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Mr. Edward Gresser
Acting Chair, Trade Policy Staff Committee
Office of the United States Trade Representative
600 17th Street, NW
Washington, DC 20508

Ref: Docket No.: USTR-2017-0013

Dear Chairman Gresser:

The National Association of Manufacturers (NAM) welcomes this opportunity to provide the following submission for the 2018 *National Trade Estimate Report on Foreign Trade Barriers*. The NAM is the largest manufacturing association in the United States, representing businesses small and large in every industrial sector and in all 50 states. Manufacturing employs more than 12 million women and men across the country, contributing more than $2.17 trillion to the U.S. economy annually. If U.S. manufacturing were a separate country, it would be the ninth-largest economy in the world.

Manufacturers in the United States seek to compete fairly in markets around the world but face a wide variety of market-distorting trade barriers in foreign markets that prevent fair competition. Growing opportunities for exports and overseas sales by U.S. companies must be a fundamental component of U.S. government efforts to meet administration goals of reducing trade deficits, and government and business strategies to capture a greater share of the global manufactured goods market. For manufacturers in the United States to succeed in an increasingly competitive global environment, they need to be able to reach effectively the 95 percent of the world's consumers living outside the United States. According to the Department of Commerce, U.S. manufactured goods exports were valued at $1.26 trillion in 2016, down from a high of more than $1.4 billion in 2014.

Trade barriers, however, continue to confront manufacturers in the United States. Trade barriers have been on the rise for a number of years, and even with a slight slowdown in late 2016 and early 2017, are still being initiated at a rate of nearly 11 new trade barriers per month.[1] G20 countries are responsible for more than half of those new trade barriers.[2] This is compounded by the decline in national efforts to facilitate trade by reducing tariffs, improve Customs procedures, or address market access barriers around the world.[3]

[1] World Trade Organization (WTO), "Trade Policy Review Body - Report to the TPRB from the Director-General on Trade-Related Developments (Mid-October 2016 to mid-May 2017)," August 10, 2017. Accessed at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=@Symbol=%20(wt/tpr/ov/w/11)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#.

[2] WTO, "Report on G20 Trade Measures (Mid-October 2016 to mid-May 2017)," June 30, 2017. Accessed at https://www.wto.org/english/news_e/news17_e/g20_wto_report_june17_e.pdf.

[3] WTO, "Trade Policy Review Body"; WTO, "Report on G20 Trade Measures."

These trade barriers take a wide variety of forms, including not only traditional trade and investment restrictions, but also forced localization barriers that pressure companies to move manufacturing and operations overseas, intellectual property theft that undercuts manufacturing competitiveness, problematic import and export policies that distort global trade and discriminatory technical barriers to trade that block imports and create advantages for domestic producers. While many of these barriers appear first at the national level, manufacturers in the United States are increasingly confronting problematic initiatives from various global institutions that promote the proliferation of trade barriers around the world. The NAM has chronicled many of these trade barriers in submissions over the last year, including its February 2017 submission to the Office of the U.S. Trade Representative (USTR) for the Special 301 investigation on intellectual property, March 2017 submission to the U.S. International Trade Commission (USITC) on digital trade barriers, May 2017 submission to the U.S. Department of Commerce (DOC) on trade deficits and September 2017 submission to USTR on China's compliance with its World Trade Organization (WTO) obligations.

To address and eliminate these barriers, the United States must leverage all available tools. This must include:

- Pursuing and negotiating new, advanced trade agreements that open up key markets for manufacturers and secure ambitious, high-standard commitments that set strong rules to allow manufacturers in the United States to compete fairly;
- Fully enforcing regional and bilateral trade and investment agreements already in force, including by pursuing formal dispute settlement cases where appropriate;
- Working with trading partners to ensure full implementation of international agreements, including (but not limited to) the WTO Trade Facilitation Agreement, the Information Technology Agreement and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).
- Modernizing and more effectively using U.S. trade tools to boost U.S. global competitiveness, such as improving export financing options, eliminating self-inflicted barriers that impede U.S. manufacturing and exports and participating in partnerships overseas that spur efficient and competitiveness of U.S. manufacturing;

The NAM welcomes the administration's focus on improving global trade relationships and looks forward to working closely with both the USTR and DOC to address concrete market-distortions and trade barriers identified in bilateral and global trading relationships as part of a broad agenda to improve U.S. manufacturing competitiveness globally in order to grow manufacturing and good-paying jobs in the United States.

1. Import Policies

Manufacturers in the United States face a broad range of policies in a variety of markets that block or limit imports from the United States. High applied tariff rates on imports of manufactured goods and remedies applied by foreign governments through non-transparent or WTO-inconsistent processes place a considerable and discriminatory burden on exports of manufactured goods from the United States.

A top challenge for many manufacturers is excessively high tariffs on imports of manufactured goods imposed by a variety of countries. Many key countries impose both higher duty rates and other "fees" that add considerably to the cost of those products and harm the competitiveness of U.S. exports. A number of countries continue to impose concerningly high tariffs on non-agricultural goods, including markets whose average applied tariff rates for these

products are more than five times higher than equivalent U.S. rates (**Algeria, Ethiopia**), more than four times higher (**Argentina**, **Brazil**), and more than three times higher (**Ecuador**, **Egypt**, **India**, **Kenya**, **Nigeria**, **Uruguay**). Tariff rates are particularly high for selected manufactured products, such as capital goods in **Argentina**; automobiles and textiles and apparel in **India**; chemicals, industrial machinery and automobiles in **Brazil**; motorcycle products in **Indonesia** and **Malaysia**; ethanol products in **China**; and food products (via special tariff codes) in the **European Union**.

Manufacturers, particularly small and medium-sized manufacturers (SMMs), also face challenges with transparency in trying to understand and navigate import rules, including both tariff rates and import procedures. Such companies often find that tariff rates are changed suddenly, with no transparency or notice. In many countries, there are significant discrepancies between the bound rate (the upper limit that cannot be exceeded under WTO rules) and the applied rate (the rate charged at the border on a most favored nation basis). A gap between the two leaves considerable flexibility for governments to change tariff rates with little warning or notice, and it is thus little coincidence that many of the countries where transparency in customs rates and rules is the biggest challenge have the largest gaps between their bound and applied rates for non-agricultural products. Countries with big gaps include **Indonesia** (which has an average applied tariff rate of 7.8 percent versus an average bound rate of 35.6 percent), **Kenya** (11.6 percent versus 57 percent), **Nigeria** (11.5 percent versus 49.2 percent), **India** (10.2 percent versus 34.5 percent), **Turkey** (5.5 percent versus 17.0 percent) and **Thailand** (7.7 percent versus 25.5 percent).

High tariffs are just one of many import barriers manufacturers face in overseas markets. Other barriers, such as import licensing schemes and other restrictions at the border oftentimes are as, if not more, harmful in limiting access for U.S. manufactured goods exports. For example, **Argentina** maintains a wide array of protectionist measures designed to boost local production, protect domestic industry and address balance of payments concerns. These measures appear to violate Argentina's obligations under the General Agreement on Tariffs and Trade (GATT) and the WTO Agreements on Customs Valuation, Import Licensing Procedures, Technical Barriers to Trade (TBT) and Trade Related Investment Measures. For example, Argentina also bans the import and sale of a variety of remanufactured products, including agricultural machinery, medical devices and information technology products, as well as bans on imports of many processed foods. Through an arbitrary and non-transparent reference pricing regime, it delays and adds significantly to the cost of importing competitive products with invoice prices less than the "reference values" for those products determined by government authorities.

Imports to Argentina also face significant challenges due to licensing and approval requirements initially laid out under its *Declaración Jurada Anticipada de Importación* (DJAI), the subject of a successful WTO dispute settlement challenged by the United States and several other countries. Following a WTO appellate body determination finding the provisions contrary to WTO rules, Argentina eliminated its original DJAI requirements in December 2015, but replaced it with a new import monitoring system, the *Sistema Integral de Monitoreo de Importaciones* (SIMI) that has raised concerns for replicating some aspects of the DJAI regime. In particular, companies seeking to import must still register and be approved to obtain an import license. Many of those import licenses remain non-automatic, including for many of the same types of manufactured goods that had been restricted under DJAI. This means that importers will still face a specific government approval that could prove a bottleneck for manufacturers looking to export to Argentina. The NAM is monitoring SIMI closely and remains concerned that that this new system may not be not in full compliance with the WTO's decision

or Argentina's WTO obligations. The NAM urges the United States to work closely to address these issues quickly.

China's customs policies and procedures continue to present challenges for importers. For example, some manufacturers have faced problematic import bans and restrictions in China, such as a July 2017 proposed import ban on 24 types of materials, including scrap paper and plastic, by end of 2017, and subsequent implementation plan and potentially non-WTO compliant standards. In addition, transparency is lacking in the development of new rules and regulations, with interested parties having little to no opportunity for meaningful input before new policies go into immediate effect. The development of China's soft customs infrastructure has not kept pace with the rapid growth of its stature in the global economy and the development of World Customs Organization (WCO) and other global best practices. For example, China should adopt a more balanced, strategic, risk-based management approach to border clearance consistent with WCO guidelines. Other opportunities for improvement and efficiencies include implementing commercially meaningful *de minimis* and informal entry treatments for low-value shipments; removing unique tax and duty requirements for e-commerce shipments that complicate rather than ease border clearance; providing 24/7 customs service; and coordinating and harmonizing policies between China Customs and other import-related agencies such as the General Administration of Quality Supervision, Inspection, and Quarantine.

India remains a challenging market for manufacturers in the United States, despite its substantial market size. Although Prime Minister Narendra Modi continues to pledge his commitment to improve the "ease of doing business" in India, India's high tariff rates and restrictive border measures continue to limit the ability of manufacturers to export there. It is no coincidence that the U.S. exports fewer manufactured goods to India ($18.7 billion in 2016) than to the United Arab Emirates, Singapore, or Belgium: all countries whose economies are less than one quarter of the size of India's and who have less than one percent of India's population.

Product-specific tariffs and customs procedures remain a challenge in India as well. As noted previously, India maintains high tariffs on a range of manufactured products, including automobiles, textiles, distilled spirits, pharmaceuticals and rubber. India also, however, continues to use varying policy tools to raise tariffs in selected industries, such as information technology products, pharmaceuticals and medical devices, in order to protect domestic industry. Moreover, India's customs and border practices are extremely complex, non-transparent and highly cumbersome to navigate. Depending on the product, importers to India may face a combination of duties, including a basic customs duty, various "additional duties," an education assessment (known as a cess) and a landing fee. This makes it challenging simply to determine the effective rates for customs tariffs, excise duties and other duties and charges that their products will face, a fact that discourages many companies from bringing their products to India. Although India's online customs platform provides some options to aid companies in understanding duty rates, it does not fully address the complexity and the lack of transparency in the system as a whole. Additionally, other import procedures and processes could be improved or rationalized to allow U.S. exports to move seamlessly across Indian borders. These include the option to transmit customs documentation electronically in all modes, simplified Know Your Customer (KYC) documentation requirements, 24/7 availability of customs officials at major ports, time-definite customs clearance procedures, and a commercially meaningful *de minimis* threshold that is applicable to commercial shipments.

Other markets with notable tariff and Customs barriers include:

- **Brazil**, where importers not only face high duties, but also a series of cascading federal and state-imposed taxes, tariff-rate import quotas, and import fees that significantly

increase the cost of imported goods to end consumers. These taxes and fees apply to a wide range of products, ranging from automobiles to ethanol to distilled spirits, and are difficult for U.S. and other foreign manufacturers, particularly SMMs, to navigate, adding to the complexity and challenges of doing business in Brazil. Even where imported goods do not compete directly with domestic products, they face additional costs that weaken aggregate demand and limit access to technology and equipment by Brazilian consumers.

- **Colombia**, where manufacturers are closely watching signals from the implementation of a new law designed to eliminate a longstanding tax on distilled spirits, in place since 1996, that appeared to violate Colombia's WTO obligations to not discriminate against foreign products and commitments under the U.S.-Colombia Trade Promotion Agreement.
- **Korea**, where implementation of the current U.S.-Korea Free Trade Agreement (KORUS) continues to require attention, and, if done fully, would address many of the most critical outstanding issues. These issues include Korea's failure to implement fully *de minimis* rules to eliminate red tape for small-value shipments, including e-commerce, as well as the Korean Customs Service's onerous and lengthy processes for post-import origin verification audits on imported products. Such processes require unnecessarily large amounts of information on imported products on short timelines, with limited transparency on proper certifications.
- **Russia**, where manufacturers continue to face a range of non-WTO consistent restrictions that impact a variety of products ranging from processed food products to combine harvesters. These problems remain despite the fact that under the terms of its accession to the WTO in 2012, Russia agreed to lower customs duties and to eliminate other import restrictions on a variety of products.

2. Investment Barriers

Overseas investment is critical to expanding U.S. exports and sales to foreign markets and to supporting high-value activities at home. In 2014 (the last year for which data is available), businesses with foreign investments accounted for 65 percent of all U.S. private sector output and generated nearly half of total U.S. goods exports (47 percent) and more than three-quarters of all research and development (R&D) expenses by private sector businesses.[4] The vast majority of sales by overseas subsidiaries of U.S. companies, which equaled about $4.3 trillion in 2013, were destined for other foreign markets.[5] Inward investment into the United States also provides important benefits, supporting millions of U.S. manufacturing jobs and increased U.S. capital investment and research and development.

While the United States has a very open investment climate, other countries restrict the ability of U.S. firms to invest through a variety of laws and regulations. These restrictions undermine the ability of manufacturers in the United States to access overseas markets and grow their businesses. These restrictions vary considerably, including outright bans on foreign investment in particular sectors, equity caps that force companies to form joint ventures with local companies, cumbersome foreign investment approval processes that provide leverage from governments (and companies) seeking to extract concessions from potential investors, screening processes based on vague definitions of national security and attempts to undermine critical investor-state dispute settlement processes in free trade agreements (FTAs).

[4] Data compiled from Bureau of Economic Analysis, International Data database, accessed at https://bea.gov/iTable/iTable.cfm?RegID=2&step=1#reqid=2&step=1&isuri=1.
[5] Sarah P. Scott, "Activities of U.S. Multinational Enterprises," *Survey of Current Business*, August 2015.

Given these significant barriers and the need to make sure that U.S. companies can fight fairly, it is critical that they have the tools to be able to address them and ensure fair treatment. Investor-state dispute settlement (ISDS) provisions, included in U.S. agreements with more than 50 countries and in thousands of other treaties around the world, are essential to help manufacturers increase exports abroad and grow and maintain jobs here at home. This longstanding enforcement tool ensures U.S. investors overseas have the same fundamental protections against discrimination, denial of fair treatment, contract breaches and seizure of private assets as they do in the United States. It also enables manufacturers to address forced technology transfer and damaging localization requirements and incentives from foreign governments that undermine U.S. manufacturing. Robust market access, investor protections and ISDS enforcement are critical and must be included in future U.S. agreements and bilateral investment treaties (BITs). As the United States is in the process of renegotiating NAFTA with **Canada** and **Mexico** and has announced plans to renegotiate FTAs with **Korea** and others, ISDS (as a required trade policy objective under TPA) must be a top priority against efforts to undermine or weaken it.

Many countries still maintain substantial barriers that must be eliminated to address competitive imbalances. For example, **Canada**, **Australia** and **New Zealand** maintain non-national security-based investment screening mechanisms. **Malaysia** prevents overseas individuals and firms from acquiring more than a 70 percent stake in local businesses. **Mexico** still retains investment restrictions in the energy sector even after its December 2013 energy reforms, and other sectors (such as forestry) remain closed to foreign participation. Even after **Vietnam** implemented its new Investment Law in July 2015 with a "negative list" approach, limitations still remain in sectors ranging from construction to energy exploration.

In **China**, NAM members have long faced investment caps in key manufacturing sectors such as agricultural processing, automotive and telecommunications, forcing them to form joint ventures with domestic companies under the Catalogue Guiding Foreign Investment. Problematically, this allows government and company stakeholders leverage to seek concessions from foreign companies (including investment commitments, local sourcing and access to capital and technology) in exchange for investment approval. In a series of changes in late 2016, China approved revisions to its main foreign investment laws to move from investment approvals to required filings for a wide swath of sectors, announced the expansion of a "negative list" approach to investment from four free trade zones to the entire country and released an updated version of their Catalogue Guiding Foreign Investment to create investment openings in a handful of sectors. These changes, while generally welcome, did not fully address remaining concerns from manufacturers in the United States about continued investment caps in critical sectors, efforts to build a national security review system for foreign investment, and broader regulatory concerns that impact foreign-invested enterprises.

India has taken important steps to eliminate some of their existing investment caps relevant to manufacturers, including developments in the last two years to loosen foreign investment limitations in sectors such as railway infrastructure, defense, food processing, pharmaceuticals and construction, and to streamline foreign investment approval processes through the elimination of the Foreign Investment Promotion Board. Efforts to promote more competition among states to attract investment and to simplify regulatory structures that impact the cost of company operations are both positive steps in promoting greater efforts to eliminate investment barriers. Investment limitations, however, remain in place in manufacturing-relevant sectors such as defense, while in other sectors, such as food processing, the path and timing of proposed liberalization remains unclear.

Of concern, however, are countervailing investment trends in India that undermine the Modi government's attempts to make India a top global investment location. India's finalized model Bilateral Investment Treaty showed a significant departure from international best practices on investment, as detailed in the NAM's April 2015 comments to the Indian government.[6] India's subsequent efforts to cancel or force existing BITs to comply with the new model brings into question the level of India's commitment to protecting the investment it is now seeking to attract. India has also sent negative investment signals in various manufacturing-related sectors. For example, in sectors with longstanding investment in India, such as tobacco, proposed tightening of investment rules that would prohibit investment in technology collaboration and licensing send negative signals for both investment and intellectual property. Manufacturers urge the United States to work with the Indian government to prevent backsliding on India's efforts to promote a positive environment for foreign investors that treats them equally with their domestic competitors.

Russia's investment regime, including the Investment Law and Strategic Sectors Law, permit the government significant flexibility to prohibit or set restrictive conditions on foreign investment on undefined terms such as "public morals and health," and to require pre-approval of a controlling stake in investment projects that fall under strategic sectors. Additionally, under the July 2015 Decree 708, manufacturers in the United States that wish to obtain the strongest possible tax and financial terms for their investment in Russia must negotiate and sign a Special Investment Contract (SIC), in order to access fully Russian markets and compete fairly with domestic producers.

Other countries, such as **Ecuador** and **Venezuela**, have taken measures against foreign investors in ways that undermine their investment climates. Additional countries where manufacturers face considerable investment restrictions include **Brazil**, **Equatorial Guinea**, **Ghana**, **Indonesia**, **Nigeria**, **Russia**, **Taiwan** and **the Philippines**.

3. Forced Localization Barriers

Forced localization barriers, including measures designed to protect, favor or stimulate domestic industries and interests at the expense of goods, services and intellectual property from other countries, are proliferating in key emerging markets. Such barriers can violate fundamental national treatment provisions of the GATT and various WTO Agreements, as well as more detailed provisions in U.S. FTAs and U.S. BITs. Some of these measures are already the subject of ongoing WTO dispute settlement cases.

Forced localization poses a serious and growing threat to manufacturing and jobs in the United States, blocking trade in strategic and innovation-intensive sectors and undermining hard-won technology and productivity gains that have made the United States one of the most competitive producers in the world. A 2013 study by the Peterson Institute for International Economics estimated that the reduction in world trade caused by just one type of forced localization barrier, local content requirements, amounts to $93 billion annually.[7]

India maintains a range of forced localization barriers that challenge manufacturers in the United States. USITC's most recent investigation of India's trade policies, and the NAM's

[6] National Association of Manufacturers, "Comments on Draft Indian Model Bilateral Investment Treaty," April 10, 2015.
[7] Gary Clyde Hufbauer, Jeffrey F. Schott et al., *Local Content Requirements: A Global Problem*, Peterson Institute for International Economics, September 2013.

detailed submission for that investigation[8], documents many of these barriers in detail and their impact on industries from solar energy to pharmaceuticals, from medical devices to pharmaceuticals.[9] Many of these policies stem from India's 2011 National Manufacturing Policy, which called for local production of everything from information technology and clean energy equipment to medicines and medical devices. Despite positive language in a few proposed industrial policies (such as NITI Aayog's 2016 proposed policy on information technology that offered the possibility of an export-driven solution, the last few years have seen a range of proposed policies that promote localization and import substitution, including language in new policies and frameworks in sectors such as medical devices, information technology, telecommunications, solar energy, and toy products.

Russia maintains forced localization barriers in a variety of sectors, including pharmaceuticals, telecommunications and heavy equipment. For example, the July 2015 Decree 719 and a recent update provided by Russia's Ministry of Industry & Trade detail a process whereby foreign manufacturing investors seeking to be recognized as a "local manufacturer" and obtain full access to the Russian market must follow a rapid process to increase their local content to approach full localization by 2025. Other decrees provide additional incentives to local manufacturers: for example, a series of May 2016 decrees (Decrees 417, 419 and 421) offered local manufacturers a 90 percent offset from a number of important fees and operational costs, such as recycling fees, workplace maintenance costs and energy consumption costs. These subsidies appear to contradict not only WTO trading rules, but also the Russian Constitution and other laws.[10] Other Russian government programs, such the Ministry of Industry and Trade's launch of a new Industry Development Fund, initiatives to develop Russia's pharmaceutical industry through 2020, and government procurement criteria, seek to promote import substitution in key manufacturing industries such as pharmaceuticals and telecommunications.

Brazil has made widespread use of localization policies in order to boost domestic industries. Perhaps the biggest example is the *Plano Maior Brasil*, launched in 2011 as a series of industrial plans and targets to promote investment and innovation through a range of tax, tariff and financing incentives to encourage local production. The plan included specific local content requirements for exports to qualify for tax incentives and extended policies that provide higher tax rate for autos that cannot meet certain criteria for local content, required levels of local engineering or R&D, fuel efficiency and emissions standards, or labeling standards. Since the plan was released, Brazil has sought to implement other local content requirements, including preferential financing in the energy, steel and machinery sectors, as well as tax incentives for localized information technology products.

Manufacturers in the United States continue to see a variety of localization policies in **China** that create harmful trade barriers as manufacturers seek to export and invest in that market. For manufacturing sectors, China's "Made in China 2025" is the best recent example. This policy framework, initially launched in May 2015, is 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-

[8] National Association of Manufacturers, Pre-Hearing Statement, USITC Inv. 332-550, April 23, 2015; NAM, Post-Hearing Brief, USITC Inv. 332-550, May 12, 2015.
[9] U.S. International Trade Commission, *Trade and Investment Policies in India, 2014-2015* , September 2015.
[10] These subsidies may contradict Article 34 of the Constitution of the Russian Federation (which covers unfair competition) and Article 15, Section 1 of Russia's 2006 Federal Law No. 135-FZ "On Protection of Competition" (which prohibits regulations which preclude, limit or eliminate competition.

energy vehicles, agricultural equipment and robotics. While the plan's overarching objective of promoting smart manufacturing policies in China is common to many countries, 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.

China has taken steps in recent years to tighten its cybersecurity environment in ways that create as localization-based trade barriers, forcing companies to use "secure and controllable" technology and software, a term that requires foreign products to disclose source code and other sensitive and proprietary information to the Chinese government or be blocked out of the market. These laws and regulations also require foreign companies to store data collected in China on local servers and prevents them from transmitting such data outside of China. Major policies in this area include the Cybersecurity Law, National Security Law, Counterterrorism Law, August 2016 opinions on strengthening the standardization of national cybersecurity, sector-specific provisions in banking and insurance, draft cybersecurity standards and possible rules related to Internet-based mapping applications. Impacted information technology products and the data flows they depend on are critical in the deployment of machine-to-machine and Internet of Things technologies that are increasingly used by manufacturers to improve their products and manage their operations. Such policies effectively serve to protect Chinese companies at the expense of manufacturers here in the United States, blocking trade in strategic and innovation-intensive sectors such as information technology and undermining hard-won technology and productivity gains that have made the United States one of the most competitive producers in the world. As manufacturers increasingly rely on digital technologies and connectivity to operate, maintain and service their products globally, China's expanding restrictions on the outward flow of data represents a significant trade barrier that will negatively impact the ability of companies fully employ digital technologies to compete in that market while forcing transfer of technologies and operations to China in order to remain competitive.

Other localization policies in China include the persistence of provincial and local "indigenous innovation" product catalogues despite central government commitments to eliminate them, as well as required local testing and certification requirements, expedited product approvals, and imposition of stricter safety standards on imports in sectors such as information technology, telecommunications, medical devices, and food and agriculture.

Around the world, an increasing number of countries, both developed and developing, have introduced or are actively contemplating introducing laws that would restrict cross-border data flows and/or impose server and data localization requirements. Such requirements would impose steep costs and significant operational challenges not only on providers of data storage and other services, but also on manufacturers who rely on those services. Manufacturers have seen new barriers proposed or considered in many markets, such as **Brazil**, **China**, **Germany**, **India**, **Indonesia**, **Korea**, **Malaysia**, **New Zealand**, **Nigeria**, **Russia**, **Turkey** and **Vietnam**. For example:

- **Brazil**'s national legislature previously debated a local data storage requirement that would have required all data relating to Brazilian operations of both domestic and international companies, as well as Brazilian citizens, to be stored in the country. While the requirement was stripped from the "Civil Internet Framework," there are some reports that such legislation may be reintroduced.
- **China**'s Cybersecurity Law, set to take effect in June 2017, requires many foreign companies to store data collected in China on local servers. Other proposed or widely

discussed measures, such as possible rules related to Internet-based mapping applications and draft cybersecurity standards released by the National Information Security Standardization Technical Committee (TC 260), appear to build on these requirements. China's Internet controls are also increasingly making it difficult for companies to operate in that country.

- In February 2014, **India**'s National Security Council proposed significant new restrictions on cross-border data flows, including requiring that all communications between users in India stay in India and be stored locally on Indian servers. This was followed by the May 2015 National Telecom Machine-to-Machine (M2M) Roadmap that raised concerns about potential inclusion of restrictions on data flows, though industry hopes that ongoing consultation over implementing guidelines may address issues. More recent intelligence indicates that some ministries are pushing for local server requirements as part of new e-commerce policies.
- In 2012, **Indonesia** issued Regulation 82, "Operation of Electronic Systems and Transactions," to the 2008 Law 11 on Electronic Information and Transactions. The regulation requires extensive certification requirements and restrictions on electronic systems providers that provide services for the "public use." This term has not been clearly defined, though it creates challenges for service providers and manufacturers using those services. In 2016, Indonesia also proposed new regulations that included unnecessary and burdensome data localization requirements for e-commerce providers.
- Industry has also raised serious concerns over a series of decrees from **Vietnam**'s Ministry of Industry and Commerce, including a 2014 circular (Circular 09/2014/TTBTTTT) that requires Vietnamese companies operating websites and networks to operate and store information on local servers for mandated periods of time and a draft decree (now shelved) that would have imposed registration and licensing requirements on providers of information technology services and thus restricted cross-border cloud computing and data services.

Given the wide breadth of growing restrictions and the importance of this issue across the manufacturing industry, the NAM has sought binding and enforceable new obligations in ongoing and future trade talks to permit the flow of data across borders and to prohibit information technology localization requirements.

Other types of localization measures that impact manufacturing sectors include local content requirements in **Brazil**, **Indonesia**, **Nigeria** and **South Africa**, limits on business permits to local citizens in **Malaysia**, preferential product approval and registration processes benefiting local companies in **Algeria** and **Morocco**, government programs that discourage the purchase of imported products in markets such as **Colombia**, government procurement policies for local products not in line with international commitments in a variety of markets such as **Turkey**, and local policies to force local research and development in markets such as **Canada**.

4. Lack of Intellectual Property Protection and Enforcement

Innovation drives and supports U.S. global leadership in manufacturing by companies large and small. The latest Department of Commerce report released in September 2016, for example, showed that intellectual property (IP)-intensive industries support at least 45 million U.S. jobs and contribute more than $6 trillion to U.S. GDP, or nearly 40 percent of the economy.[11] Despite those efforts, U.S. IP is a constant target for both foreign competitors who want to steal it. A 2013 report by the Commission on the Theft of Intellectual Property found that

[11] U.S. Department of Commerce, "Intellectual Property and the U.S. Economy: 2016 Update," September 2016.

stolen ideas, brands and inventions drain more than $300 billion from the U.S. economy, harming U.S. businesses, jobs, and workers in the process.[12]

The ability of innovative manufacturers to protect their intellectual property around the world is a critical component of their business success and a driver for future innovation. The challenges of protecting innovation and intellectual property, however, are real for companies of all sizes, but SMMs face a particularly daunting task, as the cost and complexity of protecting their rights around the world can be very high relative to their annual sales. Innovative manufacturers in the United States benefit from a number of international IP agreements such as the TRIPS, World Intellectual Property Organization (WIPO) administered international IP treaties such as the Patent Cooperation Treaty and Madrid Protocol, and U.S. FTAs with stronger IP chapters. Despite those protections, there is much more work to do to ensure the global intellectual property system enables small businesses to effectively protect their ideas, brands and inventions.

The NAM provided detailed comments on the challenges that manufacturers face around the world in a detailed submission to the U.S. government's Special 301 process in February 2017. The NAM remains highly concerned about the risk of IP erosion, a trend occurring both at the global level as well as in individual countries. The global framework of patent protections, particularly for clean technology, energy, healthcare and other advanced manufacturing products, is being challenged in a range of international forums. In WIPO, the World Health Organization (WHO) and at the United Nations (U.N.), some member states and allies at non-governmental organizations continue to call for expanded use of compulsory licensing to obtain free access to clean technology and healthcare innovation. Those calls are similar to broader efforts across the U.N. system to position IP as a barrier to the treatment of disease, the development, dissemination and deployment of clean technologies, and to access to entertainment and information products. Recent high-profile examples include the highly troubling 2016 U.N. High-Level Panel on Access to Medicines, and efforts at the United Nations Framework Convention on Climate Change (UNFCCC) COP 21 (Paris) and COP 22 (Marrakesh) meetings that were ultimately rejected. While many of these debates are playing out in multilateral forums, they are also already starting to influence IP discussions at the national level in countries such as **Chile**, **Colombia**, **Ecuador**, **India**, **Indonesia**, and **South Africa**.

Innovative manufacturers have also seen an uptick in the number of countries seeking to expand through policy, administrative action or judicial ruling the use of compulsory licensing or other flexibilities for patented products, generally in the name of public health. While compulsory licenses can be legitimate government tools to protect public health under certain circumstances, their use must comply fully with international rules, should be limited to exceptional circumstances, and through decisions made on the facts of the individual case through transparent processes that involve close consultation with all stakeholders. Above all, these decisions should be based firmly on public health grounds, not as a protectionist excuse to promote or protect local manufacturing. These efforts include not only a recent high-profile government action in **Malaysia** to invoke the "right of government" to exploit a pharmaceutical patent, but also countries such as **Brazil**, **Colombia**, **Ecuador**, **India**, and **Indonesia** that have

[12] Commission on the Theft of American Intellectual Property, "The IP Commission Report," (Washington: National Bureau of Asian Research), May 2013.

issued compulsory licenses, and countries such as the **Dominican Republic** and **Vietnam** that are considering rules to broaden use of compulsory licensing.

Price controls are also a growing concern for many companies. In addition to compulsory licensing and other patent flexibilities, many countries are using direct price caps, broad transparency requirements, aggressive use of reference pricing, and reimbursement hurdles to drive down the price or limit market access for innovative products in ways that have a negative impact on IP protection and business incentives that drive future innovation. These countries include **Australia**, **Brazil**, **Canada**, **China**, **Colombia**, **Egypt**, **France**, **Germany**, **Greece**, **India**, **Japan**, **Jordan**, **Korea**, **Netherlands**, **New Zealand**, **Norway**, **Romania**, **Singapore**, **South Africa**, **Spain**, **Tunisia**, the **United Kingdom**, and several Middle Eastern countries involved with the **Gulf Cooperation Council**.

Many countries around the world are also seeking to tighten or increase their criteria for patentability, making it more challenging for innovative manufactured products to obtain badly needed patent protection. Despite a defined set of three criteria for patentability under TRIPS Article 27.1: that a potential patent must be new ("novelty"), non-obvious ("inventive step"), and useful ("industrial applicability"), the NAM and its members have noted a growing number of countries applying additional hurdles that inventors must jump over in order to obtain or defend patents. Such unique limitations have popped up in markets such as **Argentina**, **Canada**, **China**, **India**, **Indonesia**, and **Russia**. These additional criteria have taken a variety of forms, including specific restrictions on certain types of inventions such as specific uses for pharmaceutical products (**Argentina**, **India**, and **Indonesia**), and bans on filing of supplemental data to obtain or defend a patent (**China**, **Canada**). Regardless of their form, however, such additional criteria are inconsistent with these countries' TRIPS obligations. In Canada, the Supreme Court's June 2017 decision to strike down Canada's troubling "promise doctrine," which had imposed higher-level requirements for a patent to demonstrate utility at the time of filing, was a welcome decision, though manufacturers are closely watching next steps taken by Canadian agencies and judges to see whether heightened patentability criteria arise again.

Similarly, efforts are underway to undermine global trademarks in a variety of ways. First, the **European Union** continues to advocate heavily for stronger protection for its food and agricultural products by creating a new global system of protection for geographical indications (GIs), a push that would undermine the ability of the U.S. and other countries to protect existing trademarks in these products as well as to ensure fair treatment for those making products on terms already treated as generic. This push has appeared in EU efforts to negotiate bilateral trade agreements with a variety of important U.S. trading partners, including agreements in force with critical markets such as **Korea**, **Canada** and **Colombia**, and agreements still in negotiation with markets such as **Japan**, **Mexico**, **Argentina** and **Morocco**. It also has appeared at the WIPO, where European Union countries continue to push for WIPO funding to support the GI-centric Lisbon Agreement.

Additionally, the NAM has seen increased attempts to constrain use of trademarks in the name of public health or other goals. **Australia** has enacted legislation and regulations prohibiting the use of trademarks on tobacco products or "anywhere on the retail packaging of tobacco products". This measure harms the use of all types of trademarks and appears to violate Australia's commitments under multiple articles of the WTO TRIPS Agreement. NAM members are concerned that efforts to undermine trademark rights in any particular product area will have ramifications globally across other industries. Australia's "plain packaging" legislation and regulations are the subject of an ongoing WTO dispute settlement case, but that has not stopped other countries from considering these rules. **France**, **Ireland**, **Norway**, the

United Kingdom have already begun full or partial implementation of plain packaging rules, and **Georgia, Hungary**, **New Zealand**, **Slovenia**, and **Thailand** have adopted but not yet implemented plain packaging measures. As well, many other countries are already considering similar rules for tobacco products, including **Belgium**, **Canada**, **Chile**, **Finland**, **India**, **Malaysia**, **Romania**, **Singapore, South Africa**, **Turkey**, and **Uruguay**. Similar plain packaging approaches have also begun to leak into other unrelated sectors, such the food and beverage sector restrictions faced in **Chile**.

Trade secrets and confidential business information are often the most critical assets for manufacturers, particularly SMMs, and a core part of their competitiveness. Such trade secrets, which by definition are undisclosed, have considerable economic value. Due to that economic value, trade secrets are coming under increasing attack from competitors, at times with the support of foreign governments. Trade secret theft is thus on the rise, both via physical and electronic means.[13] Lack of effective trade secrets protection and enforcement is a growing challenge in markets such as **Austria**, **China**, **India** and **Russia**.

In addition, manufacturers in the United States also face challenges from countries that do not provide adequate protection for confidential business information and regulatory test data. The lack of adequate protection of test data generated and submitted to regulators as a part of regulatory approvals for pharmaceuticals, biotechnology products, and agricultural chemicals remains a major concern in **India** and **Russia**, and is also a factor in markets such as **Algeria**, **Argentina**, **Canada**, **Chile**, **Ecuador**, **Egypt**, **Jordan**, **Mexico**, **Morocco**, **Peru**, **Saudi Arabia**, **Tunisia**, and **Turkey**. Protection of broader business confidential information is similarly a concern in a number of markets. For example, under **Canada**'s revised Workplace Hazardous Materials Information System, companies face a set of challenging options: they must provide the government with sensitive business information, or they must pay a per-product application fee for review and approval of the confidentiality of that information, an option that quickly becomes expensive. These requirements are out of line with both corresponding U.S. and European regulations. Similarly, companies report instances in which customs officials in **China** press importers of certain chemical formulations to supply proprietary information, including the name and percentage of each specific monomer as a condition of customs clearance.

Many countries lack meaningful legal deterrents, strong enforcement mechanisms, insufficient enforcement capacity, or inadequate political will to address patent infringing, counterfeit and pirated products that continue to harm manufacturers of a wide variety of products, including agricultural chemicals, auto parts, consumer goods, machinery, pharmaceuticals and software. Counterfeiting and piracy impact countries around the world, but NAM members are highly concerned by the role of **China** (both directly and via **Hong Kong**) as the world's major hub for counterfeiting, with **Canada**, **India**, **Korea**, **Russia**, **Singapore**, **Taiwan**, **Turkey** and the **United Arab Emirates** as other problematic sources and transshipment points for counterfeits. Similarly, NAM members are concerned about weak patent enforcement, including a lack of timely and effective channels for early resolution of patent disputes, poor access to legal tools such as injunctions and lack of access to evidence. These issues impact manufacturers in the United States in a variety of markets, including **Algeria**, **Argentina**, **Australia**, **Brazil**, **Canada**, **China**, **Colombia**, **India**, **Korea**, **Mexico**, **Peru**, **Russia**, **Thailand**, **Turkey**, and **Vietnam**.

[13] Almeling, D.S., Snyder, D.W., Sapoznikow, M., McCollum, W.E., and Weader J., "A Statistical Analysis of Trade Secret Litigation in State Courts," *Gonzaga Law Review* (2011) at, pp. 57-101; Baker & McKenzie, "Study on Trade Secrets and Confidential Business Information in the Internal Market," (2013, prepared for the European Commission.

Enforcement mechanisms must not only include traditional physical counterfeiting markets and cross-border transit routes, but consider all means by which counterfeit products are circulating, including online platforms in **China** run by Alibaba and others that have pledged actions but have yet to address fully the concerns of brand-owners facing rampant counterfeiting via their platforms. Other means that must be tackled include transit of counterfeit products via inadequately policed free trade zones in markets around the world,[14] and illegal use by overseas rogue sites and remote sellers of international mail services and airmail such as the China-based express mail service of the China Post.

Though **China** has increasingly recognized the vital role that innovation and IP protection play in economic development through high-level policy and incentives for companies to generate IP, manufacturers in the United States still face considerable challenges both enforcing intellectual property in China and ensuring fair treatment for their IP versus that of their Chinese competitors. Many of these concerns are included in detail in the NAM's September 2017 submission on China's compliance with its World Trade Organization (WTO) obligations. These issues include:

- Continued weaknesses and questions about implementation of core IP laws such as the Patent Law, Trademark law, Copyright Law, and the Anti-Unfair Competition Law (which covers trade secrets);
- Growing efforts to incorporate IP into other regulatory areas (such as appropriate treatment of IP under the Anti-Monopoly Law and related competition regulations, rules governing patent disclosure and royalties on patent incorporated into standards standard-setting processes) in ways that sometimes that raise concerns and questions about their consistency with WTO obligations.
- Efforts to promote "indigenous innovation" at the expense of foreign companies, products, and technologies through various industry development policies, including China's "Made in China 2025" program, cybersecurity-related policies that mandate "secure and controllable" technology, provincial indigenous innovation catalogues of largely domestic products, and policies that provide expedited approval for innovative domestic products in sectors such as medical devices;
- Inadequate or ineffective enforcement of not only trademarks and copyrights but also trade secrets, fueled by structural policy barriers, including value thresholds that prevent criminal prosecution for IP infringement in most cases, low fines and damages that do not deter counterfeiters, insufficient coordination among different agencies and levels of government.
- Inappropriate and unnecessary requests for confidential business information in some cases from government entities related to licensing and approval, such as requests for chemical formulations for products being imported without appropriate mechanisms to ensure protection of highly sensitive information.

Manufacturers in the United States also face a series of specific concerns in China, including IP licensing, China's draft "service invention" regulations, issues related to patent quality, acceptance of supplemental data for pharmaceutical patents, China's trademark

[14] Business Action to Stop Counterfeiting and Piracy, "Controlling the Zone: Balancing facilitation and control to combat illicit trade in the world's Free Trade Zones," International Chamber of Commerce, May 2013.

protection of geographical indications, and questions surrounding court decisions related to trademarks and original equipment manufacturers (OEMs).[15]

Although the U.S. and **India** are engaging more frequently on intellectual property issues, India remains a challenging market for innovators and IP rights-holders across the board, not only those concerned with patents, but also trade secrets, copyrights, and brand protection. India's new National Intellectual Property Policy, released in May 2016, included positive language that recognizes the importance of IP for economic development, calls for an IP public awareness campaign and promotes capacity building programs among IP personnel, but few specific actions to address many of the most significant outstanding issues facing NAM and its members in India. Despite some progress in other areas, such as steps to address longstanding delays in patent and trademark examinations and create new enforcement teams and tools, manufacturers face a continued list of concerns. For example, India continues to deny patent protection for inventions that would otherwise meet internationally accepted criteria, and to apply extra patentability criteria, specifically a fourth "enhanced efficacy" test under Section 3(d) of the Indian Patent Law that goes beyond internationally acceptable practices under TRIPS. This criterion continues to be used to deny, invalidate, or revoke patents widely granted around the world, and as a basis to issue compulsory licenses.

Despite a welcome pause in compulsory license decisions over the two years and positive decisions in a handful of cases, the NAM remains concerned that as long as these criteria remain on the books and part of the active public discussion, government and judicial officials can use these criteria as a tool to protect and grow India's domestic industries at the expense of U.S. innovation and IP. Other issues faced by manufacturers in India include ineffective patent enforcement for pharmaceutical patent holders, inadequate and ineffective protection for trade secrets, proposed rules on technology licensing, language in India's 2011 National Manufacturing Policy encouraging compulsory licensing of green technology, its 2011 National Competition Policy that requires IP owners to license "essential facilities," and India's vocal stances in multilateral forums challenging the value of IP systems.

India has also taken a series of troubling steps designed to impose price controls in an expanding list of medical device products, laying down a highly troubling marker with significant implications for investment and innovation. National price caps announced for coronary stents (February 2017) and orthopedic implants (August 2017) have raised serious concerns for high-value innovative manufacturers. These actions imposed drastic price cuts on innovative U.S. products but also barred manufacturers from leaving the market when the price cuts forced them to sell products at a loss. These moves are being watched carefully by other sectors, including agricultural biotechnology and pharmaceutical products, that already face price caps as well as new policies that aim to limit market access and undercut the value of their intellectual property.

Russia continues to demonstrate weak IP enforcement, including the persistent presence of counterfeit and pirated products both produced in and transshipped through Russia. Russia remains both a producer of counterfeit products and a transshipment point for counterfeit

[15] 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.

products produced in other countries (such as **China**). Manufactured products affected include agricultural chemicals, auto parts, consumer goods, machinery, medicines, software and a wide array of other products. Online piracy continues to plague the Russian market, and the government has not established an effective enforcement strategy to combat the growing array of pirate web sites located in the country. Despite some steps, including 2014 legislation that criminalized pharmaceutical counterfeiting and some uptick in Russian court actions against online piracy, structural challenges remain in place. Manufacturers operating in Russia also face practical barriers to using legal protections. Although Russian legal procedures allow enforcement of Russia's patent law, including fines, seizures, and potential civil suits, but in practice these cases have challenges, including long delays and near inaccessibility of preliminary injunctions, that thus fail to enforce patent effectively or prevent approvals of generic pharmaceuticals that are still under patent. Trade secret protection is also a significant issue in Russia, due to a variety of barriers created both by overly prescriptive requirements in the 2004 Federal Law on Commercial Secrecy that businesses must meet to bring a trade secrets case, judicial practices that apply limited penalties for trade secrets breaches despite a full set of legal options available under the Civil Code, and weak enforcement of trade secrets protection throughout the system. Changes both to legal provisions and court practice are needed to address these issues in full.

Additionally, the NAM has concerns about efforts by Russia's Federal Anti-Monopoly Service (FAS) designed to restrict patentability criteria and expand compulsory licensing in Russia. The FAS in 2015 issued a roadmap restricting patentability for new properties and new application of existing medicines. Moreover, the FAS in May 2016 drafted a roadmap that included use of compulsory licensing as a tool to increase healthcare competitiveness, and has been advocating for amendments to Russia's Anti-Monopoly Law to expand availability of compulsory licensing. In July 2017, the Russian Duma also passed a federal law adopting a WTO protocol that expanded use of compulsory licensing. These steps have raised concern for NAM and its innovative manufacturing members that these steps could be used to target patent holders and undermine innovation, market access and open competition.

Provisions in **Colombia**'s national development plan undermine the protection of intellectual property and market approvals of innovative pharmaceutical and biologic products. In particular, manufacturers are concerned that Articles 69 and 70, which diverge substantially from international practice regarding the use of compulsory licensing and patentability may violate Colombia's TRIPS obligations and undermine strong IP protection for manufacturers in the United States. Manufacturers are also concerned by Article 72 that would integrate regulatory reviews and pricing and marketing processes in a manner that would delay regulatory approvals, undermine objective medical reviews and create significant regulatory barriers to marketing authorization in Colombia. Additionally, the NAM is increasingly concerned about recent actions related to Colombia's respect for IP, including its recent use of the declaration of public interest (DPI) process impacting innovative medicines.

South Africa in 2016 approved a new consultative IP framework after multiple rounds of public comment. The framework recognizes the value of IP as a means of promoting R&D, innovation, and economic growth and creates new mechanisms to foster interagency coordination on these issues. However, the policy also strongly encourages greater use of compulsory licensing and TRIPS flexibilities and sets patentability requirements specific to South Africa (versus requirements in line with international obligations and norms). In August 2017, South Africa's Department of Trade and Industry released a draft document designed to implement the framework, reflecting similar positives (recognition of the need to build a knowledge economy in South Africa, including a clear IP policy) and negatives

(recommendations for higher patentability requirements and broad use of TRIPS flexibilities and promotion of local manufacturing above innovation). The policy also makes specific mention to the troubling U.N. High-Level Panel on Access to Medicines and WHO efforts to delink pricing from R&D costs for health products, as justification for these approaches. The NAM encourages the U.S. government and other stakeholders to engage directly with DTI to ensure that the framework supports innovation and IP that are needed to achieve the policy's high-level goal of building a culture of innovation in the country.

Indonesia's new Patent Law contains a number of concerning provisions that will weaken, rather than strengthen, Indonesia's IP system, making the country a less attractive investment destination. In particular, the NAM is very concerned about implementation of measures that would narrow the scope of patentable subject matter, require disclosure of the origin of genetic resources or traditional knowledge, discourage voluntary licensing of technology, and provide for compulsory licensing on vague and arbitrary grounds that are inconsistent with Indonesia's international obligations.

Australia maintains a unique policy enabling the Department of Health to seek damages from patent holders that pursue unsuccessful patent claims, creating a significant hurdle for companies seeking to defend their legitimate patent rights. Those damages are designed to compensate Australia's pharmaceutical reimbursement scheme (PBS) for any higher price paid for a patented medicine during the period of a provisional enforcement measure. Since 2012, this policy has resulted in at least three cases against innovative pharmaceutical companies. Such efforts create uncertainty for businesses, undermining R&D, innovation, and investment. They also unfairly penalize inventors who have sought to defend their legitimate patent rights. Additionally, the policy creates a conflict of interest by permitting the same government that examined and granted a patent to seek damages if that patent is later ruled invalid or not infringed. They appear to be inconsistent with WTO intellectual property rules, including with respect to provisional measures.

5. Standards and Technical Regulations

Unique regulatory and technical standards and conformity assessment requirements can add significantly to the cost of manufacturing exports to countries around the world, often a multiple of the tariff rate actually charged on a product. Too many foreign standards, technical regulations and conformity assessment requirements are being developed and implemented in ways that effectively block market access for manufacturers and their testing and certification service providers in the United States, or require duplicative testing and certification that increase compliance costs and delay market entry. Such practices create distorted, protected markets that give foreign manufacturers an unfair advantage in competing head-to-head with manufacturers in the United States and around the world. They also can be used to block or restrict access to much of the 95 percent of consumers living outside of U.S. borders. Both outcomes make U.S. manufacturing goods and associated services less competitive, stunting the growth of U.S. manufacturing and putting U.S. firms and workers at risk.

The NAM works to prevent and reverse the proliferation of unique regulatory and technical standards as trade barriers by promoting reliance on the WTO's Agreement on Technical Barriers to Trade (TBT), as well as the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), as the basis for developing national and international standards, technical regulations, and conformity assessment rules that provide national treatment for conformity assessment bodies. Standards, technical regulations and conformity assessment procedures should be applied evenly to both imported and domestic

goods and should be undertaken in a manner that is focused on achieving their objective without spillover effects. They should be based on scientific evidence and consider regulatory impact for all stakeholders. They should be transparent and allow reasonable opportunities for public access to all stakeholders. When national laws, regulations, policies and practices do not conform to these global norms, further action is needed in the WTO and through bilateral and regional agreements to reduce the use of technical standards as trade barriers.

Moreover, manufacturers in the United States are challenged by efforts by the **European Union** and others to limit the definition of an "international standard" to those developed by international standards bodies such as the International Organization for Standardization (ISO), International Electrotechnical Commission (IEC) and International Telecommunications Union (ITU). In this process, such ISO/IEC/ITU standards are mispresented as the only "true" international standards, while U.S. standards are characterized incorrectly as being only applicable in the United States. Such efforts discriminate directly against standards that are used widely around the world and rightfully qualify as international standards under the TBT Agreement, and serves as part of European efforts to block American products and services from key markets. These approaches also prevent industry from having the needed choice of the standard "best for purpose" from a level playing field of available standards. This approach has impacted manufacturers in a range of markets around the world, including important U.S. markets such as **Saudi Arabia**.

The NAM has concerns with the proliferation of standards and technical regulations that stem from activities undertaken by global institutions designed to influence national regulators to adopt a particular policy agenda when those regulations serve as effective barriers to trade or limit market opportunities for manufacturers in the United States. While these activities oftentimes start broadly through means such as international conferences and political declarations, the end result is frequently model legislation or technical regulations developed without broad stakeholder input or evidence that are then pushed to the national level. For example, the WHO World Health Assembly in May 2016 passed a controversial resolution[16] urging member states to adopt WHO technical guidance to prohibit the marketing of complementary food products for infants and young children.[17] The WHO technical guidance seeks to deny consumers and health care professionals access to information about milk products designed to meet the specific nutritional needs of young children. NAM members have already seen related draft regulations in markets such as **Hong Kong**, **Indonesia** and **Thailand** that appear to target imported products coming from the United States and other countries, and are hearing about growing interest from other countries to adopt similar measures.

In other cases, the proliferation of problematic standards stems from proactive efforts by individual countries or regional organizations to promote their own standards at the exclusion of U.S. or international standards. For example, U.S. automotive safety and environmental standards are being eclipsed in third markets thanks to concerted efforts by other groups, notably the **European Union**, to promote their own standards in lieu of U.S. standards in areas like the automotive industry. These issues have arisen in a range of markets, including **Ecuador**, **Egypt**, **Morocco**, **Colombia**, and **Peru**.

The NAM is closely monitoring the **European Union**'s efforts to expand existing regulatory regimes related to chemicals that reflect a fundamentally different approach to

[16] World Health Assembly, "Resolution on ending inappropriate promotion of foods for infants and young children," (WHA69.9), May 28, 2016.
[17] World Health Assembly, "Guidance on ending the inappropriate promotion of foods for infants and young children," (A69/7 Add.1), May 13, 2016.

regulating and managing chemical risk (a precautionary "hazard-based approach" that does not consider concentration exposure) than those taken in the United States and other jurisdictions. This approach is reflected in a variety of measures, including the Restrictions on the Use of Hazardous Substances (RoHS) regime and broad regulatory frameworks such as the EU's Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH). As these regimes expand to include new areas such as endocrine disrupting chemicals (EDCs), nanomaterials and phthalates, these concerns are only increasing. As the NAM has indicated in comments on these measures, broad implementation of such measures not only impacts manufacturers of those substances, but also products in a wide range of industries that use or incorporate those substances, ranging from textiles and cosmetics to machinery and agricultural commodities. Europe's conservative, non-science-based approach thus inadvertently impede the ability to sell or deliver key types of equipment that serve important public purposes. As noted above, regulatory approaches should seek input from all stakeholders and be narrowly tailored to address their objectives. As well, when major changes are made, sufficient transition times should be included especially where new product innovation will be required. While some markets like **Brazil** appear to be incorporating risk-based approaches seen in the United States, other countries are also drafting or considering chemical regulations that either appear to largely incorporate elements of RoHS and REACH (such as **China**, **Japan**, **Korea**, **Laos**, **Turkey**, **Ukraine** and the **United Arab Emirates**).

In **Korea**, market access for manufactured products has remained a challenge, despite efforts under the U.S.-Korea Free Trade Agreement to resolve these issues. For example, passenger vehicle and motorcycle manufacturers have been substantially impeded by a lack of transparency and predictability, and insufficient adherence to good regulatory practice such as periodic reviews of existing regulations and standards. The result has been a steady stream of proposed new and modified regulations that do not align with international norms as well as a lack of resolution on existing issues that serve as non-tariff barriers to imports of these products made in the United States. These and other barriers must be addressed urgently to ensure meaningful access to the Korean market for automobiles and motorcycles, and that KORUS delivers fully on its promise for manufacturers in the United States.

China's National People's Congress (NPC) in September 2017 released an updated draft of the Standardization Law for public comments. The latest draft provides some greater clarity on a few areas raised by manufacturers in the United States, including the categories of standards, which social organizations can develop association standards and penalties for non-compliance with national standards. Manufacturers remain concerned, however, about various provisions in the law. Despite repeated advocacy, this latest draft continues to make no reference to China's WTO TBT obligations, despite the fact 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 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 issues impacting manufacturers in China related to continued concerns about the ability of foreign manufacturers to participate in standards-setting processes, fair treatment of patents and royalties in those processes, and continued challenges and costs of the China Compulsory Certification (CCC) system, and sector specific barriers such as troublesome new burdensome requirements for imported food products.

As part of a broader import substitution policy, **Ecuador**'s Foreign Trade Committee (COMEX) announced Resolution 116 in December 2013, a document requiring U.S. exporters

for some 300 products to obtain Certificates of Recognition through a conformity assessment process that could only be conducted by bodies approved by the Ecuadorian Accreditation Organization. Those rules were never notified to the WTO, and were almost immediately a topic of major concern for the U.S. and other governments. Although EU officials have negotiated an exemption to the rule for products of EU origin, and although COMEX issued a series of resolutions in 2014 removing some of the initial products from the scope of the resolution, significant concerns remain about this resolution and its impact on manufacturers in the United States seeking to export to Ecuador.

India continues to present challenges on a set of standards and technical barriers. These include local testing and certification requirements in a range of sectors such as telecommunications, and requirements from India's Department of Telecommunications for local testing and certification of foreign telecommunications equipment. Although these requirements have yet to be fully implemented (as their implementation continues to be delayed a year at a time due to the continued lack of sufficient domestic capacity to certify), they raise significant concerns for foreign companies and deviate from global norms. More recently, India's Directorate-General for Foreign Trade (DGFT) on September 1 issued new troublesome requirements on imported toys. The notice, which went to effect immediately, requires all toy imports to demonstrate compliance with newly updated Indian toy safety standards IS 9873 and IS 1566 (versus applicable international standards that had been options in the past), using only testing labs in India. The notice applies only to imported products and not to domestically manufactured toys. The Food Safety Standard Authority of India (FSSAI) has taken some steps to address industry concerns related to certification of food products, but some regulatory issues remain, including non-science based approaches to regulations on processed food and food additives and continued batch-by-batch inspection requirements for imported food products at the port of entry. The NAM encourages the U.S. government to continue to monitor FSSAI's efforts closely to ensure full compliance. Finally, On medical devices, the NAM and its members are concerned with new policies and regulations that continue to apply an outdated, one-size-fits-all regulatory approach to both pharmaceuticals and medical device products, such as the lack of progress on revising the Drug and Cosmetics Act and delays in introducing separate new regulations for medical devices, both of which mean that medical devices continue to be regulated largely as pharmaceutical products despite significant differences between the sectors.

Canada also maintains strict rules to define hazardous waste that crosses its borders that disrupt trade with the United States. Unlike Canadian provincial rules or U.S. federal and state regulations, the Canadian federal government does not provide any exemption to allow empty containers with a *de minimis* level of hazardous waste residue to bypass the substantial paperwork requirements that normally accompany transboundary shipments of hazardous waste. Such policies mean that any containers transiting the border for cleaning have to go through onerous and time-consuming transboundary permitting and cradle-to-grave paperwork tracking requirements, impacting not only makers and end users of chemicals and paints, but downstream industries that use those products as well as hazardous waste cleaning facilities.

Countries around the world are considering or implementing troublesome regulations and policies that are not grounded in sound scientific evidence or international standards and have a direct, negative impact on the ability of manufacturers to export into those markets. Such standards and regulations impact a range of manufacturing industries, including problematic product labels and warnings on food products in countries such as **Canada**, **Chile**, **Ecuador**, **Israel**, **Peru** and **Uruguay**; unique standards on automotive and motorcycle components in

Indonesia; and problematic provisions in food safety laws and regulations in **China** and the **Gulf Cooperation Council**.

Many countries require local testing and certification for imported products, as opposed to testing by a laboratory or conformity assessment body certified by an independent international certification body. Such local testing and certification requirements drive up the cost and delay for getting products to market, harming both the growth of those industries as well as choices available to local consumers. These requirements include local testing requirements for information technology equipment in **Brazil** and **India**, for toy products in **India**, local testing requirements for food products in **Ecuador** and the **UAE**, local retesting of ICT hardware after software updates in **Costa Rica** and continued local telecom testing requirements in **Mexico** (due to the stalled implementation of a mutual recognition agreement).

6. Export Policies

The NAM has long supported the elimination of market-distorting export policies, subsidies, and trade practices around the world, as well as 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. The NAM has seen the growth in such policies in a variety of markets, including **Argentina**, **Brazil**, **China**, **India**, **Indonesia**, **Malaysia** and **Russia**.

Global overcapacity, largely occurring 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 Comprehensive Economic Dialogue, but should ensure consistent messaging through WTO channels as well, seeking tangible, 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. The U.S. government should work with China to tackle the root of this problem by ensuring that China comprehensively revises existing industrial policies that encourage overcapacity in various sectors and avoids new policies that foster non-market based overcapacity in other sectors. China should also move toward market-based approaches to credit and competition that curtail excess capacity by shutting down insolvent companies.

The United States has successfully used WTO channels in the past to push back on export restraints and subsidies from China, 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. Earlier this year, 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)). In addition, the United States has a set of outstanding cases against China on export promotion policies, including cases filed in July 2016 against Chinese

export duties on key raw materials such as antimony, copper and tin and in January 2017, against subsidies provided to producers of primary aluminum. The United States' aggressive WTO 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.

India's April 2015 Foreign Trade Policy (FTP) 2015-2020, designed to boost India's share in world exports, consolidated most of India's existing export subsidies and other incentives into two main export incentive schemes: the Manufactured Goods Exports Incentive Scheme (MEIS) and the Service Exports Incentive Scheme (SEIS). In September 2016, India's Directorate-General of Foreign Trade issued a notice to expand MEIS by more than 2,900 products, allowing companies exporting these products to receive sales-based credits that can be used to offset import duties, excise taxes, or service taxes. The same notice also increased the incentive rates on an additional 575 products. Products affected by the notice include a range of manufacturing industries, including metal products, household appliances, chemicals and dyes, medicinal products and components, textiles and garments, consumer products, and food and agriculture products. India in 2017 formally graduated from the category of low-income countries that are allowed to continue export subsidy programs, though public reporting indicate that the government is seeking an extended phase-out period to continue subsidizing its exports.

To give their own domestic industries an unfair commercial advantage, **Indonesia**, **India**, **Russia** and other countries have imposed damaging bans, quantitative restrictions and/or taxes on key manufacturing ore and mineral inputs. For example, **Indonesia** implemented an export ban on more than 200 types of unprocessed mineral ores in January 2014, and began a two-year phase-out of exports of eight types of mineral ore concentrates. **India** maintains trade distorting export taxes on a variety of iron ore products. It has increased those taxes in recent years, harming manufacturers in the United States. Similarly, **Russia** maintains export duties on a wide range of products, including scrap metals, hydrocarbons and agricultural products.

Other countries, including **Argentina**, **Brazil**, **Indonesia** and **Malaysia**, charge differential export taxes on value-added agricultural products and other goods. These taxes can act as an export subsidy for value-added products and create competitive advantages for local downstream processors of the taxed product, limiting U.S. exports and sales.

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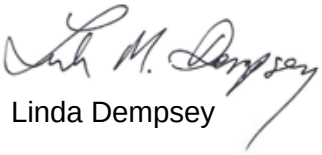
The NAM welcomes this opportunity to comment on the many barriers to U.S. trade and investment globally and looks forward to working with the Trade Policy Staff Committee agencies to address concretely these and other trade barriers in overseas markets that undermine U.S. manufacturing.

Sincerely,



Linda Dempsey

Attachments

- Appendix 1: Index of Countries in NAM Submission to National Trade Estimate

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