



# **Criminalization of Import Valuations**

**T**he United States has both criminal and civil laws in place that govern import violations. Yet, except for the most egregious violations, the U.S. government has traditionally imposed customs-related civil penalties for trade violations such as failure to pay antidumping duties or inaccurate country of origin marking. Thus, most criminal laws historically had been gathering dust. In the past few years, however, the U.S. government has signaled a sea change in its enforcement strategy and has been increasingly subjecting trade law violators to severe criminal penalties.

The trend towards criminalization of import violations began in 2008. That year and in subsequent years, there were several high-profile incidents of contaminated goods entering the U.S. market from overseas (toys, drywall, cribs). Concerns over import safety have become a lightning rod in the United States, and have beckoned a large number of responses from the Congress, federal agencies, and the U.S. Department of Justice (DOJ). For example, the U.S. government has undertaken an extensive criminal probe into schemes related to the importation of honey from China. The honey case, described in more detail below, has been a watershed that has resulted in several other cases being

### **The Wolff Case—criminal obstruction**

In September 2010, the U.S. government employed a fairly recent, but rarely used, criminal obstruction provision to indict corporate executives of foreign and domestic corporations for their participation in an alleged scheme to evade nearly \$80 million in antidumping duties on honey imported from China. In *United States v. Alexander Wolff, et al.*, DOJ charged 11 corporate executives and six corporations in a wide-ranging, 44-count indictment, which included a charge that the defendants obstructed justice in violation of 18 U.S.C. §1519 as a result of their destruction of various records before they knew they were the subject or target of any investigation into their alleged conduct. This obstruction statute is part of a provision of the Sarbanes-Oxley Act of 2002. To date, the section has resulted in few prosecutions. DOJ's use of this statute in an antidumping duty circumvention case marked a new tactic in the enforcement of U.S. trade law.

Titled "Destruction, Alteration, or Falsification of Records in Federal Investigations and Bankruptcy," Section 1519 provides in part:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, . . . any record, document, or tangible object with the intent to impede, obstruct, or

## **The U.S. government continues to up the ante for trade violations.** BY SYDNEY MINTZER AND MARGARET SALES

brought against goods that are evading U.S. duties and that may violate import safety laws.

Two other factors may also be at play in the increasing criminalization of import violations. First, when the economy falters, federal agencies often look for ways to shore up losses of revenue. Some of these duty evasion cases have resulted in large fines, and they certainly do send a message to importers that may consider skirting duties. Second, there is simply a perception in the United States that goods are entering illegally and evading U.S. laws. That perception may be motivating government authorities to clamp down on perceived cheaters.

As a result of these concerns, U.S. Customs and Border Protection (CBP) has referred more cases to DOJ for criminal investigation and prosecution. Criminal cases expand the U.S. government's ability to conduct broader trade investigations with more targets (e.g., foreign-based producers and traders, consignees), more theories of culpability and liability (e.g., conspiracy and obstruction of justice), and significant prison terms and/or fines. We examine below two cases that exemplify the broadened scope of trade enforcement cases under criminal statutes.

influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States...or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

This language departs from traditional obstruction statutes that require the existence of a pending federal investigation or judicial proceeding. The tactical advantage in charging this statute is that the government may not have to prove that a defendant undertook his obstructive act with the intent to affect a particular government proceeding. Thus, under Section 1519, falsifying, mishandling, or obstructing access to any record, at any time, could well invite criminal prosecution if that record relates to the "investigation or proper administration of any matter within the jurisdiction of any department or any agency."

The indictment in *Wolff* suggests that the U.S. government believes that the defendants coordinated efforts to circumvent U.S. antidumping duties on honey from China. Antidumping duties are imposed by the U.S. government when it determines, through an investigation requested by competing U.S. producers, that imports are being sold at less-than-fair-value in the United States,

and that these sales are threatening to cause, or are in fact causing, material injury to the U.S. industry. An antidumping duty order has been in place on imports of honey from China since 2001, with antidumping duties as high as 221 percent.

The defendants in Wolff are accused of transshipping Chinese-origin honey through third countries before exporting it to the United States. When the honey arrived in the United States, it allegedly was declared to U.S. customs authorities as non-Chinese origin and, thus, not subject to the antidumping order. The Wolff defendants also allegedly imported honey falsely labeled as “organic” when, the indictment alleges, the honey contained antibiotics and sugar.

The specific actions that led to the Section 1519 obstruction charges against the Wolff defendants include: falsifying U.S. Customs entry forms and sales documentation; seeking out customers that do not ade-

## Since 2008, there have been more high-profile incidents of contaminated goods entering the U.S.

quately test the products they purchase; and instructing alleged co-conspirators to not write emails about their activities and to delete documents and emails in case the U.S. Department of Commerce visits their offices.

Not only does Wolff represent the U.S. government’s move toward criminal prosecution for import violations, but also its willingness to use criminal statutes not specific to trade violations. Section 1519 is not a trade-specific criminal statute. Another criminal statute, 18 U.S.C. § 542, although not commonly used, does include sanctions for presenting false information to U.S. Customs officers, as well as penalties of a maximum of two years imprisonment, a fine, or both, for each violation involving importation or attempted importation. In contrast, Section 1519, which provides a potential 20-year maximum penalty, is much broader in scope. It is not limited to import transactions or even trade violations, and most importers likely are not even aware of its existence. As a result, the potential criminal penalty facing the Wolff defendants under Section 1519 is much more severe than the criminal sanctions usually faced by importers: a maximum of 20 years instead of only two years. If Wolff becomes the model for trade enforcement cases, importers will confront much steeper consequences for trade violations prosecuted under Section 1519.

### The Blyth Case—a broad reach

Another recent case involving circumvention of antidumping duties highlights the U.S. government’s

strategy of using an array of criminal charges in trade enforcement cases. In *United States v. Blyth*, DOJ coupled its prosecution under trade-specific statutes with criminal statutes enforced by non-trade-related agencies that regulate import safety.

In Blyth, two co-owners of seafood wholesale companies were sentenced to prison terms in May 2011, after pleading guilty to 13 felony offenses related to the illegal importation and mislabeling of foreign-sourced fish and other seafood. A team of prosecutors from DOJ charged the defendants with various crimes including conspiracy, receiving smuggled goods, and violations of mislabeling under the Lacey Act and misbranding under the Food, Drug and Cosmetic Act. The case was investigated by the Department of Homeland Security, Immigration and Customs Enforcement, as well as the National Oceanic and Atmospheric Administration, the Office of Law Enforcement, the U.S. Air Force Office of Special Investigations, and the Department of Defense, Defense Criminal Investigative Service.

Among other things, the defendants in Blyth bought farm-raised catfish from Vietnam, which they knew had been imported into the United States and falsely declared as sole, in order to avoid U.S. antidumping duties on imports of Vietnamese catfish. An antidumping duty has been in place on imports of catfish from Vietnam since 2003, after a determination by the U.S. Department of Commerce that such fish were being sold in the United States at less than fair value. By their actions, the defendants in Blyth avoided paying approximately \$145,000 in tariffs.

Although the Wolff defendants were charged with obstruction of justice and trade offenses, the defendants in Blyth were charged under two trade-specific criminal statutory provisions, 18 U.S.C. § 542 and § 545,<sup>1</sup> as well as under other statutes regulating imports, the Lacey Act (16 U.S.C. §§ 3371–3378) and the Food, Drug and Cosmetic Act (21 U.S.C. §§ 301 et seq.).

### Conclusion

Although the U.S. government has always used various civil statutes against trade violators, it has now added criminal sanctions to its trade enforcement methods. In doing so, it has demonstrated a willingness to commit substantial resources to the enforcement of these matters with a large number of investigators from various agencies and prosecutors from different sections within the DOJ. With this new reality, it is more important than ever that all companies involved with importing goods into the United States, even those otherwise not subject to customs investigations, ensure that they are in full compliance with U.S. antidumping duty orders, U.S. customs laws, and other trade laws. **w**

*Partner Sydney Mintzer and associate Margaret Sales are with global law firm Mayer Brown’s Government & Global Trade Group.*

**For reprints of this article, please contact Cindy Williams at [williamsc@bnpmmedia.com](mailto:williamsc@bnpmmedia.com) or 610-436-4220 ext. 8516.**