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Required Reading About International Trade Today

The Editor interviews Valerie Slater, head of Akin Gump's international trade practice, Ed Rubinoff, export control and economic sanctions partner, and Brian Pomper, partner in the firm's trade policy practice.

Editor: Please describe your respective practice areas.

Slater: We currently have about 25 lawyers and professionals in our international trade group, which is fairly sizable for a trade group. We cover all of the principal trade regulatory areas and trade-based issues, including a very significant amount of trade-remedy litigation, i.e., anti-dumping and countervailing duties and safeguards; we also have a great deal of experience with export controls and economic sanctions, and we have a very active customs practice.

We also have excellent trade policy and WTO capability within our group, which is supplemented by a number of professionals, including Brian Pomper, who focuses heavily on trade-related work as part of our policy group.

Editor: How are current economic conditions affecting your practice area and your clients involved in international trade?

Slater: Trade issues tend to be countercyclical. For example, we typically see an increase in anti-dumping cases as the economy weakens because U.S. producers of various goods will tend to be more quickly negatively affected by import competition. On the export side, as the



Valerie Slater



Ed Rubinoff



Brian Pomper

economy weakens, particularly as exchange rates change, people often look to export more, and therefore market access issues tend to become more important.

This most recent recession was so severe, though, that imports and exports declined. We saw trade regulatory work decline significantly in late 2008 and into a good part of 2009. That was also true with respect to some of our compliance-related functions on the export control side, one of Ed Rubinoff's specialties. Clients who would usually seek help in evaluating, establishing, revamping and reinforcing export control programs put that kind of proactive activity on hold.

That is now changing. As of the end of last year, with the general economy improving, imports are back up. Our clients are feeling better about getting back to their normal proactive compliance activities, and we have seen an improvement on the policy end as well. A rising level of imports may be detrimental for the U.S. balance of trade, but it is very beneficial for our work.

Our practice area's recovery has been quicker than others, and we feel like we are back to a more countercyclical mode.

Editor: Tell us about your market-access practice.

Slater: We do quite a bit of market-access work. An example of a relatively recent project involved a very large U.S.-based insurance

company that does business in China. The company was having a hard time getting certain licenses, and we were able to help it resolve the situation.

We are working with another client that has been having great difficulty getting a trademark registered in China. The client wants that trademark registered not only to protect itself against counterfeiting but also because it wants to do business in China. The company is not about to open retail outlets to do marketing just to have the counterfeiters benefit. So, its efforts are very much market-access oriented.

Editor: What about your trade-remedy work?

Slater: Trade-remedy cases have always been an anchor for our practice. Originally, we were known for this type of work, that is, anti-dumping and countervailing duty cases. We represent both domestic and foreign industries, which is pretty unusual. We have a diverse practice that we are very proud of because representing both sides in these cases gives us a perspective that is unique. There are very few firms who can do it in the way that we do. We also have a depth of experience in both market economy

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and nonmarket economy cases.

To give you an example, in anti-dumping cases we represent the U.S. catfish industry, the U.S. domestic fertilizer industry, many Korean steel producers in various cases and the government of British Columbia in the U.S.-Canadian lumber dispute.

Editor: Brian, have international trade policies under the Obama administration differed markedly from the policies of the Bush administration?

Pomper: Yes, most definitely. The Bush administration had an evolution in some ways in that they started with the Trade Act of 2002, which gave the administration the authority to negotiate and pass bilateral trade agreements, causing a flurry of activity in rushing to negotiate and pass bilateral free trade agreements.

From my perch on the Finance Committee, I perceived these agreements to be increasingly controversial, in part because of a resistance in the Bush administration to take into account growing concerns about globalization, not only just in the Democratic Party, but in the country at large. The constant drumbeats of bilateral free trade agreements, in some respects, exacerbated those concerns.

The Obama administration has not taken that course. The current administration has been very deliberate, focusing heavily on enforcement. They are acutely conscious of growing public unease, having launched a review of our bilateral investment treaties. There is a lot of in-depth thinking about what America's trade policy should be. Frankly, I think that is overdue.

There has been a lot of dissatisfaction in the business community because they are seeking clarity on what the Obama trade policy is. In some respects, the Obama trade policy is still in formation. In that respect, the Obama administration is definitely different from the Bush administration. I believe that Obama's instincts truly are multilateral, not protectionist.

Editor: Has the administration demonstrated that it upholds NAFTA and other international free trade agreements?

Pomper: Absolutely. Obama said during the campaign that he would renegotiate NAFTA, but he has walked back from that. Although the general public may not be aware, behind the scenes the administration has been very forceful in ensuring that the "Buy American" provisions that were in the various stimulus bills early on in this administration were consistent with the WTO agreements. That was not an easy thing to do at the time, but they were very, very insistent in countering protectionist voices in Congress. This is an administration that does respect our international obligations.

I think that the administration is still really trying to figure out what America's trade policy should be. Something that is not big and flashy, but important, is a reform of the U.S. preference system. This is the group of legislative bills that permits the United States to allow in exports from certain developing worlds without paying any tariffs. There are a lot of conflicting rules for different countries, and some countries are left out. It is a confusing and complicated process, but reforming and rationalizing our preference program system is worthwhile.

Finally, congressional committees are looking at a reauthorization of the legislation authorizing the Bureau of Customs and Border Protection – another worthwhile endeavor. This is actually the nuts and bolts of trade and how stuff actually flows across our borders – again not very sexy but certainly important to commerce.

Editor: Has this area been affected by the partisanship in Washington?

Pomper: I worked for a member of Congress who was not terribly partisan, Chairman Max Baucus. Trade policy is something that the unions, in particular, care about – they are not in favor of free trade. Also, you have a dynamic in Washington where you've got a lot more Democrats in town. Hence, one could say that trade policies that enable more trade are disfavored, to put it mildly. It's a shame because if you look back to 1934, the trade bills, trade legislation and reciprocal trade agreements were really Democratic initiatives that passed under Democratic presidents. Neverthe-

less, a bias in the party today seems to lean against pro-trade policies.

Slater: Traditionally, trade has been a very bipartisan exercise. Even when other things were extremely difficult, the committees on Capitol Hill, and even the various industry factions, would seek middle ground. For a long time, trade was one of the least partisan subject areas in Washington because trade has been one of those areas where views crossed party and even geographical lines. In recent years, that has changed, and it has become, like everything else, much more partisan. When trade gets affected the way that it has been, you know that the situation is pretty serious.

Pomper: We are in a tough place on trade policy right now. For many years trade policy was really about lowering tariffs. That was good for the United States because we already had really low tariffs, so it was about opening up other people's markets. Now it is more complicated because when you talk about trade, you are not just talking about tariffs, but about domestic laws regarding how you treat foreign service providers, how you respect intellectual property rights, about what are the labor rights in a country, what are their environmental policies, and how do they treat foreign investment. These are things that strike at the heart of what it means to be a sovereign country. It has touched a nerve, and people are now thinking about trade policy differently than they once did.

Slater: The China Permanent Normal Trade Relations, which took China off the list of "bad countries" that always got a higher duty rate and were not entitled to certain benefits of being a trading partner, put China on the same footing with other major trading partners.

Pomper: But it also brought them inside the rules-based system. So it put some constraints on China, which is what a lot of people thought was a good idea.

Editor: When we interviewed Jeffrey Immelt, chairman of General Electric, last year, he was very affirmative about encouraging foreign trade. Can you comment on this?

Slater: The largest U.S. corporations operate globally, and instinctively will not want barriers. In some respects, because they move parts and people – as well as finished goods – around the globe, their very operations depend on the absence of barriers. Barriers create friction in their wheels, so to speak.

Editor: Do you represent clients before government bodies?

Slater: In fact, that is what we do. We are representing clients on the Hill on trade-related matters. We are representing clients before the Commerce Department and the International Trade Commission, and Ed and his colleagues represent clients before an entire army of agencies that deal with trade controls, meaning export controls and economic sanctions and FCPA.

Rubinoff: The international trade controls practice deals with the various laws and regulations administered by an alphabet soup of trade agencies. There are numerous regulatory programs that involve rules, procedures and licenses, which govern cross-border transactions by our clients. We regularly appear before the departments of Commerce, State, Treasury and Homeland Security and just about everyone that plays a role in U.S. international trade law and policy.

Editor: Would you tell us about recent developments under FCPA, especially FCPA enforcement actions?

Rubinoff: The trend in FCPA enforcement over the last few years has been an increasing number of cases and larger fines, probably culminating in the prosecution of Siemens in late 2008, by both German and U.S. authorities, and the Halliburton/KBR case in early 2009 in the United States, with record fines assessed in each case. There was a little slackening through the rest of 2009, but in 2010 we are seeing more cases and big fines again.

The Department of Justice, which is responsible for enforcement of the anti-bribery part of the FCPA, announced that it would focus more on prosecutions of individuals. In January, an FBI under-

cover sting operation led to the indictment of 22 executives and employees of companies in the military equipment and law enforcement product fields for scheming to bribe foreign officials. DOJ also indicated that it would target certain industries, including the pharmaceutical sector. A number of companies are disclosing in their SEC filings that they are holding large reserves to settle FCPA cases.

Non-U.S. companies that are subject to the FCPA because they market securities in the U.S. are increasingly the target of U.S. enforcement.

In March, BAE, the U.K. defense contractor that was prosecuted by U.K. authorities under its anti-bribery law, agreed to pay DOJ for allegedly making false statements about its compliance with the FCPA. This was followed by an announcement that Daimler, the German auto manufacturer, will pay a \$93.6 million criminal fine and a \$91.4 million civil penalty for allegedly engaging in a series of bribery deals in several overseas markets.

Other countries are also pursuing actions under their anti-bribery laws, including investigations of U.S. companies. It was reported recently that Germany is investigating Hewlett Packard's German office with regard to sales in Russia, and Russian prosecutors are cooperating with German authorities.

Editor: To what extent do you help companies work out compliance programs so that they won't stumble?

Rubinoff: We stress to our clients that it is prudent to invest in compliance to avoid investigations and enforcement actions, which can be very expensive and harmful to reputations. Many companies were reluctant to invest in compliance programs since they are not profit centers, but as national security and corporate governance concerns became U.S. government priorities, and enforcement budgets and activities increased, compliance concerns have become paramount for anyone engaged in cross-border transactions. So we help companies design, develop, implement and administer internal compliance programs not only for the FCPA, but also for export controls, sanctions and customs.

Slater: Rather than look at a lot of legislation, this administration has been very enforcement oriented. Their theory is that we've got some good laws on the books, and the problem has been the lack of tough enforcement. Export controls, sanctions and the FCPA area were generally expected to be more vigorously enforced by this administration, and in fact it has come to be.

We are seeing a serious focus on enforcement in general across regulatory areas with laws already on the books. However, the export control area is the one place where the Obama administration not only has stepped up enforcement, but has an initiative to help industry that may result in some legislation.

Editor: How do you advise clients on this frequently changing area of exports and sanctions?

Rubinoff: We e-mail Client Alerts to advise on important new laws, regulations, cases, rulings and other developments; analyze how they might impact our clients; and suggest ways they can deal with new challenges and opportunities afforded by these developments. We also conduct in-house seminars, CLE programs and webinars for specific clients.

Editor: Do you represent clients who are looking to liberalize trade with particular countries, such as Russia and China, where relationships seem to have improved to the extent that some of these controls are unnecessary?

Rubinoff: We help clients on bilateral trade issues involving Russia and China, where we are fortunate to have Akin Gump offices that can assist us. We get involved in specific transactions, in bilateral disputes, and in policy initiatives to reduce barriers to trade.

Editor: What about Exon-Florio?

Rubinoff: Exon-Florio is the law that governs national security reviews of foreign investments in the United States. That law was amended in 2007 to provide greater transparency into the

process, but it has also expanded the scope of these reviews and the procedures for conducting them. While CFIUS focuses on U.S. national security interests, Congress and the president were equally insistent that the law balance these concerns with the longstanding U.S. policy of openness for foreign investment, which has been a key driver of our economy.

Editor: Please explain how CFIUS (Committee on Foreign Investment in the United States) authorized by Exon-Florio operates.

Rubinoff: CFIUS is an interagency committee that conducts the review of transactions that could result in foreign control of a U.S. company. Parties to a proposed transaction file a notice with CFIUS, which triggers a 30-day review of potential national security implications of the deal, possibly followed by a 45-day investigation. If CFIUS determines that a proposed acquisition of a U.S. company by foreign persons poses a threat to U.S. national security, it can attempt to mitigate the threat through measures agreed to by the parties, or it can recommend to the President that he block the transaction.

As M&A activity is picking up in conjunction with the economic recovery, the CFIUS caseload is increasing again. The new law will likely require more reviews and investigations of foreign investments that have potential national security implications.

Editor: And you can help in that effort?

Rubinoff: We help clients contemplat-

ing a transaction to assess the application of Exon-Florio and evaluate its potential impact on the deal. We engage informally with CFIUS to advise them of transactions that may require review. We prepare notices for filing with CFIUS, represent clients in the review, and negotiate mitigation agreements, where necessary. For high-profile cases that might be controversial, we work with our public law and policy practice to interact with Congress and policy makers regarding issues raised by the transaction, and coordinate public relations with the media.

Editor: On the other side, what happens to American companies that may be going into countries like India that have strict import controls? Do you help on that side as well?

Slater: We have done some of that, depending on the countries and the particular issues, but there are rules with most of our major trading partners, including India, governing investments. We sometimes do that directly in working with U.S. government officials who can help the clients, and sometimes we work with local counsel in the various countries. But we do run into that in a wide array of countries. In our case, the CFIUS process and the investment rules are relatively open. Everyone knows what the triggers should be. Internationally, barriers to investments can take many forms, and we help our clients sometimes assess whether those kinds of barriers are likely even before they go do a deal. That's the best case.

Sometimes clients forget to ask the question or to recognize the possibility of a CFIUS issue as they move along in

transactions that involve foreign parties. Recognizing the potential ought to be part of every company's inquiry when going into any kind of transaction involving foreign partners. In many cases, the answer will be an easy one: CFIUS isn't implicated. In some cases, we might say that there is a potential issue here, and let's take it up to CFIUS. It can be done very simply.

Rubinoff: And, if you have a potential CFIUS issue in a proposed transaction, we help to make sure that it is not a barrier or a roadblock by developing a strategy for addressing it so that your case does not become the next Dubai Ports World.

Editor: Do you do seminars on these subjects?

Rubinoff: We are regularly invited to speak at seminars sponsored by bar associations, conference organizers, clients and other organizations. We also sponsor our own conferences to which we invite clients and other friends of the firm. We go out to our clients and speak to them directly as well as offer CLE and other types of training. We write articles, and we send out client alerts that are added to our website and are freely available. The information gets picked up by blogs and other types of media and gets reported.

We will communicate directly with the client when we know that something has occurred that directly affects client interests. The communication of information and constant counseling are important elements of what we do and the service that we provide.