

1-31-2015

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Recommended Citation

Johan, Eva (2015) "SAFEGUARD MEASURES IN THE FRAMEWORK OF ASEAN-KOREA FREE TRADE AGREEMENT (AKFTA) ON TRADE IN GOODS COMPARE TO GATT/WTO," *Indonesian Journal of International Law*: Vol. 12: No. 2, Article 4.

DOI: 10.17304/ijil.vol12.2.600

Available at: <https://scholarhub.ui.ac.id/ijil/vol12/iss2/4>

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SAFEGUARD MEASURES IN THE FRAMEWORK OF ASEAN-KOREA FREE TRADE AGREEMENT (AKFTA) ON TRADE IN GOODS COMPARE TO GATT/WTO

Eva Johan *

Abstract

Safeguard measures is one of the WTO instruments to protect domestic industry from import product. Safeguards provision has some requirements to fulfill. A safeguard is one of trade instruments regulated on WTO Agreement. The member could provide safeguards measure for protecting his domestic industry in such increased import quantities product and under such conditions as to cause or threaten serious injury to domestic producers. This article aims to compare the rules of safeguard are regulated in Asean-Korea Free Trade Agreement (AKFTA) with WTO Rules. It is concluded that there are some different provisions of safeguard between the two regulations in the aspect of the applicability on the of safeguard measure, the Dispute settlement mechanism and the time period of safeguard measures.

Keywords: *Safeguard measures, Asean-Korea Free Trade Agreement, WTO Rules, GATT, trade in goods*

I. INTRODUCTION

Since 1947 there are more than hundreds of regional economic agreements, namely European Union, NAFTA, ASEAN, SAARC, MERCOSUR, Australia-New Zealand Closer economic relations Agreement, etc.¹ Free Trade Agreements (FTAs) are undoubtedly becoming a prominent feature in the world trading system. An FTA may be an easy substitute for a difficult multilateral arrangement. At present, the big four FTAs (the EU, NAFTA, the MERCOSUR and the ASEAN) account for 82,91% of the total export trade² and 63% of the total im-

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¹ Highlight of WTO (World Trade Organization), 4th edition, Direktorat Jenderal Perdagangan, Perindustrian, Investasi dan HKI, Dirjen Multilateral, Department of Foreign Affairs, 2006, p. 63.

² UN-COMTRADE 2006 in Figure 8.1. Shares of Regions in Worlds Exports, Tri Widodo, International Trade, Regionalism and Dynamic Market, Faculty of Economics and Business Gadjah mada University, BPFE Yogyakarta, 2010, hlm. 172

port trade in the world.³

Recently, good product from Korea has increased tremendously in our domestic market, especially for electronics product. Korean product starting to substitute china product in every part of goods. With an equal quality, less price and better design, Korea product becoming an alternative product choices over japan product. Surely, Indonesia is a big market in Korea.

Attache Reports, Ministry of Trade Republic of Indonesia in Korea stated that non-oil and gas export value has decreased 7,94%, from US\$ 1.364,55 million during the period January–Pebruari 2012, becomes US\$ 1.256,23 million in the same period in 2013. Because of Korea export value to Indonesia higher than its import, so Korea trade balancing with Indonesia during the period January–Pebruari 2012, so Korea trade balancing with Indonesia as much as US\$ 37,73 million, or deficit in Indonesia as much as US\$ 37,73 million. Meanwhile, export Indonesia oil and gas value to Korea during the period January–Pebruari 2013, also decreasing 40,29% compared to oil and gas export value in the same period in 2012, from US\$ 1.561,91million become US\$ 932,59 million. Main import product from Korea to Indonesia are electronic and automotive spare part.⁴

Noted, during the period January-Pebruari 2013 main export product Indonesia to Korea are mining (coal, nickel, chrome, etc.), natural rubber, chemical product, yield and house electricity. And having decreasing on demand for few Indonesia mining products from Korea caused by substituting Korea import to another country such as Australia, Japan and USA.

According to this period information, there are important thing has to be considered. First, the export composition from Indonesia to Korea still dominated by mining product, which they are limited resources and its export value getting decreased and rare in the future. So that, Indonesia expected to increase other than mining product to be expor-

³ WTO, International Trade Statistics 2009, pp. 178-179, Tables A3 and A4, available at: http://www.wto.org/english/res_e/statis_e/its2009_e/its2009_e.pdf.

⁴ <http://www.kemendag.go.id/id/view/trade-attache-report/114/2013/4>, Perkembangan Perdagangan Indonesia-Korea Selatan Periode: Januari-Februari 2013, Laporan ITPC Busan, Korea Selatan, Pebruari 2013

ted. Second, progressing on import value of non oil and gas Korea is increasing faster than the import value of non oil and gas Indonesia in Korea. Indonesia once again expected to increase its export products from non-oil and gas sector, to decrease and to avoid the deficit gap condition over trade balancing with Korea.⁵

Safeguard measures is one of the WTO instruments to protect domestic industry from import product. Safeguards provision has some requirements to fulfill. *A safeguard is one of trade instruments regulated on WTO Agreement.* The member could provide safeguards measure for protecting his domestic industry in such increased import quantities product and under such conditions as to cause or threaten serious injury to domestic producers.

II. UNDERSTANDING REGIONAL TRADE AGREEMENT OVER THE GATT / WTO

The trend toward regional integration has uncertain consequences for the world trading system. Economist divides the consequences of preferential trading arrangements into two categories- “trade creation” and “trade diversion”. *Trade creation* refers to the expansion of trade with efficient suppliers inside the customs union or free trade area. *Trade diversion* refers to a shift in trade from efficient suppliers outside the regional arrangement, to inefficient suppliers inside it, driven by the desire to take advantage of trade preferences.⁶

Although RTAs are by nature discriminatory, they are capable of deeper trade reforms since they are more like-minded and committed and often linked geographically and culturally. The access to wider regional markets motivates deep economic and institutional integrations. Additional economic reforms enhance the regional cost advantage and eventually allowing the region to reach multilateralism and gain globally-oriented efficiency. The marginal regionally-oriented trade and investment reforms (removal of protection) tend to allocate resources

⁵ Ibid

⁶ John H. Jackson, William J. Davey, Alan O. Sykes, Jr, *Legal Problems of International Economic Relations: cases, materials and text*, 3rd edition, American Casebook Series, West Publishing, USA, 1995, p. 465.

within the region in response to elimination of quotas and removal of tariffs in the traditionally protected sectors. On the other hand, globally-oriented reform policies are likely to trigger regional economic activities and factor mobility through creating links between the regional firms and industries due to lower transaction and transportation costs.⁷

WTO law provides for 'regional integration exceptions'. These exceptions allow Members to adopt measures otherwise WTO-inconsistent taken in the context of the pursuit of regional economic integration. The regional integration exceptions are set out in Article XXIV of the GATT 1994 (elaborated in Understanding on Article XXIV). WTO law recognizes the advantages of economic integration and trade liberalization even when these efforts involve only some of its Members. A measure otherwise inconsistent with the GATT 1994 is justified under Article XXIV of the GATT 1994:

1. If the measure is introduced upon the formation of a customs union, a free trade area, or an interim agreement, that meet all requirements set out in WTO law; and
2. If the formation of the customs union or free trade area would be prevented, i.e. made impossible, if the introduction of the measure concerned was not allowed.⁸

III.HIGHLIGHT ASEAN-KOREA FREE TRADE AGREEMENT (AKFTA) ON TRADE IN GOODS

Republic of Korea and ASEAN Member countries reaffirming their commitment to eliminate duties and other restrictive regulations of commerce on substantially all trade in goods within the specified time frames, while allowing flexibility for them to address their sensitive areas in the Agreement on Trade In Goods Under The Framework Agreement on Comprehensive Economic Cooperation Among The Governments of Southeast Asian Nations and The Republic of Korea (AKFTA).

⁷ Kankesu Jayanthakumaran and Reetu Verma, *International trade and regional income convergence: the ASEAN-5 evidence*, Research online: <http://ro.uow.edu.au/commpapers/479>, p.6

⁸ Peter Van den Bossche, *Excerpts From The Law and Policy of World Trade Organization: Text, Cases and Materials*, Chapter 7: Trade Liberalisation Versus Other Societal Values and Interests, Cambridge University Press, 2006, p. 39

Sanchita on her research explain about economic relation coverage of ASEAN+1 FTAs. The five FTAs was signed in **different time periods**. When the AEC was adopted in 2007, ASEAN had already signed the ASEAN-China FTA (ACFTA; trade in goods and services) and ASEAN-Korea FTA (AKFTA; trade in goods). Importantly, Each of these ASEAN+1 FTAs differs in terms of way of negotiation and economic coverage (*Table 1*).⁹

Table 1: Economic Coverage of ASEAN+1 FTAs

	AANZFTA	ACFTA	AIFTA	AJCEP	AKFTA
Signed	2009	2002	2009 (G)	2008	2006
Date of Entry into Force (EIF)	January 2010 (G, S, I)	July 2005 (G), July 2007 (S), Feb 2010 (I)	January 2010 (G)	December 2008	June 2007 (G), May 2009 (S), Sept 2009 (I)
Negotiation Approach	Comprehensive Single Undertaking	Sequential	Sequential	Single Undertaking	Sequential
Total Population, million, 2011	635	1955	1815	736	658
Total GDP, US\$ billion, 2011	3822	9474	4003	8043	3292
Total Trade, US\$ billion, 2011	2983	6036	3162	4072	3474

Note: G: Goods, S: Services and I: Investment

Single Undertaking: Virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately.

Sequential: A leading country decides whether to negotiate sequentially with only a subset of countries or simultaneously with all countries

In the last five years, the content of the five ASEAN+1 FTAs has been deepened. In the ACFTA, two service packages were concluded and an investment agreement was signed. Also, in the AKFTA, services and investment agreements were reached. ASEAN managed to conclude its services and investment negotiations with India in December 2012, and is currently negotiating in similar areas with Japan. Hence,

⁹ Sanchita Basu Das, Moving ASEAN+1 FTAs towards an effective, www.iseas.edu.sg/.../ISEAS-Perspective-2013-29....

all the FTAs are broad agreements with many WTO-Plus elements. The key provisions of ASEAN+1 FTAs are shown in *Table 2*.¹⁰

Table 2: Key Provisions of ASEAN+1 FTAs

	ACFTA	AJCEP	AKFTA	AANZFTA	AIFTA
A. Goods					
Tariff Elimination					
ROO					
Trade Remedies-Anti Dumping					
Trade Remedies-Subsidies and Countervailing					
Trade Remedies-Bilateral Safeguards					
Agriculture					
Textiles and Apparel					
Quarantine and SPS Measures					
Other Non-Tariff Measures					
Technical Barriers to Trade					
Standards and Conformance, MRAs					
Customs Administration and Procedures					

From Table 2. above, it's shown that ASEAN+1 FTAs covered in AKFTA doesn't come with specific agreement concerning Safeguard measures separately. So that, we only discuss and make comparison between Article 9 AKFTA on Trade in Goods and under WTO rules are Article XIX GATT 1994 and the Agreement on Safeguards.

What does safeguard measures? WTO law provides 'emergency exceptions'. These exceptions set out primarily in Article XIX of the GATT 1994 and the Agreement on Safeguards, allow members to adopt measures otherwise WTO –inconsistent in situations where a surge in imports causes, or threatens to cause, serious injury to the domestic industry. The otherwise WTO-inconsistent measures taken in economic emergency situations are referred to as “safeguard measures”. Safeguard measures temporarily restrict imports to allow the domestic

¹⁰ Ibid

industry concerned time for structural adjustment to new economic realities. Safeguard measures typically take the form of customs duties above the binding or quantitative restrictions. Safeguard measures must be limited in time and applied in a non-discriminatory manner. Moreover, a member applying a safeguard measure must seek to compensate other Members affected by the measure.¹¹

*A safeguard is one of trade instruments regulated on WTO Agreement. The member could provide safeguards measure for protecting his domestic industry in such increased import quantities product and under such conditions as to cause or threaten serious injury to domestic producers. Safeguards measure meant for avoiding a situation where member state WTO finds difficulties water must let domestic market bothered by import product or must withdraw from membership. Because of that, GATT 1947 requires a special requirement in the case of emergency action under Article XIX GATT 1947 entitled *Emerging Action on Imports of Particular Products*. Specified some requirements how safeguards measures can be executed.¹² Safeguard measures set out in the safeguard Agreement as an integrated provision, completing Article XIX GATT 1994.*

Safeguard measures is measures which are justified under the economic emergency exception provided for in Article XIX of the GATT 1994 and the Safeguards Agreement. The purpose of the a safeguard measure is to give 'breathing space' to a domestic industry to adapt itself to the new market situation by temporarily restricting imports. Safeguards measure therefore typically takes the form of:

- a. Import tariff for duration of four years,
- b. Quota for duration of four years,
- c. Combination Tariff and Quota for duration of four years.

Safeguard measures are, by nature, temporary measures. Article 7.1 of the Agreement on Safeguards provides that safeguards measures may only be applied for such a period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment.

¹¹ Ibid, p.39

¹² Indonesia Safeguarding Trade Committee/Komite Pengamanan Perdagangan Indonesia (KPPI), *Perlindungan Industri melalui Kesepakatan Safeguards World Trade Organization*, p. 2.

IV. COMPARISON BETWEEN AKFTA PROVISION AND GATT/ WTO PROVISION REGARDING SAFEGUARDS MEASURES

It should be discussed on how is the position of ASEAN-Korea FTA in the Regional Trade Agreement WTO in the first place. Then, it will analyze deeper on what is the differences of safeguarding measures between AKFTA and GATT/WTO.

Tania Voon divided some Regional Trade Agreement (RTAs) as a model for reducing trade remedies¹³ into three categories, even though most RTAs do not vary the general WTO rights to impose trade remedies, or they modify these rights in only a minor way.

Category 1: No changes to WTO Rules

This kind RTAs makes no mention of WTO anti-dumping, countervailing, or safeguard measures (thus leaving the WTO rules unmodified, and maintaining rights to impose trade remedies in accordance with those rules) or make significant changes to the WTO trade remedy provisions.

Category 2: Introduction of bilateral safeguards

The Category 2 RTAs all provide additional rules for bilateral safeguards (that is, safeguard applied between RTA partners as opposed to global safeguards applied to all WTO members in accordance with GATT Article XIX and the Safeguards Agreement). These bilateral safeguards are sometimes described as ‘tariff snapbacks’, because they involve reversion of MFN tariff rates in particular circumstances. Sometimes bilateral safeguards are allowed for a transitional period only and sometimes only in relation in specific products or for specific purposes. These kinds of RTAs, in allowing the imposition of global as well as bilateral safeguards, have the potential to *increase* the use of ‘trade remedies’, broadly defined, among WTO Members. Although some of the agreements specify that global and bilateral safeguards cannot both be applied in the same instance,¹⁴ these kinds of RTAs do not

¹³ Trade remedies covered dumping, countervailing, and global safeguard measures. This paper only focus discussed on safeguard measures.

¹⁴ See, eg, AKFTA Article 9.10. Similarly, Article 5.8 of the Agreement on Agriculture precludes recourse to both the special safeguards under that agreement and global safeguards under Article XIX of the GATT 1994.

provide much of a model in demonstrating how to reduce the use of trade remedies in the WTO.

Category 3: Procedural modifications and bilateral safeguards

RTAs Category 3, make procedural changes to the application of WTO trade remedies and also provide additional rules regarding the application of bilateral safeguards. As with the procedural changes in these RTAs include enhanced notification requirements before applying trade remedies.

From Tania Voon research paper above, it's clear that ASEAN-Korea Agreement on Trade in Goods (AKFTA) is RTAs under category 2. As stated before, this paper will be examined particularly article 9 AKFTA concerning Safeguard Measure, which obligate:

Each party which is a WTO member retains its rights and obligations under Article XIX of GATT 1994 and the WTO Agreement on Safeguards. The actions taken pursuant to Article XIX of GATT 1994 and the WTO Agreement on Safeguards shall not be subject to the Agreement on Dispute Settlement Mechanism under the Framework Agreement.¹⁵

No Party may impose an AKFTA Safeguard Measures on a good to which actions are being applied pursuant to Article XIX of GATT 1994 and the WTO Agreement on Safeguard. When Party intends to apply, pursuant to Article XIX of GATT 1994 and the WTO Agreement on Safeguards, an action on a good to which AKFTA safeguard measure is being applied, it shall terminate the AKFTA safeguard measure prior to the imposition of the action to be applied pursuant to the Article XIX of GATT 1994 and the WTO Agreement on Safeguards.¹⁶

From those provisions, it's clear that AKFTA specify that global and bilateral safeguards cannot both be applied in the same instance. In line to safeguarding measure, on Dispute Settlement Mechanism, every action taken pursuant to the global mechanism cannot be subject to the bilateral dispute settlement mechanism. Meaning, Party member of the WTO and AKFTA as well, should determine whether they are going to apply global or bilateral provisions to overcome their dispute settle-

¹⁵ Article 9.1 AKFTA

¹⁶ Article 9.10 AKFTA

ment on safeguard measure.

Since there is no particular agreement concerning safeguard measure in AKFTA agreement on trade in goods, then we should look at Article 9 comprehensively.

AKFTA has borrowed the basic logic of safeguard from WTO disciplines.¹⁷ According to Article 9.3 of the AKFTA Agreement, safeguard measures can be by a party applied under the following conditions:

1. If, as an effect of the obligations incurred by the Party;
2. If as a result of unforeseen developments; and

Similar with Article XIX GATT 1994 and Article 2.1 Agreement on Safeguards, AKFTA pursuant Party with the requirements shall meet. These requirements are:¹⁸

1. The 'increased imports' requirement (must be recent, sudden, sharp and significant);
2. The 'serious injury' requirement (injury factors include: the rate and amount of the increase imports of the product concerned, in absolute and relative terms); and
3. The causation requirement (the test for establishing causation: the 'causal link' sub-requirement; and the 'non-attribution' sub-requirement)

Apparently, from Article 9.3 above, it's stated that AKFTA safeguard measures has the same qualification with Article XIX GATT 1994 and Article 2.1 Agreement on Safeguards in determining condition for safeguard measures applied. However, the safeguard discipline under AKFTA are remarkably less restrictive than the corresponding rules in the WTO Agreements in respect of the application and duration of safeguard measures.

There are two kinds of AKFTA safeguard measures could be taken

¹⁷ Writer has influenced by Wang Jiangyu research paper on making comparison between AKFTA and WTO rules regarding safeguard measures. Wang Jiangyu, ASEAN-ACFTA: legal and Institutional Apects, www.eastlaw.net/jyworks/wang-acfta0001.pdf, p. 122-123.

¹⁸ Peter van den Bossche on Eva Johan, The Protection of Domestic Industry through safeguards Instrument GATT/WTO and Its Implementation on Downstream Steel Industry in Indonesia, *Indonesia Journal of International Law*, Vol. 9 Number 4 July 2012, CILS UI, p. 625

by the party, which are suspension the further reduction of any rate of tariff provided and increase the tariff rate concerned to a level not exceed the lesser of the applied MFN tariff.¹⁹ Although tariff measures are the only form of safeguard protection under AKFTA, there is still remarkable limit on the level of tariff increase. The tariff can only be increased from AKFTA preferential tariff rate to the importing country's. WTO MFN tariff rate applicable to the product. this is to say, even in the worst scenario, the exporting country is still guaranteed the treatment as a WTO partner of the importing country.

AKFTA safeguard measure can only initiated on a product within the 'transition period' of that product. "A Party shall have the right to initiate safeguard measure on a good within the transition period for that good. The transition period for a good shall begin from the date of entry into force of AKFTA to trade on goods and seven (7) years from the date of completion of tariff reduction/elimination for that good."²⁰ After the seven years, trade in liberalized goods can no longer be subject to investigation and imposition of safeguard measures. Under the WTO rules, safeguard measures can however be initiated and applied at any time. Clearly while the WTO only disciplines safeguard measures, AKFTA aims at eliminating this form of protection completely after a short transition period.

Any AKFTA safeguard measure may be maintained for an initial period of up to three (3) years and may be extended for a period not exceeding one year if it is determined pursuant to the procedures referred to in paragraph 6 that the measure continues to be necessary to prevent or remedy serious injury and to facilitate adjustment and that there is evidence that the domestic industry is adjusting. Notwithstanding the duration of an AKFTA safeguard measure on the good, such a measure shall terminate at the end of the transition period of that good.²¹

Compare to the article 7.1 Agreement on Safeguards²², the AKFTA initial period for maintained safeguard measures is only three years and

¹⁹ Article 9.4 AKFTA

²⁰ Article 9.2 AKFTA

²¹ Article 9.5 AKFTA

²² Article 7.1 Agreement on Safeguards provides safeguard measure must not exceed four years with an extension possible up to four years with some requirements. See Article 7 Agreement on Safeguard

only could be extended for one year more. Article 9.5 AKFTA provides some requirements concerning an provisional safeguard measures²³ as well. And it says AKFTA provisional safeguards adopt the rules under the WTO Agreement on Safeguard, but with the exception of the quantitative restriction set out in Article 5, Article 9, Article 13 and Article 14 of the WTO Agreement on safeguards, and all other provisions of the WTO Agreement on Safeguard. Those provisions *mutatis mutandis*, be incorporated into and an integral part of this AKFTA agreement.

Under the WTO, the importing nation can use tariff measures or quantitative restrictions such as quotas. The AKFTA Agreement, in contrast, does not allow the contracting parties to use quantitative restriction measures of the WTO Agreement on safeguards.

In seeking compensation, AKFTA has different way.²⁴ The Parties shall seek the good offices of the Implementing Committee to determine the substantially equivalent level of concessions. And any proceedings arising from such good offices shall be completed within ninety (90) days from the date safeguard measures was applied.

V. CONCLUSION

There are some differences provisions to safeguard measures between bilateral²⁵ and global²⁶ regim. Here are safeguard measures in AKFTA agreement comparable to the WTO provisions (Article XIX and the Agreement on Safeguard) :

AKFTA specify that global and bilateral safeguards cannot both be applied in the same instance. In line to safeguarding measure, on Dispute Settlement Mechanism, every action taken pursuant to the global mechanism cannot be subject to the bilateral dispute settlement mechanism. The AKFTA initial period for maintained safeguard measures is only three years and only could be extended for one year more. Comparing with Agreement on Safeguard, which provides safeguard mea-

²³ See Article 9.6 AKFTA

²⁴ See the differences between Article 8 Agreement on Safeguard and Article 9.8 AKFTA

²⁵ AKFTA Agreement

²⁶ WTO (GATT 1994 and Agreement on Safeguard)

sure must not exceed four years with an extension possible up to four years with any requirement.

Compensation determined by the Implementing Committee to determine the substantially equivalent level of concessions with good offices mechanism. In taking the safeguard measure, some requirements remaining condition applied. Article 9.3 AKFTA agreement has the same requirements shall meet with Article XIX GATT 1994 and Article 2.1 Agreement on Safeguards. For provisional safeguard measures, AKFTA agreement adopt Agreement of Safeguard WTO as an integral part of AKFTA.

At the end, however, safeguard measures as an instrument to protect domestic industry is only able to apply when some specify requirements met. There are still not balance between import and export goods among Indonesia and Korea. In the future, export mining from Indonesia will be less, meanwhile import of electronics and auto parts from Korea still higher. It will make a big gap between two countries. Considering they don't have the same product.

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