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Submitted via www.regulations.gov

September 21, 2016

Mr. Edward Gresser
Chair
Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street NW
Washington, DC 20510

Re: Request for Comments on China's Compliance with its World Trade Organization Commitments

Dear Mr. Gresser:

The National Association of Manufacturers (NAM) welcomes the opportunity to provide comments to the U.S. government on China's compliance with its World Trade Organization (WTO) commitments in accordance with your Federal Register notice (81 Fed. Reg. 64646) requesting comments.

The NAM is the largest manufacturing association in the United States, representing more than 14,000 businesses of all sizes in every industrial sector and in all 50 states. Manufacturing employs more than 12 million women and men across the country, accounting for two-thirds of private sector research and development and contributing over $2.17 trillion to the U.S. economy annually. Many of those manufacturing companies do business internationally, exporting millions of dollars' worth of products overseas, including to China.

The NAM welcomes this opportunity to build on comments submitted to the U.S. Department of Commerce and Office of the U.S. Trade Representative earlier this year to highlight key issues related to the business environment in China and Chinese government policies and actions that impact manufacturers in the United States. Although the U.S.-China trade and investment relationship has grown considerably – with nearly $600 billion in trade and nearly $3 billion in bilateral investment in 2015 – manufacturers in the United States face considerable barriers that limit market access and tilt the playing field in China against foreign companies.

This submission aims to highlight key issues manufacturers in the United States face in doing business in China in the context of the commitments that China made when it joined the WTO in 2001.

Import regulation

China implemented its initial tariff commitments made during the course of its WTO schedule (2002 to 2010), reducing tariffs on a broad range of manufacturing products. This process did not eliminate all of China's high tariff rates in key manufacturing sectors – for example, the import tariff for finished automobiles remains high at 25 percent.

China participates in a number of WTO negotiations of plurilateral agreements designed to reduce tariffs in targeted sectors, including the expanded Information Technology Agreement and ongoing negotiations for the Environmental Goods Agreement (EGA). China, the United States, and other negotiating partners announced final agreement on the expanded ITA at the December 2015 WTO Ministerial Conference in Nairobi and agreed on a timetable for eliminating tariffs in covered products. Despite agreeing to a timetable that would have begun tariff reductions when the ITA went into effect on July 1, 2016, China was late in meeting that initial timetable, only cutting its first batch of tariffs on September 15. From the perspective of NAM members, it is important that China fully implement its subsequent ITA tariff commitments in a timely manner, and that it work with the United States and other EGA members to finalize an ambitious EGA that will eliminate tariffs quickly on a wide-range of environmental goods and technologies.

Additionally, manufacturers in the United States continue to be concerned about issues related to customs and trade facilitation. China ratified the WTO's Trade Facilitation Agreement (TFA) in September 2015. China had previously submitted its Schedule A commitments – those that would go into effect as soon as the TFA has enough signatories to go into effect. While those commitments included many areas that matter for manufacturers in the United States, China's submission did not include commitments to implement a "single window" system for customs clearance, publication of average customs release times, or customs cooperation. The NAM encourages China to implement the full scope of the TFA as quickly as possible.

Manufacturers in the United States also continue to face inconsistencies in customs clearance proceedings in China between different ports, different agencies, and even different customs agents as they seek to get products cleared, including customs classification, customs valuation procedures, and clearance requirements. This lack of uniformity and predictability creates unnecessary challenges for U.S. and other foreign companies seeking to export their goods to China. For example, companies with China-based investments can apply for and receive an import duty exemption if their investment falls under the "encouraged" category of the Catalogue Guiding Foreign Investment. Those companies, however, report that government agencies do not permit companies to use the duty exemption consistently, meaning that different batches of equipment, even coming into the same port, may be treated differently.

Export regulation

The NAM has long supported the elimination of market-distorting policies, subsidies, and trade practices that affect Chinese exports, and the active use of international dispute settlement, bilateral agreements, and the application of trade laws and negotiated remedies to address these issues wherever they arise – including in China. In recent years, the NAM's attention has included issues related to excess capacity, or overcapacity, in China, which have had a significant negative impact on the global market.

Overcapacity in China is affecting manufacturers in the United States in a range of industries – including steel, aluminum, metal products, chemicals, fertilizer, concrete, agricultural processing, and semiconductors – as it is actively contributing to a glut in global capacity problems that challenges economies around the world. While China has announced a mix of domestic policies to address overcapacity, more action is needed. The United States is discussing these issues with China and other partners in a variety of other forums, including multilateral channels like the OECD and G20 and bilateral dialogues like the Joint Commission on Commerce and Trade (JCCT), but should ensure consistent messaging through WTO channels as well – seeking clear, sustained efforts to curb overcapacity as well as additional concrete commitments to expand its efforts to address overcapacity effectively and mitigate its impact on the global economy.

More broadly, Chinese government agencies continue to use a variety of export policies – particularly export restraints and export subsidies – to promote or restrict the export of priority products and sectors. Such restraints have been particularly prominent in various raw material inputs, including several key industries where China serves as a leading global source. These actions raise the costs for foreign downstream producers in a variety of manufacturing industries. The United States has successfully used WTO channels in the past to push back on these policies, winning a 2013 case against Chinese export quotas and duties for raw materials such as bauxite, manganese, and zinc, as well as a 2014 case against Chinese export restraints used on rare earths metals. The United States' aggressive enforcement efforts, however, must continue – as China continues to use export restraints in key sectors in violation of WTO rules, particularly its commitment not to impose duties on products not listed in Annex III of their accession protocol.

Various Chinese government policies also provide export subsidies for Chinese products in violation of WTO rules, thus providing an unfair advantage to those products in the United States and other foreign markets. The United States scored a major victory on one set of subsidies in April 2016 when China – under pressure from a U.S.-filed WTO case filed against more than 175 Chinese government measures that provided subsidies to Chinese companies – agreed to dismantle those programs.

In their agreement with the United States, China committed to eliminate all aspects of its "Demonstration Bases–Common Service Platform" program, which had provided a series of export subsidies to support Chinese industry clusters through arrangements involving the central government, provincial governments and service providers (known as common service platform providers (CSPs)). Though the agreement represented a major step forward, implementation and further monitoring, however, will be critical to ensure that China meets its commitments and does not establish other WTO-violative export subsidy programs.

Internal Policies Impacting Trade

Localization policies

When China joined the WTO, China agreed to its core principles to provide most-favored nation (MFN) status and national treatment to foreign products, thus requiring China to provide imported products with no less favorable treatment to that that provided to domestic products. While China took steps to phase out many of the policies that explicitly discriminated against imported products, recent years have seen a proliferation of policies that have a differential impact on products and technologies produced by domestic and foreign companies, even if they

do not explicitly treat domestic and foreign companies differently. These policies are often as problematic for foreign companies as explicit discrimination, and should be eliminated.

A prime example of these problematic policies are those that require localization of production or technology, as these policies have a tangible negative impact on foreign companies seeking to do business in the market. Such barriers include policies mandating local testing and certification requirements for products in the ICT and medical sectors and policies requiring companies to store China-generated data on local services and prohibiting its transfer overseas. These policies create various problems for global manufacturers, large and small, as they tilt the playing field in favor of local competitors, thus harming the competitiveness of manufacturers here in the United States and their ability to make business and investment decisions based on how best to build supply chains and serve customers.

Examples of policies with localization elements include:

- Made in China 2025: In May 2015, China launched its "Made in China 2025," an ambitious ten-year plan designed to upgrade China's manufacturing economy. The plan sets specific targets for domestic manufacturing – 40 percent domestic content of core components and materials by 2020 and 70 percent by 2025 – as well as targeting ten priority sectors such as information technology, new-energy vehicles, agricultural equipment, and robotics. While the plan's overarching objective of promoting smart manufacturing policies in China is common to many countries, including the United States, the specific implementation and localization targets of the plan seek to benefit Chinese manufacturers over foreign ones, raising significant questions about the consistency of policies with China's WTO commitments.

- "Secure and controllable" technology: In recent months, China has released troublesome government policies that mandate the use of "secure and controllable" technology and software in the banking and insurance sectors. To qualify as "secure and controllable," technology must undergo intrusive local security testing, implement local encryption algorithms, and comply with China-specific security standards, disclose source code and other sensitive and proprietary information to the Chinese government, and engineer products to restrict the flow of cross-border data. These policies include the draft Cybersecurity Law (read for the second time by the National People's Congress in July 2016) and new August 2016 opinions on strengthening the standardization of national cyber security, as well as sector-specific provisions in banking and insurance. Although some of these regulations (like those on banking) are on hold, and others (such as the Cybersecurity Law and regulations on insurance) are still in draft form, these regulations raise clear concerns for manufacturers in the United States that should be tackled through both bilateral and WTO channels to ensure that these regulations – and any other proposed regulations that affect these or related products – do not include requirements that discriminate against foreign manufacturers or their intellectual property.

- Data flow restrictions/Internet controls: China has proposed or released a series of measures (including, again, the draft Cybersecurity Law) that both require foreign companies to store any data they collect in China on local servers, and is considering other data localization policies related to Internet-based mapping applications. These rules cause significant operational disruption for manufacturers in the United States, not only due to the increased costs of building and maintaining China-based servers, but also due to their inability to share even data in areas such as human resources and R&D

projects across borders. Such localization barriers are particularly harmful for small and medium-sized manufacturers whose exports rely on Internet storefronts and other e-commerce channels to reach consumers in China. China's Internet controls are also increasingly making it difficult for companies to operate in China. In 2015, two surveys of member companies by different business organizations identified China's Internet controls as having a significant negative impact on their ability to conduct business. The expansion of data restrictions and limitations on the use of the Internet threaten the growth of cloud computing-based business models, such as evolving machine-to-machine (M2M) applications.

China also maintains a variety of more product and sector-specific policies that have a disparate impact on imported and domestic products. Examples include expedited product approvals for innovative medical device products (which generally favor domestic products versus imported products or even products developed locally by foreign companies), mandates for local clinical trials for Class III medical devices (which are mostly imported), and implementation of China's revised Food Safety Law to prevent stricter standards for imported food and agriculture products.

Price Controls

In its WTO accession agreement, China agreed that it would not use price controls to restrict the level of imports of goods or services, and stated that it would try to reduce the number of products and services on this list and avoid imposing price controls on products or services except for extraordinary circumstances.

While China has slowly taken steps to phase out price controls in many areas, China still maintains such controls in some areas, particularly in the health sector. For example, on April 1, 2016, the China Food and Drug Administration (CFDA) informally circulated the draft "Announcement Concerning the Undertaking on Sales Price of Newly Marketed Drugs," an announcement that makes price concessions a pre-condition for marketing approval of new drugs and require proposed pricing to be no higher than prices in neighboring markets (such as India and South Korea). This announcement was released with only eleven days for comment, and has raised concerns about potentially violating WTO Technical Barriers to Trade Agreement provisions that require technical regulations to be based on product performance versus price. Although CFDA has engaged with industry on these draft regulations over the past several months to address concerns and potential revisions, they continue to raise red flags for their emphasis on strongly seeking to lower or control prices.

Standards, Technical Regulations and Conformity Assessment Procedures

Manufacturers in the United States continue to experience a variety of challenges related to standards and technical regulations in China, ranging from inadequate channels for participation in standard-setting processes, treatment of intellectual property in standards-setting, and China-specific regulatory and technical requirements that do not harmonize with international standards. All of these regulations and requirements can add significantly to the cost of manufacturing products for export to China, and limit the ability of U.S.-manufactured products to compete fairly in China.

In March 2016, China's State Council Legislative Affairs Office (SCLAO) released the Standardization Law for public comments, with significant potential changes to China's standardization system. Key areas included in these changes include the role of association standards, whether foreign technical experts will be allowed to draft and participate in standards-setting, treatment of confidential business information, and how proposed mechanisms for addressing standards-related conflicts may be resolved. The NAM and its members remain concerned about various provisions in the law. In the WTO context, one of the most troublesome omissions is that the draft law does not make specific references to China's commitments to its WTO TBT obligations – despite the fact that China is a signatory to the WTO TBT Agreement and that that agreement should reasonably serve as the basis for any signatory's legal and policy frameworks of standardization to ensure harmonization with international practices. Manufacturers are also concerned with stated self-declaration requirements for enterprise standards that could endanger intellectual property (IP) rights, as they could require companies to disclose proprietary information and antitrust implications of treating enterprise standards the same as collaboratively-developed standards.

Other specific Chinese standards and technical regulations also raise questions and concerns that are relevant for the WTO context. For example, China's January 2016-revised *Administrative Rules for Control and Use of Hazardous Substances in Electric and Electronic Products*, which updated China's restrictions on hazardous substances (known as China RoHS), expand both the set of restricted chemicals as well as the scope of products subject to RoHS restrictions. Such expansions have important implications for manufacturers in the United States, as they invoke new labeling and certification procedures for many products. China released a detailed frequently-asked questions (FAQ) document in May 2016, but it is not clear whether documents (including an updated product catalogue showing what products are subject to RoHS compliance rules, and additional details on the conformity assessment procedures) have been released, despite the regime's July 1 implementation date.

Manufacturers are also closely watching Chinese actions related to patent and royalty issues in standard-setting processes, as this has been an active area of discussion within the scope of both standards regulation and competition law. The 2012 revised draft Disposal Rules for Involving of Patents in National Standards removed some problematic language related to the handling of intellectual property in standard-setting processes, but more recent draft competition-related regulations continue to raise questions about obligations for intellectual property owners in standard-setting activities and how royalties will be handled.

State-Owned enterprises

During China's WTO accession, China made a number of commitments related to the activities of state-owned and state-invested enterprises (SOEs and SIEs), including agreeing that those firms would make purchases and sales based solely on commercial considerations and not be influenced by the government. Despite that commitment, the Chinese government has continued to play a strong hand in SOE and SIE management and decision-making, and to pressure these firms to act in ways to support government priorities. Such actions have come not only through various rules and plans (such as the 2006 State Council Guiding Opinions on Promoting the Adjustment of State-Owned Assets and the Restructuring of State-Owned Enterprises), but also conscripting SOEs to support and carry out government imperatives such as investing to boost flagging economic growth (June 2016).

Perhaps the most telltale sign of these continued issues was China's SOE reform plan, released in November 2015, which sidestepped some of the most badly needed structural reforms such as a clear commitment to ensure SOEs operate on market terms, plans or criteria to allow greater privatization for SOEs, or strategies to allow failing SOEs to go bankrupt. Instead, the plan calls for steps to "unswervingly strive to make SOEs strong, superior, and large" and instead focuses on small changes – such as promoting mixed-ownership structures, addressing corruption, and reform to executive board operations. Manufacturers are concerned by this approach and urge further attention by the U.S. government.

Intellectual property rights

China has recognized the vital role that innovation and intellectual property (IP) protection play in economic development and encouraging more foreign investment, with strong language on innovation in key high-level documents such as the 13th Five-Year Plan. While China's increased recognition of the value of innovation has fostered progress on IP issues in recent bilateral dialogues, the United States must continue to urge China to do more to create a fair innovation environment. Such an environment would allow foreign companies to develop, register, and protect IP in China on a non-discriminatory basis, while not providing unfair advantages to firms that develop IP in China.

IP protection in China is a priority for manufacturers of all sizes. Among the primary issues that manufacturers in the United States face are troubling IP-related policy developments and inadequate IP enforcement. These problems are particularly acute for small and medium-sized manufacturers that lack the resources to track down and prosecute counterfeiters and pirates and often do not have in-house IP experts or investigators.

Core Legal Framework

While China's overall legal framework for intellectual property is fairly robust, its core IP laws and regulations still contain key weaknesses. For example, trade secrets remain under the Anti-Unfair Competition Law (AUCL), last revised in 1993. In February 2016, after years of efforts by the U.S. government and others to encourage China to draft an updated, standalone trade secrets law, the State Administration of Industry and Commerce (SAIC) finally decided to act, releasing a draft of the AUCL for public comment. This release met one of China's bilateral commitments at the 2015 Joint Commission on Commerce and Trade (JCCT), alongside commitments to issue model or guiding court cases, clarify rules on preliminary injunctions, evidence preservation orders, and damages.[1]

The draft AUCL proposes some positive changes, including increasing administrative fines for trade secret infringement and allowing a company bringing a trade secret case to shift the burden of proof to a defendant once they can establish that infringement has probably occurred. Yet trade secret enforcement remains problematic, with high evidentiary burdens, low damage awards, and limited use of judicial tools such as preliminary injunctions.

The United States should continue to engage China to improve effective protection for trade secrets through multiple means, including improving judicial practices and advancing legal reforms that include not only the AUCL but also other laws and regulations that also impact trade secrets enforcement. Additionally, China must take additional steps to address concerns

[1] U.S. Department of Commerce Office of Public Affairs, "U.S. Fact Sheet: 26th U.S.-China Joint Commission on Commerce and Trade," November 2011.

about regulator requests for trade secrets and confidential business information, including limiting requests to legitimate regulatory purposes and providing clear protection for any such data required by regulators.

Manufacturers in the United States are also closely watching the ongoing revisions to other core IP laws, such as the Patent Law and the Copyright Law, which may impact the ability of manufacturers to register and protect their IP in China. Similarly, manufacturers are monitoring implementation of Chinese commitments made through bilateral dialogue on trademark-related areas such as geographical indications (GIs), including mutual pledges on the importance of relationships between GIs and trademarks, recognition that generic terms are not eligible for GI protection, and the importance of GI opposition and cancellation proceedings.

The NAM also encourages U.S. government officials to consider other priority issues raised in the NAM's Special 301 submission for their WTO relevance, including IP licensing, China's draft "service invention" regulations, issues related to patent quality, acceptance of supplemental data for pharmaceutical patents, and questions surrounding the Trademark Law and recent court decisions related to trademarks and original equipment manufacturers (OEMs).[2]

Other IP-Related Legal and Regulatory Areas of Concern

Manufacturers are also closely monitoring China's increasing incorporation of IP rules into other areas of regulation, sometimes in ways that raise significant concerns for manufacturers and questions about their consistency with WTO obligations. Such areas include standards, competition, and industry development.

One key example is China's drive to promote economic development through "indigenous innovation," which is often interpreted as innovation by Chinese firms in China – at the expense of foreign companies, products, and technologies. The United States and other national governments have pushed back repeatedly to halt or force revisions to discriminatory innovation policies, including incentives provided under China's Strategic and Emerging Industries (SEIs) program and efforts to create a national catalogue of indigenous innovation products that would be eligible for various government incentives.

Despite these efforts, manufacturers in the United States continue to face problematic indigenous innovation policies. Examples range from innovation components of China's "Made in China 2025" program, cybersecurity policies that mandate "secure and controllable" technology in ways that discriminate against foreign IP, the persistence of provincial catalogues of indigenous innovation products that largely exclude foreign products, and new government policies to promote innovative domestic products in sectors such as pharmaceuticals and medical devices with faster approvals.

[2] This includes not only the Supreme People's Court November 2015 decision in *Focker Security International v Zhejiang Yahuan Lockset* as well as the Jiangsu High Court's December 2015 decision in *Shanghai Diesel Engine Co. Ltd. v. Jiangsu Changjia Jinfeng Power Machine Co. Ltd.* ("Changjia"). The court acknowledged the reasoning in Focker but effectively distinguished it, holding on the facts of the case before it that a China OEM manufacturer had duties beyond confirming that their client has legal rights to an applied trademark in the destination jurisdiction.

Additionally, China has released a flurry of recent draft regulations – including draft guidelines from the State Council Anti-Monopoly Commission, National Development and Reform Commission – that raise concerns about how Chinese regulators may treat the legitimate exercise of IP in relation to competition. Manufacturers in the United States are concerned with whether China will ensure that competition enforcement will be "fair, objective, transparent, and non-discriminatory," and that regulators do not interpret inappropriately the existence of IP as market dominance that is subject to competition to proceedings.

IP Enforcement

Counterfeiting and piracy remain rampant in China, and the country continues to be the leading source of counterfeit and pirated goods traded around the world. These problems are fueled by structural policy barriers, including insufficient coordination among different agencies and levels of government and insufficient resources and implementation to address IP infringement. Specific value thresholds prevent criminal prosecution for IP infringement in most cases, and low administrative fines and civil damages provide little deterrence as counterfeiters and pirates often see fines merely as a cost of doing business.

Trade secret enforcement also remains weak, though companies have seen some positive steps, including a handful of trade secrets cases in which courts granted preliminary injunctions. China's new and specialized IP courts were created to facilitate better management of complex IP matters, including providing consistent, streamlined opportunities for IP litigants – but remain limited in terms of their scope and jurisdiction. Through both legal reforms and changes to practice, China must take steps to boost trade secrets enforcement, addressing evidentiary burdens and other practical barriers – such as the difficulty of using judicial tools such as preliminary injunctions – that in practice prevent companies from enforcing their trade secrets through China's courts. Additionally, damage awards have not adequately compensated trade secret owners against losses. A strong enforcement system is critical to deterring trade secret misappropriation and demonstrating to innovators that China takes protecting their intellectual property seriously.

Rule of law issues

Despite Chinese commitments during its accession to a range of reforms related to rule of law, including regulatory transparency and consistent implementation of laws and regulations, China continues to struggle with many of these areas in ways that have a significant negative impact on the ability of manufacturers in the United States to navigate China's regulatory framework.

Transparency

Global manufacturers seeking to operate in markets around the world depend on regulatory transparency – their ability to get information about laws and regulations they must follow, to provide feedback to government rulemaking processes, and to ensure that government decisions are made fairly and based on consistent criteria. China made general commitments on these issues as part of its accession protocol, but is also bound by transparency commitments under the WTO TBT Agreement to notify all laws, regulations, or other measures related to trade in goods or services no later than 90 days after they are implemented or enforced.

Despite China's WTO commitments, regulatory transparency remains a problem. Manufacturers continue to flag regulations that are not notified for the requisite period, as well as cases in which Chinese government agencies implement new or revised laws and regulations with a very short lead time.[3] Such changes cause significant hardship to manufacturers in the United States, particularly small- and medium-sized manufacturers (SMMs), seeking to comply with these rules or provide useful feedback to Chinese government agencies.

Regulatory approvals

Manufacturers in the United States also experience challenges related to regulatory approvals, in which companies are not able to get products approved due to protectionism as opposed to sound science or risk analysis. Two examples of this occur in agricultural biotechnology and meat products:

- Agricultural biotechnology product approvals: Despite the February 2016 approval of three products by the Chinese Ministry of Agriculture (MOA), and commitments made to U.S. officials during President Xi Jinping's September 2015 state visit on the importance of adopting a "timely, transparent, predictable and science-based approval process," MOA continues to delay approvals of agricultural biotechnology products. Delaying or restricting product approvals to prevent foreign players from entering the market raises serious WTO questions. To address these concerns, China must work to review and approve those products already delayed, but also create a timely, transparent and predictable biotech regulatory approval process in line with its WTO obligations.

- Market access issues for meat products: Despite past JCCT commitments to address market access issues for meat -- including its 2013 JCCT commitment to resume U.S. beef access by July 2014 – significant market access issues remain in a range of meat products. Such issues include continued bovine spongiform encephalopathy-related (BSE) bans on beef product imports, unnecessary restrictions related to veterinary drugs commonly used in pork products in U.S. and other pork-producing countries, and bans on poultry products from certain U.S. states that do not adhere to international best practices.

[3] A perfect example is this is the Ministry of Commerce's draft Interim Administrative Measures for Filing of Establishment and Changes of Foreign-Invested Enterprises, which deal with investment procedures. They were released on September 3, 2016 with a public comment period through September 22 (20 days). Given that their implementation must be coupled with other revisions to China's foreign investment laws that go into effect on October 1, 2016, it is questionable whether MOFCOM can realistically consider any changes based on comments received.

Conclusion

The NAM appreciates the persistent efforts of the members of the Trade Policy Subcommittee and their respective government agencies to assess China's track record of implementing its WTO commitments, and to use all available bilateral and multilateral channels to address them.

Please do not hesitate to contact either me or our lead contact on China issues, Ryan Ong (rong@nam.org) as the NAM can help further on these issues. I am attaching additional NAM materials that provide greater detail on these and other China issues.

Respectfully,

Linda M. Dempsey

Attachments:

- NAM's Recommended Priorities for the 2016 Joint Commission on Commerce and Trade
- China Section of NAM 2016 Submission to USTR's Special 301 Process
- NAM's 2015 Submission for USTR's National Trade Estimate Report