

International Trade In 2019: What's Happened, What's Next

By **Alex Lawson**

Law360 (July 1, 2019, 5:09 PM EDT) -- At the midway point of 2019, much of the Trump administration's trade policy remains in flux. Tensions with China remain unresolved; a new trade deal with Mexico and Canada is still without full congressional support; and the future of the World Trade Organization is more uncertain than ever.

Some of that may be by design, as President Donald Trump continues his reshaping of the U.S. trade orthodoxy that began with his withdrawal from the Trans-Pacific Partnership soon after he was inaugurated. But the first half of this year produced more questions than answers about what the White House's ideal trade landscape would look like.

Here, Law360 breaks down all the year's big happenings thus far and what lies ahead.

The China Battle Is Off, Then On, and Off Again

After Trump and Chinese President Xi Jinping spent much of 2018 lobbing new tariffs at each other's products, 2019 began on a more peaceful note, with the U.S. and China sitting down at the negotiating table with an agreement to hold off on new duties.

The talks focused primarily on the U.S. demands for China to improve its protection of U.S. intellectual property and scale back its rules requiring foreign companies to hand over sensitive technology as a condition of doing business in Beijing. The two sides also discussed thorny issues like agriculture, currency manipulation, services trade and cybersecurity.

But the effort fell apart in the middle of May, when the U.S. accused China of walking away from a number of commitments it made at earlier phases of the talks. In response, Trump raised his most recent tranche of tariffs on \$200 billion worth of Chinese goods from 10% to 25% and proposed hitting \$300 billion worth of additional goods with a 25% levy.

If that proposal takes effect, it would mean a 25% tariff on nearly every product that comes into the U.S. from China

"If they actually put a 25% tariff on \$300 billion more of goods ... it is going to be a major problem," former U.S. Trade Representative Mickey Kantor told Law360. "Any good we got out of the tax cut or any other economic moves, will pale in comparison to how this is going to hit our economy, China's

economy and a number of other economies."

Trump and Xi then met on the sidelines of the G-20 summit in Japan and again declared a tariff ceasefire while they return to the negotiating table, adding to the whipsaw nature of the administration's China approach.

The Telecom Wrinkle

Around the same time as trade talks between the U.S. and China began to sour, the Trump administration opened a new front in its standoff with Beijing: the telecommunications sector.

Trump first issued an executive order declaring the nation's telecom networks' vulnerability to foreign intrusion a national emergency and directed officials to write new restrictions on imports of goods and services in the sector. While that move was facially neutral, Trump then took aim at China specifically by barring its telecom giant Huawei from obtaining U.S. components.

The discomfort over Huawei well predates Trump, as advocates, business groups and lawmakers on both sides of the aisle have warned of national security risks the company and China more broadly pose to the U.S. for years. But Trump has kicked the discussion into high gear.

Trump has suggested folding possible restrictions on Huawei into the larger China trade talks, something that both trade and national security experts have warned against.

"The national security apparatus has made the decision that these steps need to be taken. What we need to do is make clear that we are not trying to leverage this to get other things from China. And I would as much as possible think we should keep those baskets very separate," Crowell & Moring LLP attorney Robert Holleyman said.

NAFTA 2.0 Teeters on Capitol Hill

The administration completed its renegotiation of the North American Free Trade Agreement last summer, and has spent the ensuing months pressing Congress to quickly ratify the deal when the time comes. The administration may submit implementing legislation for the deal soon, but the deal's fate remains squarely up in the air.

The fate of the new NAFTA — now rebranded as the U.S.-Mexico-Canada Agreement — took a considerable hit when Democrats took control of the House of Representatives. Many of those lawmakers now say they need to be sure that the USMCA's rules covering labor, the environment and drug pricing can be effectively enforced before they approve the deal.

U.S. Trade Representative Robert Lighthizer has been playing ball, holding meetings with lawmakers on the enforcement of those rules and assuring them it is a top priority for the administration as an improvement on the original NAFTA.

Lighthizer and others have repeatedly noted that Mexico has already passed an expansive overhaul of its labor laws in order to comply with its obligations. But the passage of the law won't mean much unless it is actually implemented and obeyed.

"I think that is a matter of the U.S. putting resources in the legislation and budgets to carefully track

whether Mexico is or is not complying with its labor obligations and to put resources into training and capacity building and working with Mexico to make sure that the new provisions of the Mexican law are actually going into force," Holleyman said.

Holleyman, who was deputy USTR in the Obama administration, said he could envision a USMCA implementing bill that directed resources for those purposes; strengthened the terms of dispute settlement; and allowed for flexibility to improve labor, environmental and drug pricing laws over time.

Where Have You Gone, WTO?

Trump has spent more than a year blocking new judges from serving on the World Trade Organization's Appellate Body, leaving it with just three sitting members — the minimum number required to hear new cases. The weakening of the Appellate Body has ramifications for the WTO as a whole, and Trump has expressed an open disdain for the Geneva institution.

The impasse only deepened over the early part of this year, so much so that the Appellate Body chair and other key officials in Geneva have all but resigned themselves to the fact that the WTO's appeals panel will effectively cease to exist come December. That is when two of the final three sitting judges' terms will end, leaving the body with just one judge remaining.

Lighthizer and his office have flagged a number of concerns with recent Appellate Body practices, including its failure to deliver opinions on time; the practice of allowing judges to continue hearing cases after their terms lapse; and a general perception of overreach beyond the remit of WTO rules.

A number of proposals have been made to address those concerns, but none have convinced the U.S. to budge. For Kantor, it is the latest example of the Trump administration's questioning of international institutions.

Venable LLP partner Ashley Craig told Law360, "If the U.S. backs out of the body, it will fundamentally impact the world's established trading protocols — a system built in the post-war era, driven in large part by the U.S. over decades, that provides a fair, balanced and transparent means of resolving trade disputes is on the verge of erosion — by the same force that helped design it."

Trump Wins Tariff Legal Scrap, for Now

Most of Trump's aggressive and creative use of the nation's trade laws have remained out of legal difficulties, but a challenge to his use of a Cold War national security statute ascended to the precipice of the U.S. Supreme Court this month.

An importer group called the American Institute for International Steel said that the law — Section 232 of the Trade Expansion Act of 1962 — violates the Constitution because Congress gave away too much of its authority over tariffs and trade to the executive branch by allowing the president to impose restrictions based on national security.

A U.S. Court of International Trade panel expressed reservations about Trump's use of Section 232 to impose a 25% steel levy last year but nevertheless deferred to a 1976 Supreme Court ruling that found Section 232 was not an unconstitutional delegation of power.

AIS filed a petition with the Supreme Court to either reverse that precedent or decide that it does not

apply in this case, but was denied near the end of the term. However, the justices declined to take up the case "before judgment," nodding to the fact that AIIIS skipped litigation at the Federal Circuit in an attempt to fast-track the case.

Litigation will now resume at that court, and will likely result in a loss for AIIIS along the same lines, as only the Supreme Court can undo or push back on its own precedent. That will tee up one last petition for the importers, likely during the next high court term.

--Editing by Brian Baresch and Emily Kokoll.