

Juridical Analysis of "Safeguards" on Protection of State Industrial Law

Rahayu Hartini¹

¹Universitas Muhammadiyah of Malang, Jl Raya Tlogomas No 246 ,Malang ,65144

Keywords: Safeguard, Regulation, Legal Protection

Abstract: Safeguard is one of the legal instruments to protect domestic industries from increasing imported goods that occur in normal trade but harming domestic industries. To avoid this, the WTO and the Government of Indonesia issued a protection regulation. The purpose of the study is to find out 1).Protection of domestic industrial law against safeguards in WTO provisions and regulations in Indonesia. 2).Adjustment of a substance in Indonesia to safeguard provisions. This legal research is normative juridical by using a statue approach, analyzed in a continuous manner. The results of the study:1).There are still some weaknesses in the safeguard rules in Indonesia because there are no specific rules regarding safeguards because they are still regulated in the Customs Law, while each WTO rule is regulated in each different Article, there is no explanation that absolute and relative in terms of imposition of safeguards. 2).In implementing safeguards there are still differences found in the form of safeguard provisions in WTO rules and regulations in Indonesia.

1 INTRODUCTION

International trade is one part of business activities that have recently experienced very rapid progress. This can be seen from the increasingly expanding circulation of goods, services, capital and labour between countries. This activity can occur through export, import, investment, service trade, license and franchise, intellectual property rights and technology experts, which in turn have an influence on other economic activities, such as banking, insurance, taxation and so on (Indraswari and Sudiarta, a).

It is realized that it is not easy to implement the WTO agreement in accordance with the stipulated provisions so that there may be deviations in the process of trade liberalization that urges the position of the domestic industry, so it is necessary to take safeguards so that mutually beneficial international trade activities can be realized. Many cases of security measures implemented by several countries such as Argentina that implement security measures against the footwear industry in their countries without harmonizing the WTO provisions, resulting in losses suffered by these countries.(Alfaqiih, 2012)

Trade relations between countries known as international trade experience rapid development from time to time. The dynamics of international trade are followed by a variety of complex problems as a consequence of a fair trade relationship occurring in the

business world. A distinctive feature of international trade is the existence of trade relations carried out between cross-border countries carried out by business actors by following a specific and specific system. In international trade, the existence of a system is a patron that forms and directs trade activities into certain desired goals (Barutu, 2007). Indonesia officially became a member of the WTO in 1995 by ratifying all WTO agreements, through Law No. 7 of 1994 concerning the Ratification of the Agreement Establishing the World Trade Organization.

Open international market conditions, for Indonesia, offers a great opportunity for domestic products to be exported, however in accordance with the principle of causality Indonesia is also required to open a domestic market for imported products to enter and circulate (Lestari, 2010). This certainly can bring intense competition from imported products, especially if the number of imported products floods the domestic market. Thus, this can lead to the formation of an unfair business competition in the domestic market. If these conditions occur, then as a member of the WTO, Indonesia can implement legal measures in the form of safeguards. Safeguard is one of the legal instruments to protect domestic industries from increasing imported goods that occur in normal trade but harming domestic industries.

A safeguard mechanism for an international trade agreement is the core element to secure market ac-

cess commitments in trade negotiations and effectively sustain trade liberalization despite domestic resistance from comparatively disadvantaged economic sectors. A safeguard system is not only essential to provide safety nets for overly excessive importation within such a short period of time, but also critical to facilitate structural adjustment induced by import competition. (Ahn, 2006)

WTO data show that Indonesia is the second largest country that actively applies safeguard measures. This can be proven since Indonesia joined the WTO from 01/01/1995 until 31/12/2015.

In Indonesia, the institution authorized to conduct the investigation is the Indonesian Trade Safeguard Committee (KPPi) which was established in 2003 through the Decree of the Minister of Industry and Trade No.84/MPP/Kep/2/2003 dated February 17, 2003. This decree is a follow-up to Presidential Decree No. 84 of 2002 dated December 16, 2002 concerning Measures for Safeguarding Domestic Industries from the Effects of a surge in Imports. This KPPi has the task of handling problems related to efforts to recover serious losses or prevent the threat of serious losses suffered by domestic industries as a result of a surge in the number of imported goods (Indonesia, a).

Safeguard is regulated in the WTO, GATT (General Agreement on Tariff and Trade) Article XIX and in several national regulations, namely Law No. 7 of 1994 concerning Ratification of the Agreement Establishing The World Trade Organization; UU no. 17 of 2006 concerning Amendments to Law No. 10 of 1995 concerning Customs; Government Regulation No. 34 of 2011 concerning Antidumping Measures, Reward Measures and Trade Safeguard Measures and Decree of the Minister of Industry and Trade of the Republic of Indonesia No. 85/MPP/Kep/2003 concerning Procedures and Requirements for Requests for Investigation of Safeguarding Domestic Industries from the Effects of a Surge in Imports.

Some previous study research on safeguards, for example:

1. Protection of Domestic Industry through Safeguard Actions of the World Trade Organization. That safeguard regulation refers to Article XIX GAAT (Emergency Action on Imports of Particular Product) as perfected by the 1994 agreement on safeguard. Safeguard measures are also regulated in the Indonesian legal system with Presidential Decree Number 84 of 2002 concerning measures to safeguard domestic industries from the consequences import policy (Indraswari and Sudiarta, b).
2. Harmonization of Regulations and Effectiveness

of Safeguard Institutions in Indonesia , Analysis of the Interest of Indonesia's Special Safeguard Mechanism in Agricultural Negotiations in the World Trade Organization (WTO), which addresses the issue of protecting domestic producers from import surges through the Special Protection Mechanism (SSM) scheme (Lubis et al., 2010).

3. Likewise for the nuclear field, as the study conducted by Ign. Djoko Irianto in the Title: The Role of Safeguards Technology and Physical Protection for the Protection of Nuclear Materials.
4. Safeguard Mechanism and ATIGA (ASEAN Trade in Goods Agreement): Case Study of Sugar Trade in Indonesia and Fruit Trade in Vietnam, which explains among others the emergence of new problems in trade that exist between ASEAN member countries, is due to non-cultural negotiations their confrontation and informal cooperation adopted by member countries in solving trade problems.
5. Anita Kamilah's research entitled: Law Protection for Domestic Industries Due To Dumping Practice. Basically, this research focuses on: (1) What factors cause a corporation to practice dumping, and (2) How is the legal protection of a country due to dumping practices. Factors causing dumping, to gain profit by setting lower prices on the import market and monopoly on the market of the importing country. The form of protection for countries suffering from losses due to dumping practices is to be able to impose "Antidumping Import Duty", as a sanction for exporting countries(Kamilah, 2015).
6. Subsequent research on safeguards by Dukgeun Ahr, a Professor from Korea (Professor of International Trade Law and Policy, Graduate School of International Studies, Seoul National University, Korea). With the title of his research "Restructuring the WTO Safeguard System" in his journal entitled "The WTO Trade Remedy System: East Asian Perspectives". In this study discussed some of the problems that are more basic, procedural and substantive. Also explained a little about the establishment of better protection mechanisms in the future(Ahn, 2006)

Meanwhile, in my research entitled Juridical Analysis of "Safeguards" On Protection of State Industrial Law, by raising the issue as set out in the legal issue below.

Based on the description above, several problems arise. The objectivities of the study in this study are:

1. How about safeguards against the protection of-

domestic industrial law according to WTO Provisions and Regulations in Indonesia?

2. is safeguards in Indonesia in accordance with the safeguard provisions stipulated by the WTO?

2 METHOD

This research is juridical normative by using a statute approach, and a conceptual approach. This research is normative juridical with a literature approach that is by studying journals, books, legislation and other documents related to this research.

This approach views the law as identical with written norms created and promulgated by authorized institutions or officials.

In this study there are 3 legal materials: primary, secondary and tertiary. Primary legal materials which are provisions relating to Safeguards based on WTO regulations and national regulations consisting of: a. General Agreement on Tariffs and Trade (GATT) 1947; agreement on Safeguard: c. Law No. 7 of 1994 concerning Ratification of the Agreement Establishing The World Trade Organization d. UU no. 17 of 2006 concerning Amendments to Law No. 10 of 1995 concerning Customs; Government Regulation No. 34 of 2011 concerning Antidumping Actions, Reward Actions, and Trade Safeguard Measures; Secondary legal material that is all publications about law that are not official documents (books, dictionaries, journals, comments on court decisions). Tertiary legal materials namely: a large Indonesian dictionary, Law dictionary, encyclopaedia, and others.

Legal Material Collection Techniques with the model of library research (Ibrahim, 2006).

The technique of analysing legal material is carried out in a descriptive qualitative manner, namely the selection of theories, principles, norms, doctrines and articles in the law. Legal materials obtained are then subjected to discussion, examination and grouping into certain parts to be processed into information data (Asshiddiqie, 1997).

3 SAFEGUARDS (TRADE SECURITY MEASURES) AGAINST THE PROTECTION OF DOMESTIC INDUSTRIAL LAW ACCORDING TO WTO PROVISIONS AND REGULATIONS IN INDONESIA

It is not easy to establish a WTO agreement in accordance with the provisions applied so that a safety valve may be needed so that mutually beneficial international trade activities can be realised. This has been done since the entry into force of the 1947 GATT agreement, one of which is safeguard action (Barutu, 2007). Safeguard actions are intended to avoid situations in which WTO members face a dilemma between allowing domestic markets that are severely disturbed by imported goods and withdrawing themselves from the agreement. If the second one is chosen by many countries, it means that the agreement is ineffective.

GATT 1947 has special conditions in emergency actions stipulated in Article XIX regarding this Emergency Action on Imports of Particular Products, and the provisions in the condition of how safeguard actions can be implemented, specifically Article 1 (a) concerning unforeseen developments are stipulated (Indonesia, b). Safeguard actions can be carried out if there are elements of unexpected developments, the obligations of the parties to the agreement include: concessions on tariffs which consequently increase the number of imported goods into the area, causing a serious threat to similar products so that the countries that make the agreement are given the authority to take preventative action against the more severe losses that will be experienced by the domestic industry. Preventive and corrective actions can be in the form of delaying concessions, withdrawing or changing concessions.

In Article XIX GATT, a country is allowed to: modify agreed concessions, impose import restrictions for a temporary time if it can be proven that an increase in certain imported products results in considerable losses for domestic producers, and continues to impose import restrictions during the time needed to overcome corrected losses. In its development, the provisions on safeguards were rewritten in a formulation that was somewhat different from what was stated in the Agreement on Safeguard Agreement which was one part of the WTO agreement.

There is a difference regarding the identification of the increase in imports between Article XIX GATT 1994 and Article 2.1 Agreement on Safeguard where

Article 2.1 Agreement on Safeguard identification of imports is further clarified by the inclusion of elements of difference between absolute and relative increases, where this is not mentioned in Article XIX GATT 1994.

Law Number 10 of 1995 concerning Customs which originally only regulates the issue of Anti-Dumping Import Duty and Subsidized Import Duty, then Law Number 17 of 2006 concerning amendments to Law number 10 of 1995 concerning customs, extends actions trade safeguards by including two new provisions, namely Safeguard Measures Import Duty and Revitalization Import Duty in addition to Anti-Dumping Import Duty and Rewards Import Duty (Barutu, 2007).

In the opinion of the author, Indonesia, which has ratified Law Number 7 of 1994 in protecting domestic industries for safeguards, has not been able to provide preventive safeguards optimally. This can be proven by the absence of regulations regarding safeguards stipulated in more specific laws. Safeguard in Law Number 17 of 2006 concerning changes to Law number 10 of 1995 concerning customs is only inserted. Whereas in the WTO regulations both are regulated in different Articles, safeguards are regulated in Article XIX GATT while Customs is regulated in Article VII GATT.

In Government Regulation No. 34 of 2011 concerning Antidumping Measures, Reward Measures, and Trade Safeguard Measures more specifically regulates the safeguard actions themselves both in terms of their understanding and procedures. The shortcomings do not explain who the parties are interested in.

3.1 Safeguards Provisions in Indonesia Viewed from WTO Safeguard Provisions

In principle, open international trade demands uniformity of rules that apply at the international level with rules made at the national level. This uniformity of rules is commonly referred to as a harmony between international rules and national rules. In harmonizing this law, the most important thing is the existence of a meeting point on fundamental principles between the two, so that the conflict of law is avoided (Alfaqih, 2012).

The inconsistency in the substance of the arrangement and its application will have an impact on the demands through the WTO Dispute Settlement Body.

A question is whether the safeguard provisions made by the Indonesian government are in accordance with the provisions that apply internationally, the fundamental principles of the GATT and national

legislation need to be compared. These fundamental principles are examined through 2 categories, namely the safeguard imposition requirements and the safeguard forms that can be imposed.

Rules regarding safeguards in Indonesia are regulated more fully in Government Regulation No. 34 of 2011 concerning Antidumping Measures, Reward Measures and Trade Safeguard Measures, while at the international level, the safeguard provisions contained in the GATT are further elaborated in the Agreement on Safeguard.

First, the conditions for imposing safeguards. In this government regulation, safeguard requirements can be found in the definition of safeguards, namely actions taken by the government to restore Serious Loss or prevent the Threat of Serious Loss suffered by the Domestic Industry as a result of a surge in the number of imported goods in absolute or relative to the Similar Goods or Directly Competing Goods. Provisions regarding safeguard requirements are in line with the provisions contained in the Agreement on Safeguard. It can be said that Indonesia has adjusted the substance to the WTO safeguard regarding the requirements for imposing safeguards because there is no difference between the safeguard imposition requirements. There should be a harmony between international rules and national rules so that there is no conflict of law. (ULFA, 2017)

Second, the form of safeguards in regulations in Indonesia can be found in article 70 paragraph 2 of Government Regulation Number 34 of 2011 in which safeguards can be imposed in the form of import duties or quotas. If the form of safeguard chosen is import duty, then the one who determines it is the Minister of Finance, while the safeguard in the form of a quota is determined by the Minister of Industry and Trade (Indonesia, a).

PP No. 34 of 2011 divides safeguards into temporary safeguards and permanent safeguards. Temporary safeguards stipulated in article 80, article 81, article 82, where temporary safeguards can be applied in the event of recovery of domestic industry losses are difficult due to delay in imposing security measures, during the investigation period KPPI can recommend to the Minister to impose temporary security measures.

Safeguard on Agreement has temporary safeguards and permanent safeguards. Temporary safeguards are carried out if there is initial evidence of an increase in imports that results in serious losses or the threat of serious concern for domestic industries, temporary safeguard measures (Article 6 Agreement on Safeguard), are needed if domestic industry conditions are in "critical condition". That is, if no imme-

diate action is taken, an increasingly difficult situation will be created to make repairs and recovery (Indonesia and Indonesia,).

For safeguards, it can still be determined in 3 forms, namely an increase in import duties, a stipulated import quota, and a combination of both forms. If safeguard measures are set in the form of quotas, the number of quota may not be smaller than the average import data in the last three years. In other words, for the case of imposing a number of quotas that are different from the import average in the last 3 years, there is a need for evidence/justification specifically (Barutu, 2007). As stated in Article 5.1 Agreement on Safeguard.

The arrangement of safeguard forms in this Government Regulation is the same as the arrangement in the Agreement on Safeguard. Even if there is a difference, it is only in the form of temporary safeguards, in the Agreement on Safeguard Article 6 it is mentioned that it should be imposed in the form of import duty and not quota, while in PP Number 34 of 2011 article 80 paragraph 1 is mentioned only in the form of import duty temporary security measures and not as a choice.

4 CONCLUSIONS

4.1 Conclusion

4.1 Safeguards (trade security measures) against the protection of domestic industrial law according to WTO Provisions and Regulations in Indonesia, it turns out there are still some disadvantages, namely:

a). Safeguard arrangements in Indonesia have not been maximized in providing legal protection to domestic industries'). Protection of domestic industrial law regarding safeguards in Indonesia can be realized through preventive legal protection provided by the Government, namely by making more appropriate regulations regarding safeguards, providing socialization for business actors, and conducting an assessment of the import mechanism. While repressive legal protection is carried out by the government by giving import duties and quotas or both so that the domestic industry does not suffer losses due to a surge in imports.

4.2 In the safeguard provisions in Indonesia, judging from the WTO safeguard provisions both from the safeguard imposition requirements and viewed from the form of safeguards in Indonesia, they are quite consistent in their provisions. However, there are still differences found in the form of temporary safeguards, in the Agreement on Safeguard Article 6

Agreement of Safeguard: it should be imposed in the form of an import duty tariff (and not a quota), while PP No. 34 of 2011 article 80 paragraph 1 is mentioned only imposed in the form of import duty for temporary security measures and not as an option. In implementing a rule, there should be uniformity of rules that apply at the international level with rules made at the national level so that later it can avoid the occurrence of a conflict of law.

4.2 Suggestion

B.1. For the government, especially the Indonesian Trade Security Committee (KPPI), to be more massive in providing services and outreach to the public, especially the domestic industrial parties, so that the economy and trade flows run in accordance with what is stated. Seeing the increasingly dynamic development of the trading business world, it can be made a concern for the government in the future so that the domestic industry does not suffer losses for the welfare of the country's economy. In protecting the domestic industry against a surge in imports, it is necessary to have legal protection through the establishment of regulations specifically discussing safeguards. Because until now there is no specific regulation governing safeguards. Safeguard regulation is still an insert in the Customs Law and there needs to be an additional in substance regulating in more detail who are the parties interested in this government regulation and the intent of absolute or relative.

B.2. For the domestic industry parties to take an active role in providing reports to the KPPI so that the KPPI can directly follow up with the imposition of import duties on temporary safeguards decided by the finance minister in order to prevent greater losses. Because KPPI is not the only one that has an important role in protecting its domestic industry, the public, especially domestic industries, also has an important role in achieving economic welfare goals in Indonesia.

REFERENCES

- Ahn, D. (2006). Restructuring the wto safeguard system. *The WTO Trade Remedy System: East Asian Perspective*, pages 11–31.
- Alfaqih, A. (2012). Harmonisasi regulasi dan efektivitas kelembagaan safeguard di indonesia. *Media Hukum*, 19(1).
- Asshiddiqie, J. (1997). *Teori dan aliran penafsiran hukum tata negara*. Ind Hill-Company.
- Barutu, C. (2007). Sejarah sistem perdagangan internasional (dari upaya pembentukan internasional trade organization, eksistensi general agreement on tariffs and trade sampai berdirinya world trade organization). *Jurnal Hukum Gloris Juris*, 7(1).
- Ibrahim, J. (2006). Teori dan metodologi penelitian hukum normatif. *Malang: Bayumedia Publishing*, 57.
- Indonesia, K. A. and Indonesia, K. P. P. Pengenaan tindakan safeguard (bagian pertama). *Fair Trade*, (3).
- Indonesia, K. P. Komite pengamanan perdagangan indonesia.
- Indonesia, K. P. Perlindungan industri dalam negeri melalui kesepakatan safeguard world trade organization.
- Indraswari, A. I. and Sudiarta, I. K. Perlindungan industri dalam negeri melalui tindakan safeguard world trade organization. *Kertha Semaya: Journal Ilmu Hukum*.
- Indraswari, A. I. and Sudiarta, I. K. Perlindungan industri dalam negeri melalui tindakan safeguard world trade organization. *Kertha Semaya: Journal Ilmu Hukum*.
- Kamilah, A. (2015). Law protection for domestic industries due to dumping practice. *Jurnal Dinamika Hukum*, 15(3):304–310.
- Lestari, S. K. (2010). *Tinjauan yuridis tas perlindungan hukum terhadap industri dalam negeri melalui peraturan nasional dikaitkan dengan upaya sefguards dalam world trade organization (WTO)*. PhD thesis, Universitas Indonesia. Fakultas Hukum.
- Lubis, A. D., Mutakin, F., and Arianti, R. K. (2010). analisis kepentingan special safeguard mechanism indonesia dalam negosiasi pertanian di world trade organization (wto). *Buletin Ilmiah Litbang Perdagangan*, 4(1):63–74.
- ULFA, M. (2017). *TINJAUAN YURIDIS TENTANG TINDAKAN PENGAMANAN PERDAGANGAN (SAFEGUARD) DALAM KAITANNYA DENGAN PERLINDUNGAN HUKUM TERHADAP INDUSTRI DALAM NEGERI BERDASARKAN KETENTUAN WTO DAN PERATURAN DI INDONESIA*. PhD thesis, University of Muhammadiyah Malang.