

Linda M. Dempsey

Vice President

International Economic Affairs

October 30, 2018

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

Ref: Docket No.: USTR-2018-0029

Dear Chairman Gresser:

The National Association of Manufacturers (NAM) welcomes this opportunity to provide the following submission for the 2019 *National Trade Estimate Report on Foreign Trade Barriers*, in line with *Federal Register* notice (83 FR 42966, issued on August 24, 2018). 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 12.7 million women and men across the country, contributing more than \$2.33 trillion to the U.S. economy as of the first quarter of 2018. If U.S. manufacturing were a separate country, it would be the eighth-largest economy in the world.<sup>1</sup>

Manufacturing in the United States is most successful when markets at home and abroad are open and fair. Global economic growth has created record levels of demand for advanced and high-quality consumer and durable manufactured goods that range from personal care, medical equipment and food products that meet consumer demand to major capital and electrical equipment that build new cities and modernize infrastructure. Thanks to global, bilateral and regional trade agreements that have lowered barriers and set basic rules of commerce, and to improved telecommunications and transportation services that better connect global customers and suppliers, manufacturers in the United States have already been able to benefit substantially from this growth beyond our borders. Indeed, manufacturers in the United States have more than quadrupled U.S. manufacturing output and exports over the last 25 years.

Today, manufacturers in the United States export about half of U.S. value-added output (\$1.35 trillion), helping to support record U.S. manufacturing production and about half of the U.S. manufacturing workforce. With more than 95 percent of the world's consumers living outside the United States and the growth of competitive manufacturing industries across the world, manufacturers in the United States need a strong and multi-faceted trade policy to strengthen U.S. manufacturing and grow well-paying jobs across America. Such a strategy must seek to expand opportunities at home and overseas, including by growing exports and overseas

---

<sup>1</sup> International Monetary Fund, "World Economic Outlook (October 2018)". Accessed at <https://www.imf.org/external/datamapper/NGDPD@WEO/OEMDC/ADVEC/WEOWORLD>.

sales through well-crafted trade agreements and by tackling the wide variety of market-distorting trade barriers in foreign markets that prevent fair competition.

While opportunities have grown substantially overseas, manufacturers in the United States face, however, a growing array of trade barriers in major markets. Trade restricting measures have increased at a steady clip in recent years, and in 2017-2018 were issued at a rate of nearly 11 new actions per month.<sup>2</sup> G20 countries are responsible for more than half of those new trade barriers.<sup>3</sup> 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. In addition to trade barriers that 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 testimony and submissions over the last year, including the NAM's February 2018 submission to the Office of the U.S. Trade Representative (USTR) for the [Special 301 investigation on intellectual property](#); the NAM's April 2018 written submission to the Senate Finance Committee's International Trade, Customs and Global Competitiveness Subcommittee on [market access challenges in China](#); and April 2018 written testimony by Chuck Wetherington, member of the NAM's Board of Directors, in front of the House Committee on Small Business on the [state of trade for small businesses in the United States](#).

To address and eliminate these barriers, the United States must develop and implement clear, coherent strategies that will both address specific policies and practices that act as unfair trade barriers for manufacturers in the United States and also make tangible progress on broader issues that limit the ability of manufacturers to export and sell in those markets. In particular, manufacturers in the United States support and urge efforts to:

- Pursue and negotiate 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;
- Enforce fully bilateral and regional trade and investment agreements already in force, including by pursuing formal dispute settlement cases where appropriate;
- Work with trading partners to maintain and strengthen international trade-related rules, institutions such as the World Trade Organization (WTO), and agreements<sup>4</sup> that

---

<sup>2</sup> World Trade Organization (WTO), "Trade Policy Review Body - Report to the TPRB from the Director-General on Trade-Related Developments (Mid-October 2017 to mid-May 2018)," July 10, 2018. Accessed at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?MetaCollection=WTO&SymbolList=%22WT%2fTPR%2fOV%2fW%2f12%22+OR+%22WT%2fTPR%2fOV%2fW%2f12%2f\\*%22&Serial=&IssuingDateFrom=&IssuingDateTo=&CATTITLE=&ConcernedCountryList=&OtherCountryList=&SubjectList=&TypeList=&FullTextHash=371857150&ProductList=&BodyList=&OrganizationList=&ArticleList=&Contents=&CollectionList=&RestrictionTypeName=&PostingDateFrom=&PostingDateTo=&DerstrictionDateFrom=&DerstrictionDateTo=&ReferenceList=&Language=ENGLISH&SearchPage=FE\\_S\\_S001&ActiveTabIndex=0&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?MetaCollection=WTO&SymbolList=%22WT%2fTPR%2fOV%2fW%2f12%22+OR+%22WT%2fTPR%2fOV%2fW%2f12%2f*%22&Serial=&IssuingDateFrom=&IssuingDateTo=&CATTITLE=&ConcernedCountryList=&OtherCountryList=&SubjectList=&TypeList=&FullTextHash=371857150&ProductList=&BodyList=&OrganizationList=&ArticleList=&Contents=&CollectionList=&RestrictionTypeName=&PostingDateFrom=&PostingDateTo=&DerstrictionDateFrom=&DerstrictionDateTo=&ReferenceList=&Language=ENGLISH&SearchPage=FE_S_S001&ActiveTabIndex=0&languageUIChanged=true#).

<sup>3</sup> WTO, "Report on G20 Trade Measures (Mid-October 2017 to mid-May 2018)," July 4, 2018. Accessed at [https://www.wto.org/english/news\\_e/news18\\_e/g20\\_wto\\_report\\_july18\\_e.pdf](https://www.wto.org/english/news_e/news18_e/g20_wto_report_july18_e.pdf).

<sup>4</sup> These agreements include (but are not limited to) WTO agreements such as the Trade Facilitation Agreement, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and the Government Procurement Agreement, as well as plurilateral agreements such as Information Technology Agreement.

strengthen the competitiveness of manufacturers to ensure that they fully address market-distorting trade behaviors;

- Modernize and use more effectively 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; and
- Strengthen U.S. rules that promote business competitiveness in areas such as customs, export administration, and intellectual property to ensure that they achieve legitimate policy goals while minimizing disruptive impact on legitimate business.

The NAM is pleased to provide detailed comments on trade barriers confronting manufacturers around the world that cover many of the specific areas enumerated by USTR. Given the geographic scope and the wide range of issues that face manufacturers across the country, the NAM’s comments will focus on a core of top priority countries for these priority areas, as well as a list of other markets in which these issues have arisen. The NAM would be happy to provide further direct information on these markets and issues upon request.

The NAM looks forward to working closely with USTR and other agencies represented on the Trade Policy Staff Committee (TPSC) to address concrete market distortions and global trade barriers 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

<b>Top Priority Countries</b>	<b>India, China, Brazil</b>
<b>Additional Countries of Concern</b>	<b>Argentina, Indonesia, Kenya, Korea, Malaysia, Russia, Thailand, Turkey</b>

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, including high applied tariff rates, trade remedies that are applied by foreign governments through non-transparent or WTO-inconsistent processes, customs barriers, and other policy barriers that exclude or hinder manufactured goods from the United States from entering a foreign country.

Among the top challenges faced by manufacturers are excessively high tariffs on imports of manufactured goods imposed by a variety of countries. Many key countries continue to impose concerning high tariffs on non-agricultural goods, including critical markets for manufacturers in the United States, such as **Argentina** (with applied tariff rates 4.6 times those in the United States), **Brazil** (4.5 times), **Kenya** (3.7 times), **India** (3.5 times) and **China** (2.8 times).<sup>5</sup> Other countries maintain large gaps between their bound tariff 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) that allows them to change tariff rates with little warning or notice, fueling a lack of transparency and predictability. This includes global economies such as **India** (which has an average applied tariff rate of 10.7 percent versus an average bound rate of 34.6 percent), **Brazil** (13.9 percent versus 30.8 percent), **Indonesia** (8.0 percent versus 35.5 percent), **Turkey** (5.8 percent versus 17.3 percent), **Argentina** (14.3 percent versus 31.7 percent) and **Thailand** (7.2 percent versus 25.6 percent). In addition to higher duty rates, some countries apply other “fees” that add considerably to the cost of selling U.S. products in those

<sup>5</sup> A fuller list of applied tariff rates in key markets is available through the World Trade Organization’s World Tariff Profiles, the [2018 version of which](#) was published earlier this year.

markets, harming the competitiveness of U.S. exports, or levy high tariffs on targeted manufactured products to protect local industries (such as information technology products in **India** or motorcycle products in **Indonesia**).

In addition to high tariff rates, manufacturers (particularly small and medium-sized manufacturers (SMMs)) face challenges in many markets due to limited transparency on changing tariff rates and customs procedures, or discriminatory import barriers such as import licensing schemes and other restrictions at the border. Companies may find that tariff rates or customs procedures are changed suddenly, with no transparency or notice, or are implemented inconsistently. The WTO's Trade Facilitation Agreement (TFA), which went into force in February 2017, has been an important and positive driver of increased transparency in foreign customs procedures and regulations. While many markets have moved rapidly to implement their TFA commitments and improve the transparency and predictability of customs procedures, many other countries have lagged, particularly in Africa (such as **Kenya** and **Ghana**), Asia (such as **Thailand** and **Vietnam**) and the Americas (such as **Ecuador**)

Highlighted below are priority countries on issues related to imports barriers:

- **China:** China's customs policies and procedures continue to present challenges for importers of a range of manufactured products. In the wake of current U.S.-China trade developments, many manufacturers are concerned about potential retaliation in the form of longer delays or increased inspections for U.S. exports in China.

Additionally, manufacturers are concerned about import-related policies that discriminate against foreign companies. For example, on January 1, 2018 China imposed an import ban on 24 types of materials, including scrap paper and plastic, and then followed up with an implementation plan and set of rigid product standards that discriminate against foreign products and appear to violate China's WTO commitments. In April 2018, China announced plans to impose further bans on the importation of other products (including plastics, small motors, insulated wire, and other metal scrap) in two batches that would be implemented in January 2019 and January 2020. Most recently, the Ministry of Ecology and Environment in July 2018 released a draft proposal to amend the country's solid waste statute that would prohibit all solid waste imports into China in ways that would include recyclable materials without similar treatment for similar domestic materials. China has also sought to curtail imports of these products by lowering the number and quotas of import licenses. While these steps were claimed to be taken in the name of environmental protection, in fact they are discriminatory barriers as similar steps and standards have not been applied to domestic manufacturers, resulting in a significant drop in U.S. exports in these areas and raising legitimate questions about protectionism and WTO compliance.

Although China has implemented its TFA commitments, further improvements in China's customs procedures and infrastructure are needed, including a more balanced, strategic, risk-based management approach to border clearance consistent with World Customs Organization (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; and coordinating and harmonizing policies between China's customs agency and other import-related agencies such as the State Market Regulatory Administration.

Other import-related issues that manufacturers face in China include required local testing and certification requirements, expedited product approvals, as well as imposition of stricter safety standards on imports in sectors such as information technology, telecommunications, medical devices and food and agriculture.

- **India:** 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. Despite increases in recent years, manufacturers in the United States still export fewer manufactured goods to India (\$21.1 billion in 2017) than to Belgium, Sweden, Singapore or Taiwan: all economies that are less than one quarter of the size of India’s and who have less than two 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 continues to use varying policy tools to raise tariffs in order to protect domestic companies in selected industries, such as information technology products, pharmaceuticals and medical devices. Despite ongoing conversations between USTR and their Indian counterparts on these issues, India continues to show little willingness to change these approaches.

India’s customs and border practices remain extremely complex, non-transparent and highly cumbersome to navigate. Manufacturers appreciate that India has shown some increased attention to implementation of its TFA commitments in important areas such as a single window interface, expansion of 24/7 customs clearance facilities, increased digitalization of customs documents, and greater interagency coordination both at the policymaker level and in key ports. Such progress marks important first steps that can and should be expanded. Manufacturers also encourage India to address other longstanding issues that would allow U.S. exports to move seamlessly across borders, working to ensure that manufacturers can determine effective tariff and duty rates as well as all applicable customs procedures, consistently submit necessary customs documentation electronically, use time-definite customs clearance procedures, and utilize a commercially meaningful *de minimis* threshold that is applicable to commercial shipments.

- **Brazil:** Manufacturers seeking to export to Brazil continue to face not only 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.

## 2. Technical Barriers to Trade

<b>Top Priority Countries</b>	<b>European Union, China, India, Korea</b>
<b>Additional Countries of Concern</b>	<b>Canada, Indonesia, Mexico, Saudi Arabia</b>

Non-tariff barriers such as unique regulatory and technical standards and conformity assessment requirements add significantly to the cost of manufacturing exports and can often impact the cost more than actual tariff barriers. In far too many markets, 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 set local testing and certification requirements that duplicate existing tests, 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. 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. These barriers impose a particular hardship on SMMs that have fewer options to create different product lines for different markets.

The NAM and its members strongly support the WTO's Agreement on Technical Barriers to Trade (TBT) as a critical basis for developing national and international standards, technical regulations, and conformity assessment rules in a transparent fashion that provides 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.

Manufacturers face a wide array of challenges related to technical barriers to trade. On a systemic level, manufacturers in the United States are challenged by efforts designed to block the adoption or use of U.S.-based standards overseas that can facilitate entry for U.S. products. These include efforts, largely driven by the **European Union (EU)** and its member states, to limit the definition of an "international standard" to those developed by 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 misrepresented as the only "true" international standards, while standards produced by U.S. standard development organizations (SDOs) that are used widely around the world and rightfully qualify as international standards under the TBT Agreement are overlooked as European regulations cite relevant standards. Although some U.S.-based standards developers are working to have more constructive discussions with European standards agencies to develop joint standards to address these issues, existing practices limit the EU market for many U.S. based, globally accepted product certification programs, which in turn limits market access for U.S. products unless they undergo additional testing, at an additional expense, according to EU standards. Broader transparency and stakeholder access concerns in European standard-setting processes further exacerbate these issues.

These issues have implications beyond the EU as well, as the EU exports its standards via other agreements with the ISO and IEC as well as capacity building programs by the European Commission and by European regional and national standards bodies. Under the Vienna and Frankfurt Agreements, European standards bodies such as CEN and CENELEC can submit their standards to ISO and IEC via either normal procedures or a “fast track” approach that may limit opportunities for non-European stakeholders to comment and provide feedback. While any national standards body that is a ISO or IEC member can propose standards for a “fast track” approach, but this process needs to be re-examined and revised to ensure that all ISO and IEC members have an adequate voice in decisions on whether to accept or reject “fast track” proposals to ensure that ISO and IEC work are focused on the best, most globally relevant ISO and IEC standards. The fact that no other region or country has such a relationship with ISO feeds the perception that European standards have a favored place at the ISO and IEC that may lend them additional implicit weight during ISO and IEC standard-setting processes. While it is possible for U.S.-domiciled companies and SDOs to weigh in on these standards processes, they must actively participate in ISO and IEC committees to do so, which is a process that requires time and expense that can be difficult for SMMs and smaller standards development organizations.

On a systemic level, manufacturers also face significant issues with the proliferation of problematic standards stemming from proactive efforts by individual countries or regional organizations, most notably the **EU** and **China**, to promote their own standards at the exclusion of international standards developed in the United States or in other 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.

Many countries also create roadblocks for conformity assessment that impact manufacturers across a range of industries. These include limitations on fair market access for conformity assessment service providers in a variety of global markets. Other concerning measures mandate local testing and certification, rather than allowing testing by an accredited laboratory or conformity assessment body located in another country or recognizing independent, third-party certifications. 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. Such requirements, both broad and product-specific, impact manufacturers in countries such as **Brazil**, **India**, **Mexico**, **South Africa** and Gulf Cooperation Council countries like **Saudi Arabia**.<sup>6</sup>

On an operational level, these burdensome standards and technical regulations can take a number of forms, including regulatory requirements that are inappropriate for the products in question, problematic requirements for product compliance on unreasonable timeframes, or burdensome product registrations and registration renewals. Each of these challenges can create significant challenges for manufacturers, not only in the countries imposing the technical regulations but also in other markets where they source or sell their products.

Manufacturers strongly encourage the United States to push for strong horizontal provisions on transparency and good regulatory practice and appropriate definitions of international standards through multiple fora, including in trade agreements, as was done with

---

<sup>6</sup> As an illustrative example, Mexico’s Secretaria de Economia in October 2018 published a [new set of rules](#) on conformity that complicates testing and certification requirements and reduce or eliminate waivers previously available for imports of a wide range of end-use commodities.

the U.S.-**Mexico-Canada** Agreement (USMCA) and is on the agenda for U.S.-**EU** talks, and in bilateral advocacy on standards through other dialogues.

Highlighted below are priority countries on issues related to technical barriers to trade:

- **EU:** The NAM remains highly concerned with European regulatory approaches that reflect a fundamentally different approach to regulating and managing risk (a hazard-based approach based on the “precautionary principle” rather than real-world exposure) than is seen in the United States and other jurisdictions. This non-science-based approach is reflected in a variety of measures that have broad impact on manufacturing industries, such as the Restrictions on the Use of Hazardous Substances (RoHS) regime (currently beginning work towards an expanded RoHS 3), broad regulatory frameworks such as the EU’s Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) (which continues to add new substances such as such as endocrine disrupting chemicals, nanomaterials and phthalates), and emerging rules such as draft regulation on veterinary medical products and antimicrobial resistance. Greater efforts should be made to align regulatory approaches and requirements in these and other areas.

The EU’s regulatory approach is not only directly problematic for manufacturers seeking to export to Europe, but also negatively impacts U.S. access in third country markets given active EU efforts to push those countries to adopt EU-style regulatory approaches. For example, the EU has encouraged other countries to draft chemical regulations that incorporate elements of RoHS and REACH, with these types of regulations appearing in countries such as **China, Japan, Korea, Vietnam, Taiwan, Laos, Turkey, Russia, Ukraine** and the **United Arab Emirates**. Automotive standards are another such area, where the EU Union has pushed other countries such as **Ecuador, Egypt, Morocco, Colombia** and **Peru** to adopt their automotive safety and environmental standards to the exclusion of U.S. standards in these areas.

As noted above, the EU also remains a major driver of efforts to limit the definition of an “international standard” to cover only those developed by standards organizations such as the International Organization for Standardization (ISO), International Electrotechnical Commission (IEC) and International Telecommunications Union (ITU). Such an interpretation discriminates against U.S.-developed standards that qualify as international standards under the TBT Agreement, benefiting European companies and standards at the expense of market access for American products and services from key markets. These efforts have also been promoted in other markets (such as **Saudi Arabia**) in ways that have impacted U.S. exports. The EU discriminates against private-sector developed standards in other ways as well, including its practice of limiting citations in regulations only to those developed by one of three European standardization organizations<sup>7</sup> or to one of the small groups of standards organizations cited above, a practice that in effect discriminates against private-sector standards that are widely cited in regulations in many other markets.

In July 2018, the United States and Europe agreed to a direct dialogue on regulatory issues. The NAM strongly supports frank dialogue on these topics to promote greater regulatory cooperation and address regulatory-based trade concerns such as those issues raised above. These conversations must make progress on horizontal concerns,

---

<sup>7</sup> These three organizations are the European Committee for Standardization (CEN), the European Committee for Electrotechnical Standardization (CENELEC) and the European Telecommunications Standards Institute (ETSI).



such as good regulatory practice with respect to transparency and openness during regulatory processes, regular regulatory reviews and interagency coordination, as well as sector-specific regulatory cooperation.

- **China:** China continues to present critical challenges for manufacturers in the United States, both because of systemic changes underway in its standards regime as well as continued efforts to pursue unique national standards that do not harmonize with existing international standards in a range of sectors, particularly high-technology sectors. These issues are a concern for manufacturers seeking to sell in China that must incur increased time and cost to adapt products for that market, but are increasingly impacting other markets as China seeks to encourage the regional adoption of its standards internationally through increased activity in standard-setting organizations such as the ISO and IEC and through programs such as the Belt and Road Initiative.

China's new Standardization Law, which went into effect in January 2018 after several rounds of revisions, continues to prompt concern among manufacturers for a variety of reasons, including:

- Its continued lack of reference to China's WTO/TBT obligations;
- The inclusion of explicit language to increase adoption of Chinese technologies in standards-setting processes and self-declaration requirements for enterprise standards that could endanger intellectual property (IP) rights; and
- Questions about the role of association standards.

Manufacturers continue to monitor their ability to participate consistently and meaningfully in standards-setting processes. While there has been progress in some areas (such as cybersecurity), meaningful participation in standard-setting process remains a longstanding concern. Other standards-related issues facing manufacturers include fair treatment of patents and royalties in standards-setting processes, continued challenges and costs of the China Compulsory Certification (CCC) system that particularly impact SMMs and sector specific barriers such as new burdensome requirements for imported food products.

- **India:** India continues to present challenges on a range of issues related to standards and technical regulations. Broadly, India continues to use local testing and certification requirements in multiple sectors (such as information technology, telecommunications and toys) that deviate from global norms and raise significant concerns and costs for manufacturers in the United States. India also continues to issue unique standards and outdated, one-size-fits-all regulatory approaches that are harming manufacturers in the United States in sectors such as medical devices (where the lack of progress on revising the Drug and Cosmetics Act and releasing medical devices regulations mean that these products continue to be regulated as drugs), biotechnology (where approval requirements for new products reflect outdated approaches and are both slow and non-transparent), and food products (where mandated food packaging requirements prevent many U.S. food products from entering the market).
- **Korea:** In Korea, market access for manufactured products has grown by about \$4 billion since the entry into force of the Korea-U.S. Free Trade Agreement (KORUS FTA) in 2012, yet barriers to U.S. exports and sales in certain industries have continued. Even after KORUS FTA came into force, passenger vehicle and motorcycle manufacturers

were substantially impeded by a lack of transparency and predictability as well as insufficient Korean adherence to good regulatory practices, such as periodic reviews of existing regulations and standards. These challenges resulted in a steady stream of proposed new and modified regulations in that sector that did 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. Other sectors, including the chemical sector and downstream manufacturers, also faced challenges with Korea's adoption of an EU-style approach to chemical management (known informally as K-REACH).

The United States and Korea in March 2018 announced a series of outcomes made under the KORUS FTA to address regulatory barriers, including increased harmonization of auto emissions testing requirements, agreement by Korea to recognize U.S. standards for auto parts and direct engagement on fuel economy standards. These outcomes focused on expanding U.S. exports and sales in Korea are welcome and manufacturers will be closely monitoring their full implementation, as well as looking for improved implementation of the KORUS FTA to address other technical barriers to trade in Korea impacting chemicals, information technology, and other sectors.

### 3. Subsidies

<b>Top Priority Countries</b>	<b>China, India</b>
<b>Additional Countries of Concern</b>	<b>Argentina, Brazil, Indonesia, Malaysia, Russia</b>

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. These policies can take the form not only of direct subsidies by a government or a state-owned enterprise to a private enterprise, but also can appear as bans, quantitative restrictions and/or taxes on key manufacturing inputs (such as metals and minerals) or differential export taxes on value-added products that serve as a *de facto* subsidy for these products.

Highlighted below are a series of priority countries on issues related to subsidies:

- **China:** China continues to be a major global source of overcapacity in a range of industries (including steel, aluminum, metal products, chemicals, fertilizer, concrete, agricultural processing, and semiconductors) that has been driven to a substantial degree by the use of subsidies and related unfair trade practices. China's overcapacity issues are fed by a variety of factors, such as top-down industrial policies, local government protection of over-invested industries and preferential credit to state-owned (SOEs).

Such overcapacity is actively contributing to a glut in global capacity problems that challenges economies around the world and is particularly harmful to manufacturers in the United States. While China has announced a mix of domestic policies to address overcapacity, more action is needed both bilaterally and multilaterally. The United States is working both directly and in association with other countries to tackle these issues. Manufacturers strongly urge the United States to use all available channels, not just domestic trade enforcement, but also bilateral dialogue, coordination with key trading

partners and engagement through multilateral channels like the Organization for Economic Cooperation and Development (OECD), G20 and the WTO. These efforts must all point in the same direction: tangible, verifiable Chinese steps to curb overcapacity and mitigate its impact on the global economy. The U.S. government must also tackle the root of this problem by ensuring that China comprehensively revises or removes existing industrial policies that encourage overcapacity in various sectors and eschews new subsidies and policies that foster overcapacity in favor of market-based approaches to credit and competition that curtail excess capacity and shut 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, a 2014 case against Chinese export restraints used on rare earths metals, and settling a 2017 case against more than 175 Chinese government subsidy measures by securing Chinese agreement to dismantle those programs. 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 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 was designed to boost India's share in world exports. To do so, the FTP 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 Indian 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, although public reporting indicate that the government is seeking an extended phase-out period to continue subsidizing its exports. The United States brought a WTO case against India for these programs in March 2018 that is still in process but could be critical in addressing manufacturers' concerns about Indian subsidy programs. Manufacturers continue to urge additional focus to curb India's unfair subsidy practices.

#### 4. Lack of Intellectual Property Protection and Enforcement

<b>Top Priority Countries</b>	<b>Canada, China, Colombia, India, Indonesia, Russia</b>
<b>Additional Countries of Concern<sup>8</sup></b>	<b>Argentina, Australia, Brazil, Chile, El Salvador, Japan, Malaysia, Saudi Arabia, South Africa, Thailand</b>

Innovation drives and supports U.S. global leadership in manufacturing by companies large and small. According to a 2016 report by the Department of Commerce and U.S. Patent and Trademark Office, innovative industries accounted for more than 50 percent of all U.S. merchandise exports in 2014, and directly or indirectly support more than 45 million jobs across the country.<sup>9</sup> Moreover, intellectual property, including patents, trademarks, copyrights and trade secrets, contributed \$6.6 trillion in 2015, or nearly 40 percent of total U.S. gross domestic product (GDP). As a result, U.S. intellectual property (IP) is a constant target for both foreign competitors who want to steal it. A 2017 report by the Commission on the Theft of Intellectual Property found that stolen ideas, brands and inventions drain up to \$600 billion from the U.S. economy, an estimate nearly double that of its previous report four years before and an indication of the harm to U.S. businesses, jobs and workers caused by this theft.<sup>10</sup>

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 and U.S. manufacturing leadership. The challenges of protecting intellectual property are real for manufacturers 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 WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), World Intellectual Property Organization (WIPO) administered international IP treaties such as the Patent Cooperation Treaty and Madrid Protocol, and U.S. free trade agreements with strong IP chapters. Despite those protections, much work remains to ensure the global IP system enables manufacturers to protect fully 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 2018. NAM members again raise concerns with a series of priority cross-cutting concerns that deny or threaten to deny adequate and effective IP protection and enforcement for manufactured goods. Many of these concerns are growing, spreading from country to country and compounding the challenges faced by manufacturers. Those concerns include:

- Efforts under the umbrella of international organizations to undermine critical global IP protections, including activities and discussions under the World Health Organization, U.N. Framework Convention on Climate Change, WTO, WIPO, and other forums that have spread to the national level;
- Growing use of compulsory licensing and other regulatory tools to undermine the ability of companies to use or benefit from IP, including broad use of compulsory licensing, patent flexibilities, a lack of patent linkage policies, pricing and reimbursement hurdles,

<sup>8</sup> See the index to NAM's February 2018 [submission](#) for a fuller list of countries of concern on IP issues.

<sup>9</sup> Antonipillai and Lee.

<sup>10</sup> Commission on the Theft of American Intellectual Property, "[The IP Commission Report](#)," (Washington: National Bureau of Asian Research), May 2013.

and other tools used loosely in ways that undermine intellectual property and shield local manufacturers from fair competition;

- Insufficient government efforts to battle counterfeiting, piracy and patent management, including limited legal authority, enforcement capacity or political will to address meaningfully production, distribution, and sales of fake manufactured goods and manufacturing-enabling services;
- Inadequate protection of trade secrets from increasingly sophisticated physical and electronic theft through strong policies and enforcement authorities;
- Expanding restrictions on patentability criteria, including targeted restrictions on patentability for certain types of inventions, bans on filing supplemental data or limiting the availability of patent term extensions;
- Insufficient protection of business confidential information and data submitted as a part of legal or regulatory processes, including both inadequate protection for specific types of test data (such as that submitted for regulatory approval of biopharmaceutical and chemical products) as well as weak requirements for government officials to protect such data during regulatory processes;
- Increasing challenges to legitimate trademark use, including increasing efforts to block or limit the use of trademarks and thus limit companies' ability to communicate with their customers in the name of other policy goals; and
- Expansion of geographical indications at the expense of trademarks, most notably a major EU push to advocate for a new global system of protection of geographical indications at the expense of trademark-afforded protections used in the United States and elsewhere.

More detail on the issues above, and countries in which these concerns feature most prominently, can be found in the NAM's February 2018 [Special 301 submission](#). Highlighted below are priority countries on IP-related issues:

- **China:** In recent years, China has increasingly recognized the value of innovation and IP to grow its economy, fostering more attention on IP at home and progress on IP issues in bilateral engagement. This recognition has expanded both opportunities and challenges for U.S. companies in China. In particular, manufacturers in the United States have seen China strengthening IP and regulatory channels for innovative products in key sectors at the same time that China is proliferating industrial policies and increased interest in building domestic champions in key innovative industries.

Efforts to push for fair, robust protection of American IP rights in China through various channels, including the ongoing Section 301 investigation as well as negotiations delivering concrete and enforceable outcomes, present an opportunity to address these longstanding concerns in strategic and meaningful ways. Examples of discriminatory or otherwise harmful IP policies include China's continued position as a hub for global counterfeiting and piracy, lack of effective trade secret protection and protection for confidential business information, continued weaknesses and implementation questions on core IP laws, and indigenous innovation and industry development policies that protect domestic IP-intensive industries, and structural barriers that hinder effective enforcement of IP rights.

Manufacturers in the United States continue to face problematic and discriminatory approaches to innovation, including language in policies such as Made in China 2025 that call for China to lead the world in key areas of technology, as well as the

Cybersecurity Law, persistent local programs to recognize and boost indigenous innovation products that largely exclude foreign products, and other policies and practices. The United States and other national governments have repeatedly pushed back to urge China to halt or revise discriminatory industrial policies and other innovation-related policies, including incentives provided under China's Strategic and Emerging Industries (SEIs) program and efforts to create a national catalogue of indigenous innovation products that would be eligible for various government incentives. Manufacturers are also closely monitoring China's legislative efforts to not only update its core IP laws, but also to revise and enforce rules in policy areas (such as antitrust enforcement, standard-setting processes, IP licensing and inventor remuneration) that have a direct impact on IP.

China remains the leading source of counterfeit and pirated goods traded around the world, with 78 percent of the more than \$1.2 billion in counterfeit goods seized at U.S. borders in 2017 coming from either China (46 percent) or Hong Kong (32 percent).<sup>11</sup> These problems are fueled by structural barriers, including value thresholds and low fines and damages that prevent effective criminal prosecution, weak coordination among different agencies and levels of government, insufficient political will by officials to tackle the problem, inadequate resources and capacity to address IP infringement, and the growth of online auction sites in China that are hubs for counterfeit products. Chinese counterfeiting and piracy have a broad impact here in the United States: exposing U.S. consumers to illegal or even hazardous imported products and putting critical U.S.-developed technologies at risk.

Protection of trade secrets and confidential business information in China remains a concern, although manufacturers have seen some improvements on formal trade secret protection with the revised Anti-Unfair Competition Law and continued expansion of specialized IP courts. Yet manufacturers in the United States also urge that China take additional steps to boost practical trade secrets enforcement, including by addressing evidentiary burdens and other practical barriers (such as the difficulty of using judicial tools such as preliminary injunctions) and boosting damage awards. Additionally, NAM members also long faced concerns with inadequate protection of confidential business information provided as a part of regulatory and judicial processes. Some industries, such as the pharmaceutical and medical device industries, have seen improvements on regulatory data exclusivity, but other manufacturers report challenges with requests from Chinese customs officials and other agencies for sensitive business data such as chemical formulations.

Other priority issues for NAM members in China include longstanding concerns with patent quality, the ability to submit post-filing supplemental data, revised trademark opposition and review process, trademark squatting and expanded work on GIs.

- **India:** Over the past several years, Prime Minister Narendra Modi and other senior level officials have released positive statements and broad policies about the importance of innovation and IP protection (such as the 2016 National Intellectual Property Policy), prompting tangible steps such as IP training and public awareness campaigns, steps to expedite patent approval process and increase examiner capacity, and efforts by selected states to create new IP enforcement teams. USTR has led efforts to engage

---

<sup>11</sup> Office of Trade, U.S. Customs and Border Protection, "[Intellectual Property Rights: Fiscal Year 2015 Seizure Statistics](#)," April 2016.

with its Indian counterparts in frank dialogue on topics such as copyrights and trade secret protections.

Better rhetoric has yet to translate into robust action. Despite positive pronouncements, the fundamental challenges facing manufacturers in the United States trying to protect their patents, trademarks, copyrights, and trade secrets remain largely unchanged. Indeed, India continues to insist forcefully that all of its current IP policies and practices are fully TRIPS-compliant and that it will continue to seek unfettered use of TRIPS flexibilities to deviate from full IP protection. The Indian government has also been a vocal leader supporting efforts to weaken global IP rules in multilateral fora such as the WTO, WIPO and the United Nations (UN), including efforts to champion the highly problematic and U.S.-rejected findings of the U.N. High-Level Panel on Access to Medicines.

India continues to deny patent protection, or revoke patents, for inventions that meet internationally accepted criteria under clauses like Section 3(d) of India's Patent Act. Using Section 3(d), India has rejected, invalidated, or otherwise revoked patents on at least 25 products since 2012, including products and therapies widely patented in other countries around the world. Moreover, India's lack of predictability around compulsory licenses remains a challenge. In the pharmaceutical space, India has issued fewer licenses in recent years but continues to insist on its unfettered right to issue compulsory licenses, and the continued presence of legal criteria that permit their broad use mean that Indian government and judicial officials have the power to use compulsory licensing to shield India's domestic industries at the expense of U.S. innovation and IP. Despite repeated attempts by the U.S. government to engage on this issue, India has remained unwilling to consider any steps, large or small, to address these concerns. Compulsory licensing has also arisen in other areas, such as environmental technologies and "essential facilities."

Innovative manufacturers also face other burdens, including the lack of transparency and coordination between central and state government authorities on granting marketing and manufacturing approvals in line with India-granted patents. Companies also face challenges with India's requirements under Section 8 of the Patents Act that require patent-holders to notify when filing patents for "the same or substantially same invention" outside of India or face invalidation of their patents. Companies are also challenged by actions by state-level authorities to grant marketing approval for a generic version of patented medicines without verifying whether the patent is still in force. Each of these requirements not only place burdensome administrative requirements on innovative manufacturers operating in India but also undermine the value of patent protection and ultimately confidence in India's innovative patent system.

Other priority issues for NAM members in India include continued problems with counterfeiting and piracy, the lack of clear, continued backlogs for patent and trademark reviews, and problematic IP-related language in their model Bilateral Investment Treaty, adequate and effective protection for trade secrets, confidential business information, and regulatory test data.

- **Indonesia:** Indonesia is a rising IP concern for manufacturers in the United States and is increasingly adopting a troublesome approach to IP that resembles other countries in the region. Indonesia's Patent Law (and its implementing rules that were enacted in July 2018) has continued to raise concerns due to measures that narrow the scope of

patentable subject matter, require disclosure of the origin of genetic resources or traditional knowledge, discourage voluntary licensing of technology, provide for compulsory licensing on vague and arbitrary grounds that are inconsistent with Indonesia's international obligations and mandate local production of patented products. These provisions heighten existing concerns that have risen in Indonesia in recent years through actions on compulsory licensing (where stakes have increased following a 2013 decision to grant compulsory licenses on nine patented pharmaceutical products<sup>12</sup> without following proper procedures or allowing a TRIPS-required appeal or judicial review) and localization requirements (such as a ban on foreign biopharmaceutical companies' importation of medicines unless they partner with an Indonesian firm and transfer relevant technology to allow those medicines to be produced domestically within five years).

NAM members also note trade secret concerns with Indonesia's Law on Halal Product Assurance that requires companies in affected industries, including chemicals, cosmetics, food and beverages and pharmaceuticals, to disclose sensitive business confidential information to the Halal Product Assurance Organizing Agency (BPJPH) and the Indonesian Ulama Council in order to obtain Halal certification.

- **Colombia:** Colombia has increasingly moved away from a pro-IP environment in recent years through a series of legislative and enforcement actions that are not fully consistent with Colombia's international commitments, harm manufacturers in the United States, and risk long-term damage to Colombia's business climate. In particular, manufacturers have strong concerns with patent processes under provisions in Colombia's National Development Plan 2014-2018 (NDP), compulsory licensing actions that appear to violate Colombia's IP-related commitments made in the U.S.-Colombia Trade Promotion Agreement (TPA), and market access challenges for innovative manufactured products due to regulatory barriers such as Colombia's "third pathway" for biologics.

In addition, manufacturers in the United States are concerned about the increased use of declarations of public interest (DPIs) to drive compulsory licenses or to devalue innovation for innovative manufactured products. Due in part to high levels of concerns from the U.S. government and industry groups surrounding a June 2016 DPI decision, Colombia committed to revising its DPI process. Despite Colombian government claims that it has revised the DPI process to address questions, the National Pricing Commission's November 22, 2016 Circular 3 sets out a general pricing methodology that will apply to all medicines subjected to a DPI. Such broad use of DPIs and compulsory licensing unnecessarily and harmfully revokes basic, internationally accepted property rights, and run contrary to Colombia's international commitments in this area, including its TRIPS obligations. More broadly, such actions undermine the TPA and the U.S.-Colombia commercial relationship, signaling that investments and technologies made under the TPA could be at risk.

- **Russia:** Despite significant commitments made to improve its legal and enforcement framework, Russia continues to chart little progress on IP issues. Russia continues to suffer from weak IP enforcement against counterfeiting and piracy, and serves both as a producer of counterfeit products, a transshipment point for counterfeit products produced in other countries (such as goods sourced from China and routed through Central Asia), and a hub for online piracy. Enforcement remains a problem in several areas. Legislation

---

<sup>12</sup> Government of Indonesia, "[Special 301 USTR Submission](#)," February 20, 2013.



adopted in 2014 to criminalize pharmaceutical counterfeiting has not stemmed the tide of counterfeiting in that sector. Manufacturers still lack effective mechanisms to resolve patent disputes prior to the launch of generic products. As well, structural challenges that impact enforcement of all types of IP in Russian courts (such as limited access to preliminary or permanent injunctions) remain in place.

Protection of trade secrets and confidential business information also remains highly problematic, due to both 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. Russia still does not effectively protect against unfair commercial use of test and other data generated to obtain marketing approval for pharmaceutical and agrochemical products.

Additionally, manufacturers in the United States are concerned about potential compulsory licensing issues in Russia, including direct compulsory licensing and weak patent policies (such as a lack of patent linkage, weak patent enforcement, and use of government tendering to boost local manufacturing). The Federal Anti-Monopoly Service (FAS) has developed legislation amending the Civil Code and Competition Law to enable compulsory licensing for medicines. In view of comments made by senior Russian officials alleging that some unnamed patent holders are abusing IP rights to gain a monopoly on the market and set high prices, manufacturers are concerned that the government could promote compulsory licensing in certain circumstances to promote domestic generic medicines over imported innovative medicines. That legislation is still pending.<sup>13</sup>

Manufacturers are monitoring a number of Russian activities, including a new draft law on geographical indications (GIs) being considered in the Russian Duma that could have negative implications for manufacturers in several sectors.

- **Canada:** The U.S. government has engaged actively with Canada on IP issues, including reaching agreement on strong text in the proposed USMCA that marks progress on a range of IP issues, from regulatory data protection to trade secrets, from customs enforcement to IP cooperation. Manufacturers in the United States have also noted the importance of other recent Canadian efforts, including the 2014 enactment of Bill C-8 (Combating Counterfeit Products Act) in December 2014 that granted customs authorities the power to seize imports of counterfeit and pirated goods and the June 2017 decision by the Supreme Court of Canada's to strike down Canada's troubling "promise doctrine."

Manufacturers continue to see, however, a number of concerning developments that undermine the effective value of IP-intensive manufactured products. For example, the Patented Medicines Pricing Review Board (PMPRB) continues to work on proposed changes to its guidelines that, as soon as January 2019, could impose new reporting requirements on patent holders, introduce new troublesome price regulation factors, and exclude innovative markets from its reference basket in favor of less appropriate but

---

<sup>13</sup> "[Russia's FAS designs mechanism for withdrawal of licenses on drugs production in Russia](#)," The Pharma Letter, December 13, 2016; Horodisk & Partners, "[Legal Protection of Selection Inventions in Russia](#)," No. 118, September 2017.

lower cost markets. Canada also continues to offer insufficient protection for business confidential information and regulatory data impacting various sectors, including test data for health products and chemical concentrations. Such changes would have a directly negative impact on U.S. innovation and exports, while also further undermining innovation and investment in Canada.

Other Canadian IP issues impacting manufacturers in the United States include continued challenges protecting and enforcing copyrights in Canada, issues with expanded plans to advance plain packaging requirements that infringe on core trademark rights, and ongoing implementation of Canada-EU Trade Agreement<sup>14</sup> provisions on GIs that undermine the ability of the U.S. and other countries to protect existing trademarks and enjoy fair treatment for those making products on terms already treated as generic.

## 5. Digital Trade Barriers

<b>Top Priority Countries</b>	<b>China, India, Brazil</b>
<b>Additional Countries of Concern</b>	<b>Argentina, France, Germany, Indonesia, Malaysia, Korea, Nigeria, Russia, Turkey, Vietnam</b>

Manufacturers thrive on technological change, integrating new and disruptive technologies in products and operations ranging from smart factories to autonomous vehicles, from Internet of Things platforms to biometrics. Advances in areas such as next-generation information technology products and services, digital infrastructure and cross-border sharing of data and information are increasingly important drivers for manufacturing growth. Digital trade is important for all manufacturers, but particularly to SMMs who can use these technologies to reach new markets and consumers, allowing them to maintain a competitive edge in a challenging global marketplace and support well-paying jobs in the United States.

Many countries are erecting new barriers to digital trade. Although such policies are often claimed under the aegis of legitimate public policy, such as privacy or cybersecurity, many of these policies are explicitly or implicitly discriminatory and designed to protect their companies and workers at the expense of manufacturers here in the United States. These policies can take a variety of forms, including forced localization requirements, high tariffs or import barriers on foreign digital products, or foreign investment restrictions. Regardless of their form, however, such barriers pose a serious and growing threat to manufacturing and jobs 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. Such barriers have emerged or are being considered in a variety of markets, including **India, China, Brazil, Indonesia, Mexico, Nigeria and Argentina.**

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, particularly SMM's that use cloud computing to reach customers around the world. Manufacturers have seen new barriers proposed or considered in many markets, including (but not limited to) **Brazil, China,**

<sup>14</sup> Government of Canada, [Canada-European Union Trade Agreement Final Text](#).

**France, Germany, India, Indonesia, Korea, Malaysia, New Zealand, Nigeria, Russia, Turkey and Vietnam.** Manufacturers are also closely watching the emergence of other global regulatory regimes governing data flow and privacy, such as the **EU's** General Data Privacy Regulation (GDPR), that have an impact on manufacturers. Given the wide breadth of growing restrictions and the importance of these issues across the manufacturing industry, manufacturers are seeking 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, similar to those contained in the recently negotiated USMCA.

More detail on the importance of digital trade to manufacturers and global policy barriers can be found in past NAM submissions, such as its [March 2017 submission](#) to the U.S. International Trade Commission on market opportunities and key foreign trade restrictions in digital trade. Highlighted below are priority countries with manufacturer-relevant digital trade issues:

- **China:** China in recent years has erected significant digital trade barriers, using cybersecurity and innovation as justifications to implement new policies and practices that have negatively impacted market access for digital and information technology products and services widely used by manufacturers in the United States. These trade barriers include efforts to tighten its cybersecurity environment in ways that create 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.

Chief among these troublesome policies is China’s Cybersecurity Law, which went into effect in June 2017 and requires many foreign companies to store data collected in China on local servers. Other related policies that impact digital market access and cross-border data flows include the 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 released by the National Information Security Standardization Technical Committee (TC 260), and possible rules related to Internet-based mapping applications. China’s Internet controls also have a direct negative impact on companies operating in that country.

China’s “Made in China 2025” framework, an ambitious ten-year plan to upgrade China’s manufacturing economy and make Chinese companies global leaders in specific industries, also targets information technology among a group of ten advanced sectors with specific targets for local content and seeks to provide benefits to local players over foreign companies.

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 in the United States, particularly SMMs, increasingly rely on digital technologies and connectivity to sell, 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 not only in that market, but around the world.

- **India:** India also maintains a range of digital trade barriers that challenge manufacturers in the United States. These include localization barriers, many of which 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. Examples of direct localization policies include India's Preferential Market Access (PMA) policy on computers and electronics (which was subsequently limited in scope to government procurement), and local production requirements for telecommunications equipment. India has also used tariff barriers to protect local digital industries, increasing tariffs in multiple rounds on information technology products that should be covered under India's commitments under the Information Technology Agreement.

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.

The Ministry of Commerce and Industry's current efforts to draft a new policy on e-commerce have raised significant questions about potential new requirements for local storage of consumer data and tax incentives for data localization.

- **Brazil:** Brazil has remained a potential trouble spot on digital issues. In addition to high tariffs and other technical barriers, Brazil continues efforts to implement local content requirements in this sector, such as tax incentives for localized production information technology products that build on longstanding industrial plans such as the 2011 Plano Maior Brasil that sought to promote local investment and innovation through a range of tax, tariff and financing incentives.

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 Marco Civil da Internet (Civil Internet Framework), the framework contained other provisions on storage of citizen's personal data. In July 2018 the Brazilian Senate approved the Ley General Protection of Data, a GDPR-style regulation. Both these frameworks could have potential impacts on businesses, including manufacturers, that use customer data.

## 6. Investment Barriers

<b>Top Priority Countries</b>	<b>China, India, Russia, Brazil</b>
<b>Additional Countries of Concern</b>	<b>Indonesia, Malaysia, Vietnam</b>

Overseas investment is critical to expanding U.S. exports and sales to foreign markets and to supporting high-value activities at home. In 2016, the U.S. operations of U.S. manufacturing companies with foreign investments accounted for 64 percent of all U.S. manufacturing and 87 percent of all capital expenditures. Overall, businesses with foreign

investment were responsible for 52 percent of total U.S. goods exports in 2016 and more than three-quarters (78 percent) of all research and development (R&D) expenses by private sector businesses.<sup>15</sup> The vast majority of sales by overseas subsidiaries of U.S. companies, which equaled about \$4.5 trillion in 2015, were destined for other foreign markets.<sup>16</sup> 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).

Given these significant barriers and the need to make sure that U.S. companies can participate fairly and protect their property in foreign markets, it is critical for manufacturers in the United States to have effective tools to ensure fair and non-discriminatory treatment with strong enforcement processes. 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 a vital tool to help manufacturers increase exports abroad and grow and maintain jobs here at home. This longstanding enforcement tool ensures U.S. investors overseas be guaranteed 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 directly forced technology transfer and damaging localization requirements and incentives from foreign governments that seek to offshore manufacturing out of the United States. Robust market access, investor protections and ISDS enforcement are important tools to advance manufactured goods exports and the growth of U.S. manufacturing. The United States should work to ensure that strong investor protections and enforcement are a fundamental part of U.S. trade and investment agreements.

Many countries still maintain substantial barriers that must be eliminated to address competitive imbalances, ranging from investment restrictions on specific sectors (in countries such as **Brazil, Indonesia, Mexico, and Vietnam**) or ownership caps for foreign individuals and firms to own local businesses across sectors (as in **Malaysia**). The NAM is also monitoring investment screening mechanisms in markets like **Canada, Australia and New Zealand** to ensure they do not unduly discriminate against U.S. investors or inappropriately focus on non-national security grounds, while also ensuring appropriate mechanisms to address common national security concerns.

Highlighted below are priority countries on issues related to investment barriers and concerns:

- **China:** NAM members have noted progress in removing Chinese investment caps through a series of legislative changes and the gradual expansion of a “negative list”

---

<sup>15</sup> <sup>15</sup> Kassu Hossiso, “[Activities of U.S. Multinational Enterprises in 2016](#),” *Survey of Current Business*, September 2018.

<sup>16</sup> Derrick Jennigs, “[Activities of U.S. Multinational Enterprises in 2015](#),” *Survey of Current Business*, December 2017.

approach to investment from four free trade zones to the entire country. These include 2016 revisions to its main foreign investment laws to move from investment approvals to required filings for a wide swath of sectors, 2017 revisions to its Catalogue Guiding Foreign Investment, and June 2018 announcements to remove caps in a number of the energy, infrastructure, automotive and other industries.

These changes are generally welcome, but manufacturers in the United States remain concerned with remaining investment caps (including lingering caps in important sectors such as new energy-vehicles and value-added telecommunications services used by manufacturers). Moreover, manufacturers continue to be concerned with other policy moves such as China's national security review system for foreign investment, and broader structural dynamics that provide leverage for Chinese government officials and companies to seek technology transfer during the investment negotiation and approval process, and broader policies and practices that discriminate against foreign-invested enterprises.

Localization is also a concern with China. 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-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 (and China-invested manufacturers) over foreign ones, raising significant questions about the consistency of policies with China's WTO commitments.

- **India:** 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. *De jure* and *de facto* investment barriers, however, remain in place in manufacturing-relevant sectors such as defense, while in other sectors, proposed liberalization have yet to be fully implemented.

Of concern, however, are countervailing investment trends in India that undermine the Modi government's attempts to make India a top global investment location, and a broader lack of progress on many aspects of the regulatory regime that hinder the ability of foreign investors to enter or expand in the market. 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.<sup>17</sup> 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

---

<sup>17</sup> National Association of Manufacturers, "[Comments on Draft Indian Model Bilateral Investment Treaty](#)," April 10, 2015.

manufacturing-related sectors. For example, the proposed tightening of investment rules for long-invested sectors like tobacco that would prohibit investment in technology collaboration and licensing send negative signals for both investment and intellectual property, both for that sector and for many others. 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.

Localization policies further undermine confidence for manufacturers in the United States about the investment environment in India. USITC's 2015 investigation of India's trade policies, and the NAM's detailed submission for that investigation<sup>18</sup>, documents many of these barriers in detail and their impact on industries from solar energy to pharmaceuticals to medical devices.<sup>19</sup> 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 policies with continued language calling for localization and import substitution with relevance for a range of sectors, from medical devices, information technology, telecommunications, solar energy and toy products. The NAM continues to closely watch the implementation of the "Make in India" campaign to ensure its policies do not fuel discriminatory localization policies that would undermine the competitiveness of manufacturers seeking to export or sell to that market.

- **Russia:** 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.

Russia also 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 incentives appear to contradict not only WTO trading rules, but also the Russian Constitution and other laws.<sup>20</sup> Other Russian government programs, such as the Ministry of Industry and Trade's

---

<sup>18</sup> 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.

<sup>19</sup> U.S. International Trade Commission, [Trade and Investment Policies in India, 2014-2015](#), September 2015.

<sup>20</sup> 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).

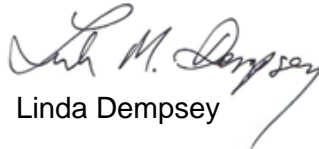
launch of a new Industry Development Fund, initiatives to develop Russia's pharmaceutical industry through 2020, and government procurement criteria, seek to promote import substitution in key manufacturing industries such as pharmaceuticals and telecommunications.

- **Indonesia:** Manufacturers also face an uphill battle in Indonesia, with a number of restrictions on foreign investment originally laid out in a "negative list" in a 2016 presidential decree. Although Indonesia revised this negative list in 2016 to open fully a number of sectors such as manufacturing of raw materials used in pharmaceuticals, key restrictions remain that impact company size, location and sector (such as medical device manufacturing, energy and telecommunications services). Moreover, Indonesia also has used local content requirements for investment that distort competitive conditions and create challenges for manufacturers in the United States. For example, the Ministry of Industry is currently drafting a new regulation to impose a local content requirement (known locally as TKDN) on biopharmaceutical products that could require local sourcing of key inputs from domestic suppliers or impose other regulatory approvals or procurement restrictions.
- **Brazil:** Brazil continues to make widespread use of localization policies in order to boost domestic industries and retains some restrictions on foreign ownership in some sectors (such as telecommunications). Brazil's 2011 Plano Maior Brasil, mentioned above, includes 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.

\* \* \* \* \*

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: Chart of Countries in NAM Submission to National Trade Estimate



**Appendix 1: Chart of Countries in NAM Submission to National Trade Estimate**

	<b>Import Policies</b>	<b>Technical Barriers to Trade</b>	<b>Subsidies</b>	<b>Lack of IP Enforcement</b>	<b>Digital Trade Barriers</b>	<b>Investment Barriers</b>
<b>Top Priority Countries</b>	Brazil China India	China European Union India Korea	China India	Canada China Colombia India Indonesia Russia	Brazil China India	China India Indonesia Russia Brazil
<b>Additional Countries of Concern</b>	Argentina Indonesia Malaysia Russia Thailand Turkey	Canada Indonesia Mexico Saudi Arabia	Argentina Brazil Indonesia Malaysia Russia	Argentina Australia Brazil Chile El Salvador Japan Malaysia Saudi Arabia South Africa Thailand	Argentina France Germany Indonesia Malaysia Korea New Zealand Nigeria Russia Turkey Vietnam	Malaysia Vietnam
<b>Additional Countries Named in Text</b>	Ecuador Ghana Kenya	Ecuador Egypt Japan Korea Laos Morocco Peru Russia South Africa Turkey Ukraine UAE Vietnam				Australia Canada Mexico New Zealand