing session has been launched, the competent authority provides a questionnaire and sends it to the domestic industry as an applicant. After that, the competent authority shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the condition of the domestic industry through on-site verification. The competent authority may analyze the result of on-site verification and the results of the questionnaire.

During the investigation period, the competent authority collects data from on-site verification and analyzes it. The analysed data represents serious injury or threat of serious injury from the domestic industry as the applicant that has been caused by increased imports which fall under the unforeseen developments requirement. This stage is majorly important. The competent authority should provide evidence of the existence of the increased imports that have caused threat of serious injury or serious injury.

When the competent authority can prove a causal link between increased imports and serious injury or threat of serious injury, they may make a final report on the result of an investigation and submit a recommendation to the minister of trade for the imposition of safeguard measures. The competent authority shall notify the Committee on Safeguards on making a finding of serious injury or threat thereof caused by increased imports.

In critical circumstances where delay in the imposition of a safeguard measure would create damage which would be difficult to repair, the WTO member countries may take a provisional safeguard measure according to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury. In this situation, it may be called a particular treatment measure which defined as a specific condition requiring a quick investigation process including a preliminary determination. There is no questionnaire and on-site verification in this situation. The preliminary determination is the investigation process. However, proof of determining serious injury or threat of serious injury caused by increased imports not removed.

Moreover, in determining that increased imports are the result of unforeseen development is very important as the panel report accepts only taking safeguard measures in conformity with GATT Article XIX and the Agreement on Safeguards²⁷. It means if the

²⁶ **Matsushita, Mitsuo, Schoenbaum, Thomas J, and Mavroidis, Petros C.** 2006. *The World Trade Organization Law, Practice, and Policy Second Edition*. New York: Oxford University Press.

²⁷ **WTO Panel.** 2012. Dominican republic - Safeguard Measures on Imports of polypropylene bags and Tubular Fabric (WT/DS417/R Date: 31 January 2012).

competent authority does not provide the requirements according to Article XIX of the GATT 1994 and the Agreement on Safeguards, and one of these requirements covers unforeseen developments, safeguard measures cannot be imposed. The investigation ends after the competent authority recommends the final report on the results of the investigation to the minister of trade.

3.2 Determination of Safeguard Measures

In the following final report of finding serious injury or threat of serious injury caused by increased imports, there is a national interest stage. To secure relevant considerations in light of national interests, the minister shall convey the competent authority's recommendation to other ministers and non-ministerial governmental institutions that are relevant to the products under investigation. Based on the competent authority's recommendation and the result of national interest, the minister decides on the amount of the safeguard duty and quota and the duration for the imposition of the safeguard duty and quota.

The WTO member countries shall apply safeguard measures only for such period to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. The period shall not exceed four years and may be extended provided that the competent authority of the importing countries have determined that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting.

In relating to increased imports, the unforeseen development may build a "great wall" to qualify in imposing safeguard measures, because proving the unforeseen development is quite difficult. Article XIX of the GATT 1994 may show that difficulties of determining the unforeseen development. There are two qualifications for analysis. Firstly, the increased imports should contain unforeseen development, and secondly, the increased imports should include the effect of obligations among members countries. Article XIX of the GATT 1994 mentions two other factors in this connection; the increased imports should be as the result of unforeseen developments, and the increased imports should be the effect of the obligations of the Member in GATT 1994. However, not included in Article 2 of the Agreement on Safeguards which appears to be comprehensive and complete in itself in laying down the conditions for taking safeguard action²⁸. These requirements are quite difficult to prove because it is mandatory to analyze the effect of increased imports. The competent authority should provide a complete analysis and make a connection between these two requirements. It may be justified as follows with the panel report on Dominican Republic case, the panel²⁹ concluded that all of WTO members acted consistently with Article XIX: 1(a) of GATT 1994 with respect to the existence of unforeseen developments and the effect of GATT obligations; with Agreement on Safeguards Articles 4.1(c) and 2.1 and GATT Article XIX: 1(a) with respect to the definition of the domestic industry; with Agreement on Safeguards Articles 4.1(a), 4.2(a) and 2.1 and GATT Article XIX: 1(a) with respect to the determination of serious injury, and only taking safeguard measures in conformity with GATT Article XIX and the Agreement on Safeguards³⁰. It can also be justified by the appellate body report on US lamb case. In the US lamb case, the competent authority

²⁸ **Das, Bhagirath Lal.** 1999. *The World Trade Organisation A Guide to the Framework for International Trade*. London: Zed Books Ltd.

²⁹ **WTO Panel.** 2012. Dominican republic - Safeguard Measures on Imports of polypropylene bags and Tubular Fabric (WT/DS417/R Date: 31 January 2012).

³⁰ **WTO Panel.** 2012. Dominican republic - Safeguard Measures on Imports of polypropylene bags and Tubular Fabric (WT/DS417/R Date: 31 January 2012).

must demonstrate the existence of the unforeseen developments³¹. Here, the unforeseen development was required to determine increased imports in the safeguard investigation. All of the WTO members should set the rules for the unforeseen development requirement in their domestic law.

However, a problem arises as to how unforeseen development produces increased imports. Unforeseen developments need strong encouragement to have produced increased imports generally³². The competent authority does determine it. These requirements qualify the preconditions³³. The prerequisites subject to the competent authority before establishing the causal link between serious injury or threat of serious injury from domestic industry caused by increased imports. These preconditions are used to determine this increase.

Based on safeguard measures by reporting member data as of December 2017, Indonesia is the ranked second in the world of these countries which had applied safeguard measures against other countries as shown in Table 3.1.

Table 3.1 Safeguard Measures by Reporting Member

No.	Country	Number of Measures
1	Indonesia	28
2.	India	23
3.	Turkiye	20
4.	Philippines	10
5.	Jordan	9
6.	Chile	9
7.	Ukraine	9

Source: WTO Statistics on Safeguard Measures (2022)

Table 3.1 shows that Indonesia is an active WTO member who has applied safeguard measures. As a WTO member, Indonesia has conducted investigations that had the requirement of unforeseen development as a constituent part. Therefore, the author has chosen case analyzes to approach from the Indonesian stand point.

The objective of imposing safeguard measures is economically sustainable development. The WTO has been given extensive authority within the field of international economic affairs, resulting in increasing involvement of the organization in matters that do not merely focus on trade, but that may be affected by trade, such as sustainable development³⁴. Safeguard measures may contribute to economically sustainable development. The study shows that the effect of safeguard measures assists domestic industries in case of a surge in imports which has a negative impact, and afterwards, local industries can sell their products, gaining value and creating balance in the global economic market. It hopes the safeguard investigation process might contribute to increased economic global competition.

³¹ **WTO Appellate Body.** 2001. United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat From New Zealand and Australia (WT/DS178/AB/R Date: 1 May 2001).

³² **Sykes, Alan O.** 2006. *The WTO Agreement on Safeguards A Commentary*. London: Oxford University Press.

³³ **Das, Bhagirath Lal.** 1999. *The World Trade Organisation A Guide to the Framework for International Trade*. London: Zed Books Ltd.

³⁴ **Sampson, Gary P, and Chambers, W. Bradnee.** 2008. *Developing Countries and The WTO Policy Approaches*. Tokyo: United Nations University Press.

3.3 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.

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.

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.

4. Policy Implications and Policy Recommendations

This chapter briefly presents policy implications and recommendations. The author provides policy implications to elaborate on the effects of unforeseen developments in safeguard investigations and after measures have been taken. The author also includes policy recommendations as an added value to this study to improve the standard quality of the safeguard investigation as follows the WTO rule of law covering the Agreement on Safeguards and Article XIX of the GATT 1994. The author recommends a new set of provisions of law regarding the unforeseen developments in the stages of safeguard investigation to the Indonesian Safeguard Committee as the competent authority on safeguard cases in Indonesia.

4.1 Policy Implications

In the WTO rule of law, there is an investigation before taking safeguard measures. The competent authority does this safeguard investigation. The competent authority may investigate safeguard cases and report on them in the final report document as the result of the investigation. The competent authority then recommends the final report to the minister of trade, and The minister of trade may impose the safeguard measures. Imposing safeguard measures may be categorized as a policy product from the government through an investigation from the competent authority. Before the WTO members impose safeguard measures, they should do an investigation. In the safeguard investigation, while the increased imports could be predicted, it may not require the imposition of safeguard measures which means there is no policy product which contributes to an implication. Unforeseen development impacts are present in cases where increased imports could not be prediction. In such circumstances, safeguard measures may be imposed provided they cover all relevant factors of an objective and quantifiable nature of that industry, in particular, the rate and amount of the increased imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment. The form of safeguard measures covers tariffs, quotas, tariff quotas or quotas tariff. The safeguard measures may make implications to domestic industry directly and other interested parties indirectly.

Unforeseen developments may contribute to preventing the abuse of the safeguard measures. Although it may not be the only requirement when imposing safeguard measures, it is an essential part in the safeguard investigation to determine the reason for the increase in imports. The abuse of safeguard measures may affect competitiveness between industries. It may decrease competitiveness in the international market among domestic industries in a country who use abuses these safeguard measures. One abuse of safeguard measures is ignoring the unforeseen development requirement in the process of the investigation or another requirement such as the effect of obligations, causal link between increased imports and threat of serious injury or serious injury, or maybe other factors which affect the threat of serious injury or serious injury to the domestic industry. The competent authority should distinguish between the increase in imports affected by the unforeseen development and the effect of obligations. These two requirements exist in Article XIX of the GATT 1994.

Through safeguard measures as policy, implications may be drawn as to the extent necessary to prevent or remedy serious injury from domestic industries. In applying safeguard measures, a WTO member shall evaluate such factors which are requirements in the investigation including the unforeseen development, and provide a causal link between a threat of serious injury or serious injury from domestic industries caused by an increase in imports. If there is a causal link established by the competent authority, safeguard measures can be applied and would be a policy product. The effect of this policy is to assist the domestic industries to the extent necessary to prevent serious injury which has been caused

by the threat of serious injury and remedy serious injury which is caused by serious injury from the adverse effect of an increase in imports.

Another policy implication is to facilitate adjustment for the domestic industry. According to Agreement on Safeguards, the obligation of the local industry as a recipient of this measure is to facilitate adjustment. For example, if industries A and B obtain advantages such as profits and new buyers after applying safeguard measures, they shall facilitate this adjustment in their industries such as buying new machines, hiring new employees or building new factories. The objective of this policy is to create a trade balance in the domestic market. It is hoped that safeguard measures as policy may assist not only the local industries but also create a trade balance in the local market.

4.2 Policy Recommendations

The Indonesian Safeguard Committee may provide a set of new rules of domestic law. It may give these on three subject criteria of unforeseen development covering the definition of the unforeseen development, determination of the unforeseen development and stages of analysis on unforeseen development in term of increased imports and the effect of obligations. These subject criteria will assist in making a fair investigation and preventing the abuse of safeguard measures regarding the investigation.

The first creation is the definition of unforeseen development as the existence of unanticipated or unexpected situations as a result of increased imports in a safeguard investigation. The second creation is the determination of unforeseen development as increased imports from a foreign country that should contain unforeseen economic circumstances. The determination of unforeseen development examines that the conditions should be unforeseen in the same period with an increase in imports and the effect of obligations. The third creation includes the stages of analysis of the unforeseen development requirement through the process of increased imports determination from foreign countries and obtaining this analysis not only through one factor of the unforeseen development requirement but also through the other elements, covering the effect of obligations between two or more countries who have concessions. First of all, the competent authority analyzes the increase in imports of the product concerned in absolute and relative terms. And then, the competent authority determines the cause of the increased imports. The objective of the increased imports should be unforeseen. The condition of an object of the increased imports should be within the same period.

There is a theory before providing a new set of provisions of the unforeseen developments, it called three fresh arguments³⁵. First, the Appellate Body's decision to 'revive' this test as a prerequisite for the application of SG measures is not necessarily incompatible with the drafting record of the SG Agreement, even though this agreement does not make explicit reference to the test. Second, the test is not excessively difficult to satisfy under the standard of review established by case law, even though governments failed to pass it in almost all SG disputes to date. Third, in sharp contrast, the recent US–Safeguard Measure on PV Products decision took a strikingly more deferential approach which fell far short of the established standard of review, leading to the first and only decision in which the test was found to be satisfied. This decision has arguably created a new theory which could lead to abuse of SG measures and damage to the dispute settlement system and hence should be avoided in future disputes. Considering the above theory, the author would propose to specify a new set of rules in the current Indonesian Safeguards Law as an example. The new set of provisions for unforeseen development is provided Table 4.1.

³⁵ **Zhou Weihuan, Fang Mandy Meng.** 'Unforeseen Developments' Before and After US – Safeguard Measure on PV Products: High Standard or New Standard?

Table 4.1 A New Set of Provisions of Unforeseen Developments

No.	Subjects	Recommendations
1.	Definition	The unforeseen development is the existence of unanticipated or unexpected situations as a result of the increased imports in safeguard investigation.
2.	Determination	The unforeseen development should be from increased imports. The competent authority shall examine the reasons of the exporting countries sell such their products to Indonesia for any products containing unforeseen development as a reasoned conclusion into the territory of Indonesia in such increased quantities.
3.	The Stages of Analysis on the Unforeseen Development	(a) The competent authority analyses increased imports of the product concerned in absolute and relative terms; and (b) The competent authority determines the caused by the increased imports as an independent obligation.
4.	The Role of Indonesian Safeguard Committee	The Indonesian Safeguard Committee as the competent authority shall analyze some of the characteristics of unforeseen development in increased imports. The competent authority shall prove that increased imports are the product of unforeseen developments in the same period.

In providing for the unforeseen development requirement in the safeguard investigation, there must be a proper investigation. It shows that unforeseen development is one part of these requirements in the phase of the safeguard investigation which influences increased imports. In the process of the safeguard investigation, the increased imports must have been affected by unforeseen developments. Through the unforeseen development requirement, the safeguard investigation will be seen as viable.

One part which is inseparable from safeguard investigation is the determination of unforeseen development. This requirement is a result of increased imports. In a safeguard investigation, it is necessary to make a causal link between the threat of serious injury or serious injury from the domestic industry caused by an increase in imports. As a requirement, unforeseen development may affect the safeguard investigation. The competent authority should provide for the unforeseen development required when making a proper investigation on safeguards; the unforeseen development affects the safeguard investigation. The competent authority must demonstrate the existence of unforeseen development³⁶. The unforeseen development is an essential requirement to fulfil the criteria of Article XIX: 1(a) of GATT 1994. Through an analysis of Article XIX of the GATT 1994, unforeseen development is not the only factor required to impose or not to impose safeguard measures. There are other factors, namely the effect of obligations between two or more countries who have concessions.

5. Conclusions

Unforeseen development is categorized as a mandatory requirement to investigate safeguard cases. It is an essential part of the safeguard investigation. If the competent authorities do not use it in their investigation, they cannot impose safeguard measures. Unforeseen development is required to determine increased imports in safeguard

³⁶ **WTO Appellate Body.** 2001. United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat From New Zealand and Australia (WT/DS178/AB/R Date: 1 May 2001).

investigation. All WTO members should set rules for the unforeseen development requirement in their domestic law.

It is hoped that all member countries follow the rules of safeguard investigation, including the unforeseen development requirement as required in their safeguard investigation based on the new set rules of unforeseen developments provisions. After the competent authority uses unforeseen development requirement in their investigation, they must do a fair investigation. This research may assist all of the competent authorities in each WTO member country to require unforeseen development in every safeguard investigation to ensure a fair investigation and fairness in the global economic market.

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