

SAFEGUARD RE-INVESTIGATION BY MADAGASCAR GOVERNMENT ON PASTA PRODUCTS FROM INDONESIA BASED ON GATT/WTO FRAMEWORK

^{1*}Tirza Gracia Shekinah Hutagaol, ²FX. Joko Priyono, ³Nanik Trihastuti

¹Faculty of Law, Universitas Diponegoro, hutagaoltirza@gmail.com

²Faculty of Law, Universitas Diponegoro, joko_undip@yahoo.com

³Faculty of Law, Universitas Diponegoro, naniktrihastuti@gmail.com

Abstract

Due to the increase of import in the last 4 years, Madagascar investigated imported pastain October 2018, terminated it on July 10, 2019, and reinvestigated it on July 18, 2019. They were followed with Provisional Safeguard Measures(PSM). This study aimed to know whether Madagascar had been fulfilling the elements of Article XIX GATT in the preliminary determination of investigation and whether a safeguard reinvestigation is in accordance with the GATT/WTO. Researchers used a juridical normative approach. The result showed that serious injuries and causal links from Article XIX GATT were undetermined in the preliminary determination. Neither the GATT nor Agreement on Safeguard (SA) were not regulating safeguard reinvestigation, so it can proceed but without PSM in the second investigation, because it violated the provisions of Article 6 SA.Madagascar shall immediately completing the elements that had not been determined and revoke the PSM in the second investigation.

Keywords: Safeguards; Re-Investigation; Madagascar; Pasta Products; Indonesia

1. Introduction

In trade liberalization, not all countries that are members of the WTO feel the benefits. The benefits of liberalization can be felt depending on the readiness of the state in various aspects, such as policies in the economic field and other related fields, adequate resources to compete, and the economic condition of the country itself. Countries that are not ready will face threats that can harm domestic industries. This is often experienced especially by developing countries that have not been able to fully face trade liberalization.¹

This circumstance was understood by the WTO so that in Article XIX GATT there is one balancing mechanism, namely safeguard, which is specifically regulated in the Agreement on Safeguard (SA). Safeguard is a temporary policy that can be taken by the government to secure the domestic industry by suspending tariff concessions on products that cause or threaten serious injury to the domestic industry.²

Safeguards can only be carried out if a country can prove the existence of conditions as stated in Article XIX GATT, including a) unforeseen development; b) increase in imports; c)

¹ Carl-Owe Olsson, "Developing Countries and Emergency Safeguards Measures in World Trade Law" (University of Lund, 2006).

² Huala Adolf, *Hukum Perdagangan Internasional* (Depok: Raja Grafindo Persada, 2006).

serious injury or threat of serious injury and d) causality. To prove these conditions, countries that want to implement safeguards must first investigate as referred to in Article 3 of the Agreement on Safeguards. In addition, Article 12 of the Agreement on Safeguards mandates that every action taken by the state to establish safeguards must be made public.

Madagascar is one of the countries that use these safeguard facilities. In 2018, Habibo Mills, Salone, and Socobis as Madagascar's domestic pasta industry filed a request for a safeguard investigation of pasta products imported in Madagascar because of a surge in imports in the last three years and is suspected of potentially causing serious damage to the domestic industry. Products submitted for investigation are classified into HS numbers 19021190, 19022090, 19021990, and 19023090.

The *Autorité Nationale Chargée des Mesures Correctives Commerciales* (ANMCC, in English, called as National Authority for Trade Remedies) as the authority that receives the request and conducts a safeguard investigation sent a notification to the WTO Committee on Safeguard that the investigation of the pasta began on 20 September 2018. The investigation was followed by the implementation of the Preliminary Safeguard Measure (PSM) in the form of an ad valorem tariff of 30% from CIF. After sent several notifications containing the results of investigations to the WTO, Madagascar announced that investigations of products with HS 19021990 and 19023090 were stopped, and PSM was revoked on 10 July 2019.

On July 18, 2019, Madagascar announced that an investigation of imported products with HS 19021190, 19021990, 19022090, and 19023090 was reopened. This second investigation was also followed by the adoption of PSM in the form of an ad valorem tariff of 30% which entry into force on August 1, 2019. This caused Indonesia and other countries that export pasta to Madagascar to face uncertainty during the re-investigation period and the imposition of high additional tariffs repeatedly. If this is allowed, it will set a precedent for other countries that will implement safeguards.

This article will focus on safeguards re-investigation conducted by Madagascar. Issues to be answered are a) whether the elements of Article XIX GATT, which regulates safeguards, have been fulfilled in the preliminary determination of the Government of Madagascar as the basis for an investigation; and b) whether a re-investigation was carried out by the Government of Madagascar in accordance with the provisions of international trade in the GATT / WTO framework so that the discussion is further outlined in this paper, entitled "Safeguard Re-

Investigation by Madagascar Government on Pasta Products from Indonesia based on the GATT / WTO Framework".

2. Methods

The approach used in this research is juridical normative, which seeks answers to legal problems in related positive law.³ This research would like to provide an overview of the re-investigation conducted by the Government of Madagascar in determining safeguards on pasta products from Indonesia. The data used are secondary data collected through library research and web research, namely primary, secondary and tertiary legal materials. All legal materials that have been collected are then compiled, interpreted, and concluded with deductive thinking. The interpretation method used in this study is the interpretation by language, which explains the language in international treaties related to everyday language, and systematic interpretation, namely by looking at the relationship of international agreements with one another.⁴

3. Results and Discussion

3.1. Article XIX GATT Elements in the Madagascar Government's Preliminary Determination as the Basis for Safeguards Investigation of Pasta Products from Indonesia

In the notification sent by Madagascar to the WTO dated July 22, 2019, the reasons underlying the re-investigation of imported pasta products numbered HS 19021190, 19021990, 19022090, and 19023090 were data available to the relevant authorities indicating an increase in imported pasta in the quantity that threatened or cause serious injury to domestic industries that produce similar products or products that directly compete with the product being investigated. This reason is also used as preliminary evidence for implementing a provisional safeguard measure (PSM).

Gene M. Grossman and Petros C. Mavroidis argued that countries that want to implement safeguards have several obligations, all of which are to prove the allegations or tendencies that bring the domestic industry seriously damaged, so that preliminary determination is needed to

³ Khudzaifah Dimiyati, *Metodologi Penelitian Hukum* (Surakarta: Fakultas Hukum UMS, 2004).

⁴ Sudikno Mertokusumo and A. Pitlo, *Bab-Bab Tentang Penemuan Hukum* (Bandung: Citra Aditya Bakti, 1993).

start an investigation, at least there must be allegations about the increase in imports. Furthermore, these shreds of evidence are needed to determine the safeguard stipulation.⁵

Meanwhile, Edwin Vermulst, Marta Pernaute, and Krista Lucenti argued that, in practice, preliminary evidence was not a mandatory requirement for implementing import restriction provisions. This is implied from many countries that issue PSM at the same time as the investigation began.⁶

The author is more inclined towards the opinion of Gene M. Grossman and Petros C. Mavroidis, that an investigation must be based on strong reasons and must be proven. The same thing applies even more if a country wants to apply restrictions even though it is only temporary like PSM. The proof is in accordance with Article 2.1 Agreement on Safeguard and Article XIX GATT, or an urgent situation to immediately apply a PSM, the country related to at least must be able to meet Article 6 of the Agreement on Safeguard. The elements of Article XIX GATT as evidenced by Madagascar in their initial allegations are:

a. Increased of Import

The increased of import as referred to in Article XIX GATT is an increase in quantity, can be seen in the most recent, sudden, and significant timeframe, which is also reflected through rising trends.⁷

Tabel 1.
Import of pasta products in Madagascar 2015-2018⁸

Year	2015	2016	2017	2018
Imports	25,967,061	26,808,124	40,300,093	44,909,601
Change	100	103	155	173

Based on these data, we know that the import of pasta by Madagascar has indeed increased in absolute terms over the past four years until it reached 73%. Madagascar does not specify the quantity of products imported from each of the relevant countries, including Indonesia. Considering that there are pasta exporters that are classified as developing countries and can be included in the exemption from Article 9.1 SA, the investigating

⁵ Gene M. ; Petros C. Mavroidis Grossman, “United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe From Korea Not for Attribution,” *World Trade Review* 4, no. S1 (2005): 99–132.

⁶ Edwin ; Marta Pernaute and Krista Lucenti Vermulst, “Recent European Community Safeguards Policy: Kill Them All and Let God Sort Them Out,” *Journal of World Trade* 38, no. 6 (2004): 955–84.

⁷ Christophorus Barutu, *Ketentuan Antidumping, Subsidi, Dan Tindakan Pengamanan (Safeguard) Dalam GATT Dan WTO* (Bandung: Citra Aditya Bakti, 2007).

⁸ World Trade Organization, “Notification on WTO No. G/SG/N/7/MDG/4,” *World Trade Organization*, 2019.

country must show the contribution of each country investigated in the increased of imports in the area of the investigator country.

The data showing the contribution of other countries in the surge in Madagascar pasta imports is only listed in the first investigation notification that has been stopped. Based on the notification, the biggest contributors are Egypt, Turkey, and Indonesia. Egypt became the largest exporter to reach an average of 68% of total imports, Turkey became the second largest contributor to imports with an average of 5.75% of total imports, and Indonesia controlled 5.25% of Madagascar's total pasta imports.

In the first investigation, these countries which accounted for more than 3% of total imports, had met the qualifications of developing countries that could meet the safeguard provisions. Indonesia's pasta export data itself shows an increase in exports from 2015 to 2018 and reached the highest peak in 2018 with an export value of US \$ 3,183,000.⁹ This is also supported by ITC data which shows the existence of significant pastes from Indonesia from 2015 to 2018 to reach US\$ 306,000. In 2018, pasta from Indonesia also controlled 4.9% of the total imported pasta of Madagascar, but important imported pasta from Indonesia is still far adrift with Egypt and Mauritius, which each collected up to 52.5% and 37.7% of market transfers imported pasta.¹⁰

Based on data from various sources above, it can be concluded that Madagascar did experience an increase in pasta imports and Indonesia was ranked as the third-largest exporter country in Madagascar. Pasta imports from Indonesia also reach 4-5% of Madagascar's total pasta imports, so that Indonesia qualifies as a developing country that can be subject to safeguard provisions and is not included in the developing country exceptions contained in Article 9.1 of the Agreement on Safeguard.

b. Unforeseen Development

Unforeseen development is an unexpected situation, that can cause a surge in imports of certain products in a country. In the *Hatters' Fur* case of the United States, unforeseen is likened to unexpected, so unforeseen development is said to be a state of unexpected and

⁹ Kementerian Perdagangan Republik Indonesia, "Statistics Indonesia" (Jakarta, 2019).

¹⁰ Kementerian Perdagangan Republik Indonesia, "ITC Calculations Based on UN COMTRADE Statistics" (Jakarta, 2019).

difficult to anticipate.¹¹ Based on Article XIX GATT, unforeseen development is one of the elements that must be proven by a country before implementing safeguard measures.

In this case, unforeseen development referred to by the Government of Madagascar is the Egyptian monetary crisis in 2016 which caused the Egyptian central bank to devalue its currency by 48%. This caused a change in Egypt's monetary policy by intensifying export activities, including the export of pasta to Madagascar. The Government of Madagascar states that Egypt exports 55% of pasta from Egypt's total pasta production to Madagascar in 2018, whereas in 2015 Egypt only exported 29% to Madagascar.

IMF data shows that in 2016 there was a decline in national reserves of 1.96%. The decline also occurred in the volume of imports in 2016 as much as 2.309% and continued until 2017. Meanwhile, inflation has experienced an upward trend since 2016. The increase in export volume, as said by the Government of Madagascar, did occur significantly in 2016. The increase in Egypt's export volume in 2016 reached 8.596% compared to 2015.¹² Based on the explanation, we can conclude that the Madagascar Government's claim of a significant increase in the volume of goods exports from Egypt did occur due to national inflation in Egypt.

As an escape clause, unforeseen development is indeed flexible and can be interpreted in various ways such as that done by Madagascar. In Article XIX GATT, unforeseen development is the cause of the increase in imports, where the increase in imports causes or threatens serious injuries to the domestic industry.¹³ Practically, if there is an increase in imports from several exporting countries, there are two ways for the importing country to prove the existence of unforeseen development.

The first way is to prove an unforeseen situation from only one country, as Indonesia has done for ceramic-tiles case. Indonesia only proved unforeseen development from the largest ceramic tile source country, China, due to overcapacity of ceramic tiles in China and imposed anti-dumping import duties on these products by the European Union, resulting in RRT diverting export of ceramic tiles to Indonesia.¹⁴ In authors opinion, this

¹¹ Tilottama Raychaudhuri, "The Unforeseen Developments Clause in Safeguards under the WTO: Confusions in Compliance," *The Estey Centre Journal of International Law and Trade Policy* 11, no. 1 (2010): 302–20.

¹² International Monetary Fund, "Report for Selected Countries and Subjects," *International Monetary Fund*, 2019.

¹³ Krzysztof J. Pelc, "Seeking Escape: The Use of Escape Clauses in International Trade Agreements," *International Studies Quarterly* 53, no. 2 (2009): 349–368.

¹⁴ Komisi Pengamanan Perdagangan Indonesia, "Laporan Akhir Hasil Penyelidikan Tindakan Pengamanan Perdagangan Terhadap Impor Barang," *Komisi Pengamanan Perdagangan Indonesia*, 2019.

method of proof can only be carried out if there is only one country that dominates market share from several exporting countries.

The second option, a country can prove a more general state of unforeseen so that it can explain the increase in imports from all exporting countries. The second way can be done like the Appellate Body verdict in the case of Argentina - Footwear, where the Appellate Body said that the state must prove an increase in the quantity of imports is an unpredictable or unexpected condition. Changes in domestic consumer tastes, as happened in Hatters' Fur case can also prove the existence of unforeseen development.¹⁵ Such proof will be more general so that it can explain the unforeseen circumstances that cause an increase in imports.

Egypt's monetary crisis cannot explain the cause of the increase in pasta import from countries other than Egypt, such as Indonesia, Mauritius, and Turkey, which dominate the imported pasta market in Madagascar. On the other hand, the use of an unforeseen state from only one country in the determination of safeguards itself does not constitute a violation of the provisions of the GATT / WTO. This is justified because unlike the imposition of Anti Dumping Duty and countervailing measures, safeguards are security measures that can be carried out without the need to prove unfair trade.¹⁶ The absence of trade fraud makes safeguards not only applicable to certain countries but also applies to all countries that export to countries that apply safeguards. In this context, safeguards cannot be applied only to Egypt as a country that has unforeseen development conditions, but also applicable to all countries that export pasta to Madagascar, including Indonesia. These provisions are carried out not to violate the principle of non-discrimination, especially the principle of Most Favored Nations.

Based on this elaboration, safeguard investigations can still be carried out against Indonesia and may even be subject to safeguard provisions. The same thing applies to all countries that export pasta to Madagascar, even though Madagascar only proves unforeseen development from one country alone. Exceptions are only applicable to developing countries in accordance with the provisions in Article 9.2 Agreement on Safeguard.

¹⁵ Raychaudhuri, "The Unforeseen Developments Clause in Safeguards under the WTO: Confusions in Compliance."

¹⁶ Robert E. ; Jeffrey W. Stagg Baldwin, "An Analysis of ITC Decisions in Antidumping, Countervailing Duty and Safeguard Cases," *Weltwirtschaftliches Archiv* 130, no. 20 (1994): 290–308.

c. Serious Injury

Article 4.1 (a) Agreement on Safeguard provides the following definitions of serious injury:

"Serious injury shall be understood to mean a significant overall impairment in the position of a domestic industry"

The existence of a serious injury can be characterized by overall impairment or overall damage to the domestic industry. The existence of overall impairment must be proven by the authorities by showing related facts that occur in the domestic industry. Article 4.2 Agreement on Safeguard determines at least seven aspects that must be proven to have occurred overall impairment. The seven aspects are the increase in imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and labor.

Madagascar determined the overall impairment for their domestic industry in several aspects, including an increase in imports as explained above and a downward trend in import prices marked by a CIF decline in pasta imports from 2015 to 2018 and not offset by the ability of industrial production domestic. The market share of imported pasta in the domestic market took over the share of the domestic pasta market which has continued to fall since 2015, even in 2018 the market share index for domestic products is less than half of the market share of imported products. This also affects the sales index which continues to decline, especially between 2017-2018 there was a decline of 11 points. Profits earned by domestic producers continued to decline by 72% from 2015 to 2018. Even in 2016, the profit index was only three points. In the aspect of labor, the domestic industry is trying to reduce employment so that the labor index in 2018 is the same as in 2015.¹⁷

Apart from all the exposures regarding serious injury, based on Article 4.1 (c) SA, the Government of Madagascar must also explain the "domestic industry". The provision provides an understanding that included in the domestic industry are domestic industries that produce similar products or products that compete directly with imported products that are in safeguard provisions. The Government of Madagascar in the notification of the safeguard investigation dated July 22, 2019, did not specify which domestic industry specifically was meant. Based on the results of the safeguard investigation which began on

¹⁷ World Trade Organization, "Notification on WTO No. G/SG/N/7/MDG/4."

September 20, 2018, and was stopped by the Government of Madagascar on July 10, 2019, the domestic industries were Socobis, Salone, and Habibo Mills. The three domestic industries then withdrew their request for an investigation into pasta imports without specifying specific reasons.¹⁸

If the domestic industry leaves undetermined, then all of the descriptions about serious injury will be like a trumped-up thing. From that description, we can conclude that serious injury of Madagascar domestic industry was not proven.

d. Causal Link

The determination of causality must be based on concrete facts of an increase in imports that causes serious injury or threaten of serious injury to the domestic industry. Importing countries must also examine other factors beyond the increase in imports that can cause serious injuries or threaten serious injuries to the domestic industry at the same time. Every factor that allows the occurrence of a serious injury or threaten of serious injury must be examined to determine which factors are truly the cause. Factors that have not been proven to cause must be separated as non-attribution factors.¹⁹

In the context of this causality relationship, two relationships must be proven, those are the increase of import which resulted in serious injury and the threat of serious injury to the domestic industry, and the increase of imports occurred due to unforeseen development.²⁰ The surge in imports must be the main cause of serious damage to the domestic industry.²¹

As explained earlier, the Government of Madagascar in the second investigation did not indicate which domestic industries suffered serious losses. As explained in Article 2.1 SA, that safeguard provisions can only be done, one of which, if the domestic industry, which produces similar goods or goods that compete directly, suffers serious damage or threat of serious damage. If Madagascar does not explain the intended domestic industry, then the serious injury and causality that they are trying to prove will be not valid.

¹⁸ Madagascar, “Notification on WTO, G/SG/N/8/MDG/1/Suppl.1, G/SG/N/10/MDG/1/Suppl.1, Dan G/SG/N/11/MDG/1/Suppl.3,” n.d.

¹⁹ Barutu, *Ketentuan Antidumping, Subsidi, Dan Tindakan Pengamanan (Safeguard) Dalam GATT Dan WTO*.

²⁰ Mevy; Siti Mahmudah and FX. Joko Priyono Adine, “Tindakan Pengamanan Perdagangan Terhadap Kain Tenun Dari Kapas Dan Benang Kapas Sebagai Akibat Peningkatan Volume Impor Tekstil,” *Diponegoro Law Review* 5, no. 2 (2016): 1–14.

²¹ Dukgeun Ahn, *Restructuring The WTO Safeguard System, The WTO Trade Remedy System: East Asian Perspectives* (London: Cameron May, 2006).

3.2. Safeguard Re-Investigation by Madagascar Government of Pasta Products from Indonesia Based on GATT / WTO

The investigation is a fundamental activity in proving the establishment of safeguard provisions. The purpose of the investigation is to find evidence that can be a reason for a country to implement safeguards based on both Article XIX GATT and Article 2 SA. The evidence is absolute as Article 2 SA includes a clause "only if" in the sentence "A member may apply a measure to a product only if that member has determined ..." which means that safeguard provisions can only be done if a country can find evidence as specified in the Agreement on Safeguard. Through this, we can conclude that without an investigation, a country cannot find evidence, and without evidence, the safeguard provisions cannot be applied.

In the case between Madagascar and Indonesia, if we look at the investigation currently carried out by the Government of Madagascar as a stand-alone investigation, the Government of Madagascar has almost fulfilled the formal provisions regarding the investigative mechanism stipulated in Article 3 SA. This can be seen from the investigation established by a special authority namely ANMCC, the existence of open notification regarding the start of the investigation, and the publication of the development of findings in the investigation through the WTO.

Based on the explanation above, the investigation carried out by the Government of Madagascar is a legitimate investigation and can be continued until the application of definitive safeguard provisions, but the problem is that the investigation carried out by the Government of Madagascar is not independent of itself. The existence of the first investigation certainly affects the second investigation and the second investigation also cannot be separated from the first investigation, because it will be related to the duration and extension of the safeguard.

The first link between the first and second investigations on pasta products is that there is a bias in the object of the second investigation conducted by the Government of Madagascar. In the notification dated July 12, 2019, to the Committee on Safeguard, Madagascar informed of the termination of investigations only on products with HS 1902190 and 19023090. Products with HS codes 19021190 and 19022090, which were also objects of the first investigation, were not explained.²² Then, on notification 4 dated July 22, 2019, Madagascar stated that the object of its investigation was products with HS codes 1902190, 19023090, 19021190, and 19022090

²² Madagascar, "Notification on WTO, G/SG/N/8/MDG/1/Suppl.1, G/SG/N/10/MDG/1/Suppl.1, Dan G/SG/N/11/MDG/1/Suppl.3."

without explaining whether the investigation of products with HS codes 19021190 and 19022090 was a further investigation or not.²³

The biased object is related to the rules regarding the stipulation of PSM. In this case, we can see that for the same products with HS codes 19021190, 19021990, 19022090, and 19023090 classified under the Madagascar tariff code, two investigations have been carried out and these products have been subject to PSM twice in the form of tariff increases ad valorem at 30% of the CIF price.

The imposition of PSM is regulated in Article 6 SA and must be considered in its compliance with Article 7 SA regarding the period of safeguard application. This is necessary because this is not the first PSM provision applied by Madagascar for imported pasta.

The PSM applied by Madagascar in this second investigation took effect on August 1, 2019. Meanwhile, during the first investigation, the PSM provisions were imposed by the Government of Madagascar on January 22, 2019, and terminated simultaneously with the cessation of the first investigation on July 10, 2019. Termination of the PSM the first and the enactment of the second PSM are only 25 days apart, whereas Article 7.5 of the Agreement on Safeguard states that a product that has been stipulated by a provision cannot be subject to the same provisions unless it has passed a period of two years without the application of these provisions.

The PSM in this second investigation also does not constitute an extension of PSM in the first investigation, so they are not subject to Article 7.2 and 7.3 SA. That means, if the Government of Madagascar wants to re-apply PSM to pasta products, then the Government of Madagascar must wait at least two years after the provisions of the first PSM were revoked, that is, at least until July 10, 2021. A period of 25 days is certainly far appropriate according to provisions of Article 7.5 SA. Moreover, in this second investigation, the Government of Madagascar has set an investigation period, which is 9 months and not more than 12 months, so that at the end of the second investigation the Government of Madagascar was still unable to apply the PSM.

The imposition of PSM on imported pasta twice in the near future by the Government of Madagascar in the form of additional tariffs certainly has the potential to hamper the export of

²³ World Trade Organization, "Notification on WTO No. G/SG/N/7/MDG/4."

Indonesian instant noodles and pasta. This contradicts the initial concept of safeguards intended to suspend a country's obligations to temporary multilateral trade concessions.²⁴

The application of PSM twice clearly does not reflect the provisionality of safeguards, especially the nature of PSM. The maximum duration of PSM is no more than 200 days, in accordance with Article 6 SA, while the total PSM period set by the Government of Madagascar, both on the first and second investigations, is 369 days. Such a long period of time gives benefit for Madagascar because only with preliminary determination they can apply PSM that is equivalent to the definitive safeguard provisions. This is clearly not consistent with Article 6 SA.

In this case, the Government of Madagascar has twice applied a provisional measure in the form of an additional tariff of 30% from CIF. This certainly affected the export costs that must be borne by exporters and leads to rising prices for similar imported products, and consumers will tend to choose products with lower prices and thus will reduce the market share of imported products.

The GATT / WTO in general as well as the Agreement on Safeguard in particular do not regulate re-investigation or the duration of the investigation. The Government of Madagascar itself has conducted a second investigation by fulfilling formal requirements. The increase of imports can also be proven in the preliminary determination. This opens opportunities for Madagascar to establish definitive safeguard provisions.

On the other hand, there are also weaknesses and deviations from the second investigation. The biased object of investigation causes legal uncertainty. In addition, in the preliminary determination, which was the reason for the re-investigation and enactment of the PSM, the Madagascar government also did not clearly state which domestic industry is a competitor of the pasta product under investigation. This causes the verification of the serious injury to be doubted and if the serious injury is not proven then the causal link cannot be proven.

Based on the explanation above, the Government of Madagascar can continue the second investigation and be obliged to make publications on new findings that can be evidence that safeguard provisions can be applied. On the other hand, the Government of Madagascar cannot continue the PSM because it has passed the specified period. Definitive safeguard provisions also cannot be applied because of the lack of evidence. If the investigation continues, then Indonesia, which for the last four years has been ranked as the third-largest pasta exporting country in Madagascar, has the potential to be subject to definitive safeguard provisions.

²⁴ Chad P. ; Mark Wu Bown, "Safeguards and the Perils of Preferential Trade Agreements: Dominican Republic-Safeguard Measure," *World Trade Review* 13, no. 2 (2014): 179–227.

4. Conclusions

This research concluded that Madagascar did not meet the elements of Article XIX GATT in determining the preliminary determination of the second investigation, those elements are serious injury and causal link, because they did not explain which domestic industry was affected by the increased of import. On other hand, the second investigation can still be carried out because it is in accordance with the formal provisions of Article 3 SA but PSM cannot be applied anymore because it violated Article 6 and 7.5 SA. Based on this conclusion, Researchers suggest Madagascar immediately fulfill the elements of serious injury and causal link in their next notification to WTO and terminate the PSM. Indonesia is expected to conduct a consultation with Madagascar.

Acknowledgment

This article is part of the author's thesis supported by second and third authors as the thesis supervisor. We thank our lecturers who have supported us with their expertise, and in particular, we would like to thank Mr. Darminto Hartono as the thesis examiner who has provided insights that complemented this article.

References

- Adine, Mevy; Siti Mahmudah and FX. Joko Priyono. "Tindakan Pengamanan Perdagangan Terhadap Kain Tenun Dari Kapas Dan Benang Kapas Sebagai Akibat Peningkatan Volume Impor Tekstil." *Diponegoro Law Review* 5, no. 2 (2016): 1–14.
- Adolf, Huala. *Hukum Perdagangan Internasional*. Depok: Raja Grafindo Persada, 2006.
- Ahn, Dukgeun. *Restructuring The WTO Safeguard System, The WTO Trade Remedy System: East Asian Perspectives*. London: Cameron May, 2006.
- Baldwin, Robert E.; Jeffrey W. Stagall. "An Analysis of ITC Decisions in Antidumping, Countervailing Duty and Safeguard Cases." *Weltwirtschaftliches Archiv* 130, no. 20 (1994): 290–308.
- Barutu, Christophorus. *Ketentuan Antidumping, Subsidi, Dan Tindakan Pengamanan (Safeguard) Dalam GATT Dan WTO*. Bandung: Citra Aditya Bakti, 2007.
- Bown, Chad P.; Mark Wu. "Safeguards and the Perils of Preferential Trade Agreements: Dominican Republic-Safeguard Measure." *World Trade Review* 13, no. 2 (2014): 179–227.

- Dimiyati, Khudzaifah. *Metodologi Penelitian Hukum*. Surakarta: Fakultas Hukum UMS, 2004.
- Grossman, Gene M. ; Petros C. Mavroidis. “United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe From Korea Not for Attribution.” *World Trade Review* 4, no. S1 (2005): 99–132.
- International Monetary Fund. “Report for Selected Countries and Subjects.” *International Monetary Fund*, 2019.
- Kementerian Perdagangan Republik Indonesia. “ITC Calculations Based on UN COMTRADE Statistics.” Jakarta, 2019.
- . “Statistics Indonesia.” Jakarta, 2019.
- Komisi Pengamanan Perdagangan Indonesia. “Laporan Akhir Hasil Penyelidikan Tindakan Pengamanan Perdagangan Terhadap Impor Barang.” *Komisi Pengamanan Perdagangan Indonesia*, 2019.
- Madagascar. “Notificationon WTO, G/SG/N/8/MDG/1/Suppl.1, G/SG/N/10/MDG/1/Suppl.1, Dan G/SG/N/11/MDG/1/Suppl.3,” n.d.
- Mertokusumo, Sudikno, and A. Pitlo. *Bab-Bab Tentang Penemuan Hukum*. Bandung: Citra Aditya Bakti, 1993.
- Olsson, Carl-Owe. “Developing Countries and Emergency Safeguards Measures in World Trade Law.” University of Lund, 2006.
- Pelc, Krzysztof J. “Seeking Escape: The Use of Escape Clauses in International Trade Agreements.” *International Studies Quarterly* 53, no. 2 (2009): 349–368.
- Raychaudhuri, Tilottama. “The Unforeseen Developments Clause in Safeguards under the WTO: Confusions in Compliance.” *The Estey Centre Journal of Intrnational Law and Trade Policy* 11, no. 1 (2010): 302–20.
- Vermulst, Edwin ; Marta Pernaute and Krista Lucenti. “Recent European Community Safeguards Policy: Kill Them All and Let God Sort Them Out.” *Journal of World Trade* 38, no. 6 (2004): 955–84.
- World Trade Organization. “Notification on WTO No. G/SG/N/7/MDG/4.” *World Trade Organization*, 2019.