

The Unforeseen Developments to Assess a Safeguard Investigation

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Abstrak

Persyaratan perkembangan yang tidak terduga ("Unforeseen Development") sangat penting bagi negara-negara anggota Organisasi Perdagangan Dunia (WTO) yang melakukan investigasi upaya perlindungan. Studi ini mengkaji dampak perkembangan yang tidak terduga terhadap investigasi safeguard di Indonesia. Dengan menggunakan metode penelitian kualitatif dan deskriptif, analisisnya didasarkan pada studi kasus. Temuan-temuan utama mengatasi perkembangan yang tidak terduga seperti peningkatan impor, tahapan investigasi, dan penentuan langkah-langkah pengamanan. Implikasi kebijakan menjelaskan dampak perkembangan yang tidak terduga terhadap investigasi upaya perlindungan dan tindakan selanjutnya. Selain itu, rekomendasi kebijakan bertujuan untuk meningkatkan standar kualitas, dengan menawarkan tiga argumen teoritis baru. Studi ini mendorong diskusi dan rekomendasi yang mendalam mengenai investigasi upaya perlindungan, khususnya mengenai kebutuhan perkembangan yang tidak terduga.

Kata kunci: Perkembangan yang tidak terduga, Investigasi Pengamanan Perdagangan (Safeguard), Tindakan Pengamanan (Safeguard Measures), Tindakan Kebijakan Perdagangan, Tindakan Pemulihan Perdagangan di bawah WTO

Abstract

Unforeseen development requirements are crucial for World Trade Organization (WTO) member countries conducting safeguard investigations. This study examines the impact of unforeseen developments on safeguard investigations in Indonesia. Utilizing qualitative and descriptive research methods, the analysis is based on case studies. Major findings address unforeseen developments such as increased imports, investigation stages, and determination of safeguard measures. Policy implications elucidate the effects of unforeseen developments on safeguard investigations and subsequent measures. Additionally, policy recommendations aim to enhance standard quality, offering three novel theoretical arguments. This study fosters insightful discussions and recommendations concerning safeguard investigations, particularly regarding unforeseen development requirements.

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

INTRODUCTION

In the multilateral trading system, increasing trade activity among World Trade Organization (WTO) member countries, facilitated by free trade agreements, brings both positive and negative impacts. While trade liberalization can stimulate economic growth and job creation, it can also lead to a surge in imported products, posing a threat to domestic industries. Safeguard investigations serve as a mechanism to protect domestic industries from such threats, requiring proof of a causal link between increased imports and serious injury or threat thereof. Among the factors considered in safeguard investigations, the requirement of unforeseen developments plays a crucial role, enabling member countries to suspend obligations or modify concessions to prevent or remedy injury to domestic producers.

This paper focuses on the significance of unforeseen developments in safeguard investigations within Indonesia, a country actively imposing safeguard measures. Utilizing a qualitative approach and multiple case analysis involving four representative industry sectors (paper, textiles, sugar, and steel), the study explores the implications of unforeseen developments for Indonesia's Safeguard Committee. Through descriptive research and analysis of definitive safeguard measures applied in these sectors, the paper aims to provide policy recommendations for fair and effective safeguard investigations.

By examining specific industry cases and analysing the role of unforeseen developments, the study seeks to assist the Indonesian Safeguard Committee in conducting thorough investigations and issuing relevant policy guidelines. Data collected from WTO notifications, government publications, and official reports offer insights into import trends, threats of serious injury, and safeguard measures. Ultimately, the paper contributes to the enhancement of Indonesia's trade policy framework, ensuring the balanced protection of domestic industries in the face of increasing global trade dynamics.

Literature Review

Previous studies have delved into the intricacies of unforeseen developments in safeguard investigations, emphasizing the need to demonstrate that increased imports result from such developments. The Appellate Body's emphasis on this requirement underscores its importance in safeguard measures aimed at nurturing infant industries. However, discrepancies between the GATT and the Agreement on Safeguards have led to confusion regarding the necessity of proving unforeseen developments. Scholars advocate for further investigation into the factors surrounding unforeseen developments, highlighting the need for clarity in the application of safeguard measures.

Nakagawa draws comparisons between safeguard laws and other trade remedy laws, emphasizing the unique inquiry of additional causality inherent in unforeseen developments. Suggestions for clarifying the requirements and providing examples of unforeseen developments aim to ensure the practicality of the concept. Pelc elucidates the relationship between the GATT's unforeseen developments clause and its enforcement under the Agreement on Safeguards, emphasizing the stringency imposed by the Appellate Body.

The causal link between increased imports and serious injury to domestic industries must be established in safeguard investigations, with a focus on import-related dislocation as a characteristic of unforeseen developments. However, the lack of guidance on what constitutes unforeseen developments poses challenges to competent authorities. Rai's analysis highlights the differences between Article XIX of the GATT and the Agreement on Safeguards, particularly in the period after the imposition of safeguard measures.

Additionally, scholars like Raychaudhuri explore the political and economic rationale behind safeguard measures, noting how ambiguities in the Agreement on Safeguards can undermine their effectiveness. However, it's crucial to differentiate unforeseen developments as a legal requirement from broader political terms. The emphasis remains on clarifying the legal basis of safeguards and

understanding unforeseen developments within that context.

Overall, these studies contribute to a nuanced understanding of unforeseen developments in safeguard investigations, aiming to enhance the effectiveness and fairness of trade policy measures within the WTO framework.

DISUSSION 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.

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 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.

1. Increased Imports

The concern regarding the competent authority's failure to establish a link between absolute and relative terms of increased imports and unforeseen developments highlights a crucial aspect of safeguard investigations. Article 4.2(a) of the Agreement on Safeguards stipulates that the surge in imports, both in absolute and relative terms, must be examined to identify unforeseen developments. This requirement is essential to ensure a fair investigation in accordance with WTO rules.

It is imperative that unforeseen developments are identified as a cause of the import surge

in both absolute and relative terms during the investigative process. This connection underscores the significance of these factors in safeguard investigations, reflecting adherence to the rule of law within the WTO framework. Thus, it is necessary for the competent authority to assess all relevant factors and their relationship between increased imports and unforeseen developments.

Unforeseen developments serve one of a "screening device" in safeguard investigations to determine whether the increase in imports warrants further scrutiny. Establishing a causal link between the threat of serious injury or actual injury and increased imports is crucial in this process. The competent authority in Indonesia oversees different stages of the safeguard investigation, ultimately making recommendations to the minister of trade. Subsequent decisions regarding the implementation of safeguard measures, such as tariffs and quotas, involve coordination among various ministries, with the minister of finance possessing the authority to implement such measures.

In summary, linking absolute and relative terms of increased imports to unforeseen developments is vital in safeguard investigations, ensuring a thorough examination of factors contributing to import surges and adhering to WTO regulations.

2. The Stages of the Investigation

The safeguard investigation process involves several stages and qualifications, with unforeseen developments playing a crucial role in determining whether safeguard measures are warranted. Before imposing safeguard measures, two distinct requirements must be fulfilled: demonstrating increased imports and demonstrating unforeseen developments. Unforeseen developments must cause an increase in imports, implying that the injury to a domestic industry was caused by developments not foreseen at the time of the latest trade negotiation.

Safeguard measures are considered emergency actions to address increased imports, even if not necessarily unfair. The investigation process includes stages such as

receiving applications from the domestic industry, initiating investigations based on preliminary evidence, and notifying relevant bodies like the Committee on Safeguards. Public notices and hearings provide opportunities for interested parties to present evidence and views. The competent authority then evaluates all relevant factors, conducts on-site verifications, and analyses data to determine the existence of serious injury or threat thereof caused by increased imports, which must fall under the unforeseen developments requirement.

When a causal link between increased imports and serious injury or threat thereof is established, the competent authority submits a final report and recommendation to the minister of trade for the imposition of safeguard measures. In critical circumstances, provisional safeguard measures may be taken based on a preliminary determination of clear evidence of serious injury caused by increased imports. However, the requirement to demonstrate serious injury or threat thereof caused by increased imports remains essential.

It is crucial for the competent authority to prove that increased imports are the result of unforeseen developments to ensure conformity with GATT Article XIX and the Agreement on Safeguards. Failure to meet these requirements, including unforeseen developments, may result in the inability to impose safeguard measures. The investigation concludes after the competent authority submits the final report to the minister of trade.

Overall, the safeguard investigation process is meticulous and involves various stages to ensure that safeguard measures are implemented in accordance with WTO regulations and agreements, with unforeseen developments serving as a key criterion in determining the necessity of such measures.

Determination of Safeguard Measures

In the final report, after finding serious injury or threat of serious injury caused by increased imports, there is a stage dedicated to considering national interests. The minister conveys the competent authority's recommendation to other relevant

governmental institutions, and based on their input and the recommendation, decides on the amount, duration, and type of safeguard measures.

WTO member countries are required to apply safeguard measures only for the period necessary to prevent or remedy serious injury and facilitate adjustment, with a maximum duration of four years. Extensions may be granted if the competent authority determines continued necessity and evidence of industry adjustment.

However, the requirement to prove unforeseen developments can pose significant challenges, effectively creating a barrier to imposing safeguard measures. Article XIX of the GATT 1994 outlines two qualifications for analysis: increased imports resulting from unforeseen developments and as a consequence of GATT obligations. These requirements, not included in the Agreement on Safeguards, are difficult to prove and necessitate thorough analysis by the competent authority.

The panel report on the Dominican Republic case and the appellate body report on the US lamb case highlight the importance of demonstrating unforeseen developments in determining increased imports. This requirement must be reflected in domestic laws of WTO member countries.

Unforeseen developments need to be convincingly linked to increased imports, a task undertaken by the competent authority. These qualifications serve as preconditions before establishing a causal link between increased imports and serious injury or threat thereof to the domestic industry. They are essential in determining the necessity and appropriateness of safeguard measures.

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 1.

Table 1. Safeguard Measures by Reporting Member

No.	Country	Number of Measures
1	Indonesia	28

No.	Country	Number of Measures
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 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 development. 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.

Determining a Developing Country

The determination of developing country status under the WTO Safeguard Agreement poses challenges due to the absence of clear regulations on the matter. While Article 9.1 of the Safeguard Agreement provides criteria for exemption, it lacks guidance on how to determine developing country status. Consequently, WTO members have the discretion to establish their own domestic regulations for this purpose.

Article 9.1 establishes a two-part assessment for determining developing country status:

1. Individual analysis of import shares: Developing countries with import shares below 3% individually are eligible for exclusion from safeguard measures. Those above 3% must be included.
2. Collective analysis of import shares: If collectively, the import shares of developing countries do not exceed 9%, they are exempt from safeguards. Competent authorities should establish specific criteria for determining developing country status, potentially including a self-declaration mechanism. However, the lack of clear rules within WTO disciplines leaves room for controversy.

Indonesia, like other WTO members, has the right to determine developing country status under the Safeguard Agreement. It should adhere to Article 9.1 while ensuring compliance with domestic regulations.

Determining developing country status is crucial, both during and after the imposition of safeguard measures. Competent authorities must convince interested parties of their analysis, considering factors like the impact of safeguards on imports, domestic industry conditions, and the necessity of the measures.

The absence of clear regulations on determining developing country status may lead to disparities in implementation. It's essential to consider the competitiveness of developing countries and ensure fair treatment under safeguard measures.

The provision "as long as" in Article 9.1 serves as a tool for reviewing developing country status during safeguard extensions, allowing for adjustments based on evolving circumstances.

In summary, while the WTO provides criteria for exempting developing countries from safeguard measures, the absence of clear regulations necessitates careful consideration and potentially the establishment of specific criteria by individual member states.

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.

1. Policy Implications

In The context of the WTO's rule of law, safeguard measures are preceded by thorough investigations conducted by competent authorities. These investigations are crucial in determining whether safeguard measures should be imposed. While increased imports can sometimes be predicted, safeguard measures may not always be necessary unless unforeseen developments lead to a surge in imports.

Unforeseen developments play a vital role in safeguard investigations as they help determine the cause of increased imports. These investigations consider various objective and quantifiable factors such as the rate and amount of increased imports, changes in market share, sales, production, productivity, capacity utilization, profits, losses, and employment. Safeguard measures, which can take the form of tariffs, quotas, or a combination of both, directly affect domestic industries and indirectly impact other interested parties.

Preventing the abuse of safeguard measures is essential, and considering unforeseen developments is one way to achieve this. Neglecting the requirement of unforeseen developments or other relevant factors during the investigation process can lead to the misuse of safeguard measures, affecting competitiveness among domestic industries and potentially harming international trade relations.

By imposing safeguard measures, WTO members aim to prevent or remedy serious injury to domestic industries caused by

increased imports. These measures serve as policy tools to assist domestic industries facing threats of serious injury or experiencing actual harm. Additionally, safeguard measures facilitate adjustment within domestic industries, requiring recipients to adapt to changing market conditions and maintain competitiveness.

The ultimate goal of safeguard measures as policy tools is to ensure a fairtrade balance in the domestic market. By providing necessary support to affected industries and promoting adjustment, these measures aim to mitigate the adverse effects of increased imports while fostering a competitive and balanced trading environment domestically.

2. Policy Recommendations

Based on the proposed theory and the need for clarity and fairness in safeguard investigations, the Indonesian Safeguard Committee may consider implementing a new set of rules within the domestic law. These rules would focus on defining, determining, and analyzing unforeseen developments to ensure a comprehensive and equitable investigation process. Here is a suggested framework for the new provisions:

- a. Definition of Unforeseen Development
 - Define unforeseen development as any unanticipated or unexpected situation resulting from increased imports in a safeguard investigation.
 - Specify that unforeseen developments should involve economic circumstances that were not foreseeable at the time of the latest trade negotiation or agreement.
- b. Determination of Unforeseen Development
 - Establish criteria for determining unforeseen development, emphasizing that increased imports from a foreign country should be accompanied by unforeseen economic conditions.
 - Specify that the conditions leading to increased imports should be unforeseen during the same period as the import surge

and should not have been accounted for in previous trade negotiations or agreements.

c. Stages of Analysis on Unforeseen Development

- Outline the stages of analysis for assessing the unforeseen development requirement in safeguard investigations.
- Require the competent authority to analyze the increase in imports of the product concerned in absolute and relative terms.
- Mandate an examination of the causes of increased imports, focusing on whether the objective of the import surge was unforeseen and occurred within the same period as the economic conditions leading to the surge.
- Emphasize the need to consider the effect of obligations between countries involved in the trade, ensuring that concessions or agreements do not undermine the determination of unforeseen development.

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.

Source: proceed by Author

The proposed set of rules aims to provide clear guidance for safeguard investigations in Indonesia, promoting fairness, transparency, and adherence to international trade standards. By defining, determining, and analyzing unforeseen developments comprehensively, the Indonesian Safeguard Committee can enhance the effectiveness of safeguard measures while minimizing the potential for abuse and ensuring compliance with WTO regulations.

Indeed, the unforeseen development requirement plays a crucial role in safeguard investigations, as it influences the determination of whether increased imports warrant the imposition of safeguard measures. Here are some key points regarding the significance of unforeseen development in the safeguard investigation process:

• **Part of Investigation Process:**

Unforeseen development is integral to the safeguard investigation process. It serves as one of the criteria used to assess whether the conditions leading to increased imports were unforeseen and whether they justify the imposition of safeguard measures.

• **Influence on Increased Imports:**

Table 2. Guidance for Safeguard Investigations

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.

Unforeseen development directly impacts the analysis of increased imports. The competent authority must establish a causal link between the unforeseen development and the surge in imports to determine whether the increased imports resulted from unforeseen economic circumstances.

- **Requirement for Viability:**

The presence of unforeseen development is necessary for the safeguard investigation to be considered viable. Without demonstrating the existence of unforeseen developments, the investigation may lack a crucial element needed to assess the justification for safeguard measures.

- **Demonstration by Competent Authority:**

It is the responsibility of the competent authority to demonstrate the existence of unforeseen development during the investigation process. This demonstration involves providing evidence and analysis to support the conclusion that increased imports were influenced by unforeseen economic conditions.

- **Consideration in Article XIX of GATT 1994:**

Unforeseen development is explicitly addressed in Article XIX: 1(a) of the GATT 1994. While it is not the sole factor considered in the imposition of safeguard measures, it is an essential requirement that must be fulfilled along with other factors such as the effect of obligations between countries.

In summary, unforeseen development is a critical aspect of safeguard investigations, as it helps determine whether the surge in imports resulted from unforeseen economic circumstances. The competent authority must carefully analyse and demonstrate the existence of unforeseen development to ensure a thorough and valid investigation process in accordance with international trade regulations.

CONCLUSION

Indeed, unforeseen development is a fundamental requirement in the investigation of safeguard cases. It serves as a critical aspect of determining whether safeguard measures are warranted in response to

increased imports. Here are some key points regarding the importance of unforeseen development in safeguard investigations:

- i. **Mandatory Requirement:** Unforeseen development is not optional but mandatory in safeguard investigations. Competent authorities must consider this requirement as part of their investigation process, and failure to do so may invalidate the imposition of safeguard measures.

- ii. **Essential Part of Investigation:** Unforeseen development is integral to the safeguard investigation process. It helps assess whether the surge in imports was caused by unforeseen economic circumstances, which is crucial in determining the necessity of safeguard measures.

- iii. **Determining Increased Imports:** The analysis of unforeseen development is necessary to determine the causal factors behind increased imports. By examining whether economic conditions were unforeseen at the time of the surge in imports, authorities can better understand the underlying causes.

- iv. **Requirement in Domestic Law:** All WTO members are expected to incorporate rules regarding the unforeseen development requirement into their domestic laws governing safeguard investigations. This ensures consistency and fairness across member countries in their approach to safeguard measures.

- v. **Fairness in Investigation:** Utilizing the unforeseen development requirement promotes fairness in safeguard investigations. It ensures that authorities thoroughly consider all relevant factors and make informed decisions based on objective analysis rather than arbitrary measures.

By adhering to the unforeseen development requirement and conducting fair investigations, competent authorities can contribute to maintaining fairness and integrity in the global economic market. This research aims to provide guidance to authorities in fulfilling this requirement effectively and promoting consistency in safeguard investigation practices worldwide.

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