

NAM Priorities for 2016 U.S.-China Joint Commission on Commerce and Trade

April 2016

As the United States and China prepare for this year's U.S.-China Joint Commission on Commerce and Trade (JCCT), the National Association of Manufacturers (NAM) recommends that the U.S. government use this dialogue – including the plenary session and individual working group activities – to address and resolve specific trade and commercial issues in line with that dialogue's structure and focus.

The NAM is the largest manufacturing association in the United States, representing 14,000 manufacturers, small and large, in every segment of the manufacturing economy and representing all 50 states. Our membership includes multinational businesses with operations in many countries, as well as small and medium-sized firms active in international trade. Manufacturing remains critical to the U.S. economy: the most recent data shows that manufacturers contributed a record high \$2.17 trillion to the U.S. economy in 2015 and supports 18.5 million jobs in the U.S. – equivalent to one in six private-sector jobs.

The JCCT remains a critical tool to raise and resolve an array of trade and commercial issues facing manufacturers in the United States. The NAM and its member companies support the Administration's efforts to maintain this high-level dialogue as an important means to resolve trade concerns, and to continue to improve the dialogue to promote concrete progress on pressing issues.

Based on ongoing dialogue with our member companies through the course of the year, and directly in line with NAM submissions through other channels such as the Office of the U.S. Trade Representative's [Special 301](#) and [National Trade Estimate](#) processes, the NAM has compiled a detailed set of issues and concerns as top priorities for the 2016 JCCT dialogue process. NAM priority issues can be grouped into four areas:

- Intellectual property protection
- Localization
- Foreign investment
- Standards and technical regulations

The NAM encourages the U.S. Department of Commerce, Office of the U.S. Trade Representative, and other relevant U.S. government agencies to address these issues through all appropriate dialogue channels, including JCCT working group meetings and workshops held throughout the course of the year, vice minister-level meetings, and the JCCT plenary session later this year.

This list is not intended to provide a detailed overview of every possible issue, nor is it intended to supplant additional specific issues and viewpoints from individual manufacturers and manufacturing-related associations.

Leading Innovation. Creating Opportunity. Pursuing Progress.

Innovation and intellectual property protection

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 intellectual property in China on a non-discriminatory basis, while not providing unfair advantages to firms that develop intellectual property in China.

IP protection in China is a priority for manufacturers of all sizes. Among the primary issues our manufacturers 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 IPR experts or investigators. The U.S. government should use the JCCT's Intellectual Property Rights Working Group, Industries and Competitiveness Dialogue, bilateral discussions with relevant Chinese government agencies, and other platforms to seek tangible progress on intellectual property issues, with a special focus on outcomes that will concretely improve the environment for small- and medium-sized manufacturers.

- Intellectual property 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 both structural policy barriers 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. The United States should further engage China to boost effective enforcement against counterfeiting and piracy, including revising laws and regulations to address both physical and online counterfeiting and piracy, increase material resources devoted to IPR enforcement at all levels, and adopt and implement stronger deterrents against those who infringe upon trademarks and copyrights. The United States and China should also engage to address use of China-based mail services, such as China Post's express mail service, that are used frequently by overseas infringers to ship counterfeit goods into the United States.
- Trade secrets protection: China in February 2016 released a draft of its Anti-Unfair Competition Law (AUCL) for public comment, in line with 2015 JCCT commitments, alongside commitments to issue model or guiding court cases, clarify rules on preliminary injunctions, evidence preservation orders, and damages.¹ 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 Anti-Unfair Competition Law but also other laws and regulations that also impact trade secrets enforcement. Additionally, China must take additional steps to address concerns about regulator requests for trade secrets and confidential business

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.

information, including limiting requests to legitimate regulatory purposes and providing clear protection for any such data required by regulators.

- Indigenous innovation: Despite past Chinese government commitments to limit indigenous innovation policies, 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 domestic products in sectors such as pharmaceuticals and medical devices. The United States should engage China both broadly and on specific policies to accentuate the importance of China meeting past commitments to treat all IP equally, regardless of national origin.
- IP and competition: 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. The United States should engage China on each of these regulations to ensure that they meet past commitments to ensure that competition enforcement is “fair, objective, transparent, and non-discriminatory,” and that the existence of IPRs does not equate to market power. Additionally, the United States should continue to engage Chinese agencies on antitrust issues related to handling of patent and royalty issues in standard-setting processes.
- Geographical indications (GIs): At the December 2014 JCCT, China and the U.S. made important commitments related to 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 – and a commitment to further dialogue on these issues. The United States and China should continue to engage actively on these issues both in bilateral discussions and as the two countries engage with other trading partners.

The NAM also encourages U.S. government officials to engage their Chinese counterparts on other priority issues raised in the [NAM’s Special 301 submission](#), including IP licensing, IP and standards issues, 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

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.

Localization and local support policies

China maintains – either in writing or in implementation – various localization barriers that 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 servers 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. The U.S. government should use varying platforms, including the JCCT's IPR Working Group, Trade and Investment Working Group, and Information Industry Working Group; bilateral discussions with relevant Chinese government agencies; and other platforms to ensure concrete progress on these localization barriers.

- 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. Based on the NAM’s experience, such discriminatory approaches are not only contrary to the broad-based multilateral trading rules, they also undermine the development of the very manufacturing environment that China seeks to create. Promoting a strong manufacturing ecosystem requires fair and open competition and the ability to attract investment and resources from all over the world. The United States should press China to ensure that “Made in China 2025” and related policies do not discriminate against foreign manufacturers, either on paper or in implementation.
- “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. Although these regulations are largely on hold, the United States must continue to engage the Chinese government 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 localization: China has put in place a series of measures 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. The United States must deepen its engagement with the Chinese government about why such data localization policies not only limit commercial opportunities, but also impede the competitiveness of manufacturers from both countries around the world.

- Export subsidies and restrictions: The [NAM welcomed](#) USTR's April 2016 announcement of a new agreement with the Ministry of Commerce (MOFCOM) to dismantle a major government-funded export subsidy program that had boosted Chinese manufacturers at the expense of foreign companies. This win follows successful challenges to export restrictions on rare earths and raw materials, which were both found by the WTO to distort markets and violate global rules. The United States must closely monitor China's implementation of these decisions, and signal that they plan to engage actively and regularly with MOFCOM to ensure full compliance.
- Overcapacity: The NAM has long supported the elimination of market-distorting policies, subsidies, and trade practices, 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. Overcapacity in China has raised significant concerns for NAM members in a range of industries – including steel, aluminum, chemicals, fertilizer, concrete, and others – 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 U.S. is discussing these issues with China and other partners in a variety of other forums, including the OECD, but should ensure consistent messaging in the JCCT as well. The United States should use JCCT dialogues, such as the Industries and Competitiveness Dialogue and sector-specific dialogues on steel and aluminum, to engage key Chinese ministries responsible for tackling overcapacity on current and future efforts to curb overcapacity, and to seek additional concrete commitments to expand its efforts to address overcapacity effectively and mitigate its impact on the global economy.
- State-owned enterprises: The NAM has long urged U.S. government agencies to use various channels, including bilateral commercial dialogues and trade negotiations, to address trade-distorting practices of state-owned and state-influenced enterprises (SOEs and SIEs) in markets such as China. The U.S. government should encourage China to implement goals of “letting the market play a decisive role” in the economy promised by President Xi Jinping to level the playing field for foreign companies competing with SOEs and SIEs. This engagement should ensure not only implementation of previous commitments made in bilateral dialogues such as the JCCT and Strategic & Economic Dialogue on areas such as SOE corporate governance, market-based operations, expenditures, and profits, but also further deepen SOE reforms to ensure that they operate on market-oriented terms.

The NAM also encourages U.S. government officials to engage their Chinese counterparts on other issues, such as expedited product approvals for innovative medical device products and mandates for local clinical trials for Class III medical devices (which are mostly imported).

Foreign investment

China's investment approval regime caps foreign investment in key sectors such as agricultural processing, automotive, telecommunications, and other manufacturing-related industries, thus requiring them to form joint ventures with domestic companies. Such a system creates major challenges for foreign companies and provides leeway for government and company stakeholders to seek concessions from foreign companies – including investment commitments, local sourcing, and access to capital and technology – in exchange for investment approval.

China is in the midst of a series of investment-related reforms, including bilateral negotiations with the United States over a Bilateral Investment Treaty, the parallel launch of a new investment “negative list” in four free trade zones (FTZs) in Shanghai, Tianjin, Fujian, and Guangdong, and ongoing revisions to its Foreign Investment Law. While such reforms could be significant if they result in true investment openings in limited sectors, manufacturers in the United States are actively looking for new investment openings and streamlined rules that eliminate discrimination.

The United States should continue to engage China through all available channels – including not only direct BIT negotiations, but also the JCCT's Trade and Investment Working Group, bilateral discussions with relevant Chinese government agencies, and other platforms to push for concrete investment openings and greater engagement with foreign industry players to account for their views.

Standards and technical regulations

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.

The U.S. government should use varying platforms, including the JCCT's Trade and Investment Working Group, Intellectual Property Rights Working Group, Pharmaceutical and Medical Device Working Group, Agriculture and Sanitary & Phytosanitary Working Group; bilateral discussions with relevant Chinese government agencies; and other platforms (such as the World Trade Organization's Technical Barriers to Trade Committee) to seek tangible progress on issues related to standards and technical regulations.

- Standards reform: China's State Council Legislative Affairs Office (SCLAO) in March released the Standardization Law for public comments, with significant potential changes to China's standardization system – including areas of progress, areas with remaining questions, and areas that require further clarification. Such areas include the role of association standards, whether foreign technical experts will be allowed to draft and participate in standards-setting, and how proposed mechanisms for addressing standards-related conflicts may be resolved. We also note our concern with stated self-declaration requirements for enterprise standards that could endanger IPR due to potential requirements for enterprises to disclose proprietary information and antitrust implications of treating enterprise standards the same as collaboratively-developed standards. Additionally, the draft law does not make specific references to China's

commitments to the WTO TBT Agreement – references that should be explicitly added to the final law. The United States should engage directly with SAC, SCLAO and other agencies to discuss plans for standards reform, including specific provisions in the draft law. Additionally, the United States should encourage SCLAO to engage broadly and transparently with foreign industry to ensure full consideration of all stakeholder views.

- China RoHS 2: In January 2016, China released a revised version of the *Administrative Rules for Control and Use of Hazardous Substances in Electric and Electronic Products* – measures setting rules for China’s restrictions on hazardous substances, known informally as “China RoHS.” The revised measures redefine the scope of both products and restricted substances scope of China’s RoHS regime and have important implications for manufacturers related to covered compounds, labelling, and certification procedures – including questions about the scope of products and components subject to certification. Despite the fact that the new regime is supposed to go into effect on July 1, several additional documents – including a detailed frequently-asked questions (FAQ) document, an updated product catalogue showing what products are subject to RoHS compliance rules, and additional details on the conformity assessment procedures – remain unreleased, creating substantial uncertainty among manufacturers of these products that sell in China. The United States should engage closely with the Ministry of Industry and Information Technology and Certification and Accreditation Administration of the People’s Republic of China on the implementation of China RoHS 2 to address industry questions and concerns and urge a delay in the implementation unless they can be fully addressed.
- CFDA draft announcement on prices and drug approvals: On April 1, 2016, the China Food and Drug Administration 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 World Trade Organization’s Technical Barriers to Trade Agreement provisions that require technical regulations to be based on product performance versus price. The United States should urge CFDA to halt any plans to finalize or implement the proposed announcement, and engage in meaningful dialogue with foreign industry stakeholders before taking any further action.
- Agricultural biotechnology product approvals: Despite the February 2016 approval of three products by the Chinese Ministry of Agriculture (MOA), and commitments made 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. The United States should engage China to ensure approval of products already delayed, as well as to secure a commitment from China to create a timely, transparent and predictable biotech regulatory approval process, in line with international 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. The United States should work to secure commitments from China to remove regulatory import restrictions on U.S. beef, pork, and chicken products.

The NAM also encourages U.S. government officials to engage their Chinese counterparts on other issues, such as ongoing implementation of China's revised Food Safety Law that impacts imported food and agriculture products.