

QUALIFICATION CLAUSE OF SERIOUS INJURY AND/OR THREATEN TO
CAUSE INJURY FOR ENFORCEMENT MECHANISM AS A SAFEGUARD
MEASURES UNDER ARTICLE XIX OF GATT 1994 IN POSITIVE LAW
INDONESIA

Nyoman Indra Juarsa, Hanif N Widhiyanti, S.H., M.Hum., Heru Prijanto, S.H., M.H.

Fakultas Hukum Universitas Brawijaya Malang

Email : humbler1992@yahoo.com

Abstrak

Indonesia sebagai negara yang tergabung didalam Organisasi Perdagangan Dunia atau sering disebut *World Trade Organization* (WTO) merupakan perdagangan multilateral yang mengakomodir kepentingan negara-negara di dunia dengan latar belakang perekonomian yang berbeda-beda. Indonesia diketahui sebagai negara berkembang diberi kesempatan oleh WTO untuk melakukan pengecualian terhadap beberapa aspek dari perdagangan multilateral dengan tujuan untuk melakukan penyesuaian perdagangan dengan negara-negara lainnya. Indikator perekonomian suatu bangsa dapat dilihat dari neraca Impor dan Ekspor, bagi Indonesia masuknya produk impor dari negara lain ke pasar domestik di Indonesia membuat produsen domestik yang memproduksi barang sejenis akan mengalami persaingan dan kerugian apabila pemerintah sebagai pelaksana kebijakan tidak mampu melindungi produk domestik dalam negeri dari membanjirnya produk impor. Tindakan pengamanan yang ada dalam melindungi produk domestik yang mengalami kerugian adalah dengan melakukan tindakan pengamanan (*safeguards*) sebagai upaya perlindungan produk domestik dari membanjirnya produk impor. Untuk dapat mengajukan tindakan pengamanan perlu adanya kualifikasi kapan suatu produk impor mengalami kerugian serius dan ancaman kerugian serius yang akan lebih spesifik dijelaskan didalam analisa yang mendalam.

Kata kunci: Kerugian Serius, Ancaman Kerugian Serius, *Safeguards*.

Abstract

Indonesia is a country that is incorporated within the World Trade Organization or often called the World Trade Organization (WTO) is a multilateral trade accommodate the interests of the countries in the world with backgrounds different economy. Indonesia is known as developing countries are given the opportunity by the WTO to make exceptions to some aspects of the multilateral trading with the aim to make adjustments to trade with other countries. Indicator of a nation 's economy can see in balance Import and Export, for Indonesia influx of imported products from other countries to the domestic market in Indonesia, making domestic manufacturers

that produce similar goods and competition will experience losses if the government is not capable of implementing policies to protect domestic product in the country of imported products. Existing security measures to protect domestic product losses is to perform safeguards measures as efforts to protect domestic products from imported products. To be able to file a safety measure needs to be qualified when a product is imported suffered serious losses and the threat of serious injury to be more specifically described in -depth analysis.

Keywords : Serious injury, threaten to cause injury, safeguards measures.

A. Background

International trade is a very important factor in improving the economic progress of the countries in the world. According to some experts if economic in the world wants to prosper in a changing atmosphere as it is now, the trade must play a vital role. In addition, the development of more advanced age led to an increasingly complex needs and influencing aspects in addition to products in international trade . Aspects such as mobilization, government policies of each country , and trading systems.

There are several reasons that lead to international trade , the first reason is the revolution of information and transportation reform era characterized by the development of technology, the use of computer -based systems as well as advances in the field of information, the use of satellite data processing and digitization, and the development of communication equipment. The second reason is the need for interdependence, where the result of each country has advantages as well as advantages in each aspect that will have an impact on the dependence between the state and another. A third reason is the economic liberalization which freedom in the transaction and cooperation implies that each country will seek opportunities to interact through interstate commerce.¹

In an effort to build a cross- country trade relations orderly, provisions need to be made in the form of legal rules that are set up are accepted as a fair trade. The rule of law is meant to function as a reference (guidance) which applies in general to be

¹ See *Trade Policies For A Better Future*, Proposal For Action, GATT, Geneva, March, 1985. Hata, **Perdagangan Internasional Dalam sistem GATT dan WTO (Aspek-aspek Hukum dan Non Hukum)**, Bandung, Refika Aditama, 2006, hal. 1. See, *Trade Policies For A Better Future*, Proposal For Action, GATT, Geneva, March, 1985.

followed and monitored and strictly enforced to eliminate or reduce the distortions that can occur in international trade relations.²

To realize the integration of the world trading system , several large states try to shape the world trade organization that serves to regulate and oversee an ideal world trading system, which starts from the efforts to establish the International Trade Organization (ITO), the General Agreement on Tariffs and Trade (GATT) 1947, until the formation of the World Trade Organization (WTO). Efforts to establish world trade organization reflects the strong desire to create a trading system that is fair.

Indonesia as a member of the world trade through its ratification of Law No. 7 of 1994 on Ratification of the Agreement on Establishing the World Trade Organization have consequences both internally and externally. Internal consequences, Indonesia should be to harmonize national legislation in accordance with the WTO agreement. While external consequences, Indonesia must comply with all the agreements in the WTO forum.

Indonesia's participation in free trade to encourage domestic industry to competition, both domestically and abroad. This is a challenge for Indonesia to prepare for product regulation in industrial securing domestic products. The problems that are often faced by Indonesia in international trade is the practice of dumping. This occurs as a result of Indonesia imposed a free market that resulted in imported products are sold for less than the price of domestic goods production importing country, so it will lead to similar goods in the country less competitive and ultimately deadly domestic goods market.

For the development of the Indonesian economy, export - import transactions is one of the most important economic activities, because trading activity increase

² Pengantar Ekspor Impor, <http://www.scribd.com/doc/3115978/modul-exim-new1>. access on date 11 oktober 2013

sources of foreign exchange, among others, is to increase the export transactions and pressing foreign exchange expenditures by limiting the import activities.³

With the current international market conditions provide a great opportunity for domestic products to compete with foreign products by way of exports , and thus Indonesia is also required to open up the domestic market to compete and receive imported products that have an impact on the product when the country imported products flooding the domestic market.

In protecting domestic products over imported products in the domestic market that makes domestic products less competitive and can't evolve can lead to the formation of an unfair competition.⁴ If the condition is allowed to happen, Indonesia as a WTO member countries can apply remedies in the form of safeguards measures. Safeguards created by Article XIX of GATT that security measures are measures taken by the government of the importing country to recover serious injury and/or threaten to cause injury in the country as a result of a surge in imports of goods similar⁵ or directly competitive goods.⁶

So far, Indonesia only use security measures due to Indonesia three times using bilateral negotiations more beneficial to the two countries. This resulted in Indonesia often disregarded protracted over imported products in the country so that the domestic product losses prolonged until the government has a trade policy efforts to rescue and domestic products to compete again and make adjustments to the flood of imported goods in the market domestic.

Regarding the requirements for the application of safeguards based on Article 4.2b Safeguards Agreement which states:

³ Roselyne Hutabarat, *Transaction of Ekspor-Import*, Jakarta, Erlangga, 1989, hal. 1.

⁴ Sylviana Kusuma Lestari, **Tinjauan Yuridis atas Perlindungan Hukum Terhadap Industri Dalam Negeri Melalui Peraturan Nasional Dikaitkan Dengan Upaya Safeguards dalam World Trade Organization**, Tesis diterbitkan, Jakarta, Fakultas Hukum Universitas Indonesia, 2010.

⁵ See, Article 1 paragraph 10 Government Regulation No. 34 Year 2011 Concerning AntiDumping, Countervailing Measures, and Safeguards.

⁶ See, Article 1 paragraph 11 Government Regulation No. 34 Year 2011 Concerning AntiDumping, Countervailing Measures, and Safeguards.

The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the casual link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

The important thing to note on the application of safeguards is that such action can only be performed if indicated the existence of a causal link between increased imports and the serious injury threaten to cause serious injury and any loss caused by factors other than imports should not related to increased, while the increase in imports must be considered based on the requirements of Article XIX of GATT 1994 , ie unforeseen developments.

Indonesia is a country that is a member of the World Trade Organization has a very important role in any international trade negotiations. Besides Indonesia as a developing country exceptions based on the principle of preference given to develop state that provides the opportunity for developing countries to be able to exclude the rules of world trade and provide ease of adjustment of international trade as a form of strengthening of national trade. The opportunities that Indonesia could protect domestic product in the country through the safeguard mechanism based on a result of serious injury and /or threaten to cause injury.

Based on these considerations will, Indonesia through Government Regulation No. 34 Year 2011 About Antidumping Measures, Countervailing Measures and Safeguards Measures, a product of positive law in Indonesia regulating security measures so that the domestic industry suffered serious losses may adjust - structural adjustments were legally justified under the provisions of the Agreement on Safeguard.

The problem is in the GATT 1994 and the positive law in Indonesia has not set the boundaries serious injury and/or threaten to cause injury as the reason for the implementation of safeguards which Indonesia as a developing country can make

adjustments to make the protection of domestic products in the country in accordance with the principle of preference as a developing country which can be implemented in the implementation of safeguards.

B. Legal Issues

In this paper, the problems will be analyzed in the implementation of the qualification is any serious injury and/or threaten to cause injury by GATT 1994 in Indonesian positive law? and instruments are to be used for the Indonesian government to implement safeguards as the protection of domestic products?

C. Research Method

A. Research Approach

Types of research used in the study of this law is the juridical - normative. Normative research is a scientific procedure to find the truth of scientific logic based on the normative side of the object is the law itself. Considerations used in determining the type of this research is to qualify the provisions of clause serious injury and / or threaten to cause injury under the provisions of GATT 1994 for a country that wants to implement security measures such as safeguards and studied by Indonesian positive law.

B. Research Approach

Methods The approach used in this paper is juridical - normative approach. Normative juridical approach is done by reviewing the efforts books, journals, papers relating to the object under study. Therefore, the approach used is the approach law (statute approach) and approach cases that occurred earlier (case approach). Law approach is used to examine the provisions norms show a link or relationship over the imposition of safeguard clauses serious injury and/or threaten to cause injury under the provisions of GATT 1994 and the Agreement on Safeguards in Indonesian positive law.

C. Types and Sources of Material Laws

To solve the legal issues and provide prescriptions of what should be, the necessary legal research sources. Legal research resources can be divided into

research resources in the form of primary legal materials and secondary legal materials.

a. Primary Legal Materials

Primary legal materials are materials that are authoritative legal means to have authority. Primary legal materials composed of laws and regulations, official records or minutes in the making of the laws and decisions of the judges. Legal materials in this thesis include:

1. General Agreement on Tariffs and Trade 1947
2. Agreement on Safeguards 1944
3. Act No. 7 of 1994 on Ratification of the Agreement Establishing the World Trade Organization.
4. Presidential Regulation Number 84 of 2002 on Domestic Industry Security Of Impact of Import Surge
5. Minister of Industry and Trade of the Republic of Indonesia Number : 84/MPP/Kep/2/2003 About Indonesian Trade Security Committee
6. Government Regulation No. 34 Year 2011 About Anti-Dumping Measures, Countervailing Measures, Safeguards Measures

b. Secondary Legal Materials

Secondary Legal Materials in the form of all the publicity about the law which is the official documents. Publication of the law include text books, law dictionaries, legal journals, and the comments the court's decision. In addition, according to Valerie JL Kriekhoff, the document as a reference material can also be used to analyze the material contained in the legislation, scientific books, contracts, and court decisions. Secondary legal materials include:

1. Books on International Trade
2. Books on International Economic Law
3. Books on GATT and International Cooperation
4. The National Law Journal
5. Journal of International Law

6. Research , Seminars and Work Shop

c. Obtain Materials Engineering Law

Both primary and secondary legal materials collected by topic issues that have been formulated through literature studies, both the literature and the study of law rules. Primary and secondary legal materials are also collected by the library and browse through legislation through online media.

d. Data Analysis Techniques

Data analysis in this study used a qualitative - descriptive data, which is an analysis of the data clearly and described in the form of a sentence in order to obtain a clear picture of the sources of law which is obtained by describing the legal materials, do an analysis of legal materials, conduct and interpretation of legal materials qualitative analysis of the legal material relating to this thesis, in order to obtain a clear picture of the progress of this thesis.

D. Analysis

A country that wants to implement safeguard measures one of the requirements that must be proven is the existence of serious injury or threat of serious damages that can be proven by factors relating to peningktan volume of imported goods in the domestic market in the country.

Based on the *Article 4.2 (b)* stated that:

Article 4.2 (b) Agreement on Safeguards. The determination referred to in sub paragraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

Under article 4.2 (b) of the Agreement on Safeguards that an action to be taken by the state can be made if :

1. The existence of a causal link between increased imports with serious injury and / or threaten to cause injury.

2. Other losses were caused by factors other than imports should not related to increased imports.
3. The increase in imports must be considered based on the requirements of article XIX of GATT 1994 on unforeseen development.

From the results of the above data , the qualifying clause serious injury and / or threaten to cause injury are as follows :

1. **The increase in imports**, it is applied for has been an increase of imported products, thus causing losses (injury) in the country which is serious injury. So that the exporting countries should be restricted market access in the importing country. In addition, another requirement is that the country is facing the importing country should be compensated.

In implementing the increase in imports, there are 2 forms of the increase in imports is one of them:⁷

- a. An absolute increase in imports

The increase in imports in absolute terms is referred Yeah there was an increase in the import of a particular unit of measures, such as tons or other units.

- b. The increase in imports relative

Relative comparisons between goods imports to domestic production of goods that directly competed.

2. The presence or Similar Items Directly unrivaled
In analyzing the increase in imports should be seen that the trend of imports during the period of investigation was not a comparison in the beginning and end of the period to determine the condition of the increase in imports that has been set in Article 2.1 Agreement on Safeguards. In Article 2.1 Agreement on Safeguards that should be considered is the like or directly competitive products. It is difficult to determine an item in the same category of goods or directly competed. By going to the same

⁷ Dr. Mahmud Siregar, SH., M.Hum, **Transaksi Bisnis Internasional “Dumping”**, data online http://ocw.usu.ac.id/course/download/10430000019-hukum-transaksi-bisnis-internasional/hk_607_slide_transaksi_bisnis_internasional.pdf. accessed 23-02-2014

subject in Annex I of the Notes and Supplementary Provisions Article III Ad Paragraph 2 states that :

A tax conforming to the requirements of the first sentence of paragraph 2 would be Considered to be inconsistent with the provisions of the second sentence only in cases where competition was INVOLVED between , on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

This article explains that the product can categorized as substitutes can be categorized into the types of goods like or directly competitive products.

3. Causal relationship between the loss or threat of loss of the imported goods that flood the domestic products.

An imported product can be said to have resulted in the loss must be registered with the Indonesian Trade Security Committee (KKPPI) on the existence of serious injury or threat of serious losses on imported products that have been competing in the domestic market in the country. Inquiry or investigation is conducted to ask the security measures it is necessary to set up a general picture of the occurrence of the loss and serve targeted investigations carried out to companies that conduct charges.

Based on the above explanation safeguards measures should be no real loss suffered by the domestic industry. Based on Presidential Decree No. 84 Year 2002 on Safeguard Measures of Domestic Industry Due to a surge in imports has determined a serious injury and/or threaten to cause injury, to the domestic industry over the result of a surge in imports of goods investigated should be based on analysis and related factors. Article 12 and Article 13 of the Decree states that the qualifying clause and a serious loss or threat of serious injury is as follows:

1. The level of surge in imports of investigated goods magnitude.
2. Domestic market share
3. Changes in the level of sales
4. Production

5. Capacity Utilization
6. Loss
7. Profit
8. employment opportunities

Safeguard action is temporary protection to domestic industries that suffered serious losses or threat of serious injury caused by a surge in imports of the same goods or directly compete with products produced by the domestic industry.⁸

The actions of safeguards can be performed with the imposition of safeguard duties or safeguard measures in the form of imposition of the quota , the introduction permitted, the authority of import and other similar measures to control imports. Safeguards the most extreme action was the establishment of an import ban or the imposition of a zero quota. Including in the form of non - tariff protection policies, among others, government procurement, subsidizing exports of industrial goods in the country through export certificates , small industry protection against rival large or medium -scale industries as well as industrial businesses provisioning policy.⁹

If a country find serious loss or threat of serious injury caused by increased imports of the country must notify the committee safeguards.

Such action may be taken in the form:¹⁰

a. Enforcement Rates

For example, in the case of an increase in import duty rate exceeded the rates, the imposition of additional costs or additional taxes, replacement taxes on the product, or the introduction of tariff quotas, the quota for imports at a lower rate and charging at a higher rate for imports which are in above the quota.

b. Imposition of non – tariff

⁸ Dewa Gede Pradnya Yustiawan, **Perlindungan Industri Dalam Negeri Dari Praktik Dumping**, Tesis diterbitkan, Denpasar, 2011, hal. 104.

⁹ Christophorus Barutu, **Ketentuan ANTIDUMPING SUBSIDI dan TINDAKAN PENGAMANAN (SAFEGUARD) dalam GATT dan WTO**, Bandung, Citra Aditya Bakti, 2007, hal. 117.

¹⁰ Ibid, hal 116

For example, the global quota for imports, the introduction of ease of licensing, import authority, and other similar measures to control imports.

Safeguards policies made under article XIX of GATT 1994 which should end in no less than 8 (eight) years after the date when the policy was first implemented or 5 (five) years after the date of entry into force of the Agreement on Safeguards. So in accordance with the provisions of Article 7.3 Agreement on Safeguard, the time limit for a safeguard action is as follows:

1. In general, a period lasting a safeguard measure does not exceed four (4) years, although it can be extended;
2. Extension granted up to a maximum of eight (8) years but shall be given confirmation of the purposes of the extension by the authorities;
3. Especially for developing countries , the time limit may be extended for two (2) years became to 10 (ten) years.
4. Every action performed safeguards for a period of more than 1 (one) year must be progressively liberalized during the validity period .

A safeguard measure shall be valid for a period of 180 (one hundred eighty) or lack of emotion can only be charged back to the import of goods if the time has passed at least one (1) year from the date of commencement of the action safeguards against such goods , and if such action not been subjected to the same item more than twice within a period of 5 (five) years immediately preceding the date of enactment of the act.

Subject matter of this action the imposition of safeguards in accordance with the provisions of the Agreement on Safeguards include:

a. Temporarily Safeguards Measures

Under Article 6 Provisional Measures Safeguards Agreement on Safeguards states :

In critical circumstances delay would cause damage where the which it would be difficult to repair, a Member may take a provisional measures pursuant to a preliminary determination that there is clear evidence that imports have Increased the caused or are threatening to cause serious injury. The duration of the provisional measures shall not exceed 200 days, during the which period the pertinent requirements of articles 2

through 7 and 12 shall be met. Such measures should take the form of tariff increases to be promptly refunded if the subsequent investigation Referred to in paragraph 2 of article 4 does not Determine Increased imports that have the caused or threatened to cause serious injury to a domestic industry. The duration of any such provisional measure shall be counted as a part of the initial period and any extension Referred to in paragraphs 1, 2 and 3 of article 7

This article supports the notion that this temporary safeguard measures can only be imposed in the form of increased customs duties , and the imposition of the provisional duty valid for a period of 200 days from the imposition and can't be extended. Imposition of provisional safeguard measures must meet the requirements, as stipulated in Article 2 - Article 7 and Article 12 Agreement on Safeguards and about it is also regulated on Government Regulation No. 34 Year 2011 About Antidumping Measures, Yield Measures and Precautions can be found in the provisions of Trade article 80 paragraph 1, which states as follows:

In the event of injury to domestic industry recovery is difficult due to delay imposition of Safeguard, then during the investigation KKPPI may recommend to the minister to impose Precautions

Based on these provisions can be explained that the provisional safeguard measure can be done in the form of imposition of Safeguard Duty While that can be done by way of a cash payment of import duties Measures meantime.¹¹ Term of provisional safeguard measure shall not exceed 200 (two hundred) days from the force¹² and deliver a decision on the recommendation of the Minister KPPI to the minister held government affairs in finance no later than 30 (thirty) working days from the date of recommendation KPPI.

Period of implementation of security measures while a maximum of 4 (four) years and may be extended up to a maximum of 4 (four) years and can be extended a maximum of two (2) years.¹³

¹¹ See, Regulation Article 86 ayat (1) – (5)

¹² Christhphorus Barutu, *op.cit.* hal. 118

¹³ *Ibid* hal. 119

And if the investigation proved no correlation with the increase in imports of serious injury or threat of serious loss safeguard measures temporarily halted and duties that have been collected are returned.

b. Final Safeguard Measures

Under Article 5.1 of the Agreement on Safeguards set of safeguards measures as follows:

A member shall apply safeguard measures only to the extent Necessary to Prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used , such a measures shall not reduce the quantity of imports below the level of a recent period, the which shall be the average of imports in the last three representative years for the which statistics are available, unless clear justification is given that a different levels is Necessary to Prevent or remedy serious injury . Members should choose measures most suitable for the achievement of these objectives

Safeguard action can be specified in three forms , namely an increase in customs duties, import quotas, and the combination of both forms.¹⁴ Countries are taking measures safeguards in the form of quotas can make a deal with the country's largest exporter of the allocation of the quota. If there is no agreement, each country's quota is determined on the export market share of each country in a given period.

Requirements for safeguards measures can still be made if:

1. There is evidence that the increase in imports of goods investigated cause serious harm and / or threat of serious injury to the domestic industry.
2. The Committee establishes recommendations serious losses of domestic industry.
3. Committees make recommendations to the minister of safety measures remain trading.
4. Safety precautions can still set performance form of customs duties and the finance minister or the minister of trade quotas.

The validity period of the action over the imposition of safeguards equipment are as follows :

1. Safety measures remain only for as long as may be necessary to restore the serious losses and to allow time for the structural adjustment of the domestic industry suffered serious losses or threat of serious injury.
2. Safety precautions are a maximum of 4 (four) years and may be extended up to 8 years or 10 years for developing countries.
3. In terms of security measures have been put in place more than three (3) years, the committee review the security measures and notify the results of the assessment at least 6 (six) months before the validity period expires security measures to interested parties .

¹⁴ Ibid hal. 119

Safety measures remain only for as long as may be necessary to recover or prevent serious losses and threat of serious injury and to allow time for the structural adjustment of the domestic industry suffered serious losses and or threat of serious injury.

Safeguards actions above have similar provisions in the safeguards set up the action, either permanently or temporarily. Action remains safeguards implementation if there is evidence that the onset of the increase in imports resulted in serious harm to the domestic industry and seen the condition of the domestic industry in a critical state that if no immediate action will create an increasingly difficult situation to be improved, while the safeguards measures still apply when the investigation has proven a link between increased imports that cause a severe loss.¹⁵

E. Conclusion

Qualification provisions of serious injury and/or threaten to cause injury, among others, the rate and magnitude of a surge in imports of goods investigated either in absolute terms or relative to similar goods or goods that are directly competitive, the domestic market share being taken as a result of a surge in imports of goods investigated, and changes in the level of sales and production, capacity utilization declined, prices tend to decrease, the amount of dumping margin, negative cash flow, workforce reduction, impaired growth, impaired investments, the investment is impaired, and the ability to raise capital to experience problems.

That the implementation of security measures in Indonesia has set more comprehensive with the Presidential Decree No. 84 Year 2002 on the actions of Homeland Security Industry From Impact of Import Surge and has been updated with the laws of Government Regulation No. 34 Year 2011 About Antidumping Measures, Countervailing Measures and Safeguards Measures, where purpose of this regulation as Indonesia's commitment to trade liberalization within the framework of the Agreement Establishing the World Trade Organization (Agreement establishing the World Trade Organization) through tariff reduction and elimination of non-tariff barriers to imports surge can be cause serious adverse effects and the threat of serious injury to the domestic industry. Moving it, the Indonesian government has prepared other legal instruments intended to protect domestic products from imported goods surge.

¹⁵ See, Article 23 Paragraph 3 Presidential Decree No 84 Year 2002

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