

4 Pressing Trade Policy Questions Looming In 2022

By **Alex Lawson**

Law360 (January 3, 2022, 12:02 PM EST) -- After a mostly quiet year that prioritized domestic policy, the Biden administration will face a number of pressing matters on international trade, including how to best engage with China, potential new trade talks and whether and how to save the World Trade Organization.

Here, Law360 walks you through the key trade questions facing the administration in 2022.

What's next for U.S.-China relations?

The Biden administration mostly refrained from any confrontations or serious engagement with China for much of 2021, but U.S. Trade Representative Katherine Tai has begun talking with her counterparts in Beijing, leaving trade watchers eager to see what comes next.

"This will be the year that's very telling about what the actual U.S.-China strategy looks like," said former Deputy U.S. Trade Representative Robert Holleyman, now the president and CEO of Crowell & Moring International and a partner at Crowell & Moring LLP.

The administration has committed to enforcing the so-called Phase One agreement struck in early 2020 by former President Donald Trump. The deal obligated China to increase its purchases of U.S. goods and make a number of structural reforms, but put off the most pressing and thorny issues, like cybersecurity and China's industrial subsidies.

Tai's negotiations have thus far focused on making sure Beijing honors Phase One, but Wiley Rein LLP partner and former U.S. Department of Commerce official Nazak Nikakhtar told Law360 that the real headaches will emerge if she tries to push further.

"Tai knows full well, knowing the history of dealing with China, it's not going to easily change. That said, it would be really irresponsible for anyone who has been entrusted by the American people to just abandon engagement," Nikakhtar told Law360. "You have to talk, you have to express what your concerns are, the other side is going to push back."

So far, Tai has maintained the tariffs on more than \$300 billion worth of Chinese goods imposed by the Trump administration, and attorneys are anxious to see whether any progress in her engagement with China will lead to a removal or reduction of those levies.

The U.S. will also continue to tussle with Beijing over a litany of security and human rights concerns, which may make any progress on purely trade issues difficult to come by, observers say.

Will the U.S. assert itself in the Asia-Pacific region?

The administration's plan for China will be greatly informed by whether and to what extent it looks to strengthen its trade partnership with the rest of the Asia-Pacific. U.S. plans to construct sweeping new trade rules in the region have been adrift since Trump pulled out of the U.S.-led Trans-Pacific Partnership in 2017, and questions are beginning to swirl about whether President Joe Biden will get back in the game.

"With all of the focus on domestic policy, I do think the Indo-Pacific is a pretty big blind spot for the administration," Hogan Lovells partner Kelly Ann Shaw, a former U.S. trade official, told Law360.

The TPP has been rechristened as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and stripped of many U.S. priorities in key areas like intellectual property. Tai is facing calls to rejoin and perhaps renegotiate the pact, but has thus far been noncommittal.

The U.S. may opt to launch its own initiative in the region, perhaps focusing on digital trade issues. But Shaw said that would be difficult given the structure already in place with CPTPP, which crucially does not include China.

"I think that is an attractive way forward, but if you're going to do it without rejoining CPTPP ... you're basically starting from zero," Shaw said.

Holleyman, the former deputy U.S. trade representative, said any new trade initiative in the region would send a positive signal about the Biden administration's willingness to strike new trade deals, which it has so far been reluctant to do on a large scale.

"This is an effort to show that the U.S. can actually get back into the trade arena in a more active space pursuing things we want, rather than just reacting to things we don't like," Holleyman told Law360.

Can the WTO be salvaged?

The WTO's efforts to get its negotiating wing back on track were dealt a blow late in 2021 when a COVID-19 surge shut down the trade body's plans for a ministerial summit in late November. At that meeting, members were hoping to complete negotiations on reducing global fisheries subsidies and potentially a relaxation of intellectual property rules for COVID-19 vaccines.

WTO members are considering rescheduling the summit for March, but Director-General Ngozi Okonjo-Iweala has stressed that members do not need to have an actual summit to make progress in key areas.

Former general counsel Stephen Kho, now with Akin Gump Strauss Hauer & Feld LLP, said that historically, the summits have created urgency to force government negotiators into making deals.

"I don't think people should freak out and think there's going to be no forward progress," he said. "The nature of these massive negotiations is you're only going to see progress at a big scale when you get close to the end, when push comes to shove."

The WTO has been struggling to rewrite the rules of global trade for more than two decades, and any agreement, even in a relatively small sector like fisheries, will be seen as providing momentum for a more ambitious negotiating plan.

On a grander scale, though, the WTO will also deal with more pressing existential questions, like the shuttering of the Appellate Body, Geneva's highest legal authority. The U.S. bears the most responsibility for that, as it has refused to appoint new judges to fill vacant seats on the panel for several years.

The U.S. opposition stems from a number of reservations about the Appellate Body and the purported exceeding of its mandate. Discussions to resolve the blockade have moved slowly, and the U.S. has yet to issue a formal proposal on how it wishes to see the Appellate Body run.

"We will see whether or not the U.S. puts anything on the table," Holleyman said. "Right now, we haven't seen a plan to resolve those issues, so we may end up further solidifying the fact that we will continue to operate without an Appellate Body."

Can the U.S. and EU take the next step?

The Biden administration spent much of 2021 repairing a number of lingering trade fights with the European Union, making good on its promise to restore ties with crucial allies. But in the eyes of many trade observers, all that did was return the U.S. and EU to a somewhat neutral state, where they still remain far apart on the key trade issues that have made a trans-Atlantic agreement so elusive over the past decade.

The two governments made an effort to break new ground in that area with the establishment of the Trade and Technology Council, which has identified areas like foreign investment screening, artificial intelligence, semiconductor supply chains and export controls. But this is not the first time the U.S. and EU have established a forum for new trade initiatives, and its past iterations have yielded limited results at best.

In a blog for the Council on Foreign Relations from October, former USTR General Counsel Jennifer Hillman and Seara Grundhoefer signaled that the next 12 months will be crucial in assessing the ambition and potential of the TTC for U.S.-EU trade work.

"The TTC offers a chance to turn the page on U.S.-EU economic relations by focusing on a limited but strategically important set of issues," they wrote. "Failure to do so would allow long-standing disputes, both large and small, to once again undermine attempts at much-needed transatlantic coordination."

--Editing by Alanna Weissman and Nicole Bleier.