

Season 3- Episode 3

Olga Torres: Thank you for joining the Torres Talks Trade Podcast. My name is Olga Torres, and I'll be your host today. In today's episode, we'll explore whistleblower programs and statutes available in the United States to prosecute fraud cases of customs duties evasion. We'll discuss how U.S. enforcement agencies, particularly DOJ's civil and criminal divisions, are ramping up scrutiny of customs and tariff evasion schemes under the False Claims Act and related statutes, as well as the whistleblower program.

Our guest today is a prominent whistleblower attorney in Washington, DC with experience in FCA cases involving customs and tariff fraud. I'm delighted to welcome Andrew Miller, an attorney with the law firm Barron and Budd in Washington, DC. His practice focuses on bringing fraud and abuse litigation throughout the United States. Under the False Claims Act statute, including representation of whistleblowers in customs fraud cases.

Our goal today is to discuss not only enforcement trends, but also practical tips and advice in whether you want to be a whistleblower in a case or if you're a company that believes you may have a whistleblower situation in your company. We will talk about the DOJ Criminal Division's recent memorandum emphasizing enforcement of tariff evasion, export controls, and economic sanctions. We also will discuss DOJ's recently updated Whistleblower Awards pilot program, which I believe started technically in 2024 but we recently added categories that now include trade, tariff, and customs fraud, as well as sanctions offenses, material support of terrorism, cartels, and transnational criminal organizations, as well as money laundering. And with that, Andrew, thank you so much for joining us today and giving us your time.

Andrew Miller: Well, Olga, thank you for having me. It's a pleasure to join you today.

Olga Torres: And it's actually really interesting. When I was reviewing your bio, I didn't know what are your ties to Texas.

Andrew Miller: I grew up in Texas.

Olga Torres: Okay I did not know that.

Andrew Miller: I'm a native Texan. I'm a lost Texan in Washington, DC. I grew up in El Paso, Texas. Went to school at Trinity University in San Antonio. I worked for a few years in Dallas, TX, where I think you're located, and then went to law school at the University of Houston and then clerked on the 5th Circuit Court of Appeals and my judge's chambers were located in Houston. I've traveled the entire state over and then somehow found myself in Washington DC and I can't get myself out.

Olga Torres: Oh, so that's funny because I saw that you went to Houston Law School or the university in Houston. And I was like, OK, I didn't know that. And I know we've had at least

one case together, a customs fraud case. And I had no idea back then that you had those ties. I said I'm going to be nicer to him in the podcast.

One of the questions that we're getting a lot, I guess recently is are we really going to start seeing more cases related to customs fraud, especially because we were already seeing a fairly distant amount of activity under the Biden administration. Now with the Trump administration, we get this massive tariff escalation. We have now the Supreme Court weighing over some of those tariffs and whether it's constitutional or not. But we definitely are seeing more explicit statements, especially coming out of DOJ with the change to the memorandum specifically emphasizing these areas. What are you seeing on the ground in your practice? Are you actually seeing a spike in potential whistleblower cases related to customs? Or is it still steady? And the reason I ask is as a customs lawyer, as a trade lawyer, we're getting a lot of questions every day. We typically will assist proactively. We'll help with compliance programs and prior disclosures and classifications and all the technical aspects of customs compliance. But we still are expecting to get those investigations trickling in with respect to the latest round of tariffs that were raised under the second administration that the last round of tariffs was under the first Trump administration. There was a bit more under the Biden administration, but a lot of the cases that we saw under Biden were still from the first Trump administration. I am still seeing that sort of shock adjustment by companies. But are you actually starting to see those cases being investigated like with the latest round of tariffs? Investigations take quite a long time, so I'm interested to see your take on that.

Andrew Miller: Sure. It's a great question. I think for the more recent set of tariffs that he's enacted under his emergency powers that's currently before the U.S. Supreme Court. We have yet to see cases brought to us under that regime. I think it will not be a surprise if we ultimately do see those cases start to trickle in. I think it's kind of at this point just a little wait and see. It's in our experience, almost 100% of the customs fraud cases that come across my desk are related to the tariffs that President Trump instituted during his first administration under primarily under Section 301 of the Trade Act of 1974. And so, it was prior to that, though, it was pretty quiet on the customs fraud front. Tariffs were low, companies had little incentive to violate customs rules and therefore things on the whistleblower front were pretty smooth. But then when the introduction of the new tariffs under Section 301 with that came then a flood of new inquiries into, hey, I think things have changed in my company. I'm starting to think that maybe we're taking steps to avoid paying what we owe under these new tariffs. And will you take a look? I think we are still getting cases even as recently as two days ago under the Section 301 kind of regime.

Olga Torres: Yeah. And those are the cases that we are seeing too. I'm expecting maybe more investigations. What I'm seeing on the administrative side it's actually kind of interesting because we're seeing a lot more CF-28 from customs, which if you're not familiar with it's basically a request for information from customs. That typically could trigger whether the attorney or the company says, oh wow, based on this request, we reviewed our records, we have an issue, we're going to do a prior disclosure or in some cases, especially if they don't take it too seriously, they submit the information. The government, the customs, could issue CF-29 action taken, which could technically prevent you from filing prior disclosures. Now the concerns are with the memorandum by DOJ and I'm amending the whistleblower pilot program to include this areas, whether at least from my perspective as a customs attorney, should I be worried about more general awareness by companies right now

that we have this kind of more history about Section 301 enforcement with DOJ now involved in the equation versus when I started my career where it was you're typically worried about mainly customs. Once in a while there'll be a referral back in the day where we had, for example, before Section 301 under the first administration tariffs were low, except in a few cases where like anti-dumping duties or countervailing duties and those were stratospheric type of tariffs. We would see some of those. But now when I'm seeing this potential spike in activity, I'm starting to see it with customs inquiries because a lot of that is customs kind of generally being aware of wait, an entire industry just switched codes. It's kind of interesting how companies think they're so smart. Then customs just has this automated systems where they can see all of this entire industry are trying to switch code to this. Where they're now changing values all of a sudden. And we start seeing CF-28's.

My question now, and a lot of it is honestly unprecedented, right? We don't know. But should I be worried as a customs attorney, should I be worried that there could be more referrals? Whether customs themselves get information from the importer where it was traditional before? Like you don't even give it a second thought. CF-28 comes in, I give information to the government and whether that could trigger more. And I had a podcast last week. And we had a former customs auditor and I asked him that question and he was like, I do expect more referrals because coming from the Trump administration, the orders are focused on criminal enforcement, not just the civil side. That is something that I'm monitoring very acutely, just because we're very kind of trusting of customs and I still am. But that is another step that I'm conducting automatically. What are we potentially disclosing? Do we need a disclosure? But not only with customs, do I need to worry about DOJ and could there be more referrals? It sounds like you're seeing kind of the same thing. We're still not seeing the IEEPA tariff referrals. We're still not seeing those cases picked up.

One question that I just thought of, do you think that it now that we have this challenge in the Supreme Court and we're waiting to see what the decision is, how would that impact do you think, an investigation, if you have a situation where we have fraud and it's clear that it is fraud, but the actual constitutionality of the law is being challenged? How do you think U.S. Attorney's offices would deal with that?

Andrew Miller: Well, it's an interesting question and I think that they've got to be wary of it because I think if it's a constitutional challenge, ultimately it goes to, well could those tariffs have ever been put in place in the first instance and therefore did liability ever attach? I still think the tariffs are still so new that the likelihood of, for example, a False Claims Act complaint being filed and the government already investigating it at this stage and we're speaking in November of 2025, is highly unlikely. And so I think ultimately it's a question that while certainly very interesting. I think it's ultimately in practice never going to come up. But I wanted to go back to what you said and I think it's your instincts are 100% accurate. This used to be an agency issue. CBP would monitor its own backyard and would request follow up information from companies. But now the Department of Justice has stepped in not only on the criminal side but the civil side. And I think the more we hear about how customs enforcement is a priority of this administration over and over again. Now we have both criminal and civil taking a look. People are going to start to notice that even folks who aren't attorneys in this space like you and I, and this includes potential whistleblowers. And the more people hear about why this is a priority and that tariff invasion is something that's important to this administration, that's going to result in more inquiries from potential clients. I think certainly if the constitutionality of those tariffs is upheld, then I think the floodgates could potentially open.

Whether or not ultimately we're talking about valid FCA cases is a different question, but I think that the number of inquiries will certainly increase.

Olga Torres: Yeah, I have a comment on even if it was upheld, I was still at least from a defense point of view, I would still make the argument, well at least things were still kind of up in the air at the time. So is that I guess it is still the law of the land at the moment. But I wonder if there could be any arguments if you're negotiating some kind of penalty of like, well, it was still kind of all a scramble with the government because I remember when we were looking at Section 301. Section 301 also had a case in the Court of International Trade and then it went to appeals process. I remember having discussions and whether they stuck or not debatable, but I do remember making those arguments of well even this law, because at the times everybody was, Oh my God, we haven't used Section 301 like this and to this extent and whether it was in violation of the APA and all the things. There was theoretically some preliminary confusion by industry because it was the first time that it had been done in a long time. Even that would be interesting if it was upheld was that confusing to people that were importing, that were thinking maybe it's not going to be or two courts at the time were saying it was unconstitutional, but that's a different discussion.

In terms of like getting potentially a lot of whistleblowers because there's a lot more awareness and you're so right when you were saying that. I wrote it down because now people used to ask me what do you do for a living and I'm an attorney and what is a customs "okay this that like import" and people just didn't compute even sanctions, for example, or export controls. People still didn't kind of understand what it was. And I feel like now people actually know, like I can just say I'm a trade and national security lawyer and they're like, yeah, like export stuff and tariffs and like trade wars like I get it now. There's definitely that like I call it the main street awareness of what we do or you know the agencies and who regulates what. Is that in a way also creating a lot of work for you to sort of filter real whistleblower cases versus things that may not be good cases. Like how do you go through that process as a whistleblower attorney? Like what's a good case?

Andrew Miller: Well, what distinguishes a good case from a weak one? I'll say this this is true, whether it's in international trade or healthcare or government contracts, documents, documents, documents. Our clients tend to be very credible individuals and their first-hand accounts of what they're seeing and hearing at their place of work or with a competitor is certainly one thing to consider. But it's hard to dispute actual documents that evidence, the alleged fraud. If you've got import records, invoices, and emails that touch upon a potential scheme to evade what is actually owed on imported goods, that's the best place to start, at least in my world. It avoids more of the he said, she said that can come up when a potential client comes forward without documents. Now that's not to say that documents are required, but it certainly tends to get us off on a stronger footing.

Olga Torres: Do you have situations where someone approaches you and says I believe such and such is happening at my company and may not have the documents where they actually are still with the company and basically start gathering documentation while still working for the company? Is that common?

Andrew Miller: Yes, that's common. We were always careful to explain that documents that

are within the normal course of your duties, like if you come into a contact with documents as part of your role as a bookkeeper or as a doc worker, whatever it might be, that's fine. But we don't want folks going outside of their lane to get material.

Olga Torres: Like gathering, almost like an investigator role type.

Andrew Miller: Correct. We're not in the business of using our potential client as private investigators. If you've got it on hand, great and if ultimately, it's a case that we decide is strong enough to file and bring to the attention of the Department of Justice there are mechanisms in place for them, the department, to go get the materials that we think exist. That way we don't run into any of the issues with tasking a client to go get documents that they wouldn't normally have access to.

Olga Torres: That makes sense. It's really interesting because I was speaking at a conference in Spain and I want to say this was like two or three years ago and I was speaking about False Claims Act and customs cases. What to do to avoid having to do with a whistleblower situation and

giving advice on make sure you have a whistleblower policy, you take it seriously, et cetera. One of the Spanish attorneys, he goes that's so interesting you in America, it kind of reminds me of like the Western movies where they would have like wanted and then they would get like a bounty for turning someone in. And I was like, okay, yeah, I guess so because they were so surprised that the whistleblower gets a portion of the award. I was explaining some of the cases and sort of how it works. It brings me to my next question. What do you think is the motivation? In that conference, they were like it's just the money. I remember saying no there are other reasons why I've seen people nervous about losing their customs broker license or potential personal liability. I think they had a very jaded way of looking at it. But what do you think? You are closer to the whistleblower than I am. What do you think is the motivation? Are there different motivations? Does it change? Does it vary case by case? I'm assuming the award doesn't hurt right in terms of motivation, but I would think there are other reasons other than just the award as such.

Andrew Miller: Yes. Just like with anything, folks come forward for all types of different reasons. I think the type of client that I prefer is typically one who has reported what they've seen internally at their company, they've reported it up the chain of command and express their concerns about what they're seeing. Making suggestions about are there other ways we can go about this that maybe don't cross a line into what could be considered fraud against the government. Oftentimes what we see is those individuals either aren't believed or they're ignored and then they feel like they've done the right thing with reporting internally. But then there's a secondary concern of am I going to get in trouble because my signatures on these documents or I've certified that I've reviewed certain invoices. I don't want to go to prison. I don't want any part of this. What do I do to kind of protect myself? A lot of times folks reach out to me after they've reported internally to no avail. And then also they have kind of realized I feel like I need to do something and it's more about self-preservation and making sure that their freedoms aren't taken away for something that they didn't really have anything to do with. At least in terms of coming up with a scheme. That's how a lot of my clients come to me. The fact that there's a reward that's something that Congress put together way back

when the False Claims Act was first passed back during the Civil War. That was just a recognition that there's no way even back then, for the government to be able to identify all types of fraudulent schemes that might be impacting federal programs. Congress determined that it was in everyone's best interest to put in an incentive that if there is ultimately a resolution that comes along as part as a result of your information, then you're entitled to a range of a recovery of that of that total amount recovered. I think it's a fair process. I'll be honest with you, I defended these cases for the first few years of my legal career. I've been on both sides and or I saw the light.

Olga Torres: And you switched to the dark side eventually.

Andrew Miller: Or I saw the light, however you want to characterize it. But anyway, I can totally appreciate the perspective that you shared from your international colleagues. I heard it plenty when I was defending those cases. I think a lot of times the answer is somewhere in the middle. People feel like they're trying to do something right. And if there's a financial incentive at the end of the day, great. I will say that a lot of my clients are not motivated by the recovery. They just kind of want to make sure that they're doing their part to make sure that systems are running legally in compliance with the laws.

Olga Torres: Yeah, and what you just said, it's so important. I always tell companies take concerns seriously because we have had cases that were so preventable that basically got out of control because someone kept emailing. It is sad in a way because I've had a couple of cases where the employee actually believed the concern was real. There were there were actually no violations, right? But someone had to take the time to sit down or review and express that, hey, we are taking it seriously. We have legal reviewing or internal legal or whatever the case may be. So that employee understands that it's not being, he's not, she's not being ignored. And I've had that happen several times. And what's interesting is like the company still ends up spending resources. Because eventually you have to bring legal to show that there was no violation, that the employee misunderstood the law or must misunderstood the transaction. And it could have been solved with just we have a process in place, we have a procedure, like even a hotline of you voice your concern, you receive something tangible. Like you were going to follow up with you. We're going to tell you what our review shows and it could be solved with that. And you'll be surprised that so many people don't have those systems in place. I've also seen more sophisticated companies that have the systems in place. I had a situation where and this actually was a Fortune 500 company and they had a hotline which was technically an e-mail and no one was monitoring the e-mail so people were sending and somebody in this case wasn't an employee, it was they were supplying parts to the company. They were complaining or they were not complaining, but they were asking, inquiring as to the legality of an export, but no one was responding. Believe it or not like basic tweaks to systems just to make sure you have a hotline that it is monitored. Not only that it is monitored, but that you have that that basic follow up with the employee, with the supplier, with your business partner. I don't have percentages, just from my experience, I think that would solve like 50% of the issues that we see that lead to a whistleblower situation. Just having that basic. It always surprises me why more people don't have something more concrete to deal with whistleblowers.

Switching gears a little bit in terms of whistleblower options, I suppose, one thing that I've seen is, for example, one of the export agencies, the Bureau of Industry and Security, BIS under commerce. It was interesting under the Biden administration they switched a bunch of

things and they had several memos on enforcement and one of them was about the voluntary self-disclosure process and they changed a few things in the process. Then towards the end of the memo it was like, hey, and by the way, if you submit tips to us, then we'll give you credit if you ever need it. It literally was that they don't have a full-blown whistleblower program, but it was like such an interest in industry reaching out like because and that agency actually has investigators like on the ground, people with badges that can go and check. Some of the other agencies don't even have that. But even that agency as they were trying to you know get more cases I suppose. Having that in there like hey if you know of anybody competitor or whatever and you tell us as part of your voluntary disclosure or whatever the case may be, if you tell us of somebody else that did something and then we make to give you well it was almost like we'll store this credit for you if you ever need it. And they also mentioned the whistleblower program with the anti-money laundering provisions that they have. FenCEN has their own whistleblower program. We're seeing more of this like hey reach out to us industry. It actually becomes interesting in case someone is actually thinking of blowing the whistle, what to choose, right? Like do you go first with a BIS tag? Do you go to all of them? One of my questions to you, especially for people that may not be as familiar with the new whistleblower pilot program by DOJ, where they just this year amended to include customs violations and sanctions violations. Why would someone go to that program, say, versus the False Claims Act? Like, can you talk about the differences, advantages, disadvantages of those programs?

Andrew Miller: Sure. And just a quick comment on what you just shared. It's not surprised me at all that BIS, that they're asking for tips from industry about their competitors because a lot of the inquiries that we get are not from insiders within a company, they're from competitors. And because they're so well positioned, especially in intimate industries that have very slim margins, they know when there's been a change within some kind of dynamic where their competitors are now offering maybe prices that aren't in line with what they know the underlying costs are. Competitors are a great source of information when it comes to potential customs fraud. Now going back to your question about why would someone use the corporate whistleblower pilot program versus the FCA? I think it's a great question because until further notice I'm going to use the False Claims Act where appropriate to bring these types of cases. And that's no shade on this new pilot program. It's simply that I know what the FCA mechanism is. I know what it is to file a qui tam complaint. I know what it is to work collaboratively with Department of Justice and CBP. I feel like until we have better on the ground data about how that corporate whistleblower pilot program is actually working. I think the False Claims Act, at least for the time being, is going to remain

Olga Torres: The golden standard.

Andrew Miller: The primary vehicle for bringing in these types of cases. And it's my understanding because we just had our annual conference among the relators bar and this customs fraud was something that was a panel topic. I talked to some of my fellow practitioners and in this space I think we all it was my sense that almost uniformly the FCA will be the way that we approach these cases moving forward. Again, that could change when DOJ says they want something to be a priority and they want this program to focus on it, it makes sense to listen to that. They're directing you. They're giving you a pretty big hint. We will always keep it in mind for what we think might be an appropriate case. But I think the default, at least at this stage, is still to use the False Claims Act.