CIRC Training Programme on Anti-dumping, Anti-subsidy and Safeguard Measures
Kilachand Conference Room, Indian Merchants' Chamber Building, IMC Marg, Churchgate, Mumbai, 8-10 October 2009

Day 1

Opening Session

Mukesh Kacker, the Director General of CIRC welcomed the participants and gave an introduction of CIRC. He acknowledged the support of the Department of Commerce (DoC). Explaining the logic of organizing this programme, he said it was a result of globalization and protectionism, which required Indian business to rise to the challenges of these two forces.

Session 1 Overview of the WTO Agreements on Trade Remedial Measures, Sanjay Notani

In his lecture, Sanjay Notani said that trade remedial measures (TRM) come every three years. They are like the economy. If the economy is going down, TRM come up. He then gave an introduction of the World Trade Organization (WTO) explaining WTO principles like non-discrimination (Most Favoured Nation {MFN} and National Treatment), enforceable commitments, transparency and safety valves. He also explained the MFN principle and its exceptions under strict conditions like Free Trade Agreements (FTAs), special access for developing countries, barriers against unfair trade, and discrimination in services. He went on to explain national treatment, the WTO Dispute Settlement Mechanism (DSM), the Trade Policy Review Mechanism (TPRM) and showed the Trade Policy Review (TPR) Secretariat Report of India. Explaining the utility of TPRM, he said it reduces pressure on DSM. He then explained the three TRM.

Anti-dumping Agreement (ADA)

He explained anti-dumping measure, its history and legal framework (article VI GATT) saying it is not protectionist and is championed by India. Article 1 of ADA states that there should be dumping, material injury and causal link. Article 2 touches upon determination of dumping. Some countries have interpreted "Commerce of another country" in such a way that a bill of lading not resulting in shipping of the goods yet has resulted in dumping. According to him, every word of this article has great ramifications. Mukesh Kacker asked if these provisions were analogous with the predatory pricing provisions. Sanjay Notani replied that that was not the case. Dumping margin is the difference between export price and Normal Value (NV). NV is disregarded in the following cases: in non-market economy (NME), if sales are below the cost of production, if sales are below five percent in export market, and if sales are to a related party. He then elaborated on NV and export price, like products, factors considered for like articles, and injury (article 3).

Article 3 requires positive evidence but evidence does not have to be positive in all respects. He also mentioned the types of injury; material injury, threat, and material retardation of the establishment of a domestic industry. The last one is important because companies may start with optimism but dumped imports materially retard the establishment of these companies in the start up phase. He also referred to cumulation in article 3.3. Volume and price are to be considered for cumulation. The following questions need to be answered to apply cumulation. Is more than one country injuring you? Can you cumulate these countries and put them in one investigation? This is allowed under certain conditions. Mukesh Kacker wanted to know the purpose of cumulative evaluation. Sanjay Notani replied that it is used at the time of evaluating import data to find out if the products are like products and whether or not they are injuring the company. The aim is to make sure that evaluation of injury is transparent and objective.

India initiated a safeguard case against passenger car tyres. He asked if it was possible to compare a radial to a normal tyre or tryes made for tractors only? Use of passenger car tyre and tractor tyre is not the same. He then explained the concept of *de minimis*. Margin of dumping is exporter specific. He also described the injury parameters examined and evaluated by the Authority under AD law. Injury parameters are for three years. He detailed each parameter, which could be case-specific or country-specific etc.

Coming to an essential point, he explained causal link under article 3.5. If an export driven company cannot compete with local companies, the authorities have to examine other factors apart from local companies causing injury to the export driven company. For example, floods, contraction of demand, development in technology, export performance etc may cause a problem. Domestic industry may try to hide these factors. Causal relationship between dumping and injury is required. Investigative authority has discretion on how causal link is to be figured. But many industries have standards regarding this.

He also explained that threat of injury under article 3.7 is used mainly in sunset review and mid term review. During this time period, the expression “threat” is used more by domestic industry; whether or not the threat is continuing. There are long-term contracts in some industries and thus markets are set. Ten or fifteen percent of the capacity is left. People use this saying the leftover capacity will come to India. Can this be used as a threat? This depends on regions, people, trading community, and countries etc.

Domestic industry is dealt with by article 4. This is very important. Like product comes into play. If domestic industry is more then 25 percent but less than fifty percent and the opposition is more than the domestic industry, then it cannot bring an AD action. This is *locus standi*. Article 4.1 deals with who can file AD petition. Confidentiality is dealt with under article 6.5. Large companies are worried about handing over their information to authorities in countries especially developing countries like India and China which may have loose standards regarding this. If the country is important for a company, it should open up all its books of account.

Provisional measures under article 7 should not come before sixty days. Some countries have a retrospective system so the company has to bear the brunt of duties irrespective of 60 days. Investigation officer may not be able to come up with a determination in 60 days because he may have too many investigations on his table etc. He then explained annexes I and II to ADA and the investigation procedure.

Rajiv Bhatia asked whether a concerned party that is not responding in a new shipper review would be tagged as non-cooperative. Sanjay Notani said it can only come again in sunset or mid term review. Rajiv Bhatia asked if a transaction against advance licence could be considered when it is applying for the second time. Sanjay Notani said that was not possible because these transactions were not considered for as Anti-dumping Duty (ADD). Rajiv Bhatia said that duty levels were so high and thus no transactions could be done at that level so how could they become eligible second time? Sanjay Notani replied that the party should meet the authority and try to convince it. Depending on the facts of the case, sometimes they have considered it and he can come out of the tag. Rajiv Bhatia wanted to know the minimum number of transactions required. Sanjay Notani said that even one transaction is fine but there should be representative sales.

Agreement on Subsidies and Countervailing Measures (ASCM)

He gave the definition of subsidy and explained the reason for the inclusion of the concept of financial contribution and its forms. There should be a charge on the public account to be a subsidy. Financial contribution may be very complex and is not a subsidy unless it confers a benefit. It is difficult to prove that a benefit is conferred. In the European Union (EU), we still do not know the benefits it gives to its farmers. Then we found some papers and legislations etc but it is impossible to know. India is more transparent than EU, United States of America (USA), and China. We lose as regards paperwork is concerned. The Government needs to walk with the company in case of subsidies which is very difficult. Subsidies need to be specific to be actionable. There are three types of subsidies: red, amber, and green. He also elaborated on prohibited subsidies. Actionable subsidies are not prohibited. There needs to be an injury, serious prejudice, nullification or impairment of benefits to take action. While calculating subsidy, the test is whether there has been a benefit to the recipient and not whether the government has incurred a cost. Method of subsidy calculation is to be published. Injury has to be calculated (article 15). Causal link is also required. Definition of domestic industry is the same as in the ADA. Subsidy margin is to be calculated. Special and Differential Treatment (S&DT) for developing countries is stipulated under article 27.

Safeguards Agreements

Safeguard action, which is set out in article XIX of GATT, is not a TRM. It is an emergency action. Requirements for imposition of safeguards are defined in the Safeguards Agreement and article XIX of GATT. Standards in safeguards are much higher than in AD. Rajiv Bhatia said

that in safeguards, there is less of mathematics and more of subjectivity. Thus, the possibility of misuse of this instrument is higher. Sanjay Notani agreed saying that they had also observed this phenomenon. Increase in imports can be absolute or relative. However in case of safeguards, the focus is on the quantity of imports rather than their value. Periods of investigations in safeguard actions are absurd such as six to twelve months. People have shown recent data of the previous month to say that imports have caused problems. This happens because the Safeguards Agreement has not identified the time period to be investigated. He then referred to the US Steel Safeguards case. He also explained injury saying that in safeguards, it is serious injury and its threat. Serious injury is more severe than material injury in AD. He also elaborated on quotas based on average level of imports, and developing countries and safeguards. Additionally, he mentioned that there could be agreement on how much each exporter will supply.

He then showed figures for each of the three TRM taken from the WTO website. When USA does a case against India, EU will do the same case after a year and *vice versa*. If an AD case is done, then CV case is also done. For India, this is burdensome because it cannot supply the data so quickly.

Session 2 Strategies and Approach to Anti-dumping, Anti-subsidy and Safeguard Measures against Indian Exports, Sanjay Notani

Sanjay Notani began by showing figures for the three TRM. He classified the TRM in two categories: Unfair Trade Practice (UTP) – Dumping, Subsidy and Fair Trade Practice (FTP) – Safeguards. Model match criterion, which came up in the Bed Linen case, is used to solve problems relating to models of the product. For example, it could help in determining the models to be matched if forty yarns are sold in the EC and eighty in India. He then talked of comparative US/EC structure. EC system is not so transparent. US system is very transparent. In EC, no verification reports are available. In USA they are available. US has a lot of information and bases its injury analysis on it. Its analysis is superb. International Trade Court (ITC) is very effective. ITC hearings come after preliminary. Final hearings are very important because they have all the data. One has direct access to Commissioners who ask the questions. US Department of Commerce (USDoC) has a system called SAS and provides all the detailed figures for a high price.

He then elaborated on the pre-investigation strategy in case of

a) Anti-subsidy – it is important to know the subsidies. In India, line paper was subsidized. India was a leader exporting line paper to US. China shifted its whole market to Vietnam and started exporting from there.

b) Safeguards – it is important to keep in touch with your consulate in the destination of your exports.

Going on to the strategy in TRM investigations, he said that it is possible to be involved without receiving notice. Therefore, it is important to find out and lobby people. This works in USA and EC. He reiterated that lobby was not a bad word. Monetary cost is bearable in EC but impossible in USA. The US also has a sampling method.

Coming to post-initiation actions – he advised appointing local and foreign counsels. This also helps in solving translation problems. Local counsel has better understanding of the terrain. Foreign counsel can be helpful if they have closer access to the government and can provide the right data. In USA there are two types of lawyers, one at the ITC and one at the USDoC. While filing documents in the USA, one person has to be there as a postbox to make copies and give to everyone including the domestic industry. Additionally, it is useful to get the Indian Government involved. However, it is important to remember that the Government is not there to help you; instead you have to help them. They do not even know where the records are. Trade disputes are not only about law but also politics. Diplomatic pressure works at times.

He then explained the timetable of AD investigations in USA. The time limit is strict. If the information is not submitted in the requisite format, time, stamps, and paginated etc, it is not accepted. The US only gives an extension of 2-3 days when asked for. The US is very professional unlike the EC. In case of CVD investigations, the Government should be informed of the information shown to the USA when the latter comes to meet the Government.

Elucidating on circumvention, he said that it was not a part of the agreements because of differences between members. EC and US have anti-circumvention laws and want to legitimise them. He then explained the means of circumvention, and the American and European circumvention law.

He also presented the cases related to Indian subsidies in USA and EC commenting on the fact that they even consider wastage. However, some take it as a subsidy and some do not.

Session 3 Indian Anti-Dumping and Countervailing Duty Law and Practice, Sanjay Notani

Starting with CVD law and practice, Sanjay Notani said that there is the law and machinery for countervailing actions in India but there is only one case which is also withering away. India does not have a database. It wants CVD against China but has been unable to find out about Chinese subsidies. Indian industry wants to take CVD action against China but no one has any information. As regards CVD practice, he said there is nothing, which is unlike in AD where there is a practice. Talking from the opposite point of view, he said that once India stops getting the benefit of the WTO Agricultural agreement, the developed countries would start imposing CVD duties on its agricultural goods because India has a price support system.

He then went on to talk about AD law. All laws are in place and there are recent amendments too. With this year's budget, there has been a slight change in section 9A(1) and "any article is

exported" is now succeeded by "by an exporter or producer" because the earlier version was WTO-incompatible. This change was made to override the Reliance case in 2006 in which the NV was made country-specific which created many problems. The Court did not entertain the review so the legislation was changed.

He explained the structure of the Government and the judiciary with respect to AD. Appeals go to Custom Excise & Service Tax Appellate Tribunal (CESTAT). The Designated Authority (DA) is a quasi-judicial body according to the Reliance case. Earlier, the DA called itself an authority but now it is considered a judicial body so has more obligations.

He also used cases to explain concepts and principles in Indian law. There is a polling process to be done. Certain questions can be asked in a writ court. He also explained the concepts of domestic industry, product under consideration, like article, sales of like product in domestic market, export prices, adjustments, NV, non-market economy (NME), confidential information, Non injurious price (NIP), causal link, threat of injury, exporters' records, preliminary findings and whether they are appealable, negligible dumping, *de minimis* rule, initiation and termination, principles governing investigations, natural justice, and best facts available. Facts do not cover statements made in the press. An exact type of report is required and not somebody's thought or perception. Rajiv Bhatia said that many companies go for hedging. Sanjay Notani said that if a product is purchased at 600 and then used, 600 would be taken into account even though the price might have gone up to 900. However, if the product is not used, 900 will be taken into account.

Four conditions are required to be fulfilled for termination of investigation under rule 14. Central Government, domestic industry and exporter sit together for price undertaking and authority fixes it. Limit for completion of investigation is eighteen months and even one more day terminates it. In India, there is not a single case where the Government has imposed retrospective duty even though there is a law regarding it. Preliminary duty stays for 6 months and investigation takes 18 months. There is a duty during the time period between the expiry of the preliminary duty and the date of imposition of final duty because final duty finding goes back to the date of preliminary duty. Dollar denominated duty i.e. duties in US dollars are allowed.

There are three types of reviews - mid term, sunset, and new shipper. Opinion needs to be formed and the threat needs to be real for a review to take place. The condition for asking new shipper review is that the producer did not exist when duties were imposed. Producer can ask for review which will last for one year. During investigation, producer only deposits bonds and then final duty is determined later.

Day 2

Session 4 Concepts and Issues in Dumping Margin Calculation, Sharad Bhansali

There should be solid reasons to ask for both ADD and safeguard duty on a product. T.S. Venkateswaran wanted inputs on calculation of dumping margin. Sharad Bhansali said that it may be risky for any corporate to do these calculations in-house. Earlier, Indian lawyers would play second fiddle to foreign lawyers. Now, Indian lawyers do 80 percent of the work and it reduces the cost to half. There is no compromise in terms of quality when clients hire Indian lawyers. But clients also want local lawyers despite Indian expertise because clients do not want to take a chance.

Sharad Bhansali then explained the meaning of dumping. AD deals with the price behavior of exporters. Dumping margin is present when NV is greater than export price. This is the only definition of dumping margin and it is a legal fiction. No other issues can be brought in. To impose ADD, dumping, injury and causal link are required. Nine out of ten lawyers are not in a position to calculate dumping margin. He then explained the fallacies regarding dumping. Law applies equally for Small and Medium Enterprises (SMEs) and no discounts are available.

Dumping margin is a mathematical calculation so it is called determination of dumping. Contrarily, injury is assessed. Calculation of dumping is very complicated despite the fact that in India, things are done in a very naïve and simplistic way. Prices fluctuate which makes it difficult to decide the price to be taken into account. NV is the comparable price of like article when meant for home consumption. Ordinary course of trade includes sales over a minimum period of 6 months. Every company has sales below cost at some point of time but it is fine as long as they are below 20 percent. He then explained the grounds for discarding the main definition in case of a market economy which may involve discretionary issues. In case of China, the normal principles are not used. China does not need to be taken entirely as a NME. We could allow this status for 5 years but what would happen after that?

India has done more than 225 cases by now. Regarding treatment of costs, he said that the Generally Accepted Accounting Principles (GAAP) of exporting country and not importing country have to be used by the authorities. NV can be discarded in certain circumstances and alternate methods for calculation of NV can be used. Cost of production method is preferred over export price method. This is called constructed NV (CNV).

Duty Entitlement Passbook (DEPB) Scheme is a Government gift to corporates. In India, lesser duty rule is used i.e. lower of injury margin or dumping margin is applied. He then explained the modes of duties.

Session 5 Issues of Injury and Causal Link, Sharad Bhansali

There are three types of injury. There is nothing like threat of dumping even though there is threat of material injury. Threat of dumping is prohibited. Dumping must take place. Explaining like article, he said that products could not be identical in case more than one manufacturer is involved. Domestic industry is the producer of like article compared with product under consideration (PUC). For dumping, it is possible to do analysis for each product but for injury, it

is difficult. Thus overall picture can be taken. Cumulation cannot be done as a matter of routine according to the law but all countries do it as a matter of routine. He also elaborated on the mandatory parameters of injury. AD is a price issue unlike safeguards. *Per se* price as a factor of injury is missing in safeguards. It is relevant only as an indirect issue. Safeguard duty cannot be imposed if you have suffered as a result of price. The three TRM and remedies cannot be combined. WTO panels' analysis is *par excellence* as compared with Indian analysis.

Causal link is the casualty in most cases since it is presumed. Indian authorities do not do the causal link analysis. Causal link leads to unscrupulous practices.

Dumping is inbuilt as long as there are tariffs. There will be dumping if there are tariffs. He went on to explain non-attribution issues. T.S. Venkateswaran asked if ADD is country specific or exporter specific. Sharad Bhansali replied that it is both exporter and country specific.

Session 6 Indian Safeguard Duty Law and Practice, and Product-Specific Safeguards on Imports from China, Moushami Joshi

There are two types of safeguards – general and specific. The concept of a general safeguard is not a violation of MFN. It can be an exception to bound tariffs. Specific safeguards include Transitional Product Specific Safeguard (TPSS) against China which can be imposed only up to 2013.

AD is price based. CVD is subsidy based. Safeguards are a volume based action. The only condition required to be fulfilled is a surge in imports. It is not an UTP but an emergency measure. Imports can increase relatively or absolutely. Serious injury is higher than material injury. In general safeguards, *de minimis* is applicable only for developing countries. For TPSS, injury standard has been diluted and is not serious injury but market disruption; however, the elements are the same. In safeguards actions, the parameter mentioning 25 to 50 percent of domestic industry is not required to be fulfilled. Those having a major share of domestic production have standing. The Directorate General (DG) of Safeguards will look at the standing but there is scope to look at the type of market. Like AD and CVD, there is scope for *suo moto* action. In India, the Government does not have the resources to do it *suo moto*.

Safeguard duty can be applied for four years and it can be in force for ten years cumulatively because the WTO allows it for developing countries. 8 years is the normal period of application of safeguard duties and 10 yrs is an S&DT provision. DG can order duty for a period lesser than what the party asked for. This happened in the case of HUL Soda Ash where they asked for 3 years and the DG ordered 1 year. It can be *vice versa* but why would the Government allow protection more than asked for? Adjustment plan is required only in the case of general safeguards and not in the case of TPSS. Duty for more than a year has to be progressively liberalized. Investigation must be completed in a maximum of 8 months though extension may be allowed. Eight months is not so long given the data to be analysed and hearings to be done. Provisional duty can be asked for in case an immediate duty is needed. Provisional safeguards

can be imposed in critical circumstances. The level of proof is very high but it has been easy to fulfill as far as the DG is concerned.

The purpose of review may be to continue the duty or to withdraw the duty. In AD, exporters and importers contest the duty but the government is not active. In subsidy, the government does participate. In safeguards, the government participates because it is not exporter specific. Governments come on behalf of exporters and participate.

Rajiv Bhatia wanted to know if Russia was not a member of WTO for reasons of natural gas. Moushami Joshi replied in the positive. In AD, the duty can be imposed only 60 days after initiation but there is no such provision in case of safeguards. Rajiv Bhatia said that safeguard is more subjective than AD and CVD. According to Moushami Joshi, it depends on how convincing you are. Rajiv Bhatia said that mathematical calculations are required in the former two TRM. Moushami Joshi responded by saying that figures could be made convincing. She was trying to say that safeguards were not necessarily more subjective. Alok Mishra joined the discussion by saying that serious injury was subjective to which Moushami Joshi and Pallavi Kishore said that material injury was also subjective. The way investigations are done in India has thwarted the development of good jurisprudence. Moushami Joshi then talked about the tussle between the Finance and Commerce ministries. Safeguards postings have become desirable now. To Rajiv Bhatia's query as to who would pay retrospective duties, Moushami Joshi replied that the importer would pay them.

The data should be adequate and accurate. All information is not required but it should be sufficient for the DG to come to the conclusion that preliminary duty can be imposed. More information to boost the case can be given during the process. Increased imports have to be shown. Investigations have been initiated even though incoherent information is given. There is no specific rule on period of investigation. It can be any time period. So there is flexibility unlike in AD. Alok Mishra asked the speaker to elaborate on adjustment plan. Moushami Joshi explained in the following terms. It means whatever the petitioner will do to reduce its cost of production and increase capacity and sales. The DG has to see if injury is self-inflicted and whether the petitioner has tried to improve its situation.

Taking an example of the Compact Discs (CD) market which has gone down, Rajiv Bhatia asked if it was possible for the CD producer to say that it was due to a surge in imports of pen drives. The speaker replied in the affirmative because they could be considered like products. This kind of jurisprudence is not really there in AD because directly substitutable products are used. But you could convince someone in the Ministry of Commerce (MoC). Pallavi Kishore added that both the products (CD and pen drive) have the same purpose. Rajiv Bhatia expanded his question. He said that Moser Baer was the only CD producer in India three years ago. Its profits have come down from abnormal profit to normal profit due to the entry of other producers. How would one deal with this situation? Moushami Joshi replied that profit is a situation of absence of loss. Some applications regarding cases in which profits came down have succeeded.

Rajiv Bhatia asked if a surge in imports due to correction of very high tariff barriers would be covered. Moushami Joshi said yes and no. There can be a situation where the duties have increased and even then safeguards have been imposed.

Rajiv Bhatia raised a question concerning loss of India's negotiating power as it is negotiating FTAs with 10 countries at the same time. He referred to the Association of South East Asian Nations (ASEAN) where India had to negotiate with different members of ASEAN and had to lose out on Rules of Origin (RoO) because it could not negotiate. EU is one entity so negotiating with it is no issue. To this, the speaker replied in the form of a question by asking how active the industry was when the Government was negotiating FTAs? Alok Mishra and Rajiv Bhatia replied that it was very active. She then asked if they had put their question to the MoC to which Rajiv Bhatia replied that they had done so but received no response.

Pallavi Kishore asked if SMEs received special treatment. Moushami Joshi responded in the negative saying that in fact it could be counterproductive in case of SMEs as domestic industry because they do not contribute to the economy and do not fulfill the demand of domestic producers. Also SMEs would have to unite to fulfill the condition of standing since each SME is too small.

Rajiv Bhatia wanted to know about Special Economic Zones (SEZs). Moushami Joshi said that they could not get safeguard duty.

In response to a query by T.S. Venkateswaran and Rajiv Bhatia, Moushami Joshi said that the DA recommended duty in AD and CVD cases but the Finance Ministry decided whether or not to levy the duty. Therefore there was a possibility to lobby the Finance Ministry. DG Safeguards comes under the Finance Ministry but the Board of Safeguards includes the Commerce Secretary. DG Safeguards recommends duty to Board of Safeguards and the Finance Ministry levies the duty.

Taking a specific example, Rajiv Bhatia commented that in India, margins in the petrochemical industry were very low because a duty of 5 percent on raw material and products was imposed. This was unique in the world. There was no differential treatment whereas the differential treatment in USA was 6 percent. Moushami Joshi asked if there were any entry barriers given that the petrochemical industry had duties on many products to which Rajiv Bhatia responded in the negative.

Session 7 Overview of Requirements for Filing Applications before the Relevant Authority, Moushami Joshi

The speaker began by explaining who could file a petition under rule 2(b). In India all the industries are oligopolistic. But the rule gives everyone a voice in the investigation. The petitioner gives an undertaking that s/he is not related to exporters or importers or is not importing the product itself. But this is not a mandatory requirement. It is possible to import the

product and file a petition. Captive consumption of the one who initiates an application will be excluded. If the one who initiates an application amounts to 25 percent of industry, the costing data of its supporters will not be considered except for injury analysis because injury is assessed for entire industry.

Rajiv Bhatia said that there are three players representing 30, 30, and 40 percent of the market. The player with 30 percent market share files an application and the player with 40 percent market share supports him. However, later on the player with 40 percent market share does not provide his data. What can be done in such a situation? Moushami Joshi responded that the DG should not go ahead with the investigation because injury is for the industry as a whole. The DG should come down heavily on the player with 40 percent market share because it provided support but no data. However, the DG has gone ahead with investigation in such cases.

She went on to explain the significance of captive consumption. Captive consumption means that the intermediate product is captively consumed to make the final product. Injury has to be shown for both intermediate and final product. But domestic industry conveniently forgets captive consumption.

She then elaborated on the Period of investigation (POI) under section 9A(3) which effectively means that the remedy is provided after a year for a situation that may no longer exist. However, the POI is sacrosanct and one cannot go beyond POI. But the DoC has taken contracts beyond the POI too and it is a new trend. Rajiv Bhatia asked if the DG could ask for information for next 6 months if there was a delay of 8-10 months. Moushami Joshi replied that POI is fixed by domestic industry. In some cases DG will change POI. The Designated Authority on Anti-Dumping (DGAD) could change the POI if it feels it is incorrect. Then Rajiv Bhatia wanted to know if a new application has to be filed in such a case. To this, the speaker responded that if the application depended on the POI, domestic industry may withdraw the application and file a new one with the new POI.

She then made a comparison of PUC and like product which she termed as very debatable.

T.S. Venkateswaran asked about the number of safeguard initiations in India. Moushami Joshi replied that there had been 12 in a span of 18 months. To T.S. Venkateswaran's next query if they were mostly in chemicals, she said yes. He then commented that powerful coordination with the DoC is required in case of safeguards because procedures are difficult.

The MoC is very strict about confidential information. It will disclose the information if the fact of the information being confidential is not mentioned. It will reject the information and rely on any information it wants to if the information has not been summarized in the way the MoC asked for it. It is not obliged to go looking for information.

Invoices, price lists, and trade journals are valid evidences and serve as data for calculating NV. This is not required to be done in case of a NME. A surrogate country can be used but this rule

has never been applied because the MoC has to go and look at the books of a producer in a third country who will not open its books. If another country is subject to the same investigation, India could use it as a surrogate country for China. She however could not comment on its fairness.

T.S. Venkateswaran asked if capacity utilization is also considered and Moushami Joshi replied in the affirmative.

In a review, the duty cannot be extended from final product to intermediate product because the products are not substitutable. So it can be done only for substitutable products. That is why now the application is initiated for both products.

Export subsidy is assumed to be specific. But in case of domestic subsidy, evidence has to be given that the subsidy is specific while filing the application. India does not have CVD investigations except one against China since it does not have knowledge of other countries' laws. In subsidy cases, preliminary duty is imposed for a non-extendable period of 4 months. It has to be shown that a benefit was conferred. AD and CVD investigations can be done simultaneously but this is never done in India. Sunset and administrative reviews are the same.

Day 3

Session 8 Data Compilation for Initiating and Facing Trade Remedial Measures, Suhail Nathani and Mrugank Kamdar

Suhail Nathani gave two perspectives in his presentation, that of the initiator and that of the exporter. In this, he was assisted by Mrugank Kamdar.

Initiator Perspective

Suhail Nathani began by explaining the difference between AD, CVD, and Safeguards. He said he would not be explaining the data required for CVD measures because they have not taken place in India. He then detailed the data required for AD and Safeguard investigation. For the data, the focus is only on the hurt. In India, import data has to be procured. The trend has been to acquire private source data and each case differs because people try to extrapolate data. Importers have to provide their costing data and therefore provide maximum opposition. ITC Harmonised System (HS) Classification is very important because it forms the basis of duty. India has the most evolved PUC definition and it has evolved as commercial and technical substitutability. The DA needs to have a *prima facie* case where it is satisfied with dumping, injury and causal link.

The data of the Directorate General of Commercial Intelligence and Statistics (DGCI&S) is old and the injury is very badly felt by the time one gets it so one looks at private sources. It is possible to get data from the exporting country for example, China puts its export data online but it is under invoiced. So it is best to rely on Indian customs data. Under invoicing shows higher dumping so it is good. The period with the highest injury should be taken. The injury looks

terrible when data from International Business Information System (IBIS) is compared with DGCI&S data. DGCI&S covers all port data but IBIS does not. Subject countries i.e. countries having above 3 percent import and unfair selling price should be identified. Data must be provided on non-confidential basis so that no one can complain. Threat of imposition of duty may skew the data because imports may go up. Everything above the NIP needs to be excluded. Petitioners do not always name all the exporters. In Indian law, goods originating in or exported from can be subject to ADD. However ADD can be imposed only on goods originating in the country and not on goods exported from the country. So Indian law is not right. Captive consumers are very controversial. ADD is to remedy injury. Captive consumers are incapable of feeling injury so they should not be domestic industry. Captive consumers consume more in case of dumping. So should captive consumers be excluded from domestic industry? This is a debate going on everywhere including India.

Rajiv Bhatia asked if pen drives and CDs could be considered like products. Suhail Nathani said that the standard is technical and commercially substitutable. The evolution of technical standards also matters. Earlier, computers did not have USB ports and prices of CDs and pen drives were very high. Now computers may not have CD drives. So they may be substitutable.

Taking an example, he said that Phillips manufactures Compact Fluorescent Lamp (CFL) in India and imports from China. In the whole world Phillips has stopped manufacturing CFL and will manufacture only in India. So Phillips will be domestic industry next time.

During initiation, the petitioner would want to cast its net as wide as possible. Evidence of dumping and domestic selling price in ordinary course of trade has to be provided. If petitioner provides *prima facie* evidence, exporter has a very heavy burden. Cost of production is taken in place of domestic selling price to show *prima facie* case. NV has to be worked out at ex-factory level. Principles of Natural Justice (PNJs) have to be followed at all times to avoid filing of writs. Petitioner wants to minimize the export price. There are many subjective issues in injury. Based on injury parameters, the domestic industry can change. It happened in a case and it was contested.

Rajiv Bhatia asked if Tata and Steel Authority of India (SAIL) would be tagged as non-cooperative if they did not respond even though their costing data was not available. Suhail Nathani said that they could not be compelled to provide the data but this had not been tested in law. Duty will be imposed on them because they did not cooperate. This is a consequence of the Haldor Topsoe case in which the Supreme Court (SC) used section 118 of the Evidence Act holding that if someone is holding on to essential evidence, it has to be construed against him.

Domestic sales plus imports is demand. Consumption for the purposes of exports is not domestic demand. Imports for the purposes of exports are not subject to ADD because they are not entering the commerce stream of the country. CESTAT has held one percent landing charges. Justice Katju said last year that dumping margin has to be country specific and not exporter

specific. This is WTO incompatible. Since the Government has amended the law in this budget, we are back to exporter specific NV and thus dumping margin. Everybody follows what India does. Foreigners had said they would mount a WTO challenge but the Government changed the law in time. Trade policy and politics go hand in hand.

As regards, causal link, no analysis of significance is done in India. The analysis in other countries is far more sophisticated. In US, the ITC does injury analysis twice. In India, the injury analysis is done by case handlers so once *prima facie* case is there, it is difficult to terminate case on causal link.

When structural changes are taking place in industry, it is the best time to bring an AD petition because global slowdown can be passed off as dumping. India has a huge gap between bound and applied rates and is not willing to increase its applied rates but has a liberal AD regime. Domestic industry has to be protected. Interpretation in favour of domestic industry must be considered. This is because AD statutes are designed for protection of domestic producer. This is the economic logic of this law which is not contested.

As regards costing information, there are companies that prepare their balance sheet with a view to get ADD imposed. Costing needs to be done in a particular format and must tie with the balance sheet. Cost of production should be high to get high duty. This means including the maximum number of countries in the investigation.

Another thing that impedes AD is the lack of an appellate mechanism. The issue is over by the time it comes to the WTO because it is too late by the time the Government moves its act. But in the Mysore wine case about a Non Tariff Barrier (NTB), the Government was very cooperative.

In case of adjustment plan in safeguards, the adjustment plan should have an impact on cost of production. The previous DG S.S. Rana was generous about adjustment plan and a small thing could count as an adjustment plan. The current DG is Praveen Mahajan.

Exporter Perspective

The questionnaire in Europe is very similar to the one in India. The US is very complicated. The US estimates a duty and a bond has to be posted. Every year they will review it and an actual duty based on review will have to be paid. US and EU also take sample exporters which India does not do. They always also have CVD along with AD on India. One can emerge as a superb winner in the US if s/he plays the cards right. In the US there is no standard questionnaire but one for every investigation. 20 percent of the questionnaire is different. The US will send the questionnaire to the exporter once it has shown its willingness to participate. Analysis of like article is very complicated in the US. They want data in a particular SAS format. US has countervailed all export schemes of India. US has also said that it will countervail the entire advance licence even though it should countervail the excess only. India is planning to take it to the WTO. USA takes very high standards of information on related companies. Suhail Nathani

then clarified that the data being shown on the slides was required by all authorities. Japanese exporters operate through trading houses and Japan has a complicated procedure in commissions and reimbursements. Investment details and expansion plans leading to threat of injury are also required. GAAP rules of the country of export are critical. Any change in the accounting system of the past three years has to be highlighted. Taking a case as an example, he said that Sasol's product Sabutol, an oxy alcohol was used for *hawai chappals* in India and for paints in South Africa. In India it was priced cheaper because *chappal* manufacturers could not pay high prices. It was held that there was dumping of Sabutol but this was overturned in appeal.

The USA imposes AD and CVD on Export Promotion Capital Goods Scheme (EPCG). All SEZs are countervailed. SEZs ensure that taxes are not exported. The exporters wanted the Government to continue with DEPB even though it is countervailable because the benefits are greater than the duty. According to Suhail Nathani, in such a case only the excess should be countervailed. The WTO Agreement needs to be changed. The Government of India has taken it up but the WTO process has slowed down. The centre of economic action is shifting here. The WTO as an organization of 153 members is not viable. It will become an organization of trading blocks so that Members can play with players playing by their rules. So India is trying to align with ASEAN. Now there are Comprehensive Economic Cooperation Agreements (CECA) to have seamless blocks. The consumers should make the rules. Eventually rules will have to suit countries where the consumption is.

Terms of sale is very important in the USA. It is difficult to get the level of trade adjustment in the USA. The USA has a system of CONNUM which gives a particular weightage to a particular feature and will attach a number to it.