

Looking Back At A Transitional Year In US Trade Policy

By **Alex Lawson**

Law360 (December 20, 2021, 1:54 PM EST) -- International trade policy mostly landed on the back burner during the first year of the Biden administration, which focused most of its efforts on domestic matters. But 2021 still provided a number of important developments and signals as to where the U.S. trade agenda is headed.

Here, Law360 breaks down the trade policy moves that defined 2021.

A Cautious Approach on China

The whipsawing of the Trump administration's China engagement was put on hold in 2021 as President Joe Biden's trade team, led by U.S. Trade Representative Katherine Tai, announced early in the year that it would undertake a top-to-bottom review of its policy toward Beijing.

That review wrapped up in the fall, with Tai beginning to engage with her Chinese counterparts on the best way to implement the Donald Trump-era agreement that cooled rising trade tensions in early 2020.

"There were a lot of debates internally within the administration in terms of how to best deal with China," Akin Gump Strauss Hauer & Feld LLP and former USTR general counsel Stephen Kho told Law360. "They seem to be moving towards a place where full decoupling is no longer a real option for them, and they have to figure out how to co-exist, because you can't wipe each other off the face of the earth."

Tai's standstill has left in place the hefty tariffs on more than \$300 billion worth of Chinese goods initiated by the Trump administration, which the Biden White House has defended in court. But the USTR did move to potentially reopen the process for importers to earn exemptions from the duties for certain products.

But the tariff exclusion revival was done only on a limited basis. When the tariffs were put in place, more than 48,000 requests were made for exclusions, but only 2,200 were granted. Of those 2,200, 549 products received extensions, which have now lapsed. Tai's office is considering exclusions only for those 549 products.

Import-reliant businesses pushed hard to resume the exclusions process, and the limited nature of Tai's action has rankled some corners of the trade bar.

"The fact that they are only considering comments on this small subgroup is, I would say, a real disappointment to large sectors of the trading community," Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP partner Arthur Bodek told Law360 in October.

The administration also continued to press China on forced labor, implementing a new import ban on solar panels and components from a Chinese company operating in the Xinjiang region, even as it ultimately committed to working with Beijing on trade-only issues.

"I'm glad they turned the corner on how best to co-exist, and the need to distinguish between trade and security," Kho said.

Making Nice With the EU

Biden mostly made good on a campaign promise to repair U.S. relations with close allies like the European Union, moving to resolve or deescalate a series of disputes covering aircraft subsidies, steel tariffs and digital service taxes.

The two governments also set up a new forum for discussing trade and technology issues, vowing to intensify their cooperation across a number of pressing areas.

"There was a lot of work that was put in during the beginning of the administration for clearing off the table and trying to address some of these long-standing issues," Hogan Lovells LLP partner and former U.S. trade official Kelly Ann Shaw said. "It's not all that surprising, given Biden's campaign promises about restoring alliances with traditional allies. I think the Europeans took advantage of those opportunities to push the Biden administration on these issues early on."

The most significant of those efforts was a ceasefire in the aircraft fight, which stretches back to the George W. Bush administration. The U.S. and EU spent years accusing one another of subsidizing their respective aircraft giants, Boeing and Airbus, with each side eventually setting retaliatory tariffs on billions of dollars worth of transatlantic trade.

The conflict settled in June as each side withdrew its levies and agreed to hand out aircraft subsidies in a way that doesn't distort trade. That arrangement hardly resolved the substantive fight, but it opened the door for a fresh round of fuller negotiations between the governments.

Trade officials further resolved a dispute over Trump-era national security duties on steel and aluminum by replacing the levies with a quota system on imports, while finance leaders were able to snuff out budding disputes with several European countries over digital services taxes with a sweeping agreement on global taxation.

A newly created Trade and Technology Council will now give the U.S. and EU a chance to build a more proactive trade policy, rather than a series of responsive solutions to bilateral irritants, according to former Deputy U.S. Trade Representative Robert Holleyman, now with Crowell & Moring LLP.

"This council is a valuable tool just to give us a reason to work through those issues in a very specific way," he said. "This is a very positive sign. ... I think there should be some issues where they can make progress."

USMCA's Labor Debut

The U.S.-Mexico-Canada Agreement received overwhelming bipartisan support due in large part to the late addition of a streamlined enforcement tool focused exclusively on labor, which enabled the U.S. to set trade sanctions on specific companies for violating workers' rights.

Those rules, known formally as the rapid response mechanism, were put to the test for the first time this year in a pair of cases, one brought by a coalition of unions and one by the Biden administration itself.

Both cases were resolved through bilateral consultation before getting to a more contentious phase. Observers have suggested that is by design, as the deal aims to snuff out flagrant labor violations quickly and efficiently.

"It's accomplishing what it was designed to accomplish," Holleyman said of the rapid response mechanism. "Big kudos for how that's worked in these cases. I am guessing there will probably be more that we'll see in the months ahead. Assuming that works as it has stated, I think something like that starts becoming the new model for what the U.S. wants to see in terms of new labor provisions."

Still, others note that both the U.S.-initiated case and the case spearheaded by the AFL-CIO and other unions were strategically chosen to engineer agreeable outcomes and that a full-fledged testing of the mechanism has yet to take place.

"Given how little we know about how trade enforcement actions affect workers in trade partner countries ... it is difficult to see how frequent enforcement necessarily satisfies a 'worker-centered' trade policy," Cornell law professor Desiree LeClercq told Law360 in July.

--Editing by Jill Coffey and Alyssa Miller.