POLSINELLI

April 2017

USTR Report Highlights Foreign Barriers to U.S. Exports

By: Melissa Proctor (Shareholder, Phoenix Office)

In this Issue:

Author:

Melissa Miller Proctor
Shareholder
602.650.2002
mproctor@polsinelli.com

U.S. companies should review a recent USTR (United States Trade Representative) report providing insight into the various country-specific issues that may take center stage in future trade negotiations. Companies should then consider how the elimination or reduction of these foreign tariff barriers may impact their international operations.

On March 31st, the USTR published its 2017 National Trade Estimate Report which highlights significant foreign barriers to U.S. exports and is a companion piece to the President's Trade Policy Agenda that was published earlier in March. The USTR is required to submit this report annually to the President, Senate Finance Committee and appropriate House committees to facilitate future trade negotiations aimed at eliminating or reducing these barriers. The information provided in the report was compiled by the USTR, Commerce Department, U.S. Department of Agriculture, other federal agencies, private sector advisory committees, and U.S. embassies around the world.

Foreign trade barriers are defined as government laws, regulations, policies or practices that either protect domestic goods and services from foreign competition, artificially stimulate exports of particular domestic goods and services, or fail to provide adequate and effective protection of intellectual property rights ("IPR").

Highlights from the report with regard to barriers to U.S. exports of goods in particular to Brazil, Canada, China, India and Mexico are summarized in the following table:

Country	Significant Foreign Trade Barriers
Brazil	• Testing of telecom products by facilities in Brazil before being allowed to be placed on the market. • Conformity assessment procedures for toys requiring registration, labeling and testing of each toy. • Quality requirements for wine. • Prohibition on imports of U.S. pork products. • Frequent increases/decreases in tariffs to protect domestic industries and manage prices and supply. • High tariffs on automobiles and parts, IT and electronics, chemicals, plastics, machinery, steel, apparel. • Brazil has yet to open its Tariff Rate Quota for wheat, resulting in zero exports of US wheat. • Federal and state taxes and charges on imports double the actual cost of imported goods. • Prohibitions on imports of used consumer goods. • 25% merchant marine tax on ocean freight and port handling charges. • Onerous importer registration requirements with SECEX. • Lack of transparency with automatic and non-automatic import license requirements. • Burdensome document and registration requirements for pharmaceuticals, medical devices, health and fitness equipment, cosmetics and processed food products. • Variety of subsidies provided to Brazilian exporters in the form of tax, tariff and financing incentives. • U.S. companies without in-country presence in Brazil rarely win government contracts. • Brazil is on the Special 301 Watch List for deficiencies in its IPR protection regime. • Backlog of pending patent and trademark applications in Brazil. • Health regulatory agency (ANVISA) can conduct parallel review of patent applications for pharmaceuticals. • No protections against unfair commercial use of undisclosed test data for pharma market approvals. • Pirated and counterfeit goods remain in physical markets and are available online.
Canada	• Restrictions on U.S. seeds exports for varieties that are not registered. • Cheese compositional standards limit amounts of dry milk protein concentrate that can be used in products. • Agricultural supply-management regime prevent increases in U.S. exports above TRQ levels. • Agricultural supply-management regime also inflates the prices of U.S. dairy and poultry products. • Canada provides milk components at discounted prices to domestic processors. • Restrictions on U.S. grain exports prevent U.S. wheat and barley exporters from receiving premium grade. • Canada’s personal duty exemption is less generous than the U.S. personal duty exemption. • Canada’s de minimis threshold remains at C$20, which is the lowest among industrialized nations. • Canadians face high provincial taxes on personal imports of U.S. wines upon their return from the U.S. • Canadian provinces restrict the sale of wine, beer, and spirits through province-run liquor control boards. • Subsidies for Canadian aerospace sector. • Local (provincial) content requirement for procurements for wind energy projects. • Lack of due process and transparency of the geographical indications system in Canada. • Failure to allow for inspection of in-transit counterfeit and pirated goods destined for the U.S. • Concerns with the effectiveness of Canada’s copyright safe harbor system.

Country	Significant Foreign Trade Barriers
China	• China was again placed on Special 301 Watch List for IPR protection concerns in 2016. • Thefts of trade secrets benefitting Chinese companies have occurred both within China and outside of China. • Actors affiliated with the Chinese government/military have infiltrated US companies' computer systems. • Continuing registration of trademarks in bad faith. • Continued patent and technology transfer concerns relating to pharmaceuticals. • Need for protection against unfair commercial use of undisclosed test data for pharmaceutical products. • Need for effective enforcement against infringement of pharmaceutical patents. • Backlogged drug regulatory approval system presents market access and patient access concerns. • Online piracy of music, motion pictures, books and journals, software and video games. • Counterfeiting in China affects a wide range of goods, especially medications. • Industrial policies limit market access for imported goods and foreign manufacturers. • Industrial policies offer substantial government guidance, resources and support to Chinese industries. • Tying government preferences to the localization of technology in China. • Grants of reviews and approval preferences to innovative drug manufacturers that shift production to China. • Ranking of semiconductors requires technology transfers and creates a basis for discrimination. • Export quotas, licensing, minimum prices, duties on raw material inputs where China is a leading producer. • Substantial subsidies to domestic industries causing injury to U.S. and that are prohibited under WTO rules. • Actions and financial support to steel and aluminum sectors resulted in massive excess capacity in China. • Raising and lowering the VAT rebate on exports to manage exports of products. • The cultivation of "strategic emerging industries" results in discrimination based on the country of origin of IP, forced technology transfer, research and development requirements, investment restrictions and discriminatory treatment of foreign brands and imported vehicles. • Import ban on remanufactured products. • Foreign companies seeking to participate in standard-setting process must license their technology or IP. • Restrictions on foreign investors in services, agriculture, extractive industries and manufacturing sectors.
India	• Proposed regulations includes new and vague category of "new cosmetics." • U.S. exporters have difficulties proving that cosmetics comply with the animal testing ban. • Food package size and labeling requirements prevents many U.S.-origin products from entering India. • Biotech goods must be approved before import, and the process is slow and subject to political influences. • India imposes onerous requirements on dairy imports. • Concerns over alcoholic beverage standards that contradict standard international practice. • Restrictions on imports of poultry, pork, alfalfa, cherries, strawberries, shrimp feed, and pet food. • Batch-by-batch inspections of food at the port results in high costs and detention of cargo. • Proposed food product approval regulations may be overly burdensome and hamper U.S. exports. • Import certificate for pork requires attestations about pesticides, drugs, mycotoxins, or other chemicals above maximum levels prescribed in international standards. • Ban on imports of U.S. poultry, live swine, and related products. • Zero-tolerance for certain plant pests not based on risk assessments results in blocked U.S. wheat imports. • Customs tariff and fees system is complex and lacks transparency. • Complicated duty drawback, duty exemption, and duty remission schemes for imports. • High customs duties on drugs, including life-saving drugs and drugs on WHO's list of essential medicines. • Declared transaction value may be rejected if price is lower than the ordinary competitive price. • Basic customs duty, additional duty, and special additional duty assessed cumulatively, not separately. • Government procurement practices vary by state, by central government, and among different ministries. • Subsidies on exports and tax exemptions on export enterprises and for exporters in Special Economic Zones. • India remained on the Priority Watch List in the 2016 Special 301 Report because of IPR concerns. • Unfair commercial use and disclosure of undisclosed test data for pharmaceutical and agricultural products. • Infringing pharmaceuticals marketed without opportunity for parties to resolve IPR disputes.

Country	Significant Foreign Trade Barriers
Mexico	• Redundant testing requirements for U.S. exports, including electronic products which operate at a relatively low wattage, requiring testing and certification in Mexico even already tested in the U.S. • Draft standards for alcoholic beverages impose new burdensome requirements with insufficient timeframe for implementation. • Mexico prohibits imports of U.S. fresh potatoes beyond a 26 kilometer zone along the U.S.-Mexico border. • U.S. dairy exporters have been unable to ship raw milk for pasteurization to Mexico. • Mexico imposes direct oversight on operations of Californian stone fruit producers for market access. • Customs administrative procedures characterized by insufficient prior notification of procedural changes, inconsistent interpretation of regulatory requirements at different border posts, and uneven enforcement of Mexican standards and labeling rules. • Mexico was listed on the Watch List in the 2016 Special 301 report for IPR protection. • Wide availability of pirated and counterfeit goods, via both physical and virtual markets. • Overall criminal enforcement of intellectual property rights continues to be weak.

To view the full report, see: https://ustr.gov/sites/default/files/files/reports/2017/NTE/2017%20NTE.pdf

For More Information

For questions regarding this alert or to learn more about how it may impact your business, please contact the author, a member of our **International** practice or your Polsinelli attorney.

To learn more about our **International** practice, or to contact a member of our International team, click here or visit our website at polsinelli.com.

About this Publication

Polsinelli provides this material for informational purposes only. The material provided herein is general and is not intended to be legal advice. Nothing herein should be relied upon or used without consulting a lawyer to consider your specific circumstances, possible changes to applicable laws, rules and regulations and other legal issues. Receipt of this material does not establish an attorney-client relationship.

Polsinelli is very proud of the results we obtain for our clients, but you should know that past results do not guarantee future results; that every case is different and must be judged on its own merits; and that the choice of a lawyer is an important decision and should not be based solely upon advertisements.

Polsinelli PC. Polsinelli LLP in California.