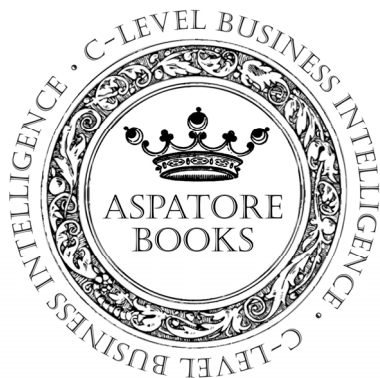


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International Trade & Transactions Law 2007

*Top Lawyers on Trends and Key Strategies
for the Upcoming Year*



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Importing Goods into the
United States in the 21st
Century: Recent
Developments You Should
Be Aware Of

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Changes in Laws, Decisions, Policies, and Public Opinion

The most important recent development in international trade is an expanding emphasis on the security of the international supply chain from the point of origin abroad to the point of distribution of imported goods in the United States. On September 30, 2006, Congress passed the Security and Accountability For Every Port Act (“SAFE Port Act”), which, among other things, codifies certain programs previously administered by the Bureau of Customs and Border Protection (“Customs”) on a less formal basis. Security is the major issue in terms of changes in customs and international trade law.

Regarding policies and procedures, Customs is currently in an enforcement mode, not only on security issues, but also on commercial issues, such as intellectual property rights, antidumping duty laws, and countervailing duty laws, as well as general customs issues, such as classification, valuation, and country of origin.

Some companies believe that the increasing emphasis on security has had a detrimental effect on the facilitation of international trade and associated commercial operations. In contrast, others have noted that some of the security requirements benefit the commercial aspects of trade. In a recent study by the National Association of Manufacturers and Stanford University, the data showed that, in complying with some of the new requirements for security, companies have actually benefited commercially from securing their supply chain. That is a positive result of the recent emphasis on security. International terrorism is not going to go away any time soon, and as long as there is a terrorist threat, security will continue to be part of international commercial operations. Companies will just have to learn to live with the new emphasis on security, but, perhaps, ultimately the benefits will outweigh any detriments to business operations.

Changing Legal Strategies

In addition to assisting companies with the traditional aspects of international commercial operations, international trade attorneys will now need to familiarize themselves with the new security-related requirements in order to advise companies about these new requirements. With Customs’

enforcement of trade laws becoming very aggressive, the commercial aspects of international trade are also more important now than in the past. Attorneys must realize that they have to continue to keep themselves informed about all of the new developments in security, as well as any changes in the traditional commercial requirements. Attorneys must be able to advise their clients intelligently on all such developments.

We are assisting clients in applying for membership to the Customs-Trade Partnership Against Terrorism, or C-TPAT, and in complying with the requirements of that program. C-TPAT is a voluntary program, administered by Customs since 2002, by which companies agree to implement security measures throughout their supply chains from point of origin abroad to point of distribution in the United States. Customs has created a new security link portal on its Web site through which companies can become members of C-TPAT and can update their security profiles annually, or more frequently, if appropriate. Existing C-TPAT members were required to update their supply chain security profiles by October 1, 2006. C-TPAT is a voluntary program that has worked well so far between Customs, on the one hand, and the importing community, brokers, freight forwarders, and carriers, on the other. Some foreign manufacturers are also allowed to become participants. The SAFE Port Act codifies the C-TPAT program.

Cases Affecting the Future of International Trade Law

Two recent cases demonstrate the aggressiveness of Customs' recent enforcement mentality. One is *United States v. Universal Fruits and Vegetables Corp. (Universal)*. In that case, Customs uncovered an alleged attempt to evade an antidumping duty. However, the statute of limitations for bringing a case under the customs laws had expired, so instead Customs filed a "reverse false claims" action through the Department of Justice under the False Claims Act, which has a longer statute of limitations. That law provides for penalties and treble damages against any company that provides false information to the government to avoid paying money owed to the government. The *Universal* case was originally brought in a U.S. district court in California and, on appeal to the Ninth Circuit, the circuit judges held that the district court lacked subject matter jurisdiction. The action was then transferred to the U.S. Court of International Trade, which

held that it lacked subject matter jurisdiction. The action currently is on appeal to the U.S. Court of Appeals for the Federal Circuit. If the government is allowed to ignore statutes of limitations that Congress has enacted, and to bring these kinds of cases years after the event giving rise to the cause of action, a risk of financial exposure is presented to companies for which they are not prepared. *Universal*, therefore, is an important, and perhaps, dangerous case.

Another case that demonstrates the aggressiveness of Customs' enforcement mentality is *United States v. Ford Motor Company*. Ford Motor Company was undergoing a standard NAFTA audit, and Customs asked Ford to produce records from an unrelated foreign manufacturer of goods to support Ford's claims for duty-free treatment under NAFTA. Ford did not have the records from the unrelated foreign manufacturer to provide to Customs. Usually, Customs just asks an importer for the NAFTA Certificate of Origin signed by a foreign manufacturer, but, in this case, Customs wanted to go behind that document to look at manufacturing records. Also, in a NAFTA audit, if Customs finds that a claim for duty-free treatment is unsupported, Customs typically denies duty-free treatment for the entries at issue and for future entries until the problem is corrected. In this case, however, the government brought an action in a U.S. district court in Texas asking for record-keeping penalties in the tens of millions of dollars from Ford for failure to keep records that Ford arguably never had to have in the first place. This is a blatant example of aggressive enforcement of commercial laws by the government.

Each of the foregoing cases goes way beyond anything that I have ever seen before in my twenty-six years of practice. Cases like these present companies with the possibility of unpredictable exposure to potentially enormous financial liability.

Strategies for 2007

Companies should be alert to the current aggressive enforcement posture by Customs and their potentially broader financial exposure. They also should make adjustments to account for the increased emphasis on security. Companies should engage an outside expert, such as an experienced customs attorney, to help them perform customs compliance self-

assessments. They need to take a fresh look at their customs operations. Companies now need to pay as much, if not more, attention to customs issues as they traditionally have to tax or intellectual property issues because the potential exposure for a violation of a customs law has increased significantly.

Contract Changes

Companies need to protect themselves by making sure that everything that they are doing complies with all the laws administered by Customs, which include the traditional customs classification, valuation, and origin laws, as well as the antidumping and countervailing duty laws and intellectual property (IP) rights laws. It is necessary for companies to contract with their suppliers to ensure that they are not violating any IP rights or other laws. Proper origins, descriptions, and values of imported goods must be required in contracts with foreign vendors. In terms of security aspects, all contracts with product suppliers or service providers need to address security issues so there are no potentially dire consequences in the future. Companies should address the compliance and security issues before they begin importing. It is also essential that a company maintains detailed records of its import transactions to prove its compliance to Customs. It is a sad state of affairs when a company has complied with the applicable laws, but lacks the documentary evidence to prove its compliance.

Pending Decisions

In the *Universal* appellate decision, we will see whether the Federal Circuit agrees that the Court of International Trade lacks jurisdiction over the civil action. What does the government do next if the Federal Circuit upholds the Court of International Trade's decision? Will the government abandon its effort to skirt around the applicable statute of limitations? Will the government try to find other means of penalizing companies if the applicable statute of limitations has expired?

If Customs can use other laws to circumvent the statute of limitations for customs cases, companies have to be even more diligent now than ever before. A company can no longer expect that, five years past the date of entry of imported goods, it is in no danger of liability. Companies must

make sure that their import operations are above reproach now, or they will have to plan for potential liabilities in the future. It, therefore, is in a company's best interests to have an outside customs expert involved at the beginning of the company's import operations to make sure that there is complete compliance before any goods cross the border into the United States.

Changes in Negotiation Strategy

Companies sometimes make prior disclosures of violations to Customs before it becomes aware of the violations. If a company does an internal audit and discovers that it has violated the law, there is a law that allows the company to come forward and admit its error. This law caps the company's potential liability at a much lesser amount than when Customs discovers the violation, with the result that the company can limit its liability by disclosing a violation. Customs' recent aggressive enforcement efforts, however, tend to make a company less likely to come forward and tell the government that there is a violation. With this aggressive enforcement, if a company does come forward and admit a mistake, the company now runs the risk that Customs will look more deeply and find violations of which the company was unaware and, therefore, did not cover with its prior disclosure. These other potential violations would not be subject to the same low liability cap as the violations that were the subject of the prior disclosure.

For example, a company recently uncovered a violation of a customs law, and, as a good citizen, decided to disclose this fact to Customs. Then the company received a notice that Customs was investigating other potential violations that were not covered by the prior disclosure. Instead of accepting the company's tender of the duties that it failed to pay Customs, the agency decided to begin a thorough investigation of all of the company's import transactions. Even if the company has no other violations, the disruption of business operations during a Customs investigation can be significant. Undoubtedly, this company, and others that learn about its experience, will hesitate to make prior disclosures in the future.

Changes in Settlement Strategy

Right now, the numbers of actions involving civil penalties and criminal charges are greater than they have ever been in the twenty-six years that I have been involved in international trade law. There is now potential exposure to huge civil penalties and even criminal penalties, so companies that may have been looking at a few thousand dollars in penalties before are now looking at potentially hundreds of thousands or even millions of dollars in exposure.

If a company finds itself in a situation where the government is proposing to charge that company with violations that could result in a significant amount of financial exposure, the company needs to get its house in order as quickly as possible to minimize the potential exposure. The company should consider starting to negotiate with the government about a potential settlement as soon as possible, rather than fighting it out. Given Customs' current aggressive enforcement policy, a company might be inclined to make a cash settlement, if that is available to it, as quickly as possible.

New Legal Documents

Contracts between importers and their foreign vendors of goods and service providers should expressly address security requirements. Companies in the international supply chain should be C-TPAT participants or participating in their own country's security program if it is the equivalent of C-TPAT or is accredited by the World Customs Organization. Contracts with business partners should incorporate this requirement.

Additionally, because of Customs' current enforcement posture, an importer would be prudent to include, in its contracts with foreign suppliers, requirements that not only are the supplied goods accurately described for Customs' classification purposes, and the goods' origin and value accurately noted, but also that the goods do not otherwise violate any of the laws administered by Customs.

New Legal Strategies

During the next year, it will be my number one priority to emphasize security to my clients. In the future, there will be a new emphasis on security, including participation in C-TPAT. Attorneys will be wise to advise their clients to start emphasizing security in their international commercial operations. If a company is not already a member of C-TPAT, it should consider becoming a member to take advantage of the benefits, which include fewer cargo examinations and less chance of imports being detained at the border. There are commercial benefits associated with having a secure supply chain.

My second priority will be to emphasize to companies the importance of IP protection. To the extent that my clients are owners of IP rights, I want them to be sure that they do everything appropriate to enforce those rights. On the other side, I also want to make sure that my clients have no potential violations of other people's IP rights.

My third priority is to make my clients aware of the more aggressive enforcement of the antidumping and countervailing duty laws. When considering the *Universal* case and some of my recent client experiences, I will emphasize that companies need to be aware of all the relevant antidumping and countervailing duty proceedings, both the orders that are already being enforced and the new petitions that are being filed. Companies need to be aware ahead of time whether anything they import would be subject to an antidumping duty or countervailing duty.

My fourth priority is to advise companies to examine more thoroughly other agencies' laws that are enforced by Customs concerning imported products. Customs enforces, at the border, the laws of agencies such as the Food & Drug Administration (FDA) and the Department of Agriculture (USDA). It is necessary to be aware of these other laws, as they may affect certain imported products. For example, a company importing food products should be aware of any relevant FDA and USDA requirements.

Furthermore, companies should be aware of the more aggressive enforcement of traditional Customs laws and regulations. An importer should do everything it reasonably can to ensure its compliance with those

laws and regulations. An importer should be familiar with the complete range of laws that apply to its imported goods and make sure that it is complying with all of those laws.

Customs is requiring C-TPAT participants to review their supply chain security profiles at least once every year and make sure that they are doing what they said they would do. Companies should update their supply chain security profiles through the C-TPAT Security Link Portal regularly to make sure that the most current and accurate information is available for Customs to review.

Companies should be doing regular self-assessments, not only from the securities standpoint, but also from the commercial operations standpoint, to ensure their compliance with all relevant laws. It is not sufficient to do a customs compliance assessment once. At least annually, a company should reassess its customs compliance.

New Hurdles

First, companies need to adopt the C-TPAT requirements into their commercial operations. Second, they need to start carefully monitoring IP rights and antidumping and countervailing duty orders to make sure that they are aware of any of those that might affect their business operations. Third, they will have to do more and more thorough, customs compliance self-assessments, which would incorporate the foregoing topics, as well. It is now necessary for companies to pay as careful attention to customs issues and the associated issues of security, IP rights, and antidumping and countervailing duties, as companies do to tax issues or any other business issues.

New Client Services

In the future, compliance with security requirements is going to be the law, so any attorney who is not paying attention to security ought to start doing so now. Now, not only am I a customs commercial operations practitioner, but I am also becoming an expert about security in the international supply chain. For the last couple of years, I have been learning as much as I can about issues involved in the security of international supply chains in order

to provide advice to my clients. Other customs and international trade attorneys would be wise to learn about security issues.

Fewer antidumping and countervailing duty cases are being filed in the United States now than at any other time since the 1980s, but, perhaps ironically, more antidumping duty cases are being filed abroad in such places as China and India. Now, in the United States, however, more cases involving international protection of IP rights are being filed than ever before. In the United States, there appears to be a shift in emphasis toward IP rights protection under section 337 of the Tariff Act of 1930 and away from trade actions under the Trade Act of 1979.

In the future, attorneys in other practice areas, such as those with a corporate or IP practice, will certainly have to learn a great deal about international trade law. For example, the attorneys in a law firm or practice area involving international financial transactions, such as mergers and acquisitions, need to make sure that they understand the relevant customs and security issues. The attorneys in an IP law firm or practice area need to understand how IP rights can be protected at the border, and they also need to make sure that none of their clients are violating anyone else's IP rights when importing goods from abroad. Attorneys with practices other than customs and international trade would be wise to consult with customs and trade attorneys when advising clients about international business transactions.

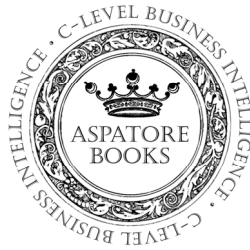
In the future, a customs and international trade law practice will involve not only the traditional commercial aspects of trade, but also the security of the international supply chain and an awareness of the aggressive enforcement of all relevant laws and regulations. Companies with import and export operations will need the assistance of outside customs and international trade experts to ensure compliance with not only the traditional customs laws, but also the new security requirements and other relevant laws.

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Mr. Hall has represented clients in the automotive, aviation, chemical, electronics, food, household products, petroleum, pharmaceutical, steel, telecommunications, and textile industries. In 2001 and 2002, he was the president of the Federal Circuit Bar Association, and he is currently treasurer of the Customs and International Trade Bar Association.

Mr. Hall is a 1980 magna cum laude graduate of the Washington College of Law of the American University, where he served as editor-in-chief of the American University Law Review. After graduating from Duke University in 1970, and prior to entering law school in 1977, Mr. Hall served as an officer in the U.S. Air Force, receiving two Air Force Commendation medals while flying the F-4 Phantom II aircraft.



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