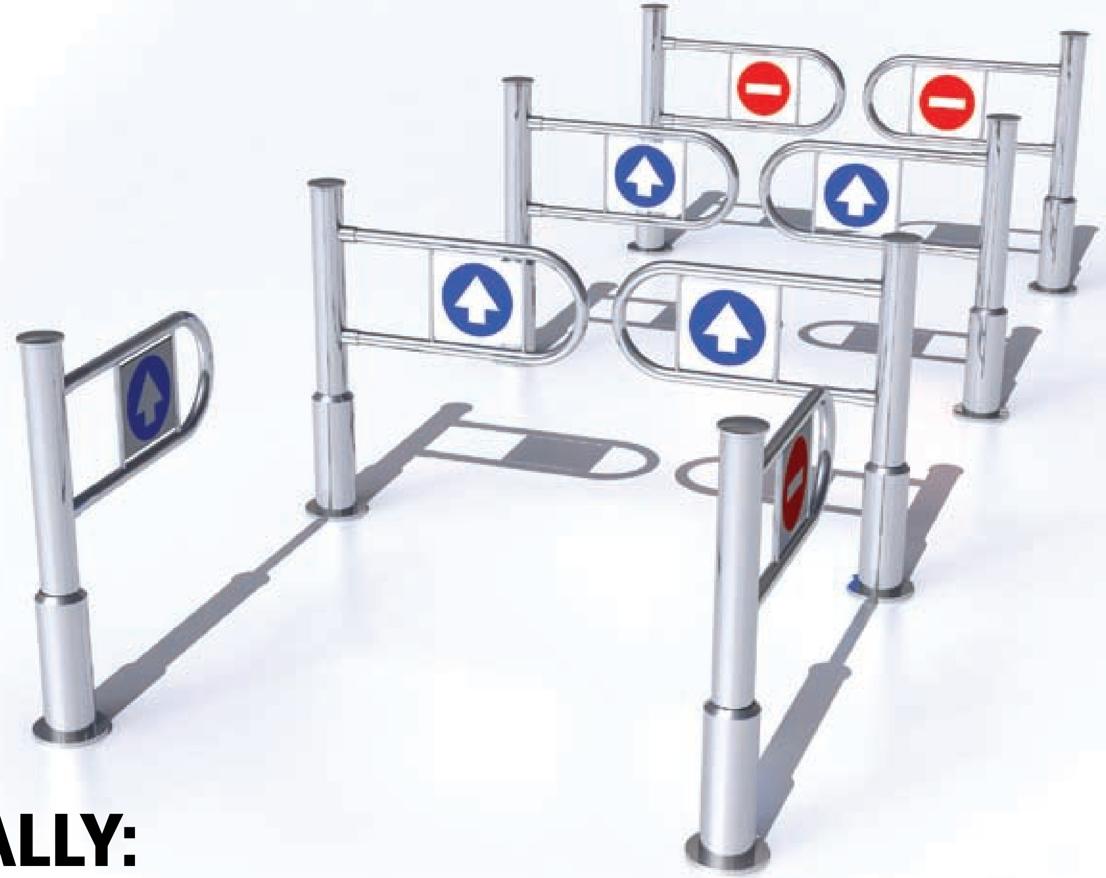

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ACT GLOBALLY:
How to Navigate Today's Hidden Trade Barriers

By Steven Andersen

"The *Fortune* 200 companies in the United States now find that most of their revenue is coming from foreign sales," says Rob Portman, who served as the U.S. trade representative in the current administration and is now of counsel to Squire, Sanders & Dempsey L.L.P. "This demonstrates the growing importance of the global marketplace for large U.S. companies and their workers. And, increasingly, many small and mid-size companies are experiencing sales growth beyond our borders. This means U.S. companies need to be more sophisticated about foreign markets and international remedies."

In the old days, international trade was pretty simple: You manufactured products in country A and sold them in country B. If you encountered trade barriers, they were typically straight tariffs at the border. Things are a little more complex today.

"Historically companies have been restricted in global markets by barriers that were fairly obvious," says Shanker Singham, a partner at Squire Sanders whose practice focus is international trade. "Now they are adversely affected more by behind-the-border measures. These things are hard to identify and even harder to deal with."

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In today's world of competing global supply chains, market distortions and anticompetitive restrictions are both subtle and pervasive. To change them, companies have to push for a unified trade policy that takes into account the de facto barriers they encounter in markets around the world.

"We need a trade policy that ensures that restrictions at the border aren't replaced by restrictions inside the border," Singham says.

Behind the Border

Hidden trade barriers occur all over the world, although they are most prevalent in countries that are transitioning from command economies, such as post-communist states, or countries that are moving away from import substitution economics, as seen in much of Latin America and parts of Asia. These restrictions can take many forms.

"For example, many countries have laws that protect local distributors," Singham explains. "Foreign suppliers can get their products to market, no problem, but they often find they can't terminate their relationship with a local distributor. In order to get out, they may have to pay a termination indemnity of millions and millions of dollars. It's also bad for consumers in those countries, because it drives prices up. It's bad for everybody but the local distributors."

But how do you change the system? It can be a daunting proposition, one Singham says general counsel too often feel is beyond their grasp. Smaller companies in particular may feel that they lack the resources or wherewithal to affect meaningful change in trade policy. But that's not always the case.

"The more specific a problem—the more tailored it is to a company's position—the more important it is for them to solve it," Singham says. "It is a question of how significant the problem is to your bottom line. This is an area where the legal function for once is not a cost center. If you can act to increase market share, you become a profit center."

It's essential for companies that choose to tackle trade barriers to use a multifaceted approach. Because of the time and expense involved, a concerted effort is likely to present the best results.

"You work really at two levels," says Singham. "One is the international, external level where you're trying to get the U.S. government to pressure a particular foreign government. You're also working domestically to try to get local agencies to help resolve the problem. If you just do one side, it's usually not enough."

Leverage Points

There are a number of steps a company with a trade grievance can take to resolve its problems. One is to ask your government to initiate an action under the provisions of the ever-growing World Trade Organization (WTO). Dispute resolution is a central pillar of the WTO's mission, but as with any large institution, it is not particularly speedy.

"Unfortunately, the reality is that it can take years," Portman says. "It often requires significant time and resources, and the remedy may not be directly beneficial."

Another tack is to see if there are any laws, such as the Foreign Corrupt Practices Act, under which a case could be brought. With increasing international collaboration on policing corruption, this can be a swifter and more effective option than it was in the past.

More sophisticated companies sometimes look to affect the ways the United States offers foreign aid to developing countries as a bargaining chit. Millennium Challenge Accounts in particular provide aid based on a country's compliance with criteria in areas of entrepreneurship, enterprise and law.

An ideal situation is to address your concerns as free trade agreements are being negotiated. The Dominican Republic-Central America-United States Free Trade Agreement is a good example.

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"The DR-CAFTA stipulated that Central American countries had to remove distributor protections," Singham says. "It was a big win for companies doing business in Central America."

Share Your Troubles

Much of a company's success in lowering trade barriers is based on effective communication with the appropriate U.S. government and international authorities.

"I think sometimes people are hesitant to engage senior officials," says Robert D. Lehman, a Squire Sanders principal who previously served in a number of government agencies. "When I was chief of staff at USTR, we appreciated having general counsel come in and share their experience and, in particular, their data with us. We were hungry for information."

The Office of the U.S. Trade Representative maintains a network of industry groups and experts that policy makers can utilize during negotiations. The more information they have about U.S. companies' problems abroad, the better. Lehman says in-house counsel should also talk to congressional leaders, particularly those responsible for trade policy, so they can take into account their experience as they consider pending legislation.

"I don't think these resources are very well known at all," he says. "We have a case right now involving a huge power company that is doing work in Kazakhstan. There is a WTO accession issue for Kazakhstan. One of the conditions of joining the WTO is having transparent and consistent laws on foreign investment and trade. Our belief is that our client is not getting transparent and consistent treatment, and we've made the Commerce Department aware of that. Our hope is that this will be taken into consideration as they decide whether this country has met the conditions of joining the WTO."

Portman notes, "In an increasingly interdependent world, U.S. companies should be trying to reach the 95 percent of global consumers who live outside our boundaries. As they do, they must be aware of the potential challenges and opportunities."

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