

**National Association of Manufacturers  
2011 Submission to the Special 301 Committee**

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM has long been a strong supporter of a proactive, aggressive U.S. Government approach to international intellectual property rights (IPR) protection. Our members are also committed to working with the U.S. Government to develop ideas and ways to enhance intellectual property protection both at our borders and abroad. IPR protection and the erosion of IP rights is truly a global concern for the NAM.

The Impact of IPR Theft on Manufacturing in the United States

The NAM emphasizes to the Special 301 Sub-committee that IPR protection and enforcement is an issue for virtually all our members. Manufacturing, yes manufacturing, is as dependent on intellectual property like patents, trademarks, trade secrets, trade dress and copyright as copyright-based industries that receive considerably more attention. Counterfeiting and piracy are existential threats to manufacturers, the people they employ, and the consumers who come in contact with their products and services.

Theft is theft no matter if it is called three-syllable words like "counterfeit" or "piracy". The trade in fake products supplants legitimate markets, steals our workers' jobs and puts American and other consumers needlessly at risk as counterfeit pharmaceuticals, unsafe products and even hazardous materials are put into the stream of commerce on a daily basis.

It is simply amazing what products and trademarks counterfeiters and pirates are so willing to steal. While most people are familiar with the counterfeiting of luxury brands because of the cachet that can command premium prices, counterfeiters are willing to engage in criminal activities by selling everyday items such as circuit breakers, extension cords, batteries, fireplace tools, golf clubs, kitchenware, toothpaste, cigarettes windshields – the list can go on and on. Even semiconductor chips that can be used in guidance systems for America's defense have been counterfeited and found in the United States.

As this nation looks to our economic recovery, it is important to note that IPR theft is an impediment to that recovery. Markets once lost through counterfeiting and/or damaged brands are not readily and easily recovered.

As cities and states face unprecedented budget shortfalls and deficits, it is important to note that IPR thieves don't generally pay taxes and maintain books.

Some people do not have a full understanding of the role of intellectual property as a core factor in defining successful manufacturing and economic development that the NAM Members do. Last year, the Intellectual Property Rights Enforcement Coordinator visited several Chicago area manufacturers where she saw first-hand the role IP and aggressive IP enforcement plays in creating and supporting successful growth. We believe there is strong

evidence from multiple academic studies that IPR protection enhances our economic growth and competitiveness in developed and developing countries alike.

We know there is an important connection between economic growth and IPR protection. We believe strong IPR protection enhances employment opportunities, revenues and encourages innovation and investment. A recent report from the International Chamber of Commerce (ICC) noted the impact of IP enforcement on small businesses. According to the report, Small and Medium-Sized Enterprises (SMEs) that rely on IP of all sorts reported higher growth, income and employment than those that do not – in some cases as much as 20 percent more.

Multinational manufacturing companies spent \$183 billion on research and development in the United States in 2008 – 77 percent of the total expenditures by multinationals on R&D. Why? Because they have confidence in the protection of their ideas and innovation in the United States. The ICC report referenced above demonstrates that companies that fully utilize their intellectual property rights generally succeed better and have a higher market value than those that do not.

As this nation looks for solutions to global problems like energy efficiency, reducing emissions, and leading the world in the adoption of green technology and enhanced medical care, IPR protection will be critical. It must be a priority for the U.S. Government, not just in words but also in actions.

Another recent study by the ICC estimates that, “based on 2008 data, the total global economic value of counterfeit and pirated products is as much as \$650 billion every year.” It showed that “international trade accounts for more than half of counterfeiting and piracy (our updated estimate is \$285 billion to \$360 billion), domestic production and consumption accounts for between \$140 billion and \$215 billion and digitally pirated music, movies and software accounts for between \$30 billion and \$75 billion. Together these estimates imply that the global value of counterfeit and pirated products could be up to \$1.77 trillion by 2015. If counterfeiting and piracy could be eradicated or seriously reduced, up to 2.5 million jobs could be created in the legitimate economies of the G20.”<sup>1</sup>

The United States Customs and Border Protection (CBP) agency reported last year that between FY 2005 and FY 2009, the domestic value of seizures for violations of Intellectual Property Rights rose 179 percent. The number of seizures and their value has continued to rise, reaching \$260.6 million and 14,000 plus seizures in 2009. China was the top source for IPR seizures in FY 2009, with a domestic value of \$204.7 million, accounting for 79 percent of the total value seized. Footwear was the top commodity seized in FY 2009 with a domestic value of \$99.7 million, which accounted for 38 percent of the entire value of infringing goods.

Three of the top ten categories of products seized include products posing possible safety or security risks. Pharmaceuticals were the top article of trade presenting potential safety or security risks seized in FY 2009.<sup>2</sup>

According to the U.S. Department of Commerce, America’s IP-intensive industries employ nearly 18 million workers, and account for more than 50 percent of all U.S. exports. U.S. intellectual property is worth over \$5 trillion – more than the nominal gross domestic

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<sup>1</sup> <http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/Global%20Impacts%20-%20Exec.pdf>

<sup>2</sup> [http://www.cbp.gov/xp/cgov/trade/priority\\_trade/ipr/pubs/seizure/](http://www.cbp.gov/xp/cgov/trade/priority_trade/ipr/pubs/seizure/)

product (GDP) of any other country. And the continuing trade in counterfeit products results in the loss of hundreds of thousands of jobs annually. However, we posit that the Agency's classification of "IP intensive industries" is too narrow.

A significant reason for the NAM to make this submission is to raise the awareness in the wider American public, the Congress and the Administration of the impact that IPR theft has on manufacturing, broadly defined. For the United States to retain the manufacturing base that most of us believe we must, the protection of the intellectual assets of our innovators is a critical component. As this nation looks for solutions to global problems like energy efficiency, reducing emissions, and leading the world in the adoption of green technology and enhanced medical care, IPR protection will be critical. Counterfeiting and piracy threatens far more than company sales, exports, and profits. When counterfeits get onto markets, consumer health, safety and life itself are put seriously at risk. Counterfeiters are often connected to organized crime and are completely unconcerned about consumers' health and safety, or a company's good reputation for producing healthful, helpful and safe products.

Simply put, IPR protection is not just about preserving American companies and the jobs they provide for our fellow citizens – it is about public safety and security as well.

For example, our pharmaceutical members tell us about the threats posed by the aggressive distribution of fake medicines, and the major effort being made by the U.S. pharmaceutical industry and its customers, suppliers and other partners to ensure that counterfeit medicines do not seep into supply chains in the United States or around the world. The World Health Organization (WHO) has estimated that up to one percent of medicines available in the developed world are likely to be counterfeit. The figure rises to 10 percent globally and can be as high as 33 percent in some developing countries. These counterfeit products often target very sensitive product areas including cardiovascular and central nervous system medications, chemotherapy medicines, and high-tech medical devices such as endoscopes and defibrillators.

#### Specific Cross-Cutting Areas of Concern

**Goods in Transit, Transshipment and Free Trade Zones:** Goods in transit are generally considered to be goods that pass through a country's territory without being formally imported, on their way to a destination in another country.

Transshipment involves shipping goods through an intermediate location prior to reaching their ultimate destination whereby, in the context of counterfeit activities, the true origin of the goods is obscured. The goods are generally dealt with at this transshipment port without clearing many customs formalities and usually changed in some way (e.g. the goods may be unloaded, re-packed, consolidated or the method of transport may change).

Free Trade Zones ("FTZs") are generally considered as: "a part of the customs territory of a Contracting Party where any goods introduced are generally regarded, in so far as import duties and taxes are concerned, as being outside the customs territory."<sup>3</sup> Generally, FTZs are established by Governments to promote legitimate trade and offer the advantage of providing a free trading environment "whereby a minimum level of regulation is demanded of those

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<sup>3</sup> World Customs Organization Glossary of International Customs Terms (May 2006), available at [www.wcoomd.org/print/file.aspx?id=6652](http://www.wcoomd.org/print/file.aspx?id=6652)

companies approved to operate” therein.<sup>4</sup> “As a result, companies derive a wide range of benefits, for example, exemptions from duty and taxes, simplified administrative procedures and duty free imports of raw materials, machinery, parts and equipment.”<sup>5</sup>

Illicit goods in transit continue to be an issue for our Members. Deficient or limited legal powers prevent and inhibit customs authorities in some countries from acting to seize goods in transit, in FTZs or being transshipped. Counterfeiters, and others involved in the illicit trade in goods identify and exploit such loopholes in these countries to the detriment of NAM Members and affected Governments. The NAM believes that when customs authorities are informed of specific illicit shipments, whether in transit or being transshipped through FTZs, jurisdiction must be clear and officials responsible for enforcement must have sufficient authority and willingness to take action. Without such protection, the global trading system inadvertently facilitates the illicit trade in counterfeit cigarettes.

**Cooperation from Law Enforcement:** Cooperation from law enforcement authorities is generally good and has improved in many countries. Despite this improvement and our members’ full commitment to work with and assist law enforcement agencies (for example, through the sharing of intelligence), we still encounter and have observed a reluctance to conduct regular enforcement actions in certain countries – both ex officio and upon a complaint being filed by the trademark owner, even though supported by solid evidence of infringement. The NAM believes that further encouragement should be given to certain Government authorities to effect meaningful law enforcement activities and to allocate sufficient resources to eliminate the production of and trade in counterfeit goods.

**Criminal Prosecution Following Enforcement Actions:** NAM Members’ efforts in working closely with law enforcement agencies around the world have led to a number of effective enforcement actions against counterfeiters. However, criminal prosecutions – an extremely effective deterrent to counterfeiters – resulting from such enforcement actions are often slow, insufficiently resourced and ineffectively managed. In our experience, the deterrent value of a criminal prosecution is often lost because the law enforcement authorities in certain jurisdictions appear to lack the motivation and political will to conduct proper follow-up on investigations essential for effective prosecution.

**Lack of Sufficient Deterrence:** In many countries, criminal penalties for IPR violations are quite lenient and do not effectively deter actual and potential counterfeiters. Generally, legislation criminalizing counterfeiting provides for the confiscation of the counterfeit goods, small fines, and limited terms of imprisonment. In practice, offenders are rarely incarcerated as their punishment is commuted to a suspended sentence. Confiscation is often not a significant financial hardship, as many products are not expensive to produce nor do counterfeiters pay excise taxes on their products.

One way to strengthen penalties is to include asset forfeiture provisions in intellectual property laws. One such example is Hong Kong’s Organized and Serious Crime Ordinance (“OSCO”). The relevant provisions of OSCO create a presumption that any property that a defendant in a criminal action held, at the time of or received in the six years prior to the initiation of the criminal proceedings, consists of proceeds of organized crime.<sup>6</sup> This property is

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<sup>4</sup> WCO Guidelines on Controlling Free Zones in Relation to IPR Infringements, Para. 2 (January 12, 2005).

<sup>5</sup> *Id.*

<sup>6</sup> OSCO Section 9(2)(a)(i-ii).

subject to forfeiture unless the defendant can prove that the assumption is incorrect.<sup>7</sup> Such a provision has the potential to greatly increase the penalties to those involved in organized crime, which would correspondingly increase the deterrent effect.

**Destruction of Seized Goods and Equipment:** As mentioned in the 2008 USTR report, “the destruction of seized counterfeit goods, materials, and related manufacturing equipment is a reliable way to ensure that these goods do not wind up again in the hands of counterfeiters”<sup>8</sup>. Because of this, we urge Governments to adopt legislation to ensure all seized counterfeit goods, materials and related manufacturing equipment are swiftly and completely destroyed, protecting both IPR holders and deterring counterfeiters. Transparent and effective destruction procedures, properly monitored by law enforcement agencies, are essential to prevent both counterfeit goods from returning to legitimate trade channels and manufacturing equipment from returning to illicit factories.

**Labeling Restrictions:** Another area of concern to the NAM is proposals by some governments around the world to require products be “plain-packaged,” or to require excessively large graphic warnings that effectively prohibit or severely limit the use of trademarks, or branding. Some options mean manufacturers of products would not be allowed to use their trademarks or logos on packages other than brand and product names in government mandated typeface. The NAM is concerned that the IPR-related elements of this option would severely damage the value of branding and trademarks used by companies for no good purpose. Such proposals are void of a sound scientific and evidentiary basis. Companies would be forced to compete in the marketplace without the long-standing branding and trade dress behind their products, and effective branding in any market and any industry is germane to the pricing of products in the market. Competition in a market essentially void of the tools to effectively differentiate brands could well result in market place results that are contrary to legitimate public health objectives. Other potential unintended results could include increased opportunities for smuggling and counterfeiting as there will be fewer means to identify legitimate products. Furthermore, other options under consideration, such as enlarging the size of pictorial warnings to extreme proportions could be equally problematic, including from an international obligation perspective.

### What Can Be Done

Some NAM members that are large corporations have been able to dedicate dozens of employees and thousands of hours and millions of dollars to record their trademarks with foreign government agencies and to take other steps in their attempt to protect their intellectual property. Some have developed sophisticated systems to mine trade and shipment data to identify potential counterfeits. Others have developed software programs to assist Customs agents in the identification of suspect products.

For those that can afford to do this, it is still a significant expense for doing business. For small companies, it is nearly impossible. They do not have that kind of in-house capability and are particularly reliant on U.S. Government efforts to combat international counterfeiting and piracy. The question is how to do that.

While this picture sounds gloomy, it is important to take note of and applauded the efforts of the U.S. Government to protect our nation’s innovative capacity.

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<sup>7</sup> *Id.* at Section 9(1)(b).

<sup>8</sup> 2008 Special 301 Report, Office of the United States Trade Representative, p. 9.

Anti-Counterfeiting Trade Agreement: The NAM endorsed and commended the Administration for concluding the Anti-Counterfeiting Trade Agreement. This milestone achievement in IPR protection will enhance criminal enforcement and the seizure and destruction of fake goods, provide new authority for customs to act against import and exports of fake goods and cooperate on transshipment, create new cooperation and information sharing among ACTA signatories and the private sector, and the promotion of best practices the result in better IPR protection.

Joint Strategic Plan on Intellectual Property Enforcement: The NAM also applauded the International Intellectual Property Rights Enforcement Coordinator's (IPEC) work last year to bring U.S. government agencies together to produce the first Joint Strategic Plan on Intellectual Property Enforcement. In the Joint Strategic Plan, IPEC identified a number of actions the Federal government will take to enhance the protection of American intellectual property rights. We endorse these ideas that include work to ensure that the Federal government does not purchase or use infringing products; support transparency in the development of enforcement policy, information sharing increase the efficiency and effectiveness of law efforts of personnel stationed overseas, secure supply chains to stem the flow of infringing products at our borders and through enhanced cooperation with the private sector.

The NAM was pleased to contribute ideas for this plan and has continued to work with the IPEC as well as USTR and other agencies through the year to identify more ways to enhance IPR protection.

Executive Order on IPR Advisory Committees: The NAM also welcomes the February 8, 2011, Executive Order establishing two intellectual property enforcement advisory committees designed to improve the Federal Government's intellectual property enforcement efforts. The NAM expects the committees established by this Executive Order will ensure the Administration focuses attention on intellectual property theft in the United States and overseas.

President's Export Council: The President's Export Council also provided some recommendations to the President in a letter concerning the important of strong IPR protection. The NAM fully endorses these ideas and commends them to your consideration.

#### Additional Ideas to Enhance IPR Enforcement and Protection

Strengthen IPR Efforts and Coordination at U.S. Embassies: A positive development in recent years is the work done at many U.S. embassies and consulates abroad in advancing America's IPR agenda, especially in combating international counterfeiting and piracy. Some important agencies have increased IPR staffing in our overseas posts. But, as here at home, progress requires close coordination of all embassy elements on the ground. In some large embassies, staff on the ground from the following agencies and embassy sections can all be working on IPR issues – Commerce/PTO, Commerce/ITA, CBP, FBI Legal Attaché, USAID and State Department Economic Officers. Imagine, if you will, the daunting task facing a small manufacturing executive who learns via the arrival of a warrantee card that its IP has been counterfeited in Malaysia by a Taiwan-based company selling the now unsafe product into Nigeria and Bolivia.

EU Trade Strategy: In November 2010, the European Commission presented its Trade Strategy for 2010-2015<sup>9</sup>). The Strategy indicates that the EU plans to take a more robust stance to defend EU interests against protectionist measures and IP infringement in third countries – potentially providing opportunities (in partnership with European firms) to better utilize Commission intervention to protect IPRs in foreign markets. The Strategy also indicates that the Commission in 2011 will propose legislation for an EU instrument that will “increase symmetry in access to public procurement markets in developed countries and large emerging market economies.” Next steps include (i) a report from the Commission to the Council on barriers to trade and investment (due in late March 2011), including in China; (ii) a report enumerating protectionist measures in third countries (Russia will feature); and (iii) a consultation related to the proposed public procurement instrument in mid-February, with legislation anticipated in late 2011. The Commission is also aiming to conclude its FTA with India in 2011. Mutual support and coordination between the USTR and DG Trade to advance strong IP legislation, policy and enforcement with key emerging market trading partners will be critical to positive outcomes on both bilateral and multilateral IP issues.

A Single EU Patent: A single EU patent and an associated EU Patent Court has been proposed, potentially enhancing the already robust enforcement available in Europe. NAM members are generally in favor of these initiatives, assuming they produce high quality assets at a reasonable cost. However, current proposals are unacceptable, especially in regards to privileged communications. Specifically, creation of a new enforcement mechanism must include a law codifying privilege to prevent discovery of customarily undiscoverable documents in the United States. Additionally, privilege needs to apply equally to in-house advisors and outside counsel.

Embassy Action Plans: We commend the efforts by the IPEC and other agencies, including the Departments of State and Commerce to developing action plans at U.S. embassies and consulates to further the protection of IPR in foreign countries. We will work with the IPEC to help deliver practical information on what a manufacturer should do when he discovers counterfeiting of his products. US Government websites should help to find the one relatively simple path through the myriad responsible agencies and web sites to learn what the government can do when, for example, a warranty card comes from a country to which a manufacturer does not export, and the type of necessary information to bring to the government or private attorney.

Sufficient Budgetary Resources: Enhanced IPR enforcement measures cannot simply be wished into place; they must be funded. All the good work done already by various U.S. Government agencies will be for naught if they do not have adequate personnel and operating resources to do their work. The agencies responsible for IPR enforcement from Customs, to USTR, the State Department, Justice, Commerce and the International Intellectual Property Rights Enforcement Coordinator must be appropriated the funds they need.

Customs Authority: Countries should clearly and unambiguously empower customs authorities with jurisdiction over goods in transit and in FTZs. Such jurisdiction must include the authority to detain goods suspected of infringing IPR, as well as inspect and seize goods that violate IPR.

Identify and Fix Outdated U.S. Government Regulations and Policies: Not all IPR problems are found overseas. We encourage IPEC to lead an aggressive review of all U.S.

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<sup>9</sup> [http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc\\_146955.pdf](http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_146955.pdf)

government agency programs, regulations and policies and to fix any problems that emerge. One particular example that has already been called to the attention of the Department of Homeland Security is the ill-advised decision from mid-2008 restricting the ability of U.S. Customs agents on the front lines at our borders from sharing full information about suspected shipments of counterfeit and pirated products with the legitimate rights holders. This policy, which we understand originated in the Customs and Border Protection's (CBP) General Counsel's office, should be reversed so as to facilitate, not frustrate, all appropriate exchanges between Customs officials and rights holders. This policy is one egregious example, but we encourage IPEC to take the lead in pushing to identify and reverse similar problems throughout the government. We note that seeking legislation to reverse this restriction was included in the IPEC's Joint Strategic Plan, and we urge that office to ensure action takes place this year.

In some instances the U.S. Government may contemplate improvements to enhance communication with foreign customs offices regarding counterfeit goods destined for restricted countries under US export laws. For example one of our members undesirably refrained from responding to Chinese Customs Officials regarding the authenticity of used products held by Chinese Custom Officials because the suspected counterfeit goods were marked with a destination of a country which was restricted under U.S. law. Under the letter of the law, a response could put them in a position of potentially participating in a prohibited transaction under U.S. export laws. Ironically, unless told otherwise, China Customs will have no choice but to release the products, whether authentic or counterfeit. Perhaps what may be most disconcerting is the perceived lack of response and the affect such lack of response will likely register towards jeopardizing communication between Customs and the member relative to subsequent seizures.

**Develop Strengthened IPR Criteria for U.S. Trade Preference Programs:** Congress should conduct a thorough review of the overall U.S. Trade Preference programs (including GSP, ATPA, CBTPDEA, AGOA and other possible new initiatives) this year. The NAM strongly urges the Administration to work with Congress, the business community and other stakeholders to develop updated and strengthened IPR benchmarks among the key eligibility criteria. Our NAM Task force will be focusing on that issue and looks forward to sharing detailed ideas with the Administration in the months ahead.

**Monitor UN Climate Change Activities:** These negotiations must continue to be monitored to ensure that any capacity building mechanism to help developing countries implement outcomes from the UN Framework Convention on Climate Change are not linked to a "compulsory licensing" regime so that developing nations can simply take the latest environmentally-friendly industrial technologies is a short-sighted attempt to take advancements made by U.S. companies that will chill investment and cost jobs.

**Negotiate Strong IPR Provisions in the TransPacific Partnership:** The United States has a golden opportunity to retain high-quality, knowledge-and skills-based jobs in the United States and for the U.S. to further develop its comparative advantage in the global trading arena, if we continue to seek the highest of standards in the our trade negotiations. The U.S. Government must aggressively press for the strongest IP substantive and enforcement provisions in the TPP, building on the world-class provisions of the U.S.-Korea Free Trade Agreement (KORUS) and U.S. law to level the playing field outside the U.S. for industries dependent on IP protection for market access. The TPP IP provisions must be clear, specific and enforceable. The U.S. must work to eliminate policies and practices that discriminate against U.S. rights holders and

that limit the ability of U.S. companies to compete fairly overseas. It must also work to improve protection and enforcement of IP rights by ensuring that the IP provisions in the TPP and existing agreements are implemented properly.

### NAM Priorities for Intellectual Property Rights Protection and Enforcement

The NAM continues to call on the U.S. Government and our members to focus on several areas in prioritizing government IPR activities:

- Counterfeiting – This is our top IPR priority at the NAM. We, business and government, must continue to find new and creative ways to identify and seize counterfeit goods at our borders and assist other countries in doing the same.
- China – China, a major force in the global economy remains the source of a hugely disproportionate share of all the counterfeit and pirated manufactured goods found anywhere in the world. U.S. Government IPR strategy must start with a China policy.
- Customs Enforcement – Many foreign governments need long-term help with IPR legislation, training and capacity building. Customs enforcement effort should be an immediate priority area for U.S. government attention, resources and aggressive political leverage.
- Cooperation Internationally – The United States needs to continue to seek gold standard IPR provisions in the Trans-Pacific Partnership negotiations and monitor other negotiations like the UNFCC to prevent diminution of IPR protection, and monitor implementation of the ACTA's high standards.

### Top Country of Concern: China

NAM member companies report that the problems of IPR theft and enforcement remain rife in China, and for this reason request that it remain under Section 306 monitoring. In spite of continued attention to this issue, most companies report that there has been little change in conditions over the past several years. Authorities at the provincial and municipal levels still are reluctant to take aggressive action to enforce IPR when it involves foreign companies. Companies must also devote significant resources to investigation and case development if they hope to have any action taken either administratively or within the judicial system.

The NAM recognizes recent positive efforts by China to improve its enforcement capabilities related to counterfeiting, but several concerns remain on this front. Recent dialogues facilitated by the U.S. Government have been helpful in advancing discussions on China's efforts on data protection and counterfeiting, and should continue.

The lack of IPR protection is an inefficient use of resources for large companies, but it is an insurmountable obstacle to small companies that have limited financial resources to protect their interests. In many cases, U.S. companies are experiencing damage to their reputation for quality and safety in third country markets.

The NAM is working with the Administration as part of the National Export Initiative (NEI) to expand export promotion services to small and medium-sized manufacturers. In looking at the Chinese import market, the fastest growing in the world, small companies often tell us that,

while they believe that they could sell to China, they will not even try given the fear of intellectual property theft. As one NAM small company told us, “We hesitate to export our USA-made products to China for fear of violation of our IP rights.”

A common complaint from U.S. companies is that IPR law in China still does not favor vigorous enforcement or punishment sufficient to act as deterrence. There are no effective administrative or legal directives that require criminal prosecution or destruction of the equipment used to make counterfeit products. Under current Chinese law, the value of a counterfeit item determines whether or not Chinese manufacturer faces civil or criminal charges. Chinese law governing valuation of counterfeit goods that does not consider the market value often leads to less serious civil charges rather than criminal.

Another area of continuing concern is the potential for IPR violations during the non-transparent process of government information inquiries. This can range from formal inquiries as part of customs or approval processes to informal, drop-by meetings from local government officials who request sensitive company information. In formal inquiries, often the inspection/auditing process is so opaque that corrupt individuals within government agencies have little difficulty in stealing a company’s intellectual property that is under review.

The issue of China’s implementation of Indigenous Innovation policies is one that causes grave concerns among all NAM member companies. Our members are telling us that these policies are becoming a serious impediment to their continued operations in China, and some may even withdraw from this important market.

We applaud the Administration for making this issue a priority in bilateral engagement with China and are pleased President Hu confirmed last month that China has delinked indigenous innovation policies from government procurement decisions or lists and assured that foreign owned intellectual property will receive national treatment.

There is still a good deal of confusion and concern about the need for foreign firms to transfer their intellectual property in joint ventures in key industries identified as the focus of Indigenous Innovation policies. Directives outlining the policy seem clearly to support the forced transfer of foreign IP as well as the development of IP in China as a path in the development of Chinese national champions.

In a meeting of the President’s Export Council’s on IPR enforcement last in 2010, President Obama said, “First, in response to the list that you just laid out, IPR has obviously been on our radar screen for a long time. I think this is very timely, particularly because I’ve got a state visit coming up with China in January. I’ll be honest with you, one of the challenges we’ve had on this, sometimes, is that it’s something everybody’s concerned about, but when we say, well, will you help us surface these issues, will you essentially be a witness – then suddenly everybody – everybody gets a little nervous. But this is obviously a top priority. I mentioned China not because it’s unique, but because obviously the size of its market makes it an important partner in trying to get better enforcement. We’ve actually seen them make some gestures towards improved enforcement, but I’m looking forward to seeing the specific recommendations.”

NAM members agree.

Patent subsidies: China's patent subsidy program squarely discriminates against foreign SMEs operating in China, violating its commitments as a member of the WTO under TRIPS Article 3.1 and hurting US industry as a result. The Chinese government subsidizes the development of home-grown patented technologies by providing financial support to certain domestic firms to fund filing of foreign patent applications<sup>10</sup>. To qualify for the subsidy, enterprises must be incorporated in China<sup>11</sup>. At the core of its obligations under TRIPS, China must provide "no less favorable" treatment to WTO members than it does its own nationals with respect to IP<sup>12</sup>. China's subsidy program deliberately accords "less favorable" treatment to foreign enterprises, given that SMEs incorporated abroad and operating in China are ineligible for the subsidies.

Chinese enterprises are clearly embracing the program. In 2009, SIPO (China Intellectual Property Office) disbursed over RMB 52.85 million (\$7.9 million) in subsidies<sup>13</sup>. Not only is China's conduct incompatible with TRIPS, but it may block U.S. industry from competing both at home and abroad<sup>14</sup>. China plans to dramatically expand the program, aiming to generate 2 million annual patent filings by 2015<sup>15</sup>. China's overarching objective is to use its massive patent portfolio to build an innovation economy, enhance its international competitiveness in strategic emerging industries (including clean energy), and to dominate these industries through ownership of patented technologies. This program clearly violates national treatment requirements and should be either eliminated or revised to treat equally Chinese indigenous enterprises and international companies.

APEC: The Chinese government is actively attempting to persuade other Asia-Pacific Economic Cooperation (APEC) economies to endorse its views on IPR abuse and treatment in standards setting. To that end, China has proposed to APEC that it conduct a survey of APEC members to better understand how they address IPR abuse. China has accused other economies of using technical standards and patent licenses to extract excessive profits in a manner that runs counter to fair competition.

MOFCOM import-export rules: A revised Patent Law requires companies filing patent applications to comply with China's Ministry of Commerce (MOFCOM) Technology Import-Export Administrative Regulations. MOFCOM's new administrative rules, which took effect in March of 2009, require registration with MOFCOM of most technology transfer and license agreements, including patent assignments, assignment of rights to apply for patents, and patent licenses. The new rules do not specify penalties for noncompliance. That said, a registration certificate from MOFCOM is necessary to engage in various commercial activities requiring

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<sup>10</sup> See Notice of the Ministry of Finance on Issuing the "Interim Measures for the Administration of Special Funds for Subsidizing Foreign Patent Applications" ("2009 Interim Measures"), C.J. No. 567 (2009) and Notice on the Submission of Applications for Special Subsidies for Foreign Patent Filings in 2010 ("2010 Guidelines"), Ministry of Finance and State Intellectual Property Office, 19 May 2010.

<sup>11</sup> See Instructions for Completing the "Application Form for Special Subsidies for Foreign Patent Filings in 2010, at ¶ 2(2)(a)

<sup>12</sup> TRIPS Article 3.1

<sup>13</sup> Report for Meeting on the 2010 Scheme for Support of Filing Foreign Patent Applications, SIPO (17 May 2010), available at [http://www.sipo.gov.cn/sipo2008/yw/2010/201005/t20100527\\_520126.html](http://www.sipo.gov.cn/sipo2008/yw/2010/201005/t20100527_520126.html)

<sup>14</sup> See Gutterman, Alan. "Innovation and Competition Policy" Kluwer Law International, 1997, pg 389

<sup>15</sup> SIPO. National Patent Strategy 2011-2020. November 2010 available in English at <http://graphics8.nytimes.com/packages/pdf/business/SIPONatPatentDevStrategy.pdf>

government authorization, including foreign exchange and customs importation – meaning that a failure to register a patent-related agreement in a timely manner could significantly impede commercialization efforts. These requirements interfere with commercial decisions and transactions in a way that inhibits rather than facilitates the development and diffusion of key technologies in the Chinese market.

**Patents and Technical Standards:** The push for domestic standards represents a barrier to the Chinese market. While successful standards generally involve widespread stakeholder consultations, China’s process has restricted participation of some foreign entities. National technology driven standards, as opposed to international ones geared towards performance, artificially advance domestic solutions regardless of technical superiority. We are concerned about the broad scope of China’s standards activities, especially with respect to their potential for discrimination and compulsory licensing. Mandating national standards limits the products to be developed and used within China. Ultimately, China-specific standards will harm international competitiveness.

Additionally, the standard setting process must be fair, transparent, and in range with global practices. As part of its National IP Strategy, China has focused on improving its standards-related policies, including regulating “the process of turning a patent into a standard.”<sup>16</sup> In November 2009, the Standards Administration of China (SAC) issued regulations for public comment<sup>17</sup>. Unfortunately, the SAC proposal departed significantly from patent policies of standards organizations widely accepted internationally. In 2010, the China National Institute of Standardization (CNIS) issued and requested comments from all stakeholders on its Disposal Rules for Inclusion of Patents in National Standards (Disposal Rules). The Disposal Rules appear to eliminate the most problematic aspects of draft regulations previously issued by the Standardization Administration of China, which would have obligated patent owners to grant a royalty-free license or a license with a royalty substantially below market rates. By omitting these highly controversial compulsory licensing requirements, the Disposal Rules are more consistent with international norms

While the Disposal Rules are much improved compared to earlier drafts, more work is required to align them with global standards. For example, infringement of essential patents is based on “commercial feasibility” as opposed to the more customary “technical essentiality.” As a result, possible infringement is broadened to both technical solutions outside the standard and technologies that develop after the standard’s promulgation. The language complicates disclosure requirements and potentially discourages innovation to improve the standard after approval. Further, it is unclear whether entities holding patents but not participating in standard setting will be bound by the Disposal Rules. It is not feasible for innovators to monitor every standard that may be applicable to their patents<sup>18</sup>. Even if non-participating innovators are aware of a particular standardization effort, as a practical matter they should not be bound by a process in which they did not participate.

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<sup>16</sup> Outline of the National Intellectual Property Strategy. SIPO. June 2008. at IV. (17) Available in English at [http://www.sipo.gov.cn/sipo\\_English/laws/developing/200906/t20090616\\_465239.html](http://www.sipo.gov.cn/sipo_English/laws/developing/200906/t20090616_465239.html)

<sup>17</sup> “Regulations on the Administration of the Formulation and Revision of Patent-Involving National Standards (Interim).”

<sup>18</sup> See Disposal Rule 4.1.1 encouraging those “participating and not participating in the standard formulation and revision to disclose any known possible patent related thereto as early as practically possible.”

Compulsory licensing: China's patent law and anti-monopoly law provide the government with broad authority to grant compulsory licenses. The relevant Chinese government agencies have yet to clarify the circumstances under which compulsory licenses may be granted and claim that they have no immediate plans to exercise this authority. Nevertheless, when viewed in the context of China's indigenous innovation strategy, the compulsory licensing provisions are troubling and a source of concern for industry. China is in the process of revising their compulsory licensing regulations, targeted to finish in June of this year.

Delinking Government Procurement from Indigenous Innovation: At the 2010 meeting of the U.S-China Joint Commission on Commerce and Trade (JCCT), China agreed to: (1) limit the use of indigenous innovation policies in the context of government procurement, i.e., it will not "make the location of the development or ownership of intellectual property a direct or indirect condition for eligibility for government procurement preferences for products and services," (2) liberalize foreign company access to wind power project supply bids, and (3) actively honor data exclusivity in pharmaceutical marketing approval process. We are further encouraged by China's recent commitment to delink "its innovation policies" from government procurement preferences following Pres. Hu's visit.<sup>19</sup> China's commitment on indigenous innovation is promising. Close attention needs to be paid to implementation so as to ensure that the top-level words are actually converted into meaningful action. Additionally, it is important to note that China has postponed for further discussion the issue of whether domestic IP ownership requirements may impact other government measures.

Prosecution of Counterfeiting: Currently 99 percent of copyright and trademark counterfeiting cases in China are enforced administratively, rather than criminally. In these circumstances, counterfeiters, if convicted, receive fines that represent just a small cost of doing business, not a real deterrent. A greater number of cases must be referred for criminal prosecution. In addition, in cases when there is a counterfeiting conviction, the equipment used to produce the goods must be destroyed. Under current Chinese practice and law, confiscated IP-infringing products can end up being sold at auction and find their way back into the marketplace. It is far too easy for IP criminals in China to leave the courtroom and resume business as usual. Provincial and municipal leaders in China who are often responsible for enforcement are measured must be held accountable both by the Government of China and internationally on the degree of IP protection afforded within their jurisdictions.

Counterfeit Pharmaceuticals: Over the last year, the Chinese Government has expressed a commitment to reducing counterfeit medicines and has undertaken a series of actions to combat drug counterfeiting. Though the prevalence of counterfeit drugs within and originating from China remains a substantial concern, their efforts to help protect patients within China and globally should be applauded. These efforts include coordination among Chinese authorities to reduce illegal sales of counterfeit medicines, including the large amount of medicines sold through illegal online websites. We hope that China's work in this regard will continue and increase in 2011, as illegal Internet sales is at the core of the worldwide counterfeit medicines problem.

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<sup>19</sup> US-China Joint Statement. The White House. 19 Jan 2011, at ¶127 available at <http://www.whitehouse.gov/the-press-office/2011/01/19/us-china-joint-statement>

## NAM's Other Countries of Priority Concern

The NAM also views a number of other countries of particular concern and recommends they all be designated/re-designated Priority Watch List (PWL) countries for 2010. They are, in alphabetical order:

### Canada:

While we commend recent developments such as the partnership between the Royal Canadian Mounted Police and the IPR Center, Canada simply must take action and responsibility for counterfeit and pirated goods that are transshipped through its territory into the United States. Canadian performance on IPR, particularly in customs enforcement and combating transshipment of counterfeit goods into the United States has been very disappointing. The U.S.-Canada policy dialogue has been good, but Canadian authorities have been unable to deliver the improved laws, practices and enforcement that they have been discussing for several years. The IPR policy dialogue with Canada has long seemed promising, but it is not translating into strengthened enforcement and cooperation at the border and real crackdowns in the marketplace. Furthermore, in regulating industry ostensibly for health reasons, Canada's policy approach has exacerbated problems with illicit and counterfeit trade in the tobacco market and undermined the health objectives set out. We are concerned that steps on this score reflect a disregard for the protection of IP, especially when there is little if any evidence that extreme regulatory measures are effective for other reasons.

### Ecuador:

Ecuador should be on the Priority Watch List for its continuing lax IPR enforcement but more specifically for the blatantly pro-pirate policies threatened, officially decreed, and now implemented by Ecuador's Head of State with regard to patent protections for pharmaceutical and chemical products. We are also deeply concerned with the dramatic erosion in the overall quality of rule-of-law and the near disappearance of judicial independence over the past two years in Ecuador. The current levels of piracy and counterfeiting in Ecuador are troubling. The fact the country's chief of state is endorsing, indeed personally driving an aggressive anti-IPR agenda, cries out for strong U.S. Government attention and action. We would, in particular, suggest that the U.S. government, both the Administration and the Congress, take a very close and skeptical eye toward Ecuador's continued eligibility for U.S. trade preferences in light of its abysmal performance on IPR, governance and its overall anti-American policies.

### India:

India can be a major channel for the export of counterfeits to consumers worldwide. In cases where counterfeit pharmaceutical products bear a deceptive mark, civil and criminal remedies are available under India's trademark statute. However, the effectiveness of such remedies is undermined by judicial delays and, in criminal cases, extremely low rates of conviction. Beyond these trademark-related deficiencies, weaknesses in India's drug regulatory regime can contribute to the proliferation of counterfeit pharmaceuticals and their global export. Even though pharmaceutical counterfeiting is first and foremost a drug safety violation, India has yet to enact drug laws that expressly address all aspects of drug counterfeiting, or to provide the kind of remedies and enforcement resources necessary to combat this growing problem. In India, criminal liability appears to be conditioned upon proof of adulteration or harm. This burdensome evidentiary requirement not only precludes criminal prosecution of many

counterfeiters, but also fails to acknowledge the inherent dangers of any deceptively mislabeled product. Anti-counterfeiting enforcement is further undermined by poor interagency coordination and India's failure to provide administrative remedies for safety violations.

**National Innovation Act/Trade Secret Protection:** The Indian Government is considering a National Innovation Act.<sup>20</sup> The Act includes a range of measures to promote innovation (including an annual "Science and Technology Plan" and provisions to aid public/private partnerships, promote innovation financing and establish special innovation zones), and also codifies rules on the protection of confidential information. (To date, lacking a relevant statute, protection of trade secrets in India relied on common law principles, meaning that the scope of protection was unpredictable.) India – alongside China and Brazil – has historically taken a position that trade secrets (and patents) impede the free exchange of clean technology. Given previously expressed views by India on trade secrets (and innovation more broadly), efforts in this space should be scrutinized to ensure TRIPS consistency and adherence to both the letter and spirit of national treatment.

**Compulsory Licensing:** India's Department of Industrial Policy & Promotion (DIPP) recently produced a discussion paper exploring the scope of compulsory licensing. While we applaud DIPP's efforts to develop a predictable environment for using the measure, we find the overall implication to expand compulsory licensing disconcerting. The paper presumes that systematic compulsory licensing will reduce prices in India and therefore serve the public interest. In reality, such a policy will reduce foreign investment and weaken the incentive to innovate.

Diluting IPR through compulsory licensing must be combated whenever encountered. Any guidance DIPP provides should establish a narrow scope for invoking the measure. The patent system grants its patent holders a limited monopoly under the law in return for sharing innovation. Ignoring this legal exchange ultimately hurts industry. Compulsory licensing should be reserved as a last resort for resolving unexpected crises. Otherwise, India may unintentionally cut off its long-term access to technology improvements.

**National IPR Policy:** We understand that DIPP will soon release a draft National IPR Policy (work, led by the Federation of Indian Chambers of Commerce and Industry (FICCI), has been underway for some time) and solicit public comment on IP issues. Given the recent DIPP consultation on compulsory licensing and India's broader stance on IP in multilateral organizations, the proposed policy should be scrutinized to ensure they avoid proposals for reforms that discriminate against foreign patent owners.

**Excluding Software Patents:** As technology develops and becomes increasingly more complicated, software is essential to making many innovations function. The most recent draft of the Manual of Patent Office Practice and Procedure excludes software innovation as a whole except when combined with novel hardware<sup>21</sup>. Limiting software protection in this manner makes these advances vulnerable to exploitation, serving as a disincentive to innovate. The approach appears to be incompatible with India's own Patents Act, which excludes "computer programmes per se" but not all computer-related inventions.

**Reducing Backlog:** Delays that IP rights holders have historically experienced in patent examinations may be shortened if the Patent Office follows through on its plan to recruit

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<sup>20</sup> (<http://www.dst.gov.in/draftinnovationlaw.pdf>)

<sup>21</sup> Indian Draft Manual of Patent Office Practice and Procedure. 2010. §3(k)

additional patent examiners over the upcoming months. The Patent Office is also currently undertaking a “backlog clearance drive” on pending applications until March 2011.<sup>22</sup> We support India’s efforts to reduce its backlog, reducing uncertainty in our patent assets.

**Standards for Patentability:** Some of the standards for patentability in India are inconsistent with the TRIPS Agreement, depart from the mainstream of practice internationally, or are not transparent. Section 3(d) of the Patents Act, 1970 as amended by the Patents (Amendment) Act, 2005 creates additional hurdles for pharmaceutical and chemical compound patents. Under this provision, salts, esters, ethers, polymorphs, and other derivatives of known substances are considered the same substance and thus not patentable, unless it can be shown that they differ significantly in properties with regard to efficacy. These additional requirements for patentability beyond novelty, commercial applicability and non-obviousness are inconsistent with the TRIPS Agreement, in at least two respects. Article 27 of the TRIPS Agreement provides a non-extendable list of the types of subject-matter that can be excluded from patent coverage. This list does not include “new forms of known substances lacking enhanced efficacy”, as excluded by Section 3(d) of the Indian law. Therefore, Section 3(d) is inconsistent with the framework provided by the TRIPS Agreement. Second, Section 3(d) represents an additional hurdle for patents on inventions specifically relating to chemical compounds and, therefore, the Indian law is in conflict with the non-discrimination principle also provided by TRIPS Article 27. From a policy perspective, Section 3(d) undermines incentives for innovation.

**Law enforcement response to IP infringement:** NAM Members’ experience with in-country law enforcement and Customs, when trying to address issues of IP infringement, has been inconsistent and the response lukewarm. At the higher levels, there is certainly recognition of the need to enforce the rights of IP holders, particularly when the infringement coincides with a fiscal crime, but this does not routinely translate into effective action at the appropriate level. Over the last year, we have seen an inability by law enforcement to deal with IP infringement purposefully and consistently. Initial success following, for example public interest litigation, has not been exploited and the situation has been allowed to slowly backslide. This was most clearly seen in Mumbai (Bombay) last year after a junior Minister of State was personally fined by the Mumbai High Court for failure to provide information regarding the levels of illicit products in the market. There followed a series of concerted and well organized raids in many areas of Mumbai in which contraband and counterfeit product was seized. Rather than reinforcing this success with follow up actions – e.g. public information campaigns, media engagement and criminal actions – or even simply sustaining the effects with repeated action, the matter was dropped as soon as the court order was satisfied and illicit levels in the market place have returned to pre-raid levels.

A lack of resources and training is a key shortcoming in Indian law enforcement. Members’ offers to conduct counterfeit recognition training sessions with street level officers have been met with polite disinterest by higher level officials. In part we attribute this to a perception issue. We continue to see the perception among Indian Law Enforcement personnel that this is not a “criminal” crime, but more of a simple civil infringement. While this attitude pervades, we will struggle to get the support and concerted effort required to deal with this problem.

**Burdensome Bureaucracy:** Indian bureaucracy is extremely complex, disconnected, chaotic and inefficient. India’s cumbersome and slow legal system presents a major challenge to rights holders seeking redress of infringements. We have encountered similar problems this year with external stakeholder engagement. There appear to be no shortage of government

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<sup>22</sup> ([http://ipindia.nic.in/iponew/PublicNotice\\_07December2010.pdf](http://ipindia.nic.in/iponew/PublicNotice_07December2010.pdf))

departments with the theoretical legal competence or mandate to investigate cases of IP infringement, but frequently finding the department that is prepared to actually take ownership and responsibility for an issue has been a challenge. Government authorities often transfer matters to other agencies as a means of avoiding responsibility for taking decisions on those matters. A small example of this occurred most recently in Mumbai where an Assistant Deputy Commissioner refused to accept a criminal complaint despite being provided with detailed evidence of outlets engaged in the sale of illicit product. Getting “buy-in” and achieving delivery from a single agency has presented major challenges for IP protection efforts in 2010.

#### Gulf Cooperation Council:

The six member nations of the Gulf Cooperation Council (GCC) – Saudi Arabia, the UAE, Kuwait, Qatar, Oman, and Bahrain – are smaller, but fast growing economies. They are also heavily dependent on imported products, have limited trade and enforcement infrastructure, and have limited experience in combating counterfeiting, piracy and smuggling. Our members are reporting increased instances of counterfeit products – spare parts, consumer goods, clothing, etc. – in almost all cases apparently from China. Transshipment of counterfeit and pirated goods remains another problem in some of the busier ports in the GCC countries. We commend U.S. Government agencies for their IPR capacity-building efforts in recent years with GCC and other Middle East countries, and urge a continued balance of cooperation and capacity-building, combined with a clear policy message of growing U.S. impatience on IPR issues.

#### Russia:

At the end of 2010 the public consultation period regarding draft amendments to Russia’s IP laws – including rules on patents and trademarks – ended. It is anticipated that the draft amendments will be presented to Parliament during the first half of 2011. The potential impact of the proposed amendments is mixed – some protections for trademarks would be weakened, whilst the proposed patent amendments are generally viewed as beneficial for patent owners. In the present draft, there are no proposed amendments that would change current law on compulsory licensing or create new regulations favoring domestic innovation; however, the draft amendments are still subject to change as they move through the legislative process.

On October 6, 2007, the Russian Federation, the Republic of Kazakhstan, and the Republic of Belarus signed an agreement to form a common customs union (the “CCU”), which was designed to eliminate all customs barriers between the three countries. On November 27, 2009, the three countries approved a Unified Customs Tariff, which came into effect on January 1, 2010. On July 1, 2010, the three countries enacted a Unified Customs Code (the “UCC”), which expressly supersedes any contradictory legislation of the member countries. Russia and Belarus also eliminated the requirement for customs clearance between the two countries. As of July 1, 2011, the elimination of customs clearance will also apply Kazakhstan. Accordingly, as of that date, all internal customs controls between the three countries will disappear, and the only controls that will remain will be at the external borders of the CCU.

Since goods coming from outside the CCU will be able to transit freely within the CCU, unified IPR regulations will be needed to prevent counterfeiters from taking advantage of weaknesses in the IPR regulations in any of the CCU’s member states, because goods entering those states by virtue of those weaknesses will be able to transit freely to the other member states. Conversely, counterfeiters may seek to use those weaknesses as a means of exporting

infringing goods outside the CCU. To avoid such a scenario, the internal customs regulations (including IPR protection and enforcement) amongst the member states must be harmonized. It is expected that this process will be carried out by January 1, 2012, but U.S. authorities need to ensure that the process is actually an effective one.

## Venezuela:

As in Ecuador, IPR is just one area where the decline in rule-of-law, respect for private property, and a market economy is threatened in Venezuela. With the Venezuelan Government, led personally by the Chief of State, daily attacking the private sector and demonizing international companies, it is not surprising that respect for IPR and enforcement of even Venezuela's own IPR laws and regulations is waning. We urge the Administration to include anti-counterfeiting and anti-piracy concerns among our growing list of major policy issues to raise forcefully with the Venezuelan authorities.

## Countries for Consideration on the Watch List

### Brazil:

We are concerned with Brazil's call to restrict IP rights in retaliation for the long-standing dispute over US cotton aid. While the WTO recognizes Brazil's right to suspend IP rights, even temporary action will have serious repercussions across industry worldwide. Scientific progress and economic recovery require companies to invest both at home and abroad. IP enables this long-term technology investment, serving as a means for our members to commercialize R&D spending. Plans to suspend IPR, even for a short time, destroy the predictability these assets provide to the market. Absent the ability to secure profits, investments in technology become too risky an enterprise. Any retaliation along these lines will result in a chilling effect on patent filings and technology investment in Brazil.

Trade with Brazil, one of today's fastest growing economies, is vital to our own success. President Obama has set a goal of doubling exports by 2014. Over half of US exports originate from IP intensive industries. Thus, IP serves as a vital trade asset and a driving force behind our innovation-based economy. Our companies require a stable legal environment to enforce its IP. While recently Brazil has taken steps to position itself as a regional center for innovation and technology, signaling out IP for retaliation tarnishes its reputation. It sends a profoundly negative signal to innovators, both local and foreign, and seriously impedes our ability to invest there. We urge the United States and Brazil to quickly reach a negotiated permanent solution to the dispute, one that directly addresses the agriculture industry and does not harm either of our countries' prospects for long-term growth.

INPI's Ability to Modify Contracts: Economic growth through innovation is most efficient when companies are allowed to freely contract for goods and services. However, Brazil's National Intellectual Property Institute's (INPI) role in to approve all IP licensing and technology transfer agreements<sup>23</sup> potentially impinges on that freedom. INPI frequently establishes limits on royalties and confidentiality clauses and prevents the return of technology at the end of contracts.<sup>24</sup> INPI's authority to interfere dates back to the 1970s and Law 5648/70, establishing INPI and granting it the authority to regulate technology transfer. While the law changed in 1996, formally ending INPI's power to interfere in licensing agreements, INPI continues the practice today.<sup>25</sup>

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<sup>23</sup>See Article 211 of the Brazilian Industrial Property Law (Law 9279/96)

<sup>24</sup> PF Barroso and JC da Matta Berardo The Role of the Brazilian PTO in the Recordal of Licence and Transfer of Technology Agreements. Executive View. March 2010 available at [http://executiveview.com/knowledge\\_centre.php?id=11228](http://executiveview.com/knowledge_centre.php?id=11228)

<sup>25</sup> It should be noted that Law 9279/96 still requires INPI to record IP licensing and technology transfer agreements.

Within Brazil today, it appears attitudes towards INPI's power to intervene are shifting. In a recent court decision, the Second Specialized Chamber held that INPI's authority does not include limiting "the values or percentages to be adopted by the parties, within the scope of their industrial or manufacturing concerns."<sup>26</sup> Specifically, the court explained that Brazil has "prioritized free enterprise and competition in the marketplace, with broad opening to foreign capital." There are also indications that the attitude within INPI may be changing. INPI's President Jorge Ávila recently remarked that the policy is being reviewed. He expects INPI to adopt an advisory position rather than imposing changes to a signed agreement. We commend Brazil's recent policy shift and urge the country to foster an open marketplace.

Supporting INPI: Like other major patent offices, INPI is experiencing a serious backlog, with an average patent pendency of eight-nine years. Unless this is addressed, the inability to timely obtain issued patents in Brazil will perpetuate a serious drag on innovation and impair the ability to commercialize increasing levels of Brazilian R&D. NAM applauds INPI efforts to improve delivery of services in the IP area, taking the necessary steps to hire examiners and enhance internal processes to reduce patents and trademarks applications backlogs. We are also encouraged by the USPTO's efforts to cooperate with INPI including the training of examiners. Further measures to facilitate progress towards dealing with backlog and supporting patent quality will be a focusing of resources on INPI's core missions of examining and granting patents and the elimination of interference of non-INPI government agencies in the patent examination process.

#### Egypt:

With its strategic geographic position between Asia and Europe, Egypt is a hub for transshipment and transit of counterfeits. Under Egyptian law, Customs does not have explicit authority to seize infringing goods in transit or in Free Economic Zones. Moreover, there are inconsistencies between Egypt's Border Measures regulations (import and export laws falling under the authority of the Ministry of Trade and Industry) and its Customs Laws (laws falling under the authority of the Ministry of Finance), which give rise to uncertainty amongst Customs and judicial authorities responsible for handling IPR infringement cases. As a result, the current IPR regime does not provide for adequate protection of IP rights. Egyptian authorities have explained that a new draft of the regulation is expected to be issued in early 2011, and provided further reassurance that Egypt's IPR legislation will be improved to better protect the rights of trademark owners.

One other positive development is the establishment of the National Observatory for the Monitoring of the Industrial Products (the "Observatory"), which was created in 2010 under the auspices of the Ministry of Trade and Industry. The objective of the Observatory is to centralize and coordinate the anti-counterfeiting efforts of the various government entities, including law enforcement agencies. While this is an encouraging development, U.S. authorities should cooperate with the Egyptian government to help ensure the Observatory will actually make a positive difference. The auctioning of seized counterfeit goods is another significant problem in Egypt. Under Egyptian law, authorities have the right to sell seized goods at auction without determining whether the goods are authentic or counterfeit. The NAM contends that the destruction of these goods is the only way to ensure that they are not resold into the illicit trade and into the hands of unsuspecting consumers. In order to prevent that eventuality, goods determined to be counterfeit should be destroyed immediately.

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<sup>26</sup> TRF2, CASE No. 2007.51.01.800906-6, Reporting Justice Messod Azulay Neto

## Turkey:

Strategically located at the convergence of the European, Middle Eastern and Central Asian regions, transshipment remains a serious problem with Turkey. Chinese and Russian counterfeit products seem to flow through Turkey to Western Europe (taking advantage of Turkey's Customs Union with the EU) and the Middle East. We urge the Administration to continue to work closely with the European Union on IPR issues in Turkey, given Turkey's interest in accession into the EU.

## Multilateral Areas of Concern

**Green Technology:** In our submission last year, the NAM noted a key new area of IPR concern affecting our "green technologies" manufacturing strategies. We avoided being injured in the international negotiations last December that followed up on the Copenhagen Conference on Climate Change. We commend the U.S. negotiators who managed to ensure that "green technologies" were not exempt from IPR rules and laws. Some nations, led by India and China, have been insisting throughout the preliminary negotiations that "green technologies" must be subject to a "compulsory licensing" regime so that developing nations can immediately access the latest environmentally-friendly industrial technologies without having to comply with standard IPR rules or indeed the rule-of-law more generally.

Leading the G77, Brazil, China and India have threatened compulsory licensing of clean energy patents. This must be strongly resisted. Providing free or reduced cost access is seen by some developing countries as yielding benefits, but such a result is far from certain. Producing more complex offerings generally requires access to a combination of patented innovation and know how. While patent owners can be compelled to license their IP, it is practically impossible for a regulation to forcibly transfer trade secrets. Even if access to a desired technology is achieved through compulsory licensing, it will severely damage the incentive for further innovation. Granting licenses to entities outside the innovation chain prevents participating entities from recouping their investments. It cuts off long-term access to technology improvements as it discourages private sector investment. Preventing this from happening must be a priority objective for the United States in order to avoid the possibility of a huge disincentive for innovation.

At the Copenhagen Summit some countries called for a compulsory licensing system regarding transfer of green technologies with a mechanism similar to the compulsory licensing mechanism for the production and export of generic versions of patented drugs to countries with insufficient capacity to manufacture or access those drugs. Compulsory licensing came up again at the Cancun UN Climate Talks in December 2010, where Brazil, South Africa, India and China said that they would not support a carbon reduction deal until absent an understanding on technology transfer. By the end of the Cancun summit, negotiators specifically omitted IPR related language in the global climate change framework, as well as in any of the technology-related parts of the agreement in particular. NAM strongly approves of this outcome. IPRs are exhaustively regulated elsewhere in the international context and IPR-related language has no place in a climate change agreement.

**World Health Organization (WHO):** Brazil, India and Thailand continue efforts to promote their domestic health and IP agendas at WHO – including in the context of WHO's ongoing efforts to implement its 2008 Global Strategy on public health, innovation and IP. The Strategy is aimed at improving treatment for developing country diseases by encouraging innovation into those diseases and by facilitating access and affordability of existing products (pharmaceuticals,

vaccines and diagnostics). WHO implementing projects include a study aimed at identifying obstacles to tech transfer and mechanisms for overcoming such obstacles (with a report due in 2011); a study on barriers to the use of innovative technologies by developing countries; and the establishment of a consultative expert working group to look at new approaches to the financing and coordination of R&D. In all of these venues, Brazil and India seek to erode the position of IP proponents as part of their industrial policies. WHO is clearly moving into the field of technology transfer promotion. In this arena we are likely to see efforts to develop principles governing this activity which seek to weaken property rights of innovators. The United States must work with other innovation countries to avoid any such weakening.

The WHO has pursued efforts to forge agreements and generate guidelines at the international level that implicate manufacturing industries. While the NAM applauds legitimate efforts to encourage public health, such efforts within the WHO should also be scrutinized for their reliance on peer reviewed science and an evidentiary basis for any agreements, conventions and guidelines. Furthermore, it will be important that understandings reached in the WHO be structured so as to ensure continued adherence with WTO disciplines, including TRIPs, which have already taken into account public health considerations in the context of previous rounds of negotiations. In short, the WHO should not be encouraged, in effect, by governments to seek to undermine objectives set forth in other international bodies, such as the WTO, which have been carefully crafted through consensus decision-making factoring in all stakeholder perspectives over many years.

World Intellectual Property Organization (WIPO) Development Agenda: WIPO continues efforts to implement the 2007 Development Agenda. The Committee on Development and Intellectual Property (CDIP) will meet again in May 2011 in an effort to agree a program of future work. To date, CDIP efforts have included studies focused on issues like exceptions/limitations alongside capacity building initiatives; moving forward, developing countries may push for more substantive efforts such as “pro-development” norm setting, possibly with a focus on particular sectors such as clean tech (mirroring developing nation efforts in the UNFCCC). The U.S. Government should engage to ensure these efforts are consistent with WIPO’s constitutional mandate to strengthen and improve IP globally.

## Conclusion

The manufacturing of many of the products with which we come into contact every day, and those we do not touch or see, are the result of the innovation spawned by America’s market economy and the innovation of management and workers. America supports the protection of their intellectual property in our Constitution. This Administration and the Congress have spoken of their support of American innovation and its role in a resurgence of manufacturing here at home. That resurgence is dependent on many variables; but the aggressive protection of intellectual property rights, in our opinion is a keystone to that policy. Our members seek strong action in this regard.

For its part, the NAM has and intends to continue to step up its own efforts on IPR, especially anti-counterfeiting and anti-piracy. Having established an International IPR Task Force we will work to identify practical measures to support IPR protection and articulate them to IPEC, USTR, CBP and the Congress.

We look forward to working closely with USTR, with the other member agencies of the Special 301 Committee, with the office of the U.S. IPR Enforcement Coordinator in the Executive Office of the President, and with the Congress.

