Trade Winds

Summer/Fall 2010

Valerie Slater
Partner

Dear Friends and Clients,

Welcome to our inaugural edition of *Trade Winds*. We will be sending this newsletter to you every 60 days in 2011 to highlight the successes of our clients in tackling international trade issues, as well as to apprise you of timely issues by spotlighting our client alerts and recent, as well as upcoming, speaking roles in the legal and trade community.

As the global economy slowly recovers, we have seen an uptick in trade activity, and we hope that you have seen an increase in your business as well.

- Mergers and acquisitions are on the rise, and many headline-grabbing deals have featured cross-border issues on which we have been asked to advise.
- Similarly, the aerospace and defense sectors have grappled with increasing regulatory scrutiny, and our trade lawyers have been at the forefront of some highly confidential, but very complex, internal investigations and regulatory negotiations.
- On the next page, we share with you, with the kind permission of United Parcel Service, a detailed and interesting account of a very positive outcome obtained by our customs and litigation teams. The result is a tribute to UPS' tenacity and its role as an industry leader.
- Our trade lawyers have been active in a number of recent proceedings under Generalized System of Preferences (GSP), which is currently the leading U.S. trade preference program

We welcome your comments on this newsletter as well as on the trade issues that you would like most to hear about. As we head into the holiday season, we wish you great happiness and success in the new year.

The International Trade Team

Client Case Study

UPS' Determination Reaps Benefits for U.S. Customs Brokerage Industry

Given its large international trade volume, and despite its close and amicable working relationship with U.S. Customs and Border Protection (CBP), United Parcel Service (UPS) has encountered relatively small fines that CBP levies for non-intentional errors on customs import entry filings. UPS has appealed many of CBP's decisions, arguing that the fines are not necessarily supported by law, but sometimes found that the appeal process resulted in very little change in the agency's stance. Specifically, CBP sought to recover monetary penalties of $75,000 against UPS due to UPS' alleged failure to exercise "responsible supervision and control" in connection with a series of non-intentional tariff misclassifications that resulted in no loss of duties or fees to CBP.

A Long Road

Beginning in 2004, UPS and Akin Gump contested CBP's allegation that UPS violated the "responsible supervision and control" requirement in a series of proceedings before the U.S. Court of International Trade (CIT) and the U.S. Court of Appeals for the Federal Circuit (CAFC). Unfortunately, the CIT initially ruled, after a 2007 trial, that UPS failed to exercise "responsible supervision and control," that CBP was not required to consider each element of that requirement and that CBP had the discretion to issue multiple monetary penalties for the misclassifications. UPS appealed this decision and continued arguments before the CAFC.

At the CAFC, Akin Gump and UPS appeared before a three-judge panel and argued that the plain meaning of the law, its history and CBP's own previous decisions in other cases required that the agency consider each element of the "responsible supervision and control" requirement before issuing any fines. The CAFC remanded the case to the CIT and, effectively, threw out the entire penalty case because CBP had not satisfied this condition precedent to a penalty case.

Because the CAFC decision found that CBP had not considered all 10 regulatory factors in the definition of "responsible supervision and control" and that the CIT erred in upholding CBP's determination that the agency was not required to consider each factor, the CIT found the main issue on remand to be whether CBP can "correct its error and demonstrate that it should be able to recover the penalty." After UPS and CBP submitted briefs, the CIT issued an opinion and answered clearly and unambiguously that the answer was "no"; as a consequence, in a favorable and final outcome to this litigation, the CIT issued judgment in favor of UPS.

The CIT's opinion focused on whether CBP should be afforded the opportunity to reopen the trial proceedings to introduce testimony on whether the agency considered each of the regulatory factors or whether the court should remand the penalty proceedings to the agency. The CIT found that CBP should neither be afforded the opportunity to reopen the trial proceedings nor be permitted to develop additional evidence on remand.

A Great Outcome

Similarly, because the CIT found that CBP did not meet its burden of proof, it also determined that any remand would essentially provide the agency with an unfair opportunity to create an additional factual record for a penalty recovery—thus rendering its burden of proof at trial meaningless. Without any reason to reopen the trial proceedings or to remand the case to the agency, the CIT entered judgment in favor of UPS.

This decision has a significant and positive impact for both UPS and the U.S. customs brokerage industry. An amicus brief was filed in support of UPS by The National Customs Brokers & Forwarders Association of America, Inc., representing nearly 870 member companies with 100,000 employees in international trade. The decision requires CBP to consider all of the regulatory factors before it issues penalties or other sanctions for alleged violations of the "responsible supervision and control" requirement. Finally, the CIT's decision sets positive precedent on various other customs issues, including the burden of proof assigned CBP in a customs broker penalty case (and, possibly, other types of customs monetary penalty proceedings).

UPS In-House Team:

Todd Benson
UPS Legal Department

Norman T. Schenk
Vice President, UPS Supply Chain Solutions

Akin Gump Team:

Lars-Erik A. Hjelm
Partner, International Trade

Terry Lynam
Partner, Litigation

U.S. Generalized System of Preferences

Akin Gump lawyers have advised and represented clients in proceedings under, and policy issues related to, the U.S. GSP program. Administered by the interagency Generalized System of Preferences (GSP) Subcommittee headed by the Office of the United States Trade Representative, GSP is the leading U.S. trade preference program, providing duty-free access to the U.S. market for thousands of products from many developing countries. In 2009, imports valued at over $20 billion entered the United States duty-free under this program.

Akin Gump lawyers have also been active in shaping the policy and legislative framework in which the GSP Subcommittee operates. While annual review proceedings follow a prescribed schedule and format, they occur in a politicized policy environment in which affected interests work through various government channels, including Congress, in seeking to influence outcomes. Working, where warranted, in conjunction with the firm's public law and policy practice Akin Gump lawyers are skilled in the formulation and execution of political strategies to maximize clients' prospects for success in GSP proceedings. Similarly, Akin Gump lawyers advise clients on the ongoing debate about potential reforms to the U.S. GSP program, including on the terms of legislative reauthorization for the program.

Examples of GSP cases:

- Pier 1, Inc., a home furnishings company, required GSP reauthorization for a policy campaign.
- Sumitomo Rubber (Thailand) Co., Ltd., a rubber manufacturer, required representation for GSP competitive need limitations (CNL) waiver proceeding.
- Azurix Corp. Argentina, a construction company, required representation for a GSP county petition.
- Royal Thai Embassy – Office of Commerce requested advice on legislative proposals to reform GSP.
- HEB Grocery Company, LP., sought a CNL waiver to extend GSP preference.

Recent Client Trade Alerts

June 29, 2010
"Enactment of Comprehensive Iran Sanctions Act Expands Extraterritorial Reach of the U.S. Embargo on Iran" (International Trade Alert)

July 21, 2010
"Financial Reform Bill to Impose Supply Chain Security and SEC Reporting Requirements for Products That Incorporate Congolese 'Conflict Minerals'" (International Trade Alert)

August 2, 2010
"UK Bribery Act Raises the Bar on FCPA Standards for Antibribery Compliance" (FCPA/Antibribery Alert)

October 25, 2010
"Draft Guidance Issued for UK Bribery Compliance" (FCPA/Antibribery Alert)

To receive our alerts, please go to **http://www.akingump.com/communicationcenter/**.

Recent and Upcoming Speaking Engagements

November 30, 2010: International trade partner **Wynn Segall** moderated a panel titled "Obtaining Required Nuclear Licenses & Authorizations and Complying with Special Reporting Requirements" at the ACI Nuclear Export Controls conference at the Westin Washington, D.C.

December 2, 2010: Akin Gump Moscow hosted "Navigating Foreign Anti-Corruption Laws," featuring international trade partner **Edward Rubinoff** and litigation partner **Justin Williams**. The seminar provided a practical overview of how the UK Bribery Act may affect Russian companies, how it compares with the U.S. anticorruption regime and what Russian companies should now be doing in response.

December 6, 2010: International trade partner **Edward Rubinoff** moderated a panel discussion, "U.S. Sanctions: Following the Funds to Find and Foil the Threats," at PLI's Coping with U.S. Export Controls 2010 at the Westin Hotel in Washington, D.C.

February 25, 2011: International trade partner **Lars-Erik Hjelm** will speak on a panel titled "A Master Class on Enforcement of ITC Exclusion Orders" at ACI's 3rd Expert Forum on ITC Litigation and Enforcement at the Marriott Downtown in New York City.

March 2, 2011: International trade partner **Lars-Erik Hjelm** will speak on "Customs and Successful Advocacy in Customs Administrative Practice" at Georgetown University's International Trade Law Update in Washington, D.C.

March 4, 2011: International trade partner **Valerie Slater** will speak on a panel titled "**Trade I: Year in Review**" at Georgetown University's International Trade Law Update in Washington, D.C.

Meet Our New Partner

Stephen S. Kho

Stephen Kho focuses on international trade policy and international dispute resolution. He represents companies and governments on matters ranging from trade and investment issues to public international law.

Mr. Kho joined Akin Gump after nine years at the Office of the U.S. Trade Representative (USTR) in the Executive Office of the President. As associate general counsel and acting chief counsel on China enforcement, he was responsible for developing disputes and advocacy positions related to China's obligations in the World Trade Organization (WTO). He was previously also the lead attorney at USTR on intellectual property and government procurement matters. In addition, he has participated in numerous free trade agreement (FTA) negotiations, including the U.S.-Jordan FTA, the U.S.-Singapore FTA, the U.S.-Chile FTA, the CAFTA-DR and the U.S.-Korea FTA.

From 2002 to 2005, Mr. Kho was legal advisor at the U.S. Mission to the WTO in Geneva, Switzerland, where he managed the WTO dispute settlement portfolio and was involved in formulating litigation strategies for the United States. Mr. Kho has participated in every stage of the WTO dispute settlement process and is currently a member of the WTO's indicative list of panelists for dispute settlement in the areas of goods, services and intellectual property rights.

Mr. Kho is listed in the 2009 and 2010 *Chambers Asia: Asia's Leading Lawyers for Business* in the category of International Trade.

Mr. Kho received his B.A. with honors from the University of Virginia in 1991, his J.D. with honors from the University of Maryland in 1995 and his LL.M. with distinction from the Georgetown University Law Center in 1998. He is a member of the District of Columbia and Maryland bars.

"When I left the government to enter the private sector three years ago, I was immediately attracted to Akin Gump because of its deep understanding of the role of governments in developing law and policy, not just here in the U.S. but around the world. With the firm's expertise in international trade and its focus on public policy in all that it does, Akin Gump was the ideal place for me to build a strong and effective international trade policy practice."

Recent Written Works

"The New Cross-Strait Pact," *China Brief*, October 1, 2010

"Beyond the Political: ECFA's International Trade Implications," *Taiwan Business Topics*, August 2010

The mission of the international trade practice at Akin Gump Strauss Hauer & Feld LLP is simple and clear: to optimize our clients' ability to engage in the cost-efficient and timely exchange of goods and services across borders, in full compliance with applicable laws and regulations. The international trade practice, comprising lawyers, economists and other professionals, has extensive experience in helping clients deal successfully with international trade regulation and policy issues. Our credibility and reputation with the Office of the U.S. Trade Representative; the International Trade Commission; the departments of State, Treasury, Commerce, Homeland Security and Justice; and U.S. Customs and Border Protection are key to our ability to help our clients achieve their international trade objectives.

AKIN GUMP
STRAUSS HAUER & FELD LLP

International Trade Partners

INTERNATIONAL TRADE PRACTICE CHAIR

VALERIE A. SLATER
Washington, D.C.
vslater@akingump.com
202.887.4112

CFIUS, ECONOMIC SANCTIONS, FCPA AND EXPORT CONTROLS

EDWARD L. RUBINOFF
Washington, D.C.
erubinoff@akingump.com
202.887.4026

WYNN H. SEGALL
Washington, D.C.
wsegall@akingump.com
202.887.4573

THOMAS JAMES MCCARTHY
Washington, D.C.
tmccarthy@akingump.com
202.887.4047

CUSTOMS

LARS-ERIK A. HJELM
Washington, D.C.
lhjelm@akingump.com
202.887.4175

TRADE POLICY

HAL S. SHAPIRO
Washington, D.C.
hshapiro@akingump.com
202.887.4053

STEPHEN S. KHO
Beijing and Washington, D.C.
skho@akingump.com
202.887.4459

TRADE REMEDIES

VALERIE A. SLATER
Washington, D.C.
vslater@akingump.com
202.887.4112

WARREN E. CONNELLY
Washington, D.C.
wconnelly@akingump.com
202.887.4046

SPENCER S. GRIFFITH
Beijing and Washington, D.C.
sgriffith@akingump.com
(86) 10.8567.2230

J. DAVID PARK
Washington, D.C.
dpark@akingump.com
202.887.4585

akingump.com

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