Training Programme on Trade Remedial Measures

New Delhi, 23-25 April 2009

A Brief Report including Participants' Feedback

Introduction

CUTS Institute for Regulation & Competition (CIRC) has organised this three-day programme with support from the Department of Commerce, Government of India. Twelve persons from different industries and government departments participated in this programme. The agenda is annexed with this report.

This programme was focussed on anti-dumping, anti-subsidy and safeguards measures. It was to strengthen professional skills on how to address issues relevant to trade remedial measures which will help maintaining position in domestic and foreign markets, especially at this time when trade protectionism is growing.

Economic recession is leading to greater protectionism around the world. Given the current economic situation, many industries may not be able to compete with imports. India has laws and rules on all the three trade remedies available under the WTO framework, i.e. anti-dumping duties, countervailing (anti-subsidy) duties and safeguard measures. The rationale of this programme was to provide practical inputs on issues such as calculation of dumping margin and injury and protection of one's exports from the imposition of trade remedial measures in export markets.

The programme content was as follows:

- WTO basic principles and an overview of GATT and specific trade remedy agreements
- Indian anti-dumping and countervailing duty law and practice
- Concepts and issues in dumping margin calculations
- Issues of injury and causal link
- Overview of requirements for filing applications before Designated Authority
- Manner of data compilation by Indian exporters for foreign investigating authorities
- Indian safeguard duty law and practice and product-specific safeguards on imports from China
- Strategies and approach to anti-dumping, anti-subsidies and safeguard measures against Indian exports to major trading partners

Inaugural

Dipak Chatterjee, Director General of CIRC introduced A V Ganesan, Former Member of the Appellate Body of the WTO and G K Pillai, Commerce Secretary to the Government of India. He then stated that CIRC had put together this programme due to the difficult economic times ahead. According to him, Trade Remedial Measures (TRM) are only a temporary relief to deal with unfair competition and ultimately industry will have to improve itself to deal with competition in the future. The second reason for organising this programme was to educate the Indian industry on the procedure to be followed while making applications to the Department of Commerce (DoC) for imposition of TRM. If the industry has not followed the correct procedures while making applications to the MoC, their application may be rejected. He then thanked G K Pillai and DoC for supporting this Programme.

G K Pillai reinforced what was said by Dipak Chatterjee when he stated that since the Indian industry was not aware of all that is required to make an application, they did not come prepared and therefore this programme was all the more important. He also asked the industry to keep in touch with the Government and inform it in case they faced problems while exporting. He added that we generally impose more anti-dumping (AD) measures than safeguard measures despite the fact that the imposition of the latter takes less time. Such use of non-tariff barriers (NTBs) by developing countries to protect their markets is not appreciated by the developed countries.

A V Ganesan stated that tariffs were no longer an issue but that NTBs were proliferating in developed countries. But, he said, the DoC could not help industry in the improvement of the quality of its products. However, sometimes, the industry instead of upgrading its products for the external market sells them in the domestic market, for example spurious drugs are sold in India. He also mentioned that we should make developed countries fulfill conditions peculiar to the Indian market to sell their products in India rather than just imposing additional duties.

Dipak Chatterjee made two important points. Firstly, he stated that since our industry knew how to sidetrack laws, it does not inform the DoC if it came across unfair laws in its export markets. However this can only take the industry up to a certain point and sooner or later the concerned authorities in the market will come down on our industry. Hence, the industry should inform MoC of the NTBs it faces. Secondly, he stated that the industry should be creative and come up with NTBs that cannot be challenged or it will be time-consuming to challenge them. The idea is to come up with ingenuous NTBs to prevent the coming in of products when they harm our industry.

One of the participants said it was difficult to contact the Government. However Dipak Chatterjee and G K Pillai responded that things were changing and some officers were receptive. For the others, one would have to be persistent.

Session 1 Basic Principles of GATT and an Overview of the Trade Remedy Agreements of WTO, A V Ganesan

In his lecture, A V Ganesan gave an explanation of the history and the basic principles of the GATT and WTO. He went on to say that TRM were like safety valves in the midst of liberalisation. The Anti-dumping Agreement (ADA) was invoked much more than the Agreement on Subsidies and Countervailing Measures (ASCM) and the Safeguards Agreement (SA) the provisions of which were much more stringent and difficult to apply. He added that ADA is meant to remove injury by dumping rather than protect the domestic industry. He also pointed out that industry must prove the causal link between dumping and injury. He clarified that dumping and margin were individual exporter-related concepts but cumulation was allowed in case of injury, which should be within the investigation period. There was a question regarding the availability of data related to price of goods exported. He stated that it could be found in industry journals, published reports and from consultants.

Coming to ASCM, A V Ganesan said it was an agreement against the behaviour of governments. He further said that subsidies were of three types, prohibited, permissible and actionable. As regards SA, he stated it was a clamp on the quantity i.e. exporting member is told of the quantity it can export. In reply to a question, he said that it was easy to impose provisional safeguard duties but that the exporting country could also impose countermeasures. Responding to another question, he said that two simultaneous actions under the agreements could be taken but two remedies could not be imposed simultaneously on the same product. Similarly two reliefs could not be given for the same injury.

A participant wanted to know the manner of calculating cost in the case of non-market economy such as China. Another participant raised a question as regards the status of the bailout package of the US Government and whether it could be classified as a subsidy. The status of DEPB (duty entitlement pass book) scheme was also discussed and divergent opinions emerged. One participant said that the DEPB scheme would amount to subsidy. Another said that this scheme neutralise custom duty rates. A V Ganesan said that this and other such schemes amounted to reimbursement of direct and indirect taxes but the fact remained that they were given for export promotion. However, since they had not been challenged in the WTO, it was not clear whether they violated WTO law.

Session 2 Indian Anti-dumping and Countervailing Duty Law and Practice, Sharad Bhansali

Sharad Bhansali underlined that trade remedial measures are exceptions to the principle of non-discrimination and are therefore strictly regulated. According to him, there should be a separate law on AD but in India it is part of the Customs Tariff Act. Explaining the concept of dumping, he said it was a legal fiction or an arithmetical exercise based on law and existed when normal value (NV) was greater than export price.

He specified that even a single producer could ask for imposition of AD duties. He also stated that 90 percent of world trade was dumped but AD was here to stay despite criticism from economists. Domestic and international prices do not play a role in determination of dumping and all cheap imports are not dumped. He mentioned that the investigations were done with a predestined result and that there was tremendous pressure to arrive at a dumping margin. Causal relationship between dumping and injury was very casual and not all injury had to be caused by dumped imports. What is required is an assessment of the actual impact of injury on the industry. Since AD duties are exporter- and country-specific, they are a very specific and targeted duty.

Responding to a question on cost of production, he said that the Profit and Loss Account would have the cost of production for each type of products.

When there was a question regarding standard return on investment for Indian industry for purposes of injury, Sharad Bhansali stated that there was no specific return on investment in India but generally 50-70 percent was taken. A decline in return on investment was a legal requirement but no numerical value was given.

Coming to the lower duty rule, he stated that wherever the US had helped in the establishment of the AD system, AD duty was equal to dumping margin but wherever EC had helped in the establishment of the system such as in India, the lower of the dumping or injury margin was applied. However this system was not without problems.

Session 3 Concepts and Issues in Dumping Margin Calculations, A K Gupta

According to A K Gupta, dumping amounts to discriminatory pricing. He then explained the types of dumping such as input and regional dumping, calculation of Selling and General Administrative (SGA) expenses, ordinary course of trade, constructed export price, comparison of NV and export price and zeroing. Making a clarification, he said that products had to be priced on prevailing prices and not on cost; thus stock losses could not be brought in. A participant said that since zeroing implies reducing negative dumping margins to zero and then calculating the average, it would amount to attributing dumping margin to a product whose margin was negative. A K Gupta was of a similar view. Additionally, he mentioned that the Indian Government had taken a very strong stand against zeroing at the WTO.

He also stated NV was company-specific in the whole world and that the Indian Supreme Court was the only one in the world to hold that NV was country-specific.

Session 4 Issues of Injury and Causal Link, Sharad Bhansali

Sharad Bhansali touched upon calculation of injury margin and the final relief given. The calculation of injury margin is not linked to AD and involves two concepts – Non Injurious Price and Landed Value. In response to a question, he clarified that the law does not allow consideration of opportunity cost in the calculation of these values. Responding to a question regarding the course of action to be taken in case NV and export price were the same but domestic price was lower, Sharad Bhansali said that since there was no dumping, AD duties or even safeguard measures could not be imposed. In response to a query on currency fluctuations, he said that export price is taken in USD and domestic price is converted from national currency to USD and then the exchange rate of the day of the contract (date of realisation in India) is taken into consideration.

He said that India followed the lesser duty rule and had asked to make it mandatory in the WTO but the USA disagreed. He also explained price undertakings, reviews, types of duties and anti-circumvention laws. Coming to the investigation process, he said that India did not have a timeline but that it was generally done in one year.

He then defined subsidies and responded to a query that benefits offered in SEZs were countervailable subsidies. He explained few other subsidy schemes which would not stand the test in WTO. According to Dipak Chatterjee, the DEPB system had been made in such a way that it was a subsidy.

According to a participant, many Indian judges were not good at accounts and numbers even though they were brilliant in law. Therefore this needs to be developed and not only the judiciary but the bureaucracy also needs to be trained in India.

Another issue that merits further discussion is the causal link between dumping and injury which is handled in an extremely casual and cavalier manner. This is because if one does not prove that a substantial part of the injury is caused by other factors, we cannot presume causal link between dumping and injury, as the WTO Appellate Body requires proof of partial injury by dumping.

Additionally, as regards like products, the Indian position was that the two products should be similar in all respects unlike the WTO position according to which the two products should be identical in all respects.

Reiterating what A K Gupta had said the previous day, he said that in the case of Reliance PTA, the Supreme Court had enunciated the rule of one country one NV for one type of product in situations where no exporter from the country responds. As a consequence, NV is country-specific in India and nowhere else in the world.

India follows the lesser duty rule unlike USA. The advantage with the American system is that there is no use of discretion.

Session 5 Overview of Requirements for filing Applications before Designated Authority, Neeraj Varshney

Neeraj Varshney stated that the AD law looks at the phenomenon of price and that dumping was price discrimination between two international markets. He then spoke on the information to be given to Department of Commerce (DoC) when an application is filed. The information has to be given on an application proforma. The starting point is the product under consideration (PUC) which needs to be defined.

Coming to circumvention, he said it amounted to making a cosmetic change in the product to circumvent the duty imposed.

To a question as to how do interested parties find out that an investigation has commenced, he stated that the commencement of an investigation was advertised in the Gazette, on the DoC website and notified to all known parties to get their views. The petitioner is required to give information on interested parties to the DoC so that the latter may intimate them. He said that investigations could be started *suo moto* or on a petition but that the former was rare. He also looked at like product, volume and value of imports and *de minimis* criteria. He said those representing 25 percent of the production could make an application; in this context domestic production is a wider term than domestic industry. He also explained NV in non-market economy countries.

According to him volume and value of imports was a fundamental requirement and availability of accurate information remained an issue. Moreover, it was a complicated exercise to get evidence of NV. One would have to ask our missions abroad for help, consult journals or see data websites.

Session 6 Manner of Data Compilation by Indian Exporters for Foreign Investigating Authorities, R S Ratna

R S Ratna stated that safeguards could be global or bilateral/regional. In case the exports of one member of a Free Trade Agreement (FTA) are harmful for another member, the latter should impose bilateral and not global WTO safeguards. Preferential Trade Agreement (PTA) safeguards can be taken on originating goods only and that too where preferences are available. The remedy is to suspend the tariff concessions provisionally maximum to Most-Favoured Nation (MFN) levels. In FTA safeguard, the duty is zero and it can be increased to MFN level.

There must be existence of subsidies in export price and causal link between subsidy and injury must exist to impose Countervailing Duty (CVD). In safeguards, there is no unfair trade practice (UTP) involved. Injury is caused by the exports of an efficient producer. Therefore, safeguard measures are not permanent and aim to give time to the domestic injury to adjust.

Coming to issues of data collection, he said that the data required for AD, CVD, WTO safeguard and bilateral safeguard investigations is different. If the authorities of the importing member want to start an investigation against the exporter, they send a questionnaire to him/her. He also explained how the export data of exporter and the import data of importer were not the same and that most organisations like the WTO relied on import data. This is because actual physical imports have taken place and customs authorities collect revenue on imports; thus import data is more authentic. The data disparity could be due to re-exports, high sea sales, over/under invoicing, company to company transfers or circumvention through certification, etc.

He also said that the importing country's data could be useful for the exporter and could be found on the internet or through a consultant. Possible solutions were to look for places/sites/agencies where authentic and official data was available, official reports of importer and its export data.

Session 7 Indian Safeguard Duty Law and Practice and Product-specific Safeguards on Imports from China, A K Gupta

Safeguard duty deals with fair priced imports. AD duty and CVD are actions taken against something wrong and therefore, they do not amount to protection. When a participant asked why dumping was wrong, A K Gupta responded that international economics could not justify lower profits in the export market as compared with those in the domestic market.

There are two safeguard laws – general and transitional product- and China-specific under the Accession Protocol of China. Concessions do not have to given to China in the latter case. He further explained that safeguards deal with the problem of sudden increase in imports due to unforeseen circumstances, in a relatively short period. Since safeguard is a protection, it should be used sparingly and equivalent concessions should be given to partner on whom safeguards are applied. An adjustment plan within safeguard duty period is required except in the case of China-specific safeguards. Safeguards can be in the form of a duty or Quantitative Restrictions (QR) law. To another question whether duty and QR could be imposed simultaneously on the same imports, he responded that such imposition is WTO-compatible and once India comes up with a QR law for safeguards, a combination of duty and QR may be used. He added that AD and safeguard duties could co-exist.

Coming to injury he said that the standards in India were higher than in USA and Europe and the scrutiny in India was very high as it was difficult to convince Indian authorities of injury.

India does not have a QR law for safeguards and industry should ask for it.

As AD duty is not a revenue generating exercise for the Government, it should be distributed as consumer welfare.

Serious injury is more than material injury but what is "serious" is not clear. Increased imports can be quantified but serious injury is subjective. According to R K Gupta, serious would include going from profit to loss.

Replying to a question, A K Gupta said that the law did not fix any period for which one must wait before filing an application but that it depended on circumstances.

On another query, he replied that even though WTO law allowed both retrospective and prospective duties, the Indian law allowed only the latter which was a fallacy in the law. Additionally, he said that clear evidence of irreparable damage to domestic industry is needed to refund provisional duties if unjustified. A participant asked how such clear evidence could become invalid in future so as to result in refunding of duties? According to A K Gupta, since safeguards can be extended a number of times, many sunset and mid-term reviews can take place.

Session 8 Strategies and Approach to Anti-dumping, Anti-subsidies and Safeguard Measures against Indian Exports to Major Trading Partners, Krishnan Venugopal

Krishnan Venugopal explained the strategies to be used by exporters before the commencement of TRM investigations. The exporters could modulate their export strategy so as not to invite TRM for example not export at dumped or subsidised prices or they could explore other markets for their exports. However the use of exchange rate policy is difficult from the standpoint of producing industries apart from being highly politically sensitive.

As regards strategies during an investigation, he stated that exporters should be highly proactive upon initiation and do a cost-benefit analysis of cooperating with the authority as compared with exclusion from the market; start liasing with the Indian Government and Embassy and competitors to evolve a common position; appoint firms with expertise in cost accounting and law in the market of importing member; hire economists and accountants in importing member to do injury analysis with respect to domestic industry and ensure no response by companies that have large dumping or subsidisation margin.

Elaborating on circumvention strategies against TRM, he said that exporters could do the assembly operations in or transfer part of the manufacturing process to third or importing country. They could also alter the characteristics of the product so that it is no longer a like product.

The Government can threaten retaliation through TRM against domestic industry of investigating member or through Dispute Settlement (DS) proceedings against it. It can also lobby with the foreign affairs ministry of the investigating country or threaten cross-sectoral retaliation.

He stated that circumvention is not a viable strategy and it has high implementation costs.

A participant enquired if there were any special provisions for developing countries in subsidies – he responded that Special and Differential Treatment (S&DT) provisions were meaningless in practice.

He went on to state that DS could also be a pressure tactic. However, firstly it did not award retrospective compensation since the measures were struck down for the future and secondly it could nullify negotiated gains which could be dangerous for developing countries whose industry may therefore not prefer to go in for DS. Additionally he stated that the DS system was power-based and could not be made completely neutral. It could be made more transparent since uncomfortable arguments are swept under the carpet.

Closing

Dipak Chatterjee introduced R Gopalan, Additional Secretary to the Department of Commerce, Government of India and the Designated Authority on Anti-dumping.

A participant raised a question about consideration of consumer interest in India like in the European Union while taking trade remedial measures and R Gopalan replied that the Ministry of Finance takes it into account through public interest. To a query that AD and safeguard duties are mutually exclusive, he replied that it was not fair to have both duties. Another participant wanted to know whether basic customs duty plus AD duty can exceed bound rate and he replied in the affirmative stating that bound duty is based on most-favoured-nation principle of the WTO whereas AD duty being against unfair trade practices does not follow that principle. Another question was whether any analysis was being done on the fact that trade remedial measures could divert and create trade for another country. R Gopalan said that the purpose of trade remedial measures is to counter unfair trade practices and that there is little that the DoC can do about trade diversion.

A discussion on the DEPB scheme took place. While one participant felt that it is a good scheme, another asked why continue with it if it is countervailable. To this R Gopalan replied that only a small fraction of this scheme has been countervailed. However Dipak Chatterjee said it had been countervailed many times but its replacement had not been found as state level taxes were acting as a hurdle. He added that in this scheme, benefit to exporters comes from government's revenue.

Dipak Chatterjee concluded the programme by thanking the Department of Commerce for its support and the participants for their active participation.

Participants' Feedback

Following the successful completion of eight sessions, CIRC requested the participants to assess this programme and share their feedback through a structured questionnaire. The participants were requested to quantify different facets of the structure of this programme as well as of different sessions with respect to their effectiveness, etc. The results drawn from that assessment are as follows.

Table 1: Structure of the Programme

Sl. No	Name of the Participants	Quality of the presentations	Length of the sessions	Quality of the resource materials	Event organisation	Venue	Total
1	Sudhir Kumar *SIEMENS Ltd., IA&DT. Thane, Maharashtra*	7	2	7	7	6	29
2	Deepika Luke *Junior Economist, Corporate Economics Cell, Aditya Birla Group*	8	8	5	6	7	34
3	D. N. Mathur *Deputy Industrial Advisor (Pharmaceuticals), Deptt. of Pharmaceuticals*	9	5	9	8	8	39
4	S. K. Mukherjee *Addl. Economic Advisor, Min. of Commerce & Industries, Deptt. of Industrial Policy & Promotion*	10	8	9	9	8	44
5	Anurag Saxena *Director, Deptt. Of Commerce*	7	6	5	6	6	30
6	Ravi Shankar *Dy. General Manager, Aditya Birla Group*	7	6	6	6	6	31
7	Jasbir Singh *Industrial Advisor, Deptt. of Chemicals & Petrochemicals*	9	7	9	9	9	43
8	Ritesh Kumar Singh *Manager (Trade Policy), Aditya Birla Management Corporation Pvt. Ltd. Mumbai*	8	4	8	3	3	26
9	Rahul B. Somrot *Sr. Manager, Trade Finance, Ranbaxy*	7	7	7	7	7	35
	Total	**72**	**53**	**65**	**61**	**60**	**311**

* Rate on a scale of 1-10, where 10 represents Excellent and 1 represents Poor
** Total participants: 12
*** Nine participants have given their feedback.

From Table 1 we can rate the percentage of satisfaction on the structure of the programme. They are given in Table 2 below.

Table 2: Percentage of Satisfaction on the Programme Structure				
S. No.	**Structure of the Programme**	**Maximum points**	**Points given by the participants**	**Percentage of satisfaction**
	Category			
1	Quality of the presentations	90	72	80
2	Length of the sessions	90	53	58.89
3	Quality of the resource materials	90	65	72.22
4	Event organization	90	61	67.78
5	Venue	90	60	66.67
	Total	**450**	**311**	**69.11**
* Rate on a scale of 1-10, where 10 represents Excellent and 1 represents Poor ** Total participants: 12 *** Nine participants have given their feedback.				

In case of "length of the sessions" some participants said that it could have been increased by reducing the number of sessions. Some also said that in some sessions there were repetitions and that should be avoided through better prior briefing of the resource persons. In short, a majority of the participants said that it would be better to have this programme in two days with lesser number of sessions with more duration of a session.

In respect of 'effectiveness' the participants rated different sessions in a scale of 10. These figures are given in Table 3 below.

Table 3: Effectiveness of Different Sessions										
		Sessions								
Sl. No	**Name Of The Participants**	**I**	**II**	**III**	**IV**	**V**	**VI**	**VII**	**VIII**	**Total**
1	Sudhir Kumar	7	7	8	7	5	7	7	8	56
2	Deepika Luke	8	7	5	8	5	10	7	10	60
3	D. N. Mathur	9	9	9	9	9	9	9	9	72
4	S. K. Mukherjee	10	10	10	10	6	10	10	10	76
5	Anurag Saxena	6	6	6	-	-	8	8	9	43
6	Ravi Shankar	7	7	7	7	7	7	7	7	56
7	Jasbir Singh	10	8	8	8	5	9	8	9	65
8	Ritesh Kumar Singh	9	8	7	8	5	10	7	8	62
9	Rahul B. Somrot	7	7	7	7	7	7	7	7	56
	Total	73	69	67	64	49	77	70	77	546
* Anurag Saxena did not rate Session IV and V.										

Overall rate of satisfaction was 7.8 out of 10. A majority of the participants was more than 75 percent satisfied about the effectiveness of different sessions. The following table represents session-wise percentage of satisfaction.

Table: 4 Percentage of Satisfaction on the Effectiveness of Different Sessions								
Sessions								
	1	**2**	**3**	**4**	**5**	**6**	**7**	**8**
Percentage of satisfaction	81	76	74	80	61	85	77	85

The following are some suggestions for future programmes on this subject:

- The course material should be made short and more informative for the Indian audience.
- There should be more emphasis on case studies.
- More case laws should be discussed.

A majority of the participants said that they would like to participate in similar programme to gain more advanced knowledge on this subject and understand its applicability.

A number of participants suggested that this programme should be held in Mumbai at a regular interval.

Agenda

23 April 2009

0915-0930 **Registration**

0930-1030 **Inauguration**
Dipak Chatterjee, Director General, CIRC
A V Ganesan, Former Commerce Secretary to Government of India and Former Member of the Appellate Body of the WTO
G K Pillai, Secretary, Department of Commerce, Government of India

1030-1100 **Break**

1100-1300 **Session 1** Basic Principles of GATT and an Overview of the Trade Remedy Agreements of WTO *A V Ganesan, Former Commerce Secretary to Government of India and Former Member of the Appellate Body of the WTO*

1300-1400 **Lunch**

1400-1600 **Session 2** Indian Anti-dumping and Countervailing Duty Law and Practice *Sharad Bhansali, Managing Partner, APJ-SLG Law Offices*

1600-1615 **Break**

1615-1815 **Session 3** Concepts and Issues in Dumping Margin Calculations *A K Gupta, TPM Consultants*

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0915-1115 **Session 4** Issues of Injury and Causal Link *Sharad Bhansali, Managing Partner, APJ-SLG Law Offices*

1115-1130 **Break**

1130-1330 **Session 5** Overview of Requirements for filing Applications before Designated Authority *Neeraj Varshney, Director (Foreign Trade), Department of Commerce, Government of India*

1330-1430 **Lunch**

1430-1630 **Session 6** Manner of Data Compilation by Indian Exporters for Foreign Investigating Authorities *R S Ratna, Professor, Centre for WTO Studies, Indian Institute of Foreign Trade*

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0915-1115 **Session 7** Indian Safeguard Duty Law and Practice and Product-specific Safeguards on Imports from China *A K Gupta, TPM Consultants*

1115-1130 **Break**

1130-1330 **Session 8** Strategies and Approach to Anti-dumping, Anti-subsidies and Safeguard Measures against Indian Exports to Major Trading Partners *Krishnan Venugopal, Senior Advocate, Supreme Court of India*

1330-1430 **Lunch**

1430-1630 **Closing**
R Gopalan, Additional Secretary, Department of Commerce, Government of India
Dipak Chatterjee, Director General, CIRC