

Top Trade Policy Moves To Watch In 2023: Midyear Report

By Jennifer Doherty

Law360 (July 28, 2023, 9:42 PM EDT) -- The U.S. and China's economic dance is picking up tempo in the second half of 2023. While the Biden administration insists it won't cut ties, expect more executive and legislative action on outgoing investments, minerals, steel and more, all aimed at getting an edge on Beijing.

Here are Law360's picks for international trade policies to watch.

Steering Outbound Investments

Calls to set up a government mechanism to block dollars from leaving the U.S. to fund advanced technology initiatives in China and other "countries of concern" through outbound investment reviews gained traction while Congress negotiated the competition bill that ultimately became the CHIPS and Science Act. The review provision was whittled out of the final package, but resurfaced this year in the National Defense Appropriations Act.

Meanwhile, the White House is said to be prepping an executive order akin to the one that set up the Committee on Foreign Investment in the United States, though its scope will likely be smaller than CFIUS'.

Former Deputy U.S. Trade Representative Robert Holleyman pointed to competing pressures on the Biden administration, with different camps on Capitol Hill calling on the White House to "move and move fast" on the one hand, and to proceed with extreme caution if at all on the other.

"Somewhere in there it gives the administration the flexibility to realize they're probably not going to satisfy everybody, and the flexibility to try to calibrate this in the best way if they go down this route," said Holleyman, now president and CEO of Crowell & Moring International. "Because that's a big step."

While China, Taiwan and South Korea already screen investments, the U.S. stands to be the first Western country to implement outbound reviews.

"The issue is not new, but it's new for the U.S.," Holleyman said.

IPEF Still in the Talking Stage

The White House's centerpiece trade initiative, the Indo-Pacific Economic Framework for Prosperity,

which aims to get 13 countries in Asia and Oceania — notably, not China — and the U.S. rowing in the same direction across four pillars focused on trade, supply chains, climate change and economic inclusivity, announced its first results this spring.

With an agreement on supply chains currently under legal review, more negotiating rounds for the three remaining IPEF pillars will take place later in the year, according to the U.S. Department of Commerce, which oversees the three non-trade pillars.

"Interestingly, it's the three Commerce pillars that are moving quicker and look like they will actually be done, some of them, if not all, by the end of the year. Whereas the trade pillar is just lagging," Akin Gump Strauss Hauer & Feld LLP partner Stephen S. Kho told Law360.

While USTR, which is responsible for the IPEF's trade pillar, has more experience in trade negotiations, and trade has a more "robust" toolbox in existing trade deals than the other pillars, as Kho put it, the Biden administration's refusal to pursue tariff elimination as a trade policy is likely slowing things down.

"I think it's flagging not because of the substance, but because there's a quid pro quo when you're negotiating," Kho explained. "We, the United States, want high standards, and they want market access, and that's usually how that works."

Green Steel Deal

IPEF is just one example of a trade initiative advancing environmental policy goals. Another is the U.S. and European Union's Global Arrangement on Sustainable Steel and Aluminium, which is currently staring down an October deadline.

Amid mounting friction with Brussels, the Biden administration reached a temporary truce in 2021, replacing national security duties on the metals — known as Section 232 tariffs — with an EU-specific quota, coaxing the European bloc to stand down on retaliatory tariffs on U.S. goods. But that deal expires this fall, and both sides are currently lobbying for different approaches to promoting less-polluting steel production and combating overproduction.

China is far and away the world's leading steel producer by volume. Its potential to put the U.S. steel industry out of business was a factor in the creation of the Section 232 tariffs.

"USTR and the European Union seem very interested in trying to move this forward. At the same time, the two sides are very far apart in the discussions," said Tim Brightbill, co-chair of the international trade group at Wiley Rein LLP.

The EU recently introduced a Carbon Border Adjustment Mechanism to be phased in over the next few years, which will levy producers of certain emissions-heavy commodities based on how much carbon dioxide they produce. Meanwhile, the U.S. is calling to set standards for emissions and excess capacity and levy countries that don't comply.

"This will be a high-priority issue for steel and aluminum in the United States and the European Union, and there will be an intensifying effort to try and wrap up some negotiations by November." Brightbill told Law360. "If that doesn't happen, It will be interesting to see if perhaps the United States makes some accommodation or changes to Section 232 tariffs on steel and aluminum."

More Mineral Moves

Following the White House's controversial agreement with Japan earlier this year on critical mineral trade, the Biden administration is currently working toward similar deals with the EU and the United Kingdom, once again in an effort to reroute supply chains outside of China.

So far, the agreements fail to address the fact that China dominates not only extraction, but also the complex process of refining ore to the pure metal needed for products like semiconductors, former Assistant Secretary of Commerce for Industry & Analysis Nazak Nikakhtar told Law360.

"What I'd really like to see happen in these agreements is more of a focus on sharing capacity," said Nikakhtar, now a partner at Wiley Rein, noting that the U.S. is the only country outside of China with viable mineral processing pilot projects.

"At some point, we need our allies to build their own capacity, and what these deals lack is substance in terms of exactly what we're going to do," she continued. "We have to make sure that we're all encouraging the scientific [research and development], in terms of separation and post-separation activities, and both of our countries are investing in our respective processing capacities."

WTO Talks Grind On

On Friday, the United States blocked a motion to install new appointees to the World Trade Organization's Appellate Body for the 68th consecutive time, once again demonstrating frustrations with the organization's dispute settlement system that have carried through three presidential administrations.

At the same meeting, Guatemala's Deputy Permanent Representative Marco Molina reported that much work remained to be done to get all members on the same page as the Dispute Settlement Body aims to reach a deal that will have both tiers of the WTO dispute settlement process up and running in time for the organization's next ministerial meeting in February.

While the EU and other members are "narrowly focused" on getting the Appellate Body back in motion, the U.S. has been "thinking more expansively," according to Brightbill, with little incentive to rush into a new arrangement.

"The dispute settlement system seems increasingly unable to deal with larger and more complex challenges, including things like national security questions," he continued, referencing recent challenges to the Section 232 tariffs. "It's been used to sort of replace negotiations at the WTO, which have been paralyzed by its members."

Former USTR General Counsel Stephen Vaughn, now a partner at King & Spalding LLP, expressed the hope that the WTO would assume a position more akin to the UN, where technical negotiations can take place in good faith, than the litigation forum it has increasingly become.

"There was never a true political consensus to have an international body that would set trade rules for the entire world," he said. "We never agreed to that. Most members never agreed to that. But that doesn't mean that there's no purpose to the WTO."

--Editing by Alanna Weissman and Emily Kokoll. All Content © 2003-2023, Portfolio Media, Inc.