

Dynamic Change Roils International Trade Waters

► **Change with a capital “C” is the watchword for those practicing in Akin Gump’s international trade practice, where Anne Borkovic focuses primarily on export controls and anti-money laundering actions and Lars-Erik Hjelm leads the customs and import controls efforts.**

CCBJ: Manufacturing and supply chain management can be high risk and highly regulated. What do you expect to change and stay the same going into 2019?

Lars-Erik Hjelm: With respect to U.S. trade and customs policy, the only constant will be change. Given the past two years of the Trump Administration and the focus on an America First trade and tariff policy, one can only sum up the environment with respect to manufacturing and supply chain management as dynamically changing. The aggressive deployment of seldomly used trade and tariff laws, all within the context of protecting American industry and seeking concessions from trading partners, have created on many levels a coherent trade and tariff policy and a state of flux. For example, the unique “Section 301” tariffs placed on roughly half of inbound China trade last year – 25 percent ad valorem and 10 percent ad valorem additional duties – are very costly for manufacturers exporting from China to the U.S. and their related importers – as well as the supply chain partners. Currently, many manufacturers are making different supply chain decisions, often seeking to produce products outside of China – or to use more creative and compliant ways to reduce their tariff burden through customs valuation. However, it is possible that some or all of these tariffs will go away if there is an agreement with China that addresses the Trump Administration’s

concerns about liberalizing China’s own trade and technology practices. The question for 2019 is: Will there be a paring back of the tariffs or will the Trump Administration expand them if a deal is not reached with the Chinese government?

With respect to the national security based tariffs and quotas on steel and aluminum imports, we do not expect there to be too much relief in 2019 except for the continued use of an opaque exclusion process administered by the Department of Commerce and the possibility of relief for certain FTA and trading partners (e.g., Canada). Basically, despite the added costs for manufacturers exports and U.S. importers, these tariffs enjoy significant support in many sectors of the U.S. economy.

It is a big open question as to whether the Administration will expand the national security based tariffs to cover imported autos and auto parts, as is whether Congress enacts without any changes the new United States-Mexico-Canada free trade agreement, which also contains new and more rigorous rules of origin on autos and auto parts. While the chances are decent that Congress will enact the USMCA, the chances of the Administration going through on the national security based tariffs on autos and auto parts are not yet known, given the strong opposition that these tariffs would engender, not only in Congress but among U.S. trading partners, particularly those with an already established U.S. auto manufacturing presence (e.g., in foreign trade zones).

Another question is, with Brexit, will the United States enter free trade negotiations with the United Kingdom? There are already talks underway to reestablish negotiations over a United States-European

Union free trade agreement. It is simply a very vibrant and evolving area of law practice and a great time to be a trade and customs lawyer.

Anne Borkovic: There's a tremendous amount of legal and regulatory change around the world, and many issues impacting corporate social responsibility, manufacturing and supply chain management are not fully fleshed out in those treaties, laws and regulations. Many of our clients are voluntarily holding themselves to higher standards than the jurisdictions in which they're doing business.

We're also seeing them explore blockchain and other technologies to help identify and track product origin, compliance with regulations and customer engagement. This is especially interesting in the conflict minerals space, where we're seeing people explore how to tag conflict minerals at the mines and trace them through the supply chain in order to be certain that they are working with trusted partners, complying with



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regulations, and meeting the legal and voluntary standards they're holding themselves to.

How are your clients shifting how they develop compliance programs and designing automated workflows?

Borkovic: Our clients recognize that a successful compliance

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program has to be tailored to their company's products and culture as well as the risks that they face. They are engaging in very thoughtful debates about how best to document their programs, format their policies and procedures, and deploy associated tools and training to their employees.

There's a little bit of tension because often the regulators, auditors, outside counsel and others want the company to have written controls; but those written controls can be overwhelming for everyone to read and keep updated. Many clients test shorter, more targeted communications or automated workflows for routine or complicated tasks. Auditors appreciate having a systematic and verifiable approach to compliance issues.

What audits and enforcement activities are you seeing among federal agencies?

Hjelm: For Customs and Border Protection, Immigration and Customs Enforcement and Homeland Security, these agencies are hiring additional personnel to enforce the China and steel and aluminum tariffs – and to rigorously enforce free trade agreements, as well as other enforcement regimes. Broadly, these agencies are reviewing importers through audits and other enforcement actions to make sure that every company

is playing by the rules, and they are emboldened given the focus of the Administration on trade and tariff enforcement – and are not hesitant to impose penalties for violations. The Trump Administration is also very keenly focused on antidumping and countervailing duties (AD CVD) enforcement. It is up to Customs to enforce AD CVD orders, collect the estimated tariffs and to ensure that the tariffs are paid on the liquidation of entries.

Forced indentured and child labor enforcement is also increasing, given the customs and labor statutes proscribing the use of this pernicious form of labor in the production of imported products. Customs relies on a Tariff Act statute in coordination with the Department of Labor, and the agency investigates alleged violations, often based on non-governmental organization allegations, and ultimately has the authority to bar imports if there is a finding that merchandise is produced with forced, indentured or child labor. Allegations that are brought to the agency



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by nongovernmental organizations are taken very seriously, and they are getting increased attention among many importers and particular industries.

Food, Drug and Cosmetic Act import enforcement is also on the rise. There is a very aggressive Commissioner at the Food and Drug Administration (FDA),

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—ANNE BORKOVIC

and he is fulfilling the commitments that he made to enforce, given the resources that he has. The FDA is underfunded to a large degree, but Customs works hand in glove with the FDA, so seizures and notices of examination are increasing for diverse commodities from eyeglasses to drugs.

Borkovic: The Departments of State, Commerce and Treasury, especially in the context of export controls and sanctions, tend to have a slower pace of investigation and enforcement so there can be a lag between when a regulatory or administration change occurs and when we see related enforcement. That said, enforcement continues to focus on national security risks and ensuring that private sector entities understand the importance of compliance and generally act as a trusted partner. What we're seeing emphasizes the importance of manufacturers and others knowing their customers and their vendors. This helps manage risk related to diversion, the highly volatile sanctions space, and money laundering.

Even with all the changes to U.S. trade policies, we're continuing to see an emphasis on compliance with U.S. trade controls on countries like China, Russia, Iran, Cuba and Venezuela. Some of those restrictions have become much more complicated and intense in the last two years.



How are you advising clients on Customs enforcement and guiding them through Customs audits? What are some best practices?

Hjelm: The first best practice for an importer, a regulated party, is to understand that they could be audited at any time. Two, they should prepare for the possibility of an audit by reviewing their compliance program and conducting what we call a self-assessment: looking at their past transactions for compliance, determining whether there needs to be enhancement. In conducting self-assessments, there is a statutory benefit if you file a disclosure. You pay the government, but you won't get penalized.

Once auditors ask an importer to produce certain data about transactions, it is important for clients to work with outside counsel but not have outside counsel dictate the relationship with the auditors. The auditors do not like lawyers to dominate the relationship. We encourage our clients to make sure that they have a point of contact who is on call to manage the audit. There's no reason to hide the ball with the auditors.

They suspect wrongdoing if a lawyer does all the talking. Someone on call – who we, outside counsel, talk with in advance – goes a long way.

Besides the tariffs I've discussed, free trade agreement claims are always a focus of audits, as are customs valuation transfer pricing rules, since about 50 percent of all U.S. inbound trade is between related parties. Importers have to review their transfer pricing and make sure that the values that they declare and any adjustments they make are defensible.

How are you advising clients on voluntary disclosures, multijurisdictional matters and internal investigations?

Borkovic: Like we've been talking about, in many ways the landscape is volatile, but in other ways, many of the core principles, risks and requirements of the regulations that I spend much of my time advising clients on have remained relatively stable, particularly the International Traffic in Arms Regulations, the Export Administration Regulations and some of the sanctions programs.

In that space we focus on innovating the internal investigation process to better and more efficiently reconcile and analyze data across different systems and functions within the client. That helps us from an investigations perspective to make sure that we're gathering the best information and providing a complete and reliable analysis to the regulators. We're really understanding the root cause of any issues, and we can supportively, effectively plan corrective actions and other compliance program enhancements because we have looked at data and inputs from different systems, functions and the jurisdictions that they are in. ■