

A Practitioner's View Of U.S. Trade Negotiations

The Editor interviews Stephen S. Kho, Partner in Akin Gump Strauss Hauer & Feld LLP's Washington, DC office.

Editor: Please tell our readers about your experience as associate general counsel in the office of the U.S. Trade Representative (USTR) and as chief counsel on China enforcement. Also, tell us about your work with the WTO.

Kho: The USTR is a great training ground for learning about trade in a sink-or-swim situation. The office is relatively small but is responsible for a wide range of activities, from trade negotiations to trade legislation, to international dispute settlements at the WTO and NAFTA. I had a wonderful time in my nine years there. The work is fast-paced. There is only a small but experienced staff, with many of the attorneys having been law firm partners. I learned from the best.

I was at the U.S. mission to the WTO as a legal advisor. There were two of us who had the primary responsibility of overseeing the U.S.'s WTO portfolio. At any given time, the U.S. has about 30 to 40 cases split between the two of us, from being complainants to respondents to being a third party. We had supervisory responsibilities, basically to ensure both consistency in arguments for U.S. cases across the entire caseload and appropriateness of tone since these were government-to-government disputes requiring a certain diplomatic, non-adversarial approach.

Editor: What are your major practice areas today at Akin Gump?

Kho: It's not unlike the work at USTR, which I am trying to translate into private practice. Major areas include WTO disputes and WTO analysis. A lot of international rules can be used for advocacy purposes for companies as well as for governments, as we also represent sovereign

states. Some of what I do involves market access issues and some investment and services work. We also do enforcement work outside of the WTO, using U.S. trade rules like Special 301 (under the Trade Act of 1974, dealing with trade barriers to U.S. companies and products related to intellectual property laws).



Stephen S. Kho

Editor: With the Obama administration announcing that trade will be an engine of growth during the balance of his term, where do you see the emphasis in the trade area being placed?

Kho: The President is focusing on two major free trade negotiations that are already underway – the TPP (Trans-Pacific Partnership) and the Europe-U.S. bilateral agreement. Now that it has been announced that Japan will join the TPP, this will add a significant market access component to these negotiations.

Two other trade agreement negotiations are ongoing that may come to fruition sooner: the expansion of the Information Technology Agreement and the International Services Agreement.

As for the substance of these negotiations, most folks are very aware of trade remedy rules and classic trade issues such as tariff issues, but we're seeing new trends in barriers – from non-tariff barriers to new services and intellectual property barriers. The administration has talked about the importance of enforcing existing trade agreements, which I consider key to our trade policy. There still are existing rules that currently are being underutilized for enforcement purposes; there's room for additional enforcement using those rules, some of which have been in place for

awhile but have never really been tested.

Editor: Do you expect fast track to be enacted?

Kho: There is no way to do these agreements without it. Historically, the administration has chosen to use the fast-track up-and-down vote with prior guidance from Congress, making it easier for our trading partners to be able to negotiate with the United States and expect that negotiation to be the final deal that is only reviewed by Congress. In fact, many trading partners have signaled the need for fast track before they go further with final negotiations. The fight right now seems to be *when* to do fast track, not *whether* to do fast track. In Congress, they would like fast track sooner, so they can dictate the terms of the agreements early on. The administration has the opposite view. It would like to finish negotiations first, then present the terms as a *fait accompli* to Congress before fast track is enacted.

Editor: When do you think the negotiations on TPP and the U.S.-Europe FTA will be completed?

Kho: These two negotiations will be very exciting to watch because there are going to be new rules and new areas to tackle. The coverage is also unique, in that TPP is the precursor to any future APEC-type broad regional agreement. Admitting Japan to TPP will be a very big deal since the U.S. doesn't have any trade agreements with Japan. Also, Japan's other FTAs don't have the broad, encompassing scope that is projected for the TPP. While there is speculation that the TPP will be completed by year's end, there are many sensitive areas still to be covered, and I expect consensus will not be reached for another 11 or 12 months at least.

The U.S.-EU FTA will take a bit longer, owing to insufficient resources in the U.S.

to cover both negotiations, certainly with the sequestration and budget cuts. The trade negotiations are all being done by USTR, a lot for an agency with fewer than 300 professionals to cover these broad-reaching negotiations and whose budget has suffered. The U.S.-EU FTA is an opportunity for the U.S. to open up the EU market, given the current austerity situation in the EU.

Editor: Do you feel that other agreements such as the International Services Agreement (ISA) and an expansion of the Information Technology Agreement (ITA) are on the right track to be completed?

Kho: The ITA has the potential to be completed by this summer, depending on the will of the participating countries to get it done. It is limited in scope in terms of product coverage and in terms of dealing with tariff cuts only. The ISA to a certain extent is smaller in scope than the broader FTAs, but there is new ground to be broken, and that might take awhile.

Editor: What are the benefits that will accrue if these negotiations are successful and the agreements are adopted?

Kho: As for benefits, first and foremost is market access. For U.S. companies it means market access to some countries that traditionally have been closed or restricted to U.S. companies but that are thriving now. Southeast Asia is one, with growth that was not there 30 or 40 years ago, so this is a prime time to get involved. As for the EU, this is a chance to develop new rules to tackle problems that were not a problem 20 or 30 years ago, but are now. Countries have gotten smarter in using non-tariff barriers, and now is the time to tackle them. So there are major benefits to generating these new rules and opening up new markets.

Editor: What is the status of global protection of intellectual property under the WTO?

Kho: In my view the rules have become stagnant. The TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement in the WTO was always intended to be just a floor, and we've never gotten beyond that floor. There have been attempts with the ACTA (Anti-Counterfeiting Trade Agreement) and some of the FTAs to provide more protection, but there has always been resistance. IP has gotten a bad rap through debates between global

health advocates and those concerned about IP protection, and that's certainly not the way to couch that debate. You need both. We shall never have better healthcare without innovation, nor innovation without strong IP rules in place. But there are some who would seek to get access to existing innovation without some reward to the innovator and who do not think about the long-term problems that would cause. What we really do need is to figure out ways to promote both innovation and the willingness to share in that innovation.

Editor: What differences have occurred in relation to trade with China as a result of its joining the WTO? Once China is treated as a market economy in 2016, what differences do you expect in our trade relations with China then?

Kho: China has become much more rule-oriented post-WTO accession. It's hard to break cultural and other practices that have gone on for thousands of years, but China realizes that it has to be held to international rules and norms. They have a long way still to go, but we do see big steps being taken.

As far as what will change when and if China gets market-access status, some wonder whether there will be changes at all. Under the U.S. trade remedy system, will the U.S. really treat China as a market-oriented country? In looking at pricing, one may be able to make the argument that prices are still not really market-based. Some make the argument that China may not get market access status in 2016, that there are ways countries can unilaterally look at the situation and make determinations about whether they will in fact be granting China market-economy status. It's not clear in WTO that that's a mandatory must-give.

Editor: We've talked about non-tariff trade barriers, and many recent trade barriers have sprung up. Please point to some of these non-tariff barriers.

Kho: One thing that comes to mind is the use of standards for excluding the import of products, either for reasons of food safety, for consumer protection or for national security (cybersecurity). There are legitimate standards, and then there are those who use standards in an illegitimate way to protect domestic industry. Burdensome labeling requirements make it difficult for some companies to compete. And while health and safety rules are legitimate, a lot of them get taken to an extreme that becomes protectionist. In terms of IP, there

are localization requirements, forcing innovation to be housed domestically or transferred to domestic entities.

Editor: Do you consider the numerous bilateral and regional trade agreements to be undercutting the efficacy of multilateral agreements, such as the Doha Round?

Kho: My view is that the WTO has become stagnant. Coming to an agreement with 159 countries multilaterally is difficult. I don't think the regional or the bilateral agreements are so much a risk as just a symptom of the fact that it's hard to get massive consensus these days. Now is the time for regional agreements, regional coalitions and regional cooperation, and once that has reached a certain saturation point, we'll all go back to the more multilateral system to start the next round of negotiations. I think the WTO is still the most valuable tool for enforcement purposes, and there is still a lot of enforcement ground that has not been covered.

Editor: What measures can we take to enforce investor-state arbitration awards, especially in view of state reluctance to accept these awards?

Kho: Only recently have a couple of countries said that it doesn't matter what they've agreed to in the past, they just are not going to abide by these awards. Now we're seeing for the first time the need to have an enforcement mechanism for these investor-state disputes. In the world of international trade, trade has evolved to be more than goods moving across borders. We are seeing trade in services and foreign direct investment. If countries that have agreed to engage in investor-state arbitration choose at the end of the day not to abide by an award, there should be some consequence, or the whole system falls apart.

Since sovereigns are not subject to any international police, how do you compel them to conform? WTO has found a way. But what sort of retaliation by another sovereign would make sense and be reasonable in an investor-state case? There has to be international agreement that that retaliation will not be seen as something that violates international law, but as something that is authorized under international law. It could come under the WTO. Or, we might add an enforcement mechanism into bilateral investment treaties. This broader TPP, for example, will have an investment chapter, and one could build into it an investor-state enforcement component.