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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 20503

Ref: Docket No.: USTR-2016-0007

Dear Chairman Gresser:

The National Association of Manufacturers (NAM) welcomes this opportunity to provide the following submission for the 2017 *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.

With 95 percent of the world's consumers living outside the United States, overseas sales and exports continue to provide an enormous opportunity for manufacturers to create and sustain jobs here at home – and such growth opportunities are perhaps even more critical in this period of global economic challenges. Through overseas sales and exports, manufacturers in the United States are competing to capture a greater share of the global manufactured goods market. The World Trade Organization (WTO) found that the trade flows in manufactured goods has grown from \$4.9 trillion in 2000 to \$12.2 trillion in 2014, but U.S. and global trade have been slowing. According to the Department of Commerce, U.S. manufactured goods exports were valued at more than \$1.3 trillion in 2015.

Trade barriers, however, are on the rise around the world: a disturbing trend noted by the G20, WTO, and other institutions as limiting global manufacturing growth and costing jobs and economic opportunity. As explained further below, manufacturers face not only traditional trade and investment restrictions, but also forced localization barriers, intellectual property theft and export bans. In all of these areas, G20 countries are leading offenders.

In addition to country-specific barriers, however, manufacturers in the United States are increasingly confronting anti-trade initiatives from a number of different international governmental organizations (IGOs) that promoting the proliferation of trade barriers. Such trade barriers impact a variety of areas, including policies to promote localization, undermine intellectual property, and promote trade-disruptive standards and technical regulations.

To address and eliminate these barriers, the United States must leverage all available tools. It must secure ambitious, high-standard commitments in ongoing and future trade agreement negotiations. It must achieve a path forward to implement and bring into force the

Trans-Pacific Partnership (TPP) agreement that will address and set important standards to address many of these types of barriers. It must continue working to implement and bring into force the WTO Trade Facilitation Agreement that will eliminate customs and other trade restrictions at the border. It must enforce multilateral, regional and bilateral trade and investment agreements already in force, including by pursuing formal dispute settlement cases where appropriate. It must implement fully new enforcement provisions contained in the Trade Facilitation and Trade Enforcement Act of 2015. It must improve and use more effectively existing tools and consider common-sense updates to preference program eligibility criteria.

1. Import Policies

Manufacturers in the United States face a broad range of troublesome import policies in a variety of markets. This includes excessively high tariffs on imports of manufactured goods imposed by a variety of countries. As one manufacturer noted, many key countries impose higher duty rates as well as other “fees” tacked on to imports that add considerably to the cost of those products and harm the competitiveness of U.S. exports. For example, countries such as **Argentina, Brazil, Ecuador, India, Kenya** and **Nigeria** use an average applied tariff rate on non-agricultural goods that is more than three times higher than equivalent U.S. rates, according to data compiled by the WTO. Tariff rates are even higher for selected manufactured products. **India** continues to impose tariffs as high as 100 percent for certain automobiles and 300 percent for textiles and recently hiked tariffs in critical sectors such as information technology and medical devices. **Brazil** maintains high tariffs on a range of critical manufactured products, including chemicals, industrial machinery and automobiles. **Argentina** maintains a high tariff on imports of capital goods and other products than for domestic products, particularly for goods that are also being domestically produced. **Indonesia** maintains high tariffs on a variety of products, including an effective 60 percent import tariff on motorcycle products (in addition to a 75 percent luxury tax and a 10 percent value-added tax.)

Manufacturers – particularly small and medium-sized manufacturers (SMMs) – also face challenges with transparency in being able to understand and navigate import rules, including both tariff rates and import procedures, and 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 little coincidence that many of those countries, where transparency in customs rates and rules is the biggest challenge, have significant gaps between their bound and applied rates. Countries with big gaps include **Indonesia** (which has an average applied tariff rate of 6.7 percent versus an average bound rate of 35.6 percent), **Kenya** (11.5 percent versus 57 percent), **Nigeria** (11.4 percent versus 49.2 percent), **India** (10.2 percent versus 34.5 percent), **Turkey** (5.4 percent versus 17.0 percent) and **Thailand** (8.3 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.

Most notably, Argentina bans the importation of many processed foods, including ketchup, tomato sauces, fruit and vegetable juices, chocolates, olive oil, canned corn, potato chips, bacon and biscuits in order to protect a few domestic companies. 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. Argentina also bans the import and sale of a variety of remanufactured products, including agricultural machinery, medical devices and information technology products.

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 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.

In **Brazil**, importers not only face high duties, but also a series of cascading federal and state-imposed taxes 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 distilled spirits, and are difficult for U.S. and other foreign manufacturers to navigate – particularly small and medium enterprises (SMMs), adding to the complexity and challenges of doing business in Brazil. Even where imported goods do not compete directly with domestic products, these additional costs weaken aggregate demand and limit access to technology and equipment by Brazilian consumers.

China’s customs policies and procedures continue to present challenges for importers. 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 increased coordination and harmonization with other border-crossing 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 (\$18.5 billion in 2015) 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.

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 in order to protect domestic industry. For example, India has increased tariffs on information technology products multiple times since 2012, including on many products that should enjoy duty-free treatment in India in accordance with India's commitments as a signatory to the 1996 WTO Information Technology Agreement. In January 2016, India raised import tariffs on a number of medical device products and withdrew several previously offered exemptions, effectively raising import tariffs further.

India's customs and border practices are extremely complex, non-transparent and highly cumbersome to navigate. Depending on their 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 Indian customs' online 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.

To address these and other troublesome policies in India, the NAM and 16 other leading business associations representing nearly every sector of the U.S. economy continue to work together as part of the Alliance for Fair Trade with India (AFTI) (<http://aftindia.org>). AFTI is working with Congress, the Administration and partners around the world to push back against unfair Indian policies and to ensure they are not repeated in the future.

In **Korea**, implementation of the U.S.-Korea Free Trade Agreement (KORUS FTA) continues to require attention. 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.

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. While, Russia's applied tariff rate has dropped considerably in a variety of products, the Russian government continues to maintain non-WTO consistent restrictions that impact a variety of products. For example, Russia refuses to include foreign food exporters on their approved list of eligible exporters, a policy that appears to violate its WTO commitments. On combine harvesters, Russia continues to maintain an import quota managed through a complex and cumbersome import licensing

procedure despite an agreement to address tariffs and import restrictions. These procedures limit market access for combines manufactured abroad to just 400 units (compared with typical sales for domestic companies of 1,200 per year). The quota also prevents the entry of most combines until after the harvesting season, when demand is low.

Since 1996, **Colombia** has maintained a discriminatory spirits tax that has the effect of applying a lower rate per degree of alcohol to domestically-produced spirits than most imported spirits, and appears to violate Colombia's WTO obligations to not discriminate. Under the U.S.-Colombia Trade Promotion Agreement, Colombia committed to bring its discriminatory spirits tax regime into compliance with its WTO obligations by 2016 and also to accept the national treatment obligations and the prohibitions against trade restrictions related to the operation of the country's state alcohol monopolies. In October 2016, the Colombian Senate offered final approval of a draft bill on alcoholic beverages that appears to address some of these concerns, but the final bill must still undergo a conference process with the Colombian House of Representatives and be signed by the President. The NAM is closely monitoring to determine whether these steps are completed and fully address concerns.

Other country-specific issues related to imports include restrictions on the import and export of mobile phones and parts in **Colombia**, proposals to ban imported remanufactured medical devices in **India**, policies to reduce mobile phone imports in **Ecuador**, challenges with customs valuation procedures for software in **Ghana**, new documentary requirements for importers in **Mexico** and high fees in **Turkey** for pharmaceutical products related to national reimbursement lists.

The NAM has been a strong supporter of the **WTO Trade Facilitation Agreement** (TFA) and is pleased to see continued efforts to have the agreement ratified by the requisite two-thirds of WTO member states. Recent ratifications by Mexico, Senegal, Bahrain and Bangladesh have brought the number of countries closer to the required two-thirds of WTO members. Key countries such as **Argentina, Canada, Chile, Colombia, Indonesia, Israel, the Philippines** and **South Africa** – all in the world's top 50 by trade volume – still have yet to ratify the TFA. Most countries that have ratified the agreement have only submitted their Category A commitments (those that will be implemented when the agreement enters into force, or within one year of that date for a least-developed country (LDC)), but have yet to submit remaining Category B and Category C commitments that have a transition period. Full implementation of the TFA is important for all WTO members in order to ensure the elimination of a broad range of border barriers that impede U.S. exports and undermine foreign countries' participation in global trade and supply chains. The NAM urges USTR to highlight countries' failure to implement this important agreement as part of its annual reporting.

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 2013 (the last year for which data is available), businesses with foreign investments accounted for nearly a quarter of U.S. private sector output (23.8 percent) and generated nearly half of total U.S. goods exports (49.9 percent) and roughly three-fourths of R&D expenditures from all U.S. businesses. The vast majority of sales by overseas subsidiaries of U.S. companies, which equaled about \$4.3 trillion that same year, were destined for other foreign markets.¹ Inward investment into the United States also

¹ Sarah P. Scott, "[Activities of U.S. Multinational Enterprises](#)," *Survey of Current Business*, August 2015.

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).

Many of the countries with which the United States government negotiated investment commitments through the pending TPP agreement 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. The final TPP agreement will address many of these issues, making passage – and robust implementation – an important avenue to address longstanding barriers in these countries facing manufacturers in the United States.

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 September 2016, the National People’s Congress approved revisions to its main foreign investment laws, shifting from investment approvals to required filings for a wide swath of sectors and revising investment approval processes. On the same day, the Ministry of Commerce announced that it was broadening the coverage of an investment “negative list” – an approach to domestic investment regulation that would allow foreign investment in any sector not specifically listed – from four free trade zones to the entire country. China, however, has yet to release the details of the list. China and the United States are in the process of negotiating a Bilateral Investment Treaty that could eliminate many of these longstanding investment barriers and prohibit forced localization requirements and incentives for investment, but only if it is robust, with as few sectors in China’s negative list as possible and strong disciplines protecting market-oriented U.S. investment in China.

India has taken steps to eliminate some of their existing investment caps relevant to manufacturers, including developments in the last two years to allow full foreign investment in railway infrastructure, defense and food processing, higher greenfield investment caps in pharmaceuticals and the elimination of investment restrictions in sectors such as construction. Efforts to promote more competition among states to attract investment and to move forward the Goods and Services Tax are both positive steps in promoting greater efforts to eliminate investment barriers. Such efforts should be placed into context, however: investment bans or

limitations remain in place in sectors such as defense, while in other sectors – such as food processing – the path and timing of proposed liberalization remains unclear.

Of greater concern 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 BIT showed a significant departure from international best practices on investment, as detailed in the NAM's April 2015 comments to the Indian government.² India's subsequent announcement that existing BIT partners would have to renegotiate their agreements on the basis of 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 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. 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**.

As U.S. investors confront these investment and other trade barriers, 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).

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

² National Association of Manufacturers, "[Comments on Draft Indian Model Bilateral Investment Treaty](#)," April 10, 2015.

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 our nation 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.³

India's array of forced localization barriers poses a particularly serious competitive challenge to manufacturers in the United States. The U.S. International Trade Commission's most recent investigation of India's trade policies – and the NAM's detailed submission for that investigation⁴ – documents many of these barriers in detail and their impact on industries from solar energy to pharmaceuticals, from medical devices to pharmaceuticals.⁵ 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. 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), new efforts earlier this year to engage on a possible new PMA policy for medical devices, local production requirements for telecommunications products and local content requirements for domestic solar modules and cells. Other policies, such as India's policies and practices related to intellectual property, also appear designed to protect domestic companies and industries (such as domestic generics companies) at the expense of innovative foreign companies. (For more detail, see Section 4 on the lack of intellectual property rights protection, particularly p. 13-14 on India.)

Since 2003, **Colombia** has required the scrapping of an existing truck or payment of a fee before the purchase or importation of a new heavy-duty truck. This regime has long distorted the sales of heavy-duty trucks, of which 92 percent were supplied by U.S. original equipment manufacturers (OEMs) before the elimination of the fee versus six percent by local assemblers and two percent by other importers. In 2013, Colombia abruptly amended its "scrapping" regime and eliminated the fee option without notice to importers or to the WTO. These provisions appear to violate Colombia's bilateral and global trade commitments, causing large economic losses to importers and a significant drop in market share that harmed manufacturers in the United States. A recent regulation issued by the Colombian government touches on some of these issues, but it is not clear that it provides lasting solutions to these challenges due to provisions that require a market study to ensure "balance" in the market, a lack of implementing detail and a long implementing timeline.

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

³ Gary Clyde Hufbauer, Jeffrey F. Schott et al., [Local Content Requirements: A Global Problem](#), Peterson Institute for International Economics, September 2013.

⁴ 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.

⁵ U.S. International Trade Commission, [Trade and Investment Policies in India, 2014-2015](#), September 2015.

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.⁶

Other Russian government regulations and practices discriminate against U.S. medicines exporters in favor of domestic producers through a national reimbursement system that gives Russian companies a 15 percent price preference and allows only domestic companies to request annual adjustment of registered prices. Additionally, the Russian government reserves certain telecommunications opportunities only for equipment made in Russia by majority-owned Russian firms. The Ministries of Economic Development and Industry & Trade determine what constitutes a domestic telecommunications equipment, based on the scope of the research activities and technological operations carried out in Russia and other aspects of their operations.

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-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.

Over the last few years, the Chinese government has also released a series of government policies that mandate the use of "secure and controllable" technology and software – a term that in practice favors domestic companies by requiring foreign products to undergo intrusive local security testing, implement local encryption algorithms, comply with China-specific security standards, disclose source code and other sensitive and proprietary information to the Chinese government and engineer products to restrict the flow of cross-border data. For

⁶ 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).

example, China released a revised draft of its Cybersecurity Law in July 2016 that left unaddressed a number of concerns raised on earlier drafts, including continued restrictions on data flows and data localization requirements, broad obligations on content monitoring and blocking. Specific challenges include discriminatory policies relating to local data storage of Chinese customer information, requiring audits of companies' cyber security systems, and requiring secure and controllable technology. Other policies include the National Security Law, the Counterterrorism law, August 2016 opinions on strengthening the standardization of national cyber security, and sector-specific provisions in banking and insurance. Other localization policies in China include required local testing and certification requirements for products in the information, communications and technology (ICT) and medical sectors, policies requiring companies to store China-generated data on local services and prohibiting its transfer overseas, expedited product approvals for innovative medical device products that generally favor domestic products and implementation of China's revised Food Safety Law to prevent stricter standards for imported food and agriculture products.

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.
- In **China**, the draft Cybersecurity Law and other proposed or widely discussed measures would require foreign companies to store any data collected in China on local servers. Reports also indicate that China is considering other data localization policies related to Internet-based mapping applications. China's Internet controls are also increasingly making it difficult for companies to operate in that country.
- **India's** National Telecom Machine-to-Machine (M2M) Roadmap, issued in May 2015 by the Department of Telecommunications, has raised concerns about potential inclusion of restrictions on data flow – particularly given data localization requirements included in July 2016 draft guidelines for regulating M2M service providers in India.
- **Indonesia** has also put in place rules to require the use of local data centers and servers. In 2016, Indonesia also proposed new regulations that included unnecessary and burdensome data localization requirements for e-commerce providers.

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 trade talks to permit the flow of data across borders and to prohibit information technology localization requirements. Such provisions were included in the TPP, which represents a major advancement on disciplines in this area. The NAM urges the United States to include similar provisions in the ongoing Transatlantic Trade and Investment Partnership (TTIP) talks, as well as future trade negotiations.

Manufacturers are also concerned by local content requirements in the ICT industry in **Brazil, Indonesia and Nigeria**, provisions granting market authorization for pharmaceuticals only to companies with local manufacturing arrangements in **Morocco**, preferential registration processes for local pharmaceutical manufacturers in **Algeria** and inconsistently applied local content and manufacturing requirements underneath **South Africa's** Black Economic Empowerment (BEE) program.

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.⁷

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. For SMMs, in particular, 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 Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the World Intellectual Property Office's body of international IP treaties such as the Patent Cooperation Treaty and Madrid Protocol, in addition to 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 2016. The NAM remains highly concerned about the risk of IPR erosion, a trend occurring both at the global level as well as in individual markets. 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 the World Intellectual Property Organization (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 UN 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 U.N. High-Level Panel on Access to Medicines](#) that ran from November 2015 until September 2016, and [efforts during the 2015 United Nations Framework Convention on Climate Change \(UNFCCC\) COP21 conference in Paris](#) 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 ranging from **Colombia** and **Ecuador** to **India** and **Indonesia**.

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 as geographical indications

⁷ U.S. Department of Commerce, "[Intellectual Property and the U.S. Economy: 2016 Update](#)," September 2016.

(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 **Korea, Vietnam, Canada, Peru, and Morocco**.

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. The **United Kingdom** and **France** began transitional implementation of plain packaging rules earlier this year, and **Ireland** has adopted but not yet implemented plain packaging measures. As well, many other countries are already considering similar rules, including **Chile, Hungary, India, Malaysia, New Zealand, Norway, Singapore, South Africa** and **Turkey**.

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. Unfortunately, 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 on the rise, both via physical and electronic means.⁸ Lack of effective trade secrets protection and enforcement is a growing challenge in many markets from **India** and **Brazil** to **China**. In addition, manufacturers in the United States also face challenges from countries requesting confidential business information without guaranteeing its protection or allowing companies to redact sensitive information. 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 (either exact chemical concentrations or product-specific concentration ranges), or they must pay a per-product application fee for review and approval of the confidentiality of chemical concentrations, 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. The NAM welcomes the trade secrets provisions contained in the TPP and views trade-secret protection commitments as a priority in the ongoing TTIP negotiations.

Many countries lack meaningful legal deterrents against counterfeiting or suffer from insufficient weak enforcement mechanisms – and insufficient capacity or political will to strengthen those enforcement mechanisms – to address the flow of counterfeiting and piracy 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

⁸ 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.

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.

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 auction sites in **China** such as Alibaba and Taobao that have pledged actions but have yet to address concerns for many 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,⁹ 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.

To help meet this challenge and stop unfair competition from the use of stolen intellectual property, the NAM has joined more than a dozen other business associations and some 275 manufacturers across the country to form the National Alliance for Jobs and Innovation (NAJI) (<http://naji.org>). By addressing the unfair cost advantage that results when foreign manufacturers use pirated software and other stolen intellectual property, NAJI hopes to increase awareness and ensure a level playing field for businesses in the United States. The NAM also provided detailed comments to the development of 2016 Joint Strategic Plan on Intellectual Property Enforcement being coordinated by the White House's Office of the U.S. Intellectual Property Enforcement Coordinator (IPEC).

Though **China** has recognized the importance of IP protection for economic growth, manufacturers in the United States still face considerable challenges protecting intellectual property in China – many of which are included in detail in the NAM's September 2016 [detailed comments on China's Compliance with Its WTO Commitments](#). 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 use of IP under the Anti-Monopoly Law and related competition regulations and royalties and participation by IP holders in standard-setting processes standards – 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.

⁹ 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.

- 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, and questions surrounding court decisions related to trademarks and original equipment manufacturers (OEMs).¹⁰

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 some positive language that recognizes on the importance of IP for economic development, but few specific actions, even removing some of the detail in earlier drafts related to proposed legal reforms. Additionally, the policy fails to address many of the most significant outstanding issues that NAM and its members have in India. 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 such compulsory license threats and decisions over the past year, the NAM remains concerned that as long as these criteria remain on the books, government and judicial officials could 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.

Russia continues to demonstrate weak IP enforcement, including the persistent presence of counterfeit and pirated products both produced in and transshipped through Russia. Manufacturers operating in Russia also face practical barriers to using legal protections. The Russian Arbitration Procedural Court rarely – if ever -- grants preliminary injunctions, frustrating company efforts to resolve potential patent issues before potentially infringing pharmaceutical products are launched on the market. Additionally, innovative manufacturers in practice lack effective mechanisms to resolve patent disputes prior to the launch of generic products. Trade secret protection is a particular problem 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

¹⁰ 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.

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 potential compulsory licensing issues in Russia. The Federal Anti-Monopoly Service (FAS) is drafting regulatory amendments to enable compulsory licensing for medicines during periods of epidemics. 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, the NAM is concerned that the government could promote compulsory licensing in certain circumstances to promote generic medicines over innovative medicines. These revisions are expected to be taken up by the Duma this fall.

The NAM continues to have considerable concerns with **Canada's** "promise doctrine" for patents, which requires an innovator generally must heightened evidence that that demonstrates "or soundly predicts" a subjectively construed "promise of the patent" – a criteria that is applied nowhere else in the world and has been used to reject or invalidate a significant number of innovative patents in various industries that have been granted elsewhere. As [NAM explained in its amicus briefing](#) filed and accepted in the ongoing NAFTA Chapter 11 case against this provision, this doctrine appears to be inconsistent both with TRIPS and Canada's obligations under the North American Free Trade Agreement (NAFTA), and has severely undermined patent protection for innovators in the United States and elsewhere and had the practical effect of rendering medical innovation all but unpatentable in Canada. In addition, Canada passed its Copyright Modernization Act several years ago. However, U.S. right holders continue to face challenges protecting and enforcing their copyrights in Canada. The law contains broad exceptions, which have been exacerbated by court decisions. Similarly, Canadian courts have placed a high burden on copyright owners to establish liability in the online context. Canada's choice of a purely informational notice, rather than a notice and takedown system, has contributed to continued problems with online piracy.

Provisions in **Colombia's** national development plan undermine the protection of intellectual property and innovative pharmaceutical and biologics approvals, and registration will delay the introduction of new medicines in Colombia. 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 WTO TRIPS obligations and undermine strong IP protection for manufacturers in the United States. Manufacturers are also concerned by Article 72 that would integrate regulatory review 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 is also in the midst of drafting a new consultative IP framework, and has been through 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 setting patentability requirements specific to South Africa (versus being in line with international obligations and norms). The NAM encourages the U.S. government and other stakeholders to engage directly with the Department of Trade and Industry to ensure that the framework does not undermine innovation and IP.

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.

In addition to its efforts to promote plain packaging mentioned above, **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.

Protection of undisclosed test and other data for various industries – including pharmaceuticals and agricultural chemicals – remains a serious problem in **India** and **Russia**, and also is a factor in markets such as **Algeria, Canada, Egypt, Jordan, Morocco, Saudi Arabia** and **Tunisia**. None of these countries effectively protect against unfair commercial use of undisclosed test and other data generated to obtain marketing approval for pharmaceutical and agrochemical products. In many other countries – including **Algeria, Canada, Egypt, Jordan, Morocco, Saudi Arabia** and **Tunisia** – governments are using non-transparent actions and aggressive use of reference pricing to drive down the price for innovative products in ways that have a negative impact on IP protection and business incentives that drive future innovation.

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. The NAM works to prevent and reverse the proliferation of unique regulatory and technical standards as trade barriers by promoting reliance on the TBT Agreement, 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. The NAM was pleased to see strong SPS and TBT chapters included in the TPP Agreement, and is similarly seeking strong TBT and SPS provisions in the TTIP and future negotiations.

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.

Additionally, the NAM firmly believes that the definition of an “international standard” should include not only international bodies such as the International Standardization Organization (ISO) or International Electrotechnical Commission (IEC), but also private-sector standards that are broadly used around the world. The NAM has urged this approach in international fora, such as the WTO, regional and bilateral negotiations, including with the **European Union** for the Transatlantic Trade and Investment Partnership, and also with respect to individual markets around the world. For example, in **Saudi Arabia**, the Saudi Standards, Metrology, and Quality Organization (SASO) has adopted a policy of basing all national standards for electrical products exclusively on IEC standards. This policy was put in place despite the fact that Saudi Arabia has a sizable residential, commercial, and industrial infrastructure that utilizes products and systems in line with U.S.-developed international standards. Many Saudi companies continue to issue product specifications utilizing U.S. standards and depend on genuine replacement parts and products that meet those very standards, meaning that this new policy hinders the ability of companies to import the U.S. electrical products and spare parts they need.

The NAM has concerns with the proliferation of standards and technical regulations that serve as effective barriers to trade or limit market opportunities for manufacturers in the United States. In some cases, the proliferation of these standards stems from activities undertaken by IGOs designed to influence national regulators to adopt a particular policy agenda. 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 World Health Organization’s (WHO) World Health Assembly in May 2016 passed a controversial resolution¹¹ urging member states to adopt WHO technical guidance to prohibit the marketing of complementary food products for infants and young children.¹² 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, Malaysia, Indonesia** and **Thailand** that appear to target imported products coming from the United States and other countries.

In other cases, the proliferation of problematic standards stem 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. For example, motor vehicle manufacturers in the United States have seen a significant move toward the adoption of European-based vehicle standards (UN-ECE) and away from U.S.-based standards (FMVSS), encouraged through Europe-funded advocacy and capacity-building programs. **Ecuador**’s 2014 announcement that it would no longer accept FMVSS on 12 safety-related standards was a jarring example, representing a departure from the status quo in which Ecuador accepted both FMVSS (U.S. Environmental Protection Administration) and United

¹¹ World Health Assembly, [“Resolution on ending inappropriate promotion of foods for infants and young children,”](#) (WHA69.9), May 28, 2016.

¹² World Health Assembly, [“Guidance on ending the inappropriate promotion of foods for infants and young children,”](#) (A69/7 Add.1), May 13, 2016.

Nations Economic Commission for Europe (UNECE) certifications for motor vehicles. After significant advocacy from the U.S., Ecuador announced that it would postpone implementation of the regulation in August 2015, but only until October 2016. Similar advocacy to protect continued recognition of U.S.-based standards have also occurred in recent years in **Egypt, Morocco, Colombia, and Peru.**

The NAM is closely monitoring the **European Union's** efforts to expand existing regulatory regimes related to chemicals, including its Restrictions on the Use of Hazardous Substances (RoHS) regime and the scope of chemicals included in the EU's Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) to include new areas such as phthalates and nanomaterials. The NAM and its members remain concerned that these measures may reflect an approach to regulating and managing chemical risk that differs from those in the United States, such as approaches incorporated into the recent Lautenberg Chemical Safety Act. As the NAM has indicated in comments on these measures, broad implementation of such measures not only impacts manufacturers of those substances, but also a wide range of products that incorporate those substances into other products – meaning that these technical regulations may 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. In addition to the expansion of these chemical regulations in Europe, other countries are also drafting or considering chemical regulations that either appear to largely incorporate elements of RoHS and REACH (such as **China, Laos, Ukraine, and the United Arab Emirates**) or are considering varying models for chemical regulation (such as **Brazil**).

In **Korea**, market access for passenger vehicle and motorcycle manufacturers has 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 and serve as non-tariff barriers to imports of these products made in the United States. Although the KORUS FTA was supposed to resolve many of the existing market access problems facing imported vehicles, companies still face a range of longstanding barriers, as well as new measures, that have had an adverse impact on imports. In the automotive sector, these mostly technical barriers vary widely, including new damage disclosure requirements on motor vehicle manufacturers, new fuel economy compliance test requirements that must be in place by the end of 2016 without a fully defined tolerance level, and new greenhouse gas innovation credit scheme that required significant US government and industry intervention to bring it in line with global norms but still does not include a mid-term review, and rushed plans to adopt a unique Korean Real Driving Emissions (RDE) requirement for passenger vehicles before the global standard is completed. Other unnecessary non-tariff barriers include marking requirements for a growing number of auto parts, unique regulatory requirements related to recalls and defects, rules for specific auto parts such as panoramic sunroofs, and outdated requirements for seat size and vehicle ground clearance. In addition, Korea maintains noise standards for motorcycles that limit the use of large motorcycles on Korean highways. These and other barriers must be addressed urgently to ensure meaningful access to the Korean market for automobiles and motorcycles, and that the KORUS FTA delivers fully on its promise for manufacturers in the United States.

China's State Council Legislative Affairs Office (SCLAO) in March 2016 released the Standardization Law for public comments, with significant potential changes to China's

standardization system. Key areas included in these changes include the role of association standards, whether foreign technical experts will be allowed to draft and participate in standards-setting, treatment of confidential business information, and how proposed mechanisms for addressing standards-related conflicts may be resolved. The NAM and its members remain concerned about various provisions in the law – including the lack of reference to China’s commitments to its WTO TBT obligations and stated self-declaration requirements for enterprise standards that could endanger IP rights.

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 has taken steps to address previous concerns related to previous certification challenges with food products, but has raised new questions about technical regulations in medical devices. In food products, the Food Safety Standard Authority of India (FSSAI) has been working with U.S. and other stakeholders to address and improve its food approval process, after the earlier process was ruled unconstitutional by the Indian Supreme Court. The NAM encourages the U.S. government to continue to monitor FSSAI’s efforts closely to ensure full compliance. 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, delays in introducing separate new regulations for medical devices, and the addition of cardiac stents to India’s essential drug list.

Canada also maintains strict rules to define hazardous waste that crosses its borders that disrupt trade in the chemical industry 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.

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**, 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).

Manufacturers in the United States also face many other instances of unique standards and certification procedures, such as unique standards on motorcycle tires in **Indonesia** that may be designed to protect local industry and unnecessary requirements set by **Saudi Arabia's** SASO requiring burdensome testing for electric motors that by regulation should be exempted.

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 Joint Commission on Commerce and Trade (JCCT), 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 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)). Though the agreement represented a major step forward, implementation and further monitoring, however, will be critical to ensure that China meets its commitments and does not establish other export subsidy programs that violate WTO rules.

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.

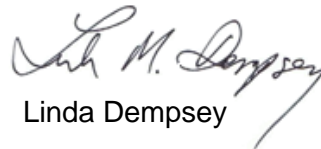
To give their own domestic industries an unfair commercial advantage, **Indonesia**, **India**, **Russia** and other countries have imposed damaging bans, quantitative restrictions and/or taxes on certain minerals and ores. For example, **Indonesia** implemented an export ban on more than 200 types of 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.

* * * * *

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 Mentioned in NAM Submission to National Trade Estimate

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

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