

International Trade Law Remains In the Spotlight

► **Matthew Nicely and Suzanne Kane, partners with Akin Gump, have extensive experience in international trade law and related regulatory matters. Here, they discuss the current state of trade law and compliance, how it has been effected by the Trump administration and the ongoing COVID-19 pandemic, and what participants in this space can expect in 2021.**

CCBJ: International trade is an incredibly complicated area. Can you describe what it is like under normal circumstances, as a baseline, compared to what you've been seeing during this global pandemic?

Matthew Nicely: Even prior to the pandemic, so much was handled electronically already. In a lot of areas of legal practice, and business matters in general, so much of what we do is communicated over email, but now you've had the huge increase in the use of virtual meeting platforms. That applies to our everyday work and our interactions with the agencies. So in many respects, in both of our practices, obviously a few things needed to change, and agencies were quick to make changes to things like required paper service for filings. They got rid of that requirement, because people aren't in their offices and don't want paper going back and forth. So we all joined the 21st century, and we're now sharing everything electronically, instead of on paper as much as we used to.

For the most part, I think it's fair to say that we haven't really missed a beat in our practice areas. From a trade remedy perspective, which is what I do, there have actually been more cases, like antidumping and countervailing duty cases, filed this year than ever before. Even though the Commerce Department officials and International Trade Commission officials who handle these cases are working from home, they've figured out how to continue their work and interact with private practitioners in a

seamless way. Sometimes the agencies have given themselves extensions – and given the parties extensions in turn – because of the pandemic, but for the most part it's sort of been business as usual. We're not having the face-to-face meetings we would usually have, but we have just as many phone calls, and if we need to see people's faces, we have the video platforms. And surprisingly enough, I would say that the body of work is even greater than it was before the pandemic.

Suzanne Kane: On the import side, from a practice perspective, I've seen the same thing during the pandemic. I mostly interact with the government agencies on behalf of clients, and the agencies haven't missed a beat. Even though they're not physically at the ports as much as they used to be, they are certainly online, and they're continuing their audits and requests for information. On the company side, in terms of what our clients are seeing as a result of the pandemic, I would agree with what Matt said: If anything, there's probably been an increase in enforcement actions.

For our clients, and for us as well, there have been episodes of extreme supply chain uncertainty. There were periods of time when we had questions about whether goods could come in from Canada and Mexico at all, and that led to some upheaval, but for the most part it's already been ironed out. It's actually been remarkable how the logistics companies and our clients have managed to adapt and have their supply chains operate very seamlessly as this has all gone on. Another disruption on the client side, however, was when the Federal Emergency Management Agency (FEMA) instituted some export restrictions on personal protective equipment (PPE). There was a decent amount of confusion around what was actually covered by these restrictions, but they've been revised a couple of times and at this point are actually fairly narrow. But when the restrictions were first announced, it was pretty amazing how much they affected companies across

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various industries (not just medical supply companies) that are used to shipping items like gloves and masks and hand sanitizer between their affiliated companies in other countries. There were supply chain disruptions that we helped manage, but now these types of disruptions have really seemed to abate, and things are working pretty well, which is surprising. I wouldn't have predicted it at the beginning.

The Organisation for Economic Co-operation and Development (OECD) has identified four priorities for

keeping trade flowing. Number one, boost confidence in trade and global markets by improving transparency about trade-related policy actions and intentions. Two, keep supply chains flowing, especially for essentials such as health supplies and food. Three, avoid making things worse through unnecessary export restrictions and other trade barriers. And four, even in the midst of the crisis, think beyond the immediate. How are you seeing companies and governments respond to these priorities?

Nicely: I generally agree with the OECD that these are good priorities, and I think most companies would agree as well. They see the benefit of trade flowing freely. However, there are plenty of companies and industries that are import-sensitive, meaning they compete with imports and therefore are on the lookout for instances in which they perceive there to be unfair trade activities occurring, in which case they may trigger a petition to



impose a greater level of duties on those imports. In other words, they're seeking some form of a protectionist policy in that instance.

As for how governments are reacting, I can really only speak about our own government. President Trump has always claimed that his America First policies are aimed at a less internationalist perspective and much more of a nationalist approach to protecting our economy. However, most of the products that come across the U.S. border are inputs to manufacturing. They're not products that people are going to buy at Walmart. So when he imposes additional duties on steel, is he making the steel mills happy? Yes. But is he making the folks who use products that come out of the other end of a steel mill happy? No, because they can't get all of the product they need from U.S. steel mills, so they depend upon an international free-trading system.

Generally, I think that the Trump administration would disagree with the OECD's priorities – at least with regard to those industries for which it is politically expedient for the administration to protect. I don't expect to see a lot of change in the Trump administration's policies in response to these OECD priorities in light of the pandemic – at least not with respect to the trade remedies area of the law.

Kane: This is interesting. Certainly U.S. Customs and Border Protection (CBP), and the Department of Homeland Security as a whole, has a dual mission where they're always trying to strike the right balance between facilitating trade but also securing our borders and identifying any imports that are dangerous or injurious to public health. So they've always had to balance those four items, and it's interesting to see it today. It's not only CBP but also the Food and Drug Administration (FDA) that has the same challenge, and it's interesting to see CBP and the FDA working together right now. They want to facilitate the quick importation of items for use in treating COVID-19,

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yet there is an influx of counterfeit and other dangerous items, so the FDA has task forces to monitor the shipments of not only PPE but also ventilators and any kind of medical supplies that are needed. So they have teams to identify dangerous or possibly counterfeit items, but they are also working with companies to get legitimate goods in quickly, and they're working with the big pharmaceutical companies and medical supply companies to get their legitimate shipments in smoothly.

What are governments doing to offer economic solutions, and are there any solutions that stand out as best in class?

Nicely: Economic solutions have been part of the CARES Act and the various stimulus bills that have been passed, but those have not necessarily alleviated the impact of duties. Early on in the pandemic, there was talk of there being a tax holiday, or a duty holiday, so to speak, on some products. That was announced and then pulled back a couple of times, perhaps because of a failure to communicate between CBP and the White House. Suzanne can talk about this in more detail, but the solutions that some folks at CBP initially thought would be useful during a pandemic weren't really delivered, or perhaps only in a limited way.

Kane: In my area, the White House and CBP together ended up offering very, very limited duty relief to importers at the beginning of the pandemic, which was really just a deferral of time to pay certain duties – and only for a very short period of time. As Matt alluded to, I think there were very few companies for which it actually made

any economic difference. And the confusion around the deferral was problematic too – the agency announced one thing, which got pulled back, and the implementation of the deferral was very difficult for importers to utilize. So that was not a best-in-class solution. These days, one thing I do very often, which companies are much more interested in than ever before, has to do with the fact that there have been so many laws enacted in the past decades that offer duty mitigation opportunities for specific categories of merchandise. There are scores of preferential duty provisions that an importer might be able to use for, e.g., certain medical devices, prototypes or U.S.-origin goods that are being returned to the U.S. And there are free-trade agreements that many companies hadn't previously thought to pursue beyond the United States–Mexico–Canada Agreement (USMCA) or the North American Free Trade Agreement (NAFTA), simply because the administrative burden to pursue the duty relief, or to comply with the FTA provisions, were just not worth it. But these days, we are living in a world where most importers are paying around 25 percent extra in tariffs for a large portion of what they import, and all of a sudden these other duty preference provisions and FTAs are worth dusting off, looking at and perhaps implementing.

How has law enforcement responded during the pandemic?

Kane: To Matt's earlier point, CBP agents are mostly working from home, but some are back at the ports. And they haven't really missed a beat in terms of enforcement actions. In fact, it feels like I'm seeing more enforcement actions than before the pandemic, which might be because the import specialists actually have more time to issue enforcement actions now that they're not on duty at the ports as much. And our auditors have not slowed down. Our onsite audit visits were canceled, but nothing else. The audits themselves haven't been canceled, and the

pace of questions has continued – on the customs side, I'm seeing increased enforcement.

Nicely: So, they are still ensuring that importers are complying with all of the requirements. One of the hallmarks of U.S. customs law, and a hallmark of the notion of trade facilitation, is to prevent product from sitting at the port for lengthy periods of time, and instead to get it into the customs area, to get it into commerce. The assumption through the Customs Modernization Act is that importers are regulating themselves, so to speak. CBP can come along after the product has already been consumed and say to an importer, "Hey, wait a second, did you value that product correctly? Did you classify that product correctly? Did you accurately report where that product was coming from?" Those are the three pillars of customs law. I think what Suzanne is saying is that in essence they're doing those audits on paper now instead of in person.

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Kane: Yes, and in fact many of them were already done that way, because it's often financial auditing. It's kind of like we all just caught up to the 21st century. The meetings that typically took place in person, on site at the company, were often not really necessary for what the agencies were looking into anyway.

Nicely: The trade remedy laws are administered by the Commerce Department and the International Trade Commission. We don't typically think of these agencies as part of law enforcement in the same way we think of CBP. But, they do go through a similar process. They conduct



an investigation, and as part of that investigation, after they collect information through a questionnaire process, they will go and visit a company in another country and do what's called a verification, kind of like an audit. Now, instead of doing that, they're issuing more and more supplemental questionnaires. They're papering the record with more information than they would otherwise, because they can't go and visit the company on site. So the answer to the question of how law enforcement has responded during the pandemic is that they are doing less face-to-face work and more interrogatories, if you will. And that doesn't mean that the enforcement level has changed. Arguably it's gone up. It's just a different format.

What kind of disputes are you seeing related to trade, and how are organizations resolving those disputes?

Kane: So many disputes. So many different kinds.

Nicely: Right. But a lot of them have nothing to do with the pandemic. Rather, they have everything to do with who is sitting in the White House. But in terms of how the U.S. government agencies are doing their jobs, not much has really changed. There are several agencies that are delegated authority by Congress under various statutory provisions, and they're resolving disputes in the ways they have always resolved them. There is more litigation, however, because President Trump has gotten more creative in how he's using these various laws. So there have been challenges to how the Trump administration is imposing these duties.

I'll give you one example that got a lot of attention in the press. At one point, President Trump decided to apply 50 percent duties on steel from Turkey instead of the 25 percent that was applied to most other countries (and which had previously applied to Turkey for a long time). Obviously, importers of steel from Turkey were taken

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-MATTHEW NICELY

aback. Really it's an example of the Trump administration willy-nilly saying, "OK, because of the concern about the way that Turkey is valuing its currency, we're going to impose a higher duty rate on Turkey." But they didn't follow any procedures, and the U.S. Court of International Trade ultimately said, "No, you can't do that. You didn't follow the procedures you're supposed to in order to do that."

There are other examples of litigation that we're involved in where the Trump administration has done similar things - or where they're not following the procedures, either the specific statutory authority that's been granted to them by Congress or the Administrative Procedures Act (APA) requirements that have been deemed to apply in this context. So we've been seeing a lot of activity like this, where the agencies have not gotten it right and the judiciary has stepped in and said, "No, wait a second, you've got to go back and do that over again."

How are organizations planning for 2021?

Kane: Day by day, I'd say.

Nicely: There's a lot packed into that very short question. I think there's an assumption that if Vice President Joe Biden is elected, the new administration will approach trade relations with our trading partners much differently from how the Trump administration has approached those relationships. This administration, despite being Republican, has implemented a much more aggressive,

nationalist type of trade policy than anything the country has seen since before World War II. I think a Biden administration would approach things very differently. Does that mean they would remove all of the additional duties that President Trump has imposed? Not necessarily, but there will certainly be some changes. Most of what Suzanne and I do typically was not front-page news before the Trump administration. And nowadays it is. Ever since Trump got into office, trade has been on the front pages.

If Biden is elected, I think there's going to be a serious reconsideration of several aspects of the Trump trade policy. And what would that do for companies going forward? What would it do to companies' planning? There has been a huge shift in supply chains as a result of Trump administration trade policy, and one of the things the Biden administration would need to be careful about is the whipsaw effect that happens when trade policies change dramatically overnight. It's going to be fascinating to see how things play out. ■



Matthew R. Nicely is a partner with Akin Gump's international trade practice. His practice covers the full range of the U.S. trade regulatory regime, including trade policy, trade remedies, customs, export controls, economic sanctions, antiboycott and anticorruption laws. Reach him at mnically@akingump.com.



Suzanne Kane is a partner with Akin Gump. She counsels clients on international trade and business and U.S. import controls. Kane has served for more than six years as senior attorney-advisor at U.S. Customs and Border Protection (CBP). Reach her at skane@akingump.com.
