

## International Trade Developments To Watch In 2016

By **Alex Lawson**

*Law360, New York (December 24, 2015, 8:38 PM ET)* -- The international trade bar is poised for a busy year in 2016 as the U.S. government races to ratify a massive Asia-Pacific trade agreement during the heat of an election year while ensuring that another deal with the European Union doesn't go off the rails, among other policy developments.

### TPP's Tough Road to Capitol Hill

The considerable effort put into wrapping up the Trans-Pacific Partnership after more than five years of arduous negotiations will all be for naught if the agreement does not make it through the gauntlet of the U.S. Congress next year, and there are more questions than answers about the timing of the vote.

Because of the Trade Promotion Authority legislation signed into law earlier this year, the deal must pass with an up-or-down vote in each chamber, with no amendments. That bill also laid out the timeline for all administrative procedures that must precede a vote, including a comprehensive study by the U.S. International Trade Commission that will be ready in six months.

But the longer the agreement waits, the further it slips into the heated November election cycle, leading many observers to speculate that the vote will not take place until after the elections are complete, which is a dicey proposition for passage, according to Alston & Bird LLP trade policy adviser Eric Shimp.

"The ITC study is not coming out until May," Shimp told Law360. "And that is a long time of lost ground in the context of a major election year. If it slips to the lame duck there are absolutely zero assurances that it makes such a small agenda."

Further complicating the prospects for TPP passage is the fact that the TPA bill passed by just eight votes in the House in June. While trade-averse Democrats have unsurprisingly bashed the completed agreement, there has also been skepticism from traditional Republican allies like Senate Majority Leader Mitch McConnell, R-Ky., and Finance Committee Chairman Orrin Hatch, R-Utah.

"They need to resolve their issues with Senator Hatch and Senator McConnell. If they can't do that, then there's not even going to be a vote," Wiley Rein LLP partner Timothy Brightbill said.

### Make-or-Break Year for TTIP?

As the TPP talks and the publishing of the text have swallowed up much of the bandwidth for trade

activity on the U.S. side, negotiations for the Transatlantic Trade and Investment Partnership with the European Union appear to have lost a bit of their shine in certain circles, according to Squire Patton Boggs LLP attorney Aline Doussin.

“There has been a noticeable cooling of interest from the U.S. side over TTIP negotiations,” Doussin said, flagging the TPP and Iran nuclear talks as items taking precedence over the talks. “With the presidential elections looming and focus diverted elsewhere, it is difficult to see how these negotiations will be finalized before the end of the Obama administration.”

Next year, the two sides are expected to hold detailed talks over perhaps the most contentious prong of the EU’s TTIP strategy, a recently unveiled overhaul of the investor-state dispute settlement mechanism.

That proposal would aim to make investment arbitration panels function more like domestic courts, with a standing bench of judges and a fully formed appellate mechanism. The proposal took about two years to roll out after lengthy public consultation but has already landed with a thud in the U.S., according to Mayer Brown partner Timothy Keeler.

“It seems very difficult to reconcile their proposal with what has traditionally been a part of U.S. bilateral investment treaties and trade agreement investment chapters,” Keeler told Law360. “The TTIP negotiations have a number of challenges and the position of the EU on that issue is definitely one of the biggest. I see that as very challenging.”

### **Turning Point for US-China Trade**

Next year will also see the expiration of a key provision within China’s World Trade Organization accession package regarding the country’s status as a nonmarket economy and the looming deadline has ignited a fierce debate over how U.S. policymakers should proceed.

Set for expiry is the passage of the protocol that enables WTO members to treat an entire Chinese industry as functioning within a nonmarket economy, or NME, in anti-dumping duty cases if that industry cannot demonstrate that it is subject to market forces.

Nonmarket economy determinations have traditionally led to higher margins, and the petitioners’ bar has begun urging the U.S. to keep its broader view of China as an NME country even as one section of the accession protocol expires.

“Under U.S. law, China will remain a nonmarket economy until the Commerce Department engages in a thorough analysis of the issue,” Brightbill said. “There are six factors they are required to consider by law and by any measure, China does not yet meet those six important tests for being a market economy.”

Some international business groups have cautioned the Obama administration against maintaining China’s NME status because it will only create more tension in the already fraught commercial relationship between the two nations.

### **What Next for Russia Sanctions?**

After modest expansions in 2015, both the U.S. and EU appear to have reached a plateau with regard to their economic sanctions against Russia over the country’s occupation of eastern Ukraine, leaving

attorneys to wonder what the future holds.

Orrick Herrington & Sutcliffe LLP partner Harry L. Clark said that terror threats emerging from the Middle East could spur the U.S. to recalibrate its sanctions strategy toward Russia, which has thus far taken measured swipes at Moscow's energy, financial services and defense sectors.

"It will be interesting to see whether those become a permanent fixture or will the geopolitics of the anti-terrorism effort and related matters result in a disassembly of those," Clark told Law360. "I have no doubt that the Russian administration is going to be looking for significant steps there if the U.S. wants collaboration on things like anti-terrorism."

Clark added that unless there is considerable acceleration of tension on the ground in Crimea, he does not foresee a dramatic uptick in Western sanctions toward Russia, meaning they would either stay the same or be gradually peeled back over the next 12 months.

"Absent some really substantial deterioration, the Russia sanctions are not going to be ascendant," he said.

### **A More Modest WTO Agenda**

With the latest WTO ministerial conference essentially heralding the death of the Doha Round of trade talks, experts forecast a shift in focus to smaller agreements among willing partners as the organization enters a new phase.

Peterson Institute for International Economics senior fellow Gary Hufbauer predicted that 2016 would see the completion of the Environmental Goods Agreement, which will slash tariffs on scores of clean energy products from participating nations. WTO members are also slated to implement the Information Technology Agreement.

The WTO's next ministerial conference doesn't take place until 2017, so Hufbauer said he expected a more modest approach on new trade talks at the organization, which may feel pressure to consider new areas contemplated by vast regional accords like the TPP.

"There may be some forward motion on digital commerce," he said. "That's a big one, we have the chapter in the TPP now on e-commerce so I can see if the TPP gets ratified that there will be an effort to carry that chapter into the WTO."

--Editing by John Quinn and Emily Kokoll.

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