PRACTICAL LAW COMPANY
PLC Global Counsel

FEATURE

The rise of anti-dumping

Effects on business

www.practicallaw.com/A43730

Illustration: Tina Zellmer

While conventional wisdom is that dumping is selling at a loss, this is not necessarily the case. Dumping is exporting a product at a lower price than that charged on the home market (the ***dumping margin*** (*see Glossary*)). As a result, a company may be making money on the export of a product, but if it is making a greater profit on its home market than it is making on a foreign market, it may be dumping.

A company may engage in dumping as part of a deliberate strategy (for instance, it may be protected from competition on its home market and may use this advantage to push competitors out of other markets). Alternatively, price differences between domestic and imported products may be explained by different demand curves or other normal business behaviour. Either way, dumping can affect competition in markets that import these lower priced products, and has the potential to eliminate local competitors.

Anti-dumping law, together with anti-subsidy law and safeguards, have developed at the World Trade Organisation (WTO) level to defend domestic industries against some of the competition issues that have arisen as a result of trade liberalisation, such as dumping. It is a complex area of law, but one that is increasingly affecting companies, either whether they are asking their country for protection (complainants) or are the "targets" of an anti-dumping action brought by a country to which they export (exporters), or whether they are just caught in the cross-fire (importers and users).

Against this backdrop, this article:

- Explains when countries can impose anti-dumping measures.

- Sets out the procedure for conducting an anti-dumping investigation in the EU (*see box, Anti-dumping investigations in the EU*).

(C) L&C Publishing Ltd 2004. This article first appeared in the October 2004 issue of PLC Global Counsel magazine and is reproduced with the permission of the publisher.
Please see www.practicallaw.com/aboutglobal for more details.

Anti-dumping measures are being used increasingly around the world to combat the flood of cheaper imports on to domestic markets. Natalie McNelis explains how anti-dumping law works and considers its impact on business.

- Provides an overview of the dispute settlement mechanisms available in the EU and WTO once an anti-dumping decision has been made.

- Considers the effects of anti-dumping on business and provides some guidance on how to bring or defend an anti-dumping action.

Imposing anti-dumping measures

Article VI of the General Agreement on Tariffs and Trade (GATT) 1994 and the WTO Agreement on Implementation of Article VI of GATT 1947 (the Anti-dumping Agreement) allow member countries of the WTO to take anti-dumping action to assist their domestic industries in certain circumstances. If countries, after rigorous investigation, find that injurious dumping is taking place, they can impose measures on offenders.

(C) L&C Publishing Ltd 2004. This article first appeared in the October 2004 issue of PLC Global Counsel magazine and is reproduced with the permission of the publisher. Please see www.practicallaw.com/aboutglobal for more details.

Injurious dumping is that which causes material harm to the relevant domestic industry in the target country. To determine whether the domestic industry has sustained material injury, the investigating authority looks at:

- The volume of the dumped imports.

- The effect of the dumped imports on prices in the target market for the same or similar ("like") products.

- The impact of the dumped imports on the domestic industry.

Before a country can impose anti-dumping measures on an exporter dumping a product on its domestic market, it must be able to demonstrate that this dumping is causing material injury independently of any other factors that may also be damaging the domestic industry. Examples of such other factors include:

- The volume and prices of non-dumped imports.

- Imports from other countries (which may be dumped).

- Contraction in demand or changes in the patterns of consumption.

- Restrictive trade practices of, and competition between, third country and domestic producers.

In the EU, an anti-dumping investigation is carried out by the European Commission (specifically, the Directorate-General Trade), which investigates both dumping and injury (*see box, Anti-dumping investigations in the EU*). The Commission then submits a proposal to the Council of the European Union (the Council) recommending either the imposition or non-imposition of anti-dumping measures (only the Council has the power to impose final measures).

In the US, the Department of Commerce investigates dumping, while the International Trade Commission (ITC) investigates injury and causation. If injurious dumping is found, the Department of Commerce instructs US customs to commence applying duties.

Anti-dumping investigations in the EU

While every case is slightly different, the following events occur in a typical anti-dumping procedure in the EU:

The complaint. The domestic industry approaches the European Commission to complain about dumping. Usually the "complaint" is not really complete; it is unsubstantiated and needs work before the Commission can consider it. The Commission usually asks the industry to present a more detailed case.

The initiation (45 days later (Day 1)). When the complaint is ready, the industry formally submits it, and the Commission has 45 days to decide whether to begin an investigation. If it decides to do so, it publishes a notice in the C-series of the Official Journal. It obtains a list of companies concerned and trade associations from the complainants, and notifies them of the procedure. The Commission also notifies the country concerned, and that country notifies interested parties (although some companies may not hear about the investigation until it is too late).

The questionnaires (due around one month from Day 1). Exporters and related importers have about one month to fill in a lengthy, complex questionnaire. Extensions are routinely granted, but usually only for an extra week or two. The questionnaire is designed to provide the information the investigators need to establish a ***normal value*** (*see Glossary*) so the questionnaire will ask for detailed information about the company's domestic sales over the period of investigation (usually one year). The questionnaire will also be detailed when it comes to ***export price.*** It will ask for information about the sales to the importing market, generally a transaction-by-transaction account of every sale to the target market that took place during the year-long investigation period. This may comprise tens of thousands of transactions, which the investigating authority will expect to receive itemised in electronic format.

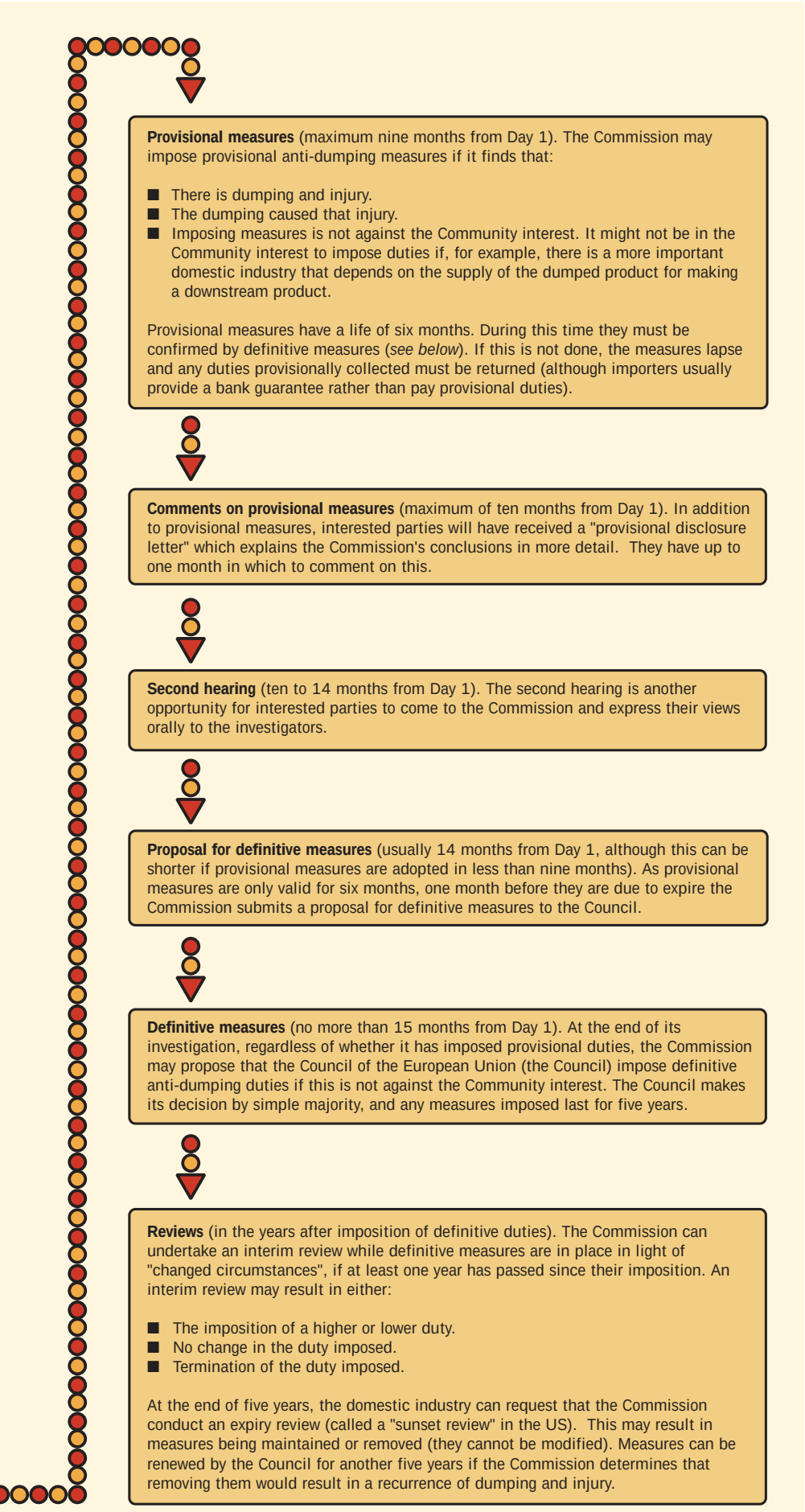
Domestic producers must also fill out questionnaires at this stage, mainly to determine the existence and gravity of the injury. These questionnaires focus on the health of their businesses over the past few years, and the factors that are affecting it.

Deficiency letters (around two months from Day 1). Once the questionnaire responses are in, the Commission looks at them to determine whether any information is missing. It then sends out "deficiency letters" requesting any additional information required.

Verification (two to four months from Day 1). Investigators visit the home offices of companies that have filled out questionnaires (both domestic producers and exporters) to check that information provided is true and accurate. A verification visit generally lasts a couple of days.

First hearing (after verification, around four months from Day 1). Interested parties may come to the Commission to present their views orally, with the aim of influencing the Commission's provisional decision.

(C) L&C Publishing Ltd 2004. This article first appeared in the October 2004 issue of PLC Global Counsel magazine and is reproduced with the permission of the publisher.
Please see www.practicallaw.com/aboutglobal for more details.



A country taking action against dumping generally imposes duties (additional to those negotiated and fixed during a WTO "round") at the border to either bring the price of the product:

- Up to "non-dumped" level.

- To such a level that the imports will not cause injury to the domestic industry anymore, if that is less (the approach taken by the EU but not by all WTO members).

Anti-dumping duties are imposed at the border by customs officials and are usually *ad valorem* (a percentage of the value declared at customs).

Under anti-dumping law, countries can accept price undertakings from exporters (a commitment from the exporter to charge at least a certain price for the product). In the EU, if extra duties are about to be imposed, exporters can contact the Commission to work out such an undertaking. If an undertaking is agreed, the duty does not apply to that company. Price undertakings are viewed as fairer as the dumping problem is resolved for the domestic industry, but the exporter gets to keep the extra money charged, rather than paying it to the customs authorities. Exporters must respect their undertakings, or else risk losing them and bearing the extra duty instead.

The WTO allows countries to have either a prospective or a retrospective system of anti-dumping:

- In a prospective system (such as the EU), the amount of the dumping and injury is calculated on the basis of a past period of time (usually the year before the investigation was initiated) and duties are put in place for the future.

- In a retrospective system (such as the US), the country imposing the measure estimates the amount of dumping on the basis of a past period, but each year conducts an administrative review to calculate the actual amount of dumping that took place.

(C) L&C Publishing Ltd 2004. This article first appeared in the October 2004 issue of PLC Global Counsel magazine and is reproduced with the permission of the publisher.
Please see www.practicallaw.com/aboutglobal for more details.

Glossary

Dumping margin. The difference between the normal value and the export price, usually expressed as a percentage of the export price. If dumping is taking place, the normal value will be higher than the export price (a positive dumping margin).

Export price. Actual invoiced prices for export sales to the target market during the anti-dumping investigation period (usually one year). The export price must be comparable to the normal value, that is, if the normal value is stated as the price at the "factory gate", the export price must also be stated as at the factory gate (subtracting costs such as transport and insurance).

The invoiced export price must also be at "arm's length". If, for instance, the exporter sells a product through a related company, the investigating authority may consider that the inter-company invoice price is not at arm's length, and will probably construct the export price. This is achieved by taking the first sale to an independent customer and deducting from it all costs accrued beyond the factory gate. Exporters usually dislike a constructed export price, arguing that the investigating authority deducts too many costs (resulting in an artificially deflated export price).

Non-market economy treatment. Investigating authorities have traditionally disregarded normal value prices and cost figures that come from an economy they consider to be controlled by the state, such as the People's Republic of China (the PRC), because they are believed to be inherently unreliable. Instead, investigators tend to calculate normal values on the figures of companies in a different market (called an analogue country in the EU or a surrogate market in the US). As an example, the EU recently opened an investigation against the PRC and suggested Norway as the analogue market for the purposes of establishing normal value (*Notice of Initiation of an anti-dumping proceeding concerning imports of certain castings originating in the People's Republic of China, OJEC [2004] C104, p. 62*).

Normal value. The price of the exported product on the home market, based on actual invoices for home sales during the anti-dumping investigation period (usually one year).

Investigating authorities may construct normal value in certain circumstances (for instance, if domestic sales were loss making, or if domestic sales account for less than 5% of export sales). Normal value is constructed by calculating the cost of production plus selling, general and administrative expenses (SG&A) and a "reasonable" profit margin. Exporters usually dislike a constructed normal value because they argue that it is artificially inflated by unreasonably estimated costs and SG&A and an optimistic profit margin.

Zeroing. A procedure used by an investigating authority when calculating a company's dumping margin. Under this procedure, the authority takes into consideration only the dumped transactions a company has engaged in when calculating the dumping margin (non-dumped transactions are counted as zero). By doing this, the company does not "get credit" for transactions where it has not dumped.

In any event, countries imposing anti-dumping duties can only compensate for the amount of dumping found, so there must be a procedure for refund if a company has overpaid.

Dispute settlement mechanisms

An affected exporter or the domestic industry may object to an anti-dumping decision made by a country. While the exporter may object if extra duties are imposed, the domestic industry may object if such duties are not imposed. In the EU, a complainant can bring an action in the Court of First Instance of the European Communities (CFI), with appeals going to the European Court of Justice (ECJ).

There is also a WTO dispute settlement procedure, which can only be used by countries rather than private parties. However, a country will often act at the request of a domestic industry that objects to another country's anti-dumping procedure.

Judicial review in the EU

To bring a case before the CFI, a complainant must have standing, that is, it must be "directly or individually concerned". While an affected domestic producer or foreign exporter normally has standing, an importer usually does not.

It is difficult to obtain a reversal of a decision by the Commission or Council in the CFI. The Commission and Council have considerable discretion in matters involving complex economic facts, and the CFI is unlikely to second-guess their findings. The CFI will not hesitate to intervene, however, if a procedural flaw has occurred in the investigation (that is, it was not fair and thorough).

While the European courts are reluctant to overrule a decision in favour of, or against, the imposition of anti-dumping duties, the ECJ recently held that where a decision to decline the imposition of duties is made, the Community body that made the decision must "provide an adequate statement of reasons which shows clearly and unambiguously why, in the light of the provisions of the basic regulation, there is no need to adopt the proposal" (*judgment of the ECJ of 30 September 2003 in Case C-76/01 P, Eurocoton v. Council (not yet reported), at recitals 89 – 94*).

WTO dispute settlement

It is comparatively easier to obtain the reversal of an anti-dumping decision at the WTO than before the European courts. Cases are heard by WTO dis-

(C) L&C Publishing Ltd 2004. This article first appeared in the October 2004 issue of PLC Global Counsel magazine and is reproduced with the permission of the publisher.
Please see www.practicallaw.com/aboutglobal for more details.

pute settlement panels, with appeal to the WTO Appellate Body. To date, dozens of decisions on anti-dumping measures (and some general methodological practices) have been challenged in the WTO. Of these, nearly all have been "lost" to some extent by the country that imposed the measure.

While the majority of anti-dumping cases brought before the WTO are intensely fact-based and therefore have little impact on other cases, two in particular have had broader ranging effects:

• *Bed Linen* (*European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India, Appellate Body Report WT/DS141/AB/R, adopted on 12 March 2001*). In this case, the WTO Appellate Body held that the EU was wrong to have used a method (***zeroing***) to calculate the dumping margins, as this practice was not allowed by the Anti-dumping Agreement. The EU ceased zeroing in all anti-dumping cases and has now brought a case against the US alleging that its zeroing is also WTO-illegal (*request for the establishment of a panel of 19 February 2004 in United States - Laws, Regulations And Methodology For Calculating Dumping Margins ("Zeroing"), WT/DS294/7/Rev.1*).

• *Byrd Amendment* (*Appellate Body Report on United States - Continued Dumping and Subsidy Offset Act of 2000, Appellate Body Report WT/DS217/AB/R, T/DS234/AB/R, adopted on 27 January 2003*). At issue in this case was a US law (*the Byrd Amendment, Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers, 66 Fed. Reg. 48,546 (US Customs Service 21 Sept. 2001) (final rule) (19 CFR §§ 159.61 – 159.64)*) that allowed anti-dumping duties, among other things, to be distributed to "affected domestic producers" (in this case, the complainants and others who supported the complaint). The countries that brought the case against the US (Australia, Brazil, Canada, Chile, the EU, India, Indonesia, Japan, Korea, Mexico and Thailand) argued that this gave domestic industries in the US an additional incentive to petition for anti-dumping action. The domestic industry was in effect given a double benefit as competing exporters were handicapped by an extra cost, and the domestic industry was advantaged by the payment.

The WTO Appellate Body struck down the Byrd Amendment. It held that WTO member countries can impose provisional and definitive duties and agree price undertakings – they have no further powers. The US has not yet repealed the Byrd Amendment and on 31 August 2004, the WTO arbitrator authorised the plaintiffs to retaliate.

Effects on business

The effects of dumping and anti-dumping on business differ depending on whether the business concerned is an exporter, domestic competitor or importer.

Exporters

Anti-dumping action can have several negative effects on exporters. An anti-dumping investigation is rigorous and time-consuming (usually lasting about a year and a half). Even if no dumping is ultimately found, the opening of an investigation can mean the loss of customers who are often unwilling to take the risk that their supplier will have additional duty imposed on it when the investigation is completed, even if reassured that no dumping is taking place (*see below Importers*). Under anti-absorption rules in place (in the EU, *Article 12, Council Regulation 384/96/EC (OJ 1996 L56/1) as modified by Council Regulation 461/2004/EC (OJ 2004 L77/12)*), an exporter cannot pay such duty on behalf of the customer, either directly or indirectly.

Knowing how difficult and damaging the mere opening of an anti-dumping investigation can be, exporters can make some effort to avoid it, for example, by not dramatically flooding a foreign market with their products or by focusing on developing or exporting products that will not compete directly with local products.

If an anti-dumping investigation is opened, it is in the exporter's interest to participate at each stage and respond promptly to requests for information. This allows the exporter to argue its case against the imposition of anti-dumping measures. If an exporter decides not to co-operate, the investigating authority is free to use the "best information available" (facts available). This is usually the worst information available, since an investigating authority does not want to "reward" exporters for non-co-operation. This means that exporters who do not participate in the investigation inevitably receive worse treatment than those that do. If measures appear unavoidable, an exporter should consider offering a price undertaking.

While exporters often argue that anti-dumping action is a form of protectionism because of in-built biases involved in calculating constructed ***normal values*** and ***export prices***, as well as the concept of ***non-market economy treatment***, it is a reality, and it is therefore advisable that exporters be aware of, and prepare for, the possible consequences of dumping.

Domestic competitors

For the domestic industry, dumping can mean its extinction. It may have in-built competitive disadvantages, such as higher labour costs and environmental standards, which mean that it cannot compete with products coming from other countries. Despite this, anti-dumping action is usually taken as a last resort, as the process of lodging a complaint and the subsequent investigation are time consuming.

Before a complaint is lodged, a company should first try to assess whether the imports in question are being dumped. It should also attempt to determine whether the domestic industry in general is suffering a decline in production, prices and profitability.

If a company decides to go ahead with a complaint, it should then make contact with other companies similarly affected by dumping, as the relevant authority will only begin an investigation if a "major proportion" of the domestic industry supports it, or at least does not oppose it. However, as competi-

(C) L&C Publishing Ltd 2004. This article first appeared in the October 2004 issue of PLC Global Counsel magazine and is reproduced with the permission of the publisher.
Please see www.practicallaw.com/aboutglobal for more details.

Related information

This PLC *Global Counsel* article can be found on PLC *Global Counsel Web* at www.practicallaw.com/A43730. The following information can also be found on www.practicallaw.com:

Know-how topics	
Anti-dumping	www.practicallaw.com/T791
International trade	www.practicallaw.com/T654
Competition: cross-border	www.practicallaw.com/T641
Dispute resolution and litigation	www.practicallaw.com/T69
Handbooks	
Competition Law	www.practicallaw.com/comphandbook
Dispute Resolution	www.practicallaw.com/disputehandbook
Practice notes	
EC anti-dumping policy and legislation	www.practicallaw.com/A28919
Articles	
The proliferation of anti-dumping measures around the world and its impact on global business	www.practicallaw.com/A32523
World Trade Organisation: using the complaints procedure to lower trade barriers	www.practicallaw.com/A7849
WTO negotiations after Cancun: getting back on track	www.practicallaw.com/A32835
Weblinks	
WTO anti-dumping web page	www.wto.org/english/tratop_e/adp_e/adp_e.htm
Directorate-General Trade, European Commission	http://europa.eu.int/comm/trade/index_en.htm

tion concerns can arise if a company approaches another company about prices, it is usually advisable to make contact through an independent third party such as a trade association or law firm, which can collect confidential information and consolidate it to draw up a complaint.

If a complaint, which takes some time to prepare, can make an initial case for dumping, injury and causation, then the investigating authority normally must open an investigation. The domestic industry must then fill out questionnaires to prove the existence of injury (*see box, Anti-dumping investigations in the EU*). Complainants must also be on-call to answer any questions raised by the investigating authority in relation to the complaint throughout the investigation.

Importers

In the short term at least, importers (and consumers) are likely to be negatively affected by anti-dumping action, which raises prices on the domestic market. In the long term, anti-dumping is designed to protect consumers from a potential export strategy where a low price is charged until competitors are eliminated from the market, at which time prices increase.

When an anti-dumping investigation is begun, an importer is likely to seek alternative sources of supply, although this in itself can be a costly and time-consuming exercise. Importers are consulted by the Commission during an investigation and can complete an importers questionnaire, to help the Commission assess the harm eventual measures would do to the Community interest.

Natalie McNelis is counsel based in Wilmer Cutler Pickering Hale and Dorr LLP's Brussels office. ***The author would like to thank Gary Horlick, a partner in the firm's Washington, DC office, for his assistance with the article.***

(C) L&C Publishing Ltd 2004. This article first appeared in the October 2004 issue of PLC Global Counsel magazine and is reproduced with the permission of the publisher.
Please see www.practicallaw.com/aboutglobal for more details.