

Indo-Australian Economic Cooperation & Trade Agreement (ECTA): Trade Remedies & Measures

written by Jidesh Kumar | May 11, 2022



India Australia ECTA

This article is regarding the India-Australia Economic Co-Operation and Trade Agreement (ECTA) which was signed on April 2nd 2022 and is part of our ongoing series on the historic deal. The trade deal enables Australian businesses to unlock or expand their operations in the Indian market of nearly one and a half billion consumers.

In this section, we will focus on the trade remedy pathways available under the India-Australia ECTA.

Trade Remedies Under ECTA

In the context of international trade, the term 'trade remedies' refers to prescribed measures that seek to provide a solution for perceived abuses or points of conflict international trade of goods. Three main types of import restraints recognized by the WTO as trade remedies are anti-dumping measures, countervailing duties and various safeguard measures. The ECTA conforms to WTO measures by listing the following under its trade remedies clauses:

- Anti-dumping measures
- Subsidies and countervailing measures
- Global safeguard measures
- Bilateral safeguard measures

We will expand on these measures below.

1. Anti-dumping measures

In practical application, anti-dumping measures act as a prohibiting provision against exporters selling goods at unfairly low prices as compared to prices in their home market. Though it is not prima facie illegal, dumping can result in market injury. Under the current trade deal, dumping goods in a dynamic market such as India's can cause injury to local businesses of the importing country. To ECTA, therefore, lays down that:

"Nothing in this Agreement affects the rights and obligations of the Parties under Article VI of GATT 1994 and the Anti-Dumping Agreement with regard to the application of anti-dumping measures."

Article VI of the GATT directs a Party to take action if the other Party causes or threatens material injury to an established industry in the territory of a contracting Party or materially retards the establishment of a domestic industry. It also provides rights of levying anti-dumping duty to

prevent dumping.

2. Subsidies and countervailing measures

The ECTA places emphasis on subsidies and countervailing measures as necessary trade remedies for the deal. Countervailing duty is a remedial measure used to discipline and counteract subsidies by national authorities that unfairly enable their companies to export at a lower price. With regard to this, the clause states that,

"Nothing in this Agreement affects the rights and obligations of the Parties under Article VI of GATT 1994 and the SCM Agreement with regard to the application of countervailing duty measures"

Hereinafter, this clause will help parties levy a special duty for the purpose of offsetting any subsidy bestowed upon the manufacture, production or export of goods in case of injury to its domestic industry. Furthermore, the ECTA discloses a lesser duty rule, i.e., in case an anti-dumping or countervailing duty is levied, parties will be allowed to consider applying a duty less than the margin of dumping or the amount of the subsidy, where such lesser duty would be adequate to remove the injury to the domestic industry in accordance with the Party's laws and regulations.

3. Global and bilateral safeguard measures

In addition to these, some remedial measures under the ECTA that hold paramount importance to the agreement are global and bilateral safeguard measures. To uphold these measures, the ECTA states that,

"Nothing in this Agreement affects the rights and obligations of the Parties under Article XIX of GATT 1994, the Safeguards Agreement and the Agreement on Agriculture."

Article XIX of GATT will permit contracting parties to escape their GATT obligations and raise trade barriers to safeguard any of their producers seriously injured by an increase in imports. Concerning the rationale behind bilateral safeguard measures, it is well known that a primary use of customs duty is to protect domestic businesses from predatory competitors. In a situation where the reduction or elimination of a customs duty of one party under the ECTA causes another party's goods to be imported to the affected party's territory in quantities that pose a serious threat to the domestic party, the following measures are listed,

a) Suspending the further reduction of any rate of customs duty on the good provided for under this Agreement; or

(b) Increasing the rate of customs duty on the goods to a level not to exceed the lesser of:

- the most-favoured-nation applied rate of customs duty on the good in effect at the time the bilateral safeguard measure is applied; and
- the most-favoured-nation applied rate of customs duty on the good in effect on the day immediately preceding the date of entry into force of this Agreement.

4. Applicability of provisional bilateral measures

In circumstances where a delay in applying the aforementioned remedial measures would cause damage that would be difficult to repair, a Party may apply a provisional bilateral safeguard measure. It is a temporary relief granted under special circumstances, and can only be invoked after a Party suffers serious injury to its domestic industry. Other conditions stated in the agreement to avail the measures are:

- Before applying a provisional bilateral safeguard measure, the affected Party

shall notify the other of the preliminary determination and shall immediately initiate consultations afterwards.

- The duration of any provisional bilateral safeguard measure shall not exceed 200 days, during which time the applying Party shall comply with the requirements of the bilateral safeguard measure and its conditions, limitations and compensation.
- The affected Party shall promptly refund any duty collected as a result of a provisional bilateral safeguard measure if the investigation conducted does not result in a finding that the requirements of the bilateral safeguard measure have been met. The duration of any provisional bilateral safeguard measure shall be counted as part of the period described in conditions and limitations.

Conditions & Limitations Of Bilateral Measures

Despite the utility of bilateral measures, Parties are subject to certain conditions and limitations when availing themselves of their benefits.

Pursuant to GATT provisions and in agreement with safeguards, the ECTA lays down that a Party may apply a bilateral safeguard measure only following an investigation by the Party's competent authorities in accordance with the procedures and requirements provided for in Articles 3 and 4.2 of the Safeguards Agreement, and to this end, Articles 3 and 4.2 of the Safeguards Agreement are incorporated into and made part of this Agreement, *mutatis mutandis*.

The provision mandates that parties would be required to conduct an investigation followed by reasonable public notice to all interested Parties and public hearings or other appropriate means. In addition to that, the gravity or severity of the alleged injury needs to be determined by competent authorities – based on facts and not merely allegation, conjecture or remote possibility.

Neither Party shall apply or maintain a bilateral safeguard measure:

- a. Except to the extent, and for such time, as may be necessary to prevent or remedy serious injury and to facilitate the adjustment of the domestic industry.
 - b. For a period exceeding two years; however, that period may be extended by up to one year if the competent authorities of the applying Party determine (in conformity with the procedures specified in this Article) that the measure continues to be necessary to prevent or rectify serious injury and to facilitate adjustment and that there is evidence that the industry is adjusting.
 - c. Regardless of its duration, any bilateral safeguard measure or provisional bilateral safeguard measure shall be terminated at the end of the transition period.
 - d. No bilateral safeguard measure shall be applied again to the import of any product or good which has been previously subject to such a measure, for a period of time equal to that during which such measure was applied, or one year since the expiry of such measure, or whichever is longer.
 - f. Notwithstanding the provisions of paragraph 6, a bilateral safeguard measure with a duration of 180 days or less may be applied again to the import of a good if:
- At least one year has elapsed since the date of introduction of a bilateral safeguard measure on the import of that product; and
 - A bilateral safeguard measure has not been applied to the same product more

than twice in the five-year period immediately preceding the date of the first imposition of the bilateral safeguard measure.

g. In order to facilitate adjustment in a situation where the expected duration of a bilateral safeguard measure is more than one year, the Party that applies the measure shall progressively liberalise it at regular intervals during its period of application.

h. When a Party terminates a bilateral safeguard measure, the rate of customs duty shall be the rate that would have been in effect but for the bilateral safeguard measure, according to the Party's Schedule to Annex 2A (Tariff Commitments).

Compensation

Finally, the ECTA consists of a clause for mutually agreed upon compensation. It can be inferred that this clause will help remunerate injured members and industries, avoid hurting innocent bystanders and can contribute to more effective compliance.

A Party applying a bilateral safeguard measure shall, in consultation with the other Party, provide a mutually agreed upon trade-liberalising compensation in the form of concessions that have substantially equivalent trade effects or are similar in value to the additional duties expected to result from the bilateral safeguard measure. The Party shall provide an opportunity for such consultations no later than 30 days after the application or the extension of the bilateral safeguard measure.

If the consultations under paragraph 1 do not result in the Parties agreeing on trade-liberalising compensation within 30 days, the Party whose goods are subject to the bilateral safeguard measure may suspend the application of substantially equivalent concessions to the trade of the Party applying the bilateral safeguard measure. This action shall be applied only for the minimum period necessary to achieve the effect of concession.

The right to take action shall not be exercised for the first two years that the measure is in effect, which includes the period of time that any provisional bilateral safeguard measure has been in effect.

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