

## MAKING USE OF EU TRADE REMEDIES

For many years, Covington & Burling has run a leading international trade practice from our offices in Brussels, London, and Washington. Our key focus is to assist companies in achieving their business objectives by exercising their rights under international trade law.

In times of surging imports into an enlarged Community, EU companies seeking protection against damaging imports must undertake significant efforts to have cases opened and measures adopted.

Based on more than a dozen years of experience in the operation of EU antidumping and other trade remedy measures, our Brussels trade team specializes in representing the EU industry as complainants in these proceedings.

### THE CURRENT CHALLENGES OF EU COMPANIES FACED WITH INCREASING IMPORTS

In 2004, imports into the Community amounted to nearly one trillion €. Some of these imports injure EU companies, and trade defense measures against them may be available—the stakes are high and the practical benefits of success can be enormous—making the difference between survival and disappearance of a product line or even an entire business.

The EU has applied trade remedy measures since the 1970s, mostly in the form of anti-dumping duties. However, over the past several years, important trends have emerged greatly affecting EU companies seeking protection against unfair imports:

#### Scrutiny of Complaints

For many years, it was a relatively easy matter for an EU industry to persuade EU regulators to open a case. Developments in the WTO and the EU have led the Commission to insist that a complaint contain detailed reasoning and is supported by pertinent evidence showing the existence of dumping or unlawful subsidies and injury. As a consequence, preparing a complaint has become much more demanding.

#### China

For several years already, China has pursued an aggressive export strategy. China's accession to the WTO and the recent lifting of import quotas for a number of sensitive products now permit it to even better exploit the cost advantages of its relatively cheap labor market while gaining increasing access to Western technology and know-how.

Trade remedy investigations against Chinese imports raise a number of very specific issues resulting in particular from the fact that China is still a non-market economy country.

#### Sophisticated Dumpers

Overseas companies that attempt to establish themselves in European markets increasingly take into account the possibility of an anti-dumping or anti-subsidy investigation when devising their commercial strategy. They do so in an effort to erect practical barriers to complaints and the imposition of trade remedy measures. They also vigorously defend against their interests once investigations are opened.

## Political Decision-Making

Decision-making in anti-dumping and anti-subsidy investigations has become increasingly political. Exporters understand this reality, and often lobby the Member States to obtain a blocking majority in the Council, which has the final say on the imposition of measures. Community industries must counter these efforts, an undertaking that has become even more important and challenging with the accession of the ten new Member States to the EU in May 2004.

## Importance of Anti-Subsidy Measures

The use of anti-subsidy trade measures remained dormant for many years. The Commission now actively encourages complainants to investigate, with help from the Commission, whether exports benefit from unfair subsidies. In many cases, parallel dumping and subsidy investigations can be very efficient and cost effective from a company's or sector's perspective.

## Circumvention

Once measures are imposed, exporters can be quite skilled in finding ways around the final ruling, using circumvention techniques to avoid payment of duties and thus frustrate any protection afforded to the Community industry. While strategies are available to reduce the risk of circumvention from the outset, such as the proper definition of the product scope, it cannot be completely eliminated. In these cases, the Commission can often detect circumvention only with the aid of the Community industry.

## WTO Challenges

Since the WTO came into existence in 1995, almost 40 antidumping and anti-subsidy cases have been decided under the WTO dispute settlement mechanism. Generally, the WTO panels and the WTO Appellate Body have been very critical of anti-dumping and anti-subsidy measures and have found a violation of WTO law in the vast majority of the cases. The complexity of EU trade remedy procedures, coupled with the need to ensure that EU rulings are not overturned in the WTO, makes the use of skilled trade counsel all the more important.

## OUR SERVICES

Georg Berrisch, who leads our EU trade defense practice, has been involved in EU anti-dumping and anti-subsidy proceedings since 1991. In addition to having acted for EU companies as complainants, he has litigated more than forty antidumping and anti-subsidy cases before the European Court of Justice and the European Court of First Instance.

We have built a trade team that specializes in representing EU industries as complainants in EU anti-dumping and anti-subsidy proceedings. Our senior lawyers are supported by a team of experienced trade law associates and policy analysts, to ensure that we provide our services efficiently at competitive rates. Because we do not believe in one-size-fits-all solutions, we offer tailor-made services, taking into account the specifics of the particular industry. Our services include:

## **Mobilizing Industry Coalitions**

An anti-dumping or anti-subsidy complaint can only be brought by producers in the Community that collectively represent at least 25% of Community production. We assist companies, where necessary, in finding allies and setting up ad hoc industry groups. Where possible, we work together with existing trade associations. We also collect and administer any confidential information that must be submitted with the complaint and that the participating complainants cannot, or do not want to, share with each other (such as individual sales volumes, prices, and costs of production).

## **Gathering Evidence & Drafting the Complaint**

We analyze in co-operation with the complainants the information and evidence that is needed to properly support a complaint. We also assist in gathering the evidence for complainants or advising them on how it can best be obtained. Of course, we also draft complaints and assist in pre-complaint discussions with the Commission.

## **Assistance During the Investigation**

We assist complainants in replying to the Commission's questionnaires and in dealing with verification visits by Commission officials. Moreover, exporters will normally raise numerous objections during an anti-dumping or anti-subsidy investigation, and we assist complainants in countering such objections. In addition, we seek to ensure that the Commission makes a strong case against exporters able to withstand scrutiny of the EU courts or the WTO.

## **Lobbying**

Member States play a central role with respect to the imposition of EU trade remedy measures. For example, the adoption of anti-dumping and anti-subsidy measures requires a majority in the EU Council of Ministers, and the Commission must consult throughout its investigation with the Member States' representatives. Some Member States can be reluctant to support the imposition of trade remedy measures, and it is thus often critical that complainants reach out to them. We help complainants develop an effective outreach program in order to create the necessary political support. In this respect, we work together with the members of our legislative advocacy group who have successfully conducted numerous lobbying campaigns on a variety of trade and other EU issues.

## **Monitoring the Measures**

We maintain contact with the Commission after the trade remedy measures have been imposed and advise the EU industry on how to monitor them. In the event circumvention is found or suspected, we assist industry in gathering the relevant evidence for submission to the Commission. Where needed, we also assist in petitioning for the opening of an anti-circumvention investigation and in imposing anticircumvention measures.

## **WTO Dispute Settlement Proceedings**

WTO anti-dumping and anti-subsidy cases are very fact intensive and conducted under tight deadlines and, therefore, put a great burden on the responsible unit in the Commission's Legal Service. In addition, governments attacking the Community in the WTO often benefit from support of exporters. Having acted for private parties in numerous WTO dispute settlement cases, we can help industry provide valuable input to the Commission in preparing its defense.

## Other Trade Remedies

In some cases, trade remedies other than anti-dumping or anti-subsidy duties may be available, such as safeguard measures or the withdrawal of benefits under the EU's General System of Preferences (GSP). We have the expertise to include these possible approaches in devising the overall strategy for our clients.

## OUR INTERNATIONAL TRADE PRACTICE

Covington & Burling's international trade and finance practice reflects the firm's unsurpassed strength and experience in the areas of government regulation, litigation, and transactional work. Stuart Eizenstat heads our practice, and has served as Deputy Secretary of the Treasury, as Under Secretary of State and of Commerce, and as Ambassador to the European Union. The practice includes senior members who have held significant government positions in Europe and the US.

With offices in Beijing, Brussels, London, New York, San Diego, San Francisco, Silicon Valley, and Washington, we have broad experience in dealing with international issues of every sort. We frequently serve as advisors or advocates on projects and transactions presenting novel and complex issues, often of national and international importance.

The brief list below outlines some of the most significant components of our overall international practice and expertise. Our clients include companies in virtually all sectors of the economy, including both established multinational corporations and smaller firms in the initial stages of operations. We advise and represent the world's leading software and high-technology concerns, major companies in the oil and gas sector, pharmaceutical and biotechnology companies, defense contractors, manufacturing and consumer products entities, financial institutions, and media companies as well as foreign governments and international organizations.

In 2003, Covington entered into an alliance with McLarty Associates, the strategic consulting firm headed by former White House Chief of Staff and Special Envoy for the Americas Thomas F. McLarty. McLarty Associates provides strategic advice and advocacy on behalf of clients throughout the world. This unique alliance gives our clients access to the combined experience and expertise of lawyers, diplomats, senior negotiators, business leaders, financiers, lobbyists, policy- and opinion-makers and intelligence analysts to address their important international legal, regulatory and commercial issues.

- International public policy
- Trade policy
- International investment disputes
- International trade controls
- European and international competition law
- International boundaries
- Customs
- International disputes litigation
- Trade proceedings
- Representation of foreign governments and international organizations

## OUR EU TRADE REMEDIES TEAM

**DR. GEORG M. BERRISCH**, a German Rechtsanwalt, has practiced EU trade law in Brussels since 1991. He has represented the Council of the European Union in more than 40 anti-dumping and anti-subsidy cases before the European Court of Justice and the European Court of First Instance. He also acts for European companies as complainants in anti-dumping cases. In addition, Dr. Berrisch advises a broad range of clients on EU customs law, EU and national export controls, general EU trade policy matters, and matters arising out of the WTO. Dr. Berrisch publishes regularly on EU trade law and WTO law. He is co-editor and co-author of *WTO Handbuch* (C.H. Beck, 2003), the leading German treatise on the WTO, in which he wrote, amongst others, the chapter on the WTO Anti-Dumping Agreement (together with a Commission official working in the anti-dumping unit of the Trade Directorate). Dr. Berrisch has also represented clients in many legislative advocacy campaigns before the EU institutions and Member State authorities.

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**DAVID L. HARFST** serves as Managing Partner of the Brussels office. His practice focuses, amongst others, on legislative advocacy campaigns. Since moving to Brussels in 1992, Mr. Harfst has worked with a variety of individual companies, informal industry coalitions, and trade associations on a broad range of EU policy issues and initiatives, including in the area of international trade. Most recently, he successfully helped US and European based companies to mount a lobbying campaign before the Commission and Member States in order to have products removed from the EU's proposed retaliation list concerning the WTO disputes between the US and the EU on the Foreign Sales Companies and the US steel safeguards measures. Mr. Harfst has also advised on a broad range of WTO matters with emphasis on WTO dispute settlement.

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