National Association of Manufacturers
2013 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 and aggressive U.S. Government approach to international intellectual property (IP) rights protection and enforcement given the importance that IP has to the development and growth of manufacturing industries throughout the United States and the competitiveness of manufacturers in the global economy. Our members are also committed to working with the U.S. Government to develop improved approaches to enhance IP protection both at our borders and abroad.

IP rights are the lifeblood of our economy, and the protection of those rights assures manufacturers that their inventions will be secure as they create jobs and build industries around them. Manufacturers in every state rely on IP rights – such as patents, copyrights, trademarks, test data and trade secrets – as an integral part of business both domestically and globally. As the U.S. Department of Commerce found in its April 2012 report, IP-intensive industries accounted for $775 billion, or 60.7 percent, of total U.S. merchandise exports in 2010.[i]

The NAM is making this submission to highlight the impact that IP theft and erosion of IP protection has on manufacturing. For the United States to retain and grow its manufacturing base, the protection of the intellectual assets of our innovators, including patents, trademarks, and trade secrets, both domestically and internationally is critical. Counterfeiting and piracy threaten far more than company sales, exports, profits and reputation. When counterfeits get onto markets, consumer health, safety and life itself are put at severe risk.

To illustrate the damaging impacts of counterfeiting, consider the following story from a NAM Member:

> *"My company has been a victim of counterfeited products in the Middle East for years. A former customer took our product and had it made in China with our name on it. The packaging was duplicated and they had our name on the box with our instructions with our name and address on it. This allowed him to sell a counterfeit product to steal our market and with inferior product single handedly ruined our product's reputation. It took us 30 years of hard work to create our good name and it took the counterfeiter only two years to ruin it. We were finally able to track the counterfeiter down and seek justice which in [country] takes years, so far more than seven. Sometime soon we hope to get our money damages."*

The Impact of IP Theft on Manufacturing in the United States

Regrettably, our members have not seen significant improvement in the concerns we detailed in our 2012 submission, and our comments in that submission remain relevant today.

Last year, United States Customs and Border Protection (CBP) reported that the value of seized goods increased from $1.1 billion in Fiscal Year (FY) 2011 to $1.26 billion in FY 2012.[ii] China continues to be the number one source country for IP-related seizures, accounting for 72 percent of the total value seized. In FY 2012, China and Hong Kong accounted for 84 percent of seizures, or $1.1 billion, an increase of 10.4 percent over the previous year or $124.7 million of the total domestic value of seizures.[iii]

The top categories of products seized include products posing potential consumer safety or security risks. In FY 2012, pharmaceuticals were the top article seized, followed by consumer electronics and parts, cigarettes, critical technology components, automotive parts, toys and food.[iv]

IP protection and enforcement are issues for virtually all of our members. Manufacturing is dependent on intellectual property, including patents, trademarks, trade secrets, trade dress and copyright. Counterfeiting and piracy are existential threats to manufacturers, the people they employ, and the consumers who come in contact with their products and services. IP protection is critical to promote innovation, particularly in those areas where the United States and the world are looking for solutions to global problems, such as energy efficiency, reducing emissions, and leading the world in the adoption of green technology and enhanced medical care.

IP Erosion in Multinational Institutions

The international framework for IP protection and enforcement, including foreign IP legislation and regulations in key emerging markets, global IP rules at the WTO and elsewhere, is under serious threat. There are continued calls by some non-governmental organizations (NGOs) and some governments for the adoption of policies that would weaken or eviscerate IP rights. Oftentimes, such calls are accompanied by claims that weakening or denying IP rights is somehow necessary to accomplish laudable ends – addressing environmental challenges, promoting development, protecting health or fostering equity. In actuality, such proposals too often lack any evidentiary basis or economic analysis. To the contrary, such proposals will likely do more harm by undermining the innovation that is needed to solve major global challenges. Such policies would seriously weaken, and in some cases, destroy the value of the IP assets that manufacturers in the United States have built and continue to build as companies commercialize research and development (R&D), and would lead to significant harm to the competitive positions of our manufacturers in fast-growing markets around the world to the detriment of American jobs and growth.

Efforts to renegotiate critical rules for all types of IP protection are unfolding in a range of fora, from climate change negotiations to the World Health Organization. This strikes at the heart of the global IP infrastructure that allows investors and manufacturers in a wide range of industries, including clean energy and environmental technology, consumer and medical products and advanced technology to capture the value of innovation. Threats to manufacturing IP rights exist in a range of international fora. In most instances, the countries involved are the same: China, India, Brazil, Venezuela, and Bolivia.

United Nations Framework Convention on Climate Change (UNFCCC): Global climate change negotiations continue to proceed under the auspices of the UNFCCC. In this context, China, India, Bolivia, and Venezuela, as well as a number of well-funded and highly active NGOs, have all called for compulsory licensing or other forms of “flexibilities” with respect to clean technology

and other environmental goods and energy-related IP Rights. These countries and others falsely portray IP rights as "barriers" to international technology transfer despite the proven positive effects such IP rights have in enabling and encouraging innovation, and the development, dissemination and deployment of existing and new technologies. Calls to weaken IP rights and to make the discussion about IP rights an agenda item have also consistently been a negotiating tool that these countries have used against the U.S. and other developed countries. For the same reasons, they have tried to portray the need for IP weakening as a "moral" rather than science- or evidence-based cause. Calls for weakening IP rights were specifically rejected during the high-level COP16 meeting in Cancún in December 2010, which remained silent on IP issues despite G-77 calls that they be weakened and that "flexibilities" be imposed. Nonetheless, the same issues were raised again during the 2011 COP17 meeting in Durban, South Africa, and the 2012 COP18 meeting in Doha, Qatar. There is a real threat that they will continue to be on the negotiating agenda for the months and years to come.

Rio+20: In June 2012, world leaders met in Rio de Janeiro, Brazil, for the 20th anniversary of the United Nations Conference on Environment and Development (Rio+20). The objective was to secure renewed political commitment for sustainable development. Several proposals for the agenda raised significant IP rights issues that have no place in the Rio+20 negotiations. Proposals by countries such as Brazil, Bolivia and India in particular, portray IP rights as a barrier to technology transfer and dissemination, and call for compulsory licensing and other forms of IP "flexibility". Their proposals, as in the case of parallel efforts in the UNFCCC, would harm a wide range of U.S. industries and technologies and would be counterproductive from an environmental, economic and development perspective as well. Suggestions that IP rights form a threat to the dissemination and diffusion of technology are unsubstantiated and are fundamentally contradicted by economic and market evidence.

World Health Organization (WHO): Global recognition of the need to address Non-Communicable Diseases began in 2000, with the endorsement of a Global Strategy for the Prevention and Control of Noncommunicable Diseases (NCDs). More recently, the UN has adopted a 2008-2013 NCD Action Plan. While these efforts are generally laudable and merit broad-based U.S. and industry support, a variety of interests, ranging from certain G-77 governments to key anti-IP NGOs and others, were able to push problematic language into the final Political Declaration of a September 2011 High-level Meeting of the UN General Assembly on the Prevention and Control of NCDs.[v] The UN language as adopted sets a harmful precedent and creates international legal ambiguity that may provide an opening for anti-IP NGOs and countries to construe the NCD mandate broadly. Weakening diagnostics and medical technology-related IP rights will be counterproductive in light of the urgent need for more extensive global trade and additional investment in relevant NCD-related technologies, services and goods.

NAM is also concerned by the work currently taking place within the WHO's Consultative Expert Working Group on Research and Development: Financing and Coordination (CEWG). In particular, the CEWG is currently preparing a report that will recommend, among other measures, that Member States enter into a globally binding treaty to regulate the financing and coordination of health focused R&D (the 'Global R&D Treaty"). Domestic manufacturers are deeply committed to innovation in public health for the benefit of the developed and developing world. A binding R&D treaty, however, such as that currently contemplated by the CEWG, will undermine IP rights and the innovation and technology diffusion that they enable, rather than promote those objectives. As a result, important innovations in health technologies of particular relevance to developing countries and emerging markets are put at risk, and critical competitive

advantages that U.S. industries and workers have spent years to develop may be lost. A dangerous precedent in terms of IP erosion for other sectors and industries would be set. Once again, China, India and Brazil appear to be the driving force.

World Trade Organization (WTO): The December 2011 WTO Ministerial Meeting agreed to extend for a period of one more year a moratorium on so-called TRIPs "non-violation" cases that has been in force since the Uruguay Round WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) first entered into force in 1995. "Non-Violation Nullification and Impairment" disputes are allowed in other areas of WTO law and, in the IP area, could be a powerful additional tool to help address ongoing challenges to U.S. innovation and advanced technology around the world. The moratorium was originally negotiated to be in place for no more than five years. Fifteen years later, however, the moratorium continues to be extended by unanimous consent. It is time to end the moratorium. At the 2013 WTO Ministerial, the United States should send a clear signal that basic rules, including those on IP rights, must be enforced by allowing the moratorium to expire at the end of this year.

World Intellectual Property Organization (WIPO): At WIPO, the work programs of Committees are being driven by an increasingly negative agenda that is focused on exceptions and limitations to IP, rather than its effective protection and enforcement. As in other forums, at WIPO, a group of emerging countries continues to argue, without supporting evidence, that IP rights are a barrier to access to new products and services and must be weakened or eliminated. At the WIPO Standing Committee on Patents, for example, Brazil has even proposed that a manual be developed to instruct countries as to how they can limit and weaken IP rights. We are concerned that the WIPO Secretariat's publications and capacity-building activities often reflect the IP-skeptic perspectives of certain members as well. In contrast, WIPO officials should promote the value of intellectual property, and communicate its critical role as a tool underpinning innovation, technology diffusion, economic growth, and social and economic advancement. The Secretariat must adopt a practical and evidence-based – rather than political – approach when talking about IP-related challenges and opportunities.

Topical Areas of Concern

IP Cross-Retaliation: The NAM continues to be concerned by calls from Brazil and certain other countries to restrict IP rights in retaliation for the lack of resolution of long-standing WTO trade disputes. While the WTO recognizes limited IP suspension rights, even temporary action of this sort will have serious repercussions across industry here in the United States and worldwide. Such actions would be particularly injurious where there is no agreed protection to terminate the retaliation, to unwind compulsory licenses and return full rights to IP holders. Scientific progress and economic recovery require companies to invest both at home and abroad and to be able to rely on consistent, sustained and predictable IP legal frameworks. IP serves as a vital trade asset and a driving force behind our innovation-based economy. Any use of IP cross-retaliation should be avoided whenever possible and limited, in any event, to countries whose economic size and industry focus force them to have recourse to it (e.g., Least Developed Countries or other very small economies only).

Goods in Transit, Transshipment and Free Trade Zones: Illicit goods in transit continue to be a significant issue for NAM members. Deficient or limited legal powers prevent and inhibit customs authorities in some countries from acting to seize goods in transit, in Free Trade Zones 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 our 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 illicit trade in counterfeit products of all kinds to the detriment of brand owners. The NAM is also concerned about the potential risk that counterfeit products seized by customs authorities may be released back into commercial circulation – whether for sale abroad or indeed for re-import, for example in the EU. Laws need to ensure that counterfeit goods under customs supervision can be intercepted and prevented from further transit.

Cooperation from Law Enforcement: Cooperation from law enforcement authorities 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. As well, the NAM supports further engagement with and encouragement of foreign government action to undertake meaningful law enforcement activities and to allocate sufficient resources to eliminate the production of and trade in counterfeit goods.

Destruction of Seized Goods and Equipment: As mentioned in the 2012 USTR report, "important elements of a deterrent enforcement system include requirements that pirated and counterfeit goods, as well as materials and implements used for their production, are seized and destroyed."[vi] It is important, therefore, that governments adopt legislation to ensure all seized counterfeit goods, materials and related manufacturing equipment are swiftly and completely destroyed, protecting both IP 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.

Express Mail Shipments: Counterfeit goods used to be mainly shipped through container cargo and potentially air cargo. Now shipments direct to consumers appear poised to become the prevalent form of transport. Overseas rogue websites and remote sellers ship counterfeit goods into the United States using international mail services and airmail. CBP inspects these shipments and then transfers them to the USPS for delivery to U.S. consumers. Overseas remote sellers often misdeclare small individual mailings to avoid detection of these counterfeit goods by CBP agents. Moreover, many overseas websites will ship in several small packages to avoid seizure or offer refunds for seized product to attract U.S. consumers. The ability of the USPS to detect and inspect these packages is complicated by the fact that materials shipped domestically by first-class, priority or express mails are closed to inspection without probable cause, and as a result, many shipments still go undetected. Mail ports need additional equipment resources and simplified and streamlined procedures to tackle this issue. Given these challenges with mail shipments, the U.S. Government should continue and strengthen its work with other countries with the objectives of improving the efficiency of shipments and minimizing shipments of counterfeits. The United Kingdom's model is a great example of how these issues can be handled more effectively.

Labeling Restrictions: As noted in NAM's 2011 and 2012 submissions, another area of significant concern includes 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 proposals deny manufacturers of products the right to use their trademarks or logos on packages other than brand and product names in government mandated typeface.

Regrettably, legislation has been implemented by the Australian Government mandating the plain packaging of all tobacco products, thereby requiring the destruction of a key form of IP: trademarks. Australia's plain packaging requirement violates Australia's international trade obligations, undermines the rules-based international trading system, lacks a sound scientific or evidentiary basis, and sets a dangerous precedent of government-mandated IP destruction. This requirement represents a draconian assault on the legal rights of IP owners and is void of regulatory best practice considerations. NAM also strongly opposes proposals by other governments to adopt similar packaging or labeling requirements that harm the protection and enforcement of IP rights.

Compulsory Licensing: The NAM is also concerned by increasing foreign government actions to push for mandatory transfer of IP (including trade secrets) in areas of public interest such as such as health[vii] (particularly in China and India), environmental technologies,[viii] chemical intermediates and most recently telecom security,[ix] well beyond the limited cases where compulsory licensing is authorized. These trends are fueled by the view that "[d]eveloped country enterprises are often reluctant to license new technology on terms and conditions that will permit developing country enterprises to effectively compete in world markets." Thus, "[c]ompulsory licensing, and the threat of compulsory licensing, are necessary to make transfer of technology a reality." [x]

As made clear in the WTO TRIPs agreement,[xi] compulsory licensing is an exceptional action to be used in emergency situations pursuant to clear rules and limitations. Unfortunately, those rules are increasingly being ignored as governments seek to expropriate a wide range of manufactured products, from pharmaceutical and medical devices, and clean energy and environmental technologies to other advanced technologies.

Increasing efforts to expand the use of compulsory licensing beyond emergency circumstances represents a major threat to the competitiveness of manufacturers in the United States and their ability to continue to innovate, retain and grow jobs and support economic growth.

Trade Secrets: Trade secrets are a key form of IP protection and are vital to the well-being and competitiveness of many of America's most important industrial and services industries and sectors. At the international level, trade secrets are protected under Article 39.2 of the WTO TRIPS agreement, which provides that natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent "in a manner contrary to honest commercial practices". The strength and competitiveness of domestic firms increasingly depends upon their know-how and intangible assets. One recent estimate placed the value of trade secrets owned by U.S. publicly traded companies at five trillion dollars.[xii] Some believe that trade secrets are "arguably the most important and most heavily litigated intellectual property right."[xiii]

Such emerging attempts to erode IP rights by forcing their disclosure and/or transfer from the "haves" to the "have-nots" could have particularly corrosive effects on trade secrets. Patents, for example, have always been considered IP rights, and as such, it is difficult for a government to argue that the holder of a valid patent is engaged in anti-competitive conduct if he is simply exercising his inherent right to refuse to license the technology at issue.[xiv] Trade secrets, on the

other hand, are protected by many governments only through a cause of action for breach of contract (if privity exists) or misappropriation through theft, bribery, espionage or misrepresentation.

When trade secrets are not considered IP rights under applicable national law, their protection is diminished because they are subject to ever changing standards of "unfair competition" and/or "commercial ethics." Indeed, a cause of action for misappropriation of trade secrets typically is included in broadly-worded unfair competition laws that have been inconsistently applied[xv] and sometimes used to accomplish industrial policy objectives. In the event a trade secret is stolen and illicitly purveyed, it is very difficult, if not impossible, to limit the damages to the owner.

Many trade secrets have played an integral role in the success of the companies who own them for decades confirming the choice of these companies not to put them in the public domain via patents or other means. Once they enter the public domain through misappropriation, however, it is very difficult to contain their spread and damage. As a result of the IP and procurement policies of certain countries, however, trade secrets and the value that they provide are increasingly under threat.

NAM members remain particularly concerned about inadequate trade secret protection and enforcement in China. While it is encouraging that China has included trade secret protection as part of its IP initiative in the 12th Five Year Plan – given that the current regime for protecting trade secrets and enforcing trade secret violations remains anemic and well below U.S. and international norms – authorities at the provincial and municipal levels remain reluctant to take aggressive action to enforce IP when it involves foreign companies. For this reason, it is not infrequent for the initiation of trade secrets cases to incite a proliferation of the misappropriated knowledge, rather than putting a halt to it, as is typical in the United States. 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. Furthermore, there have been repeated instances when misappropriated knowledge has gone unpunished after its discovery. The absence of solid enforcement means there is no deterrent to future perpetrators committing the same theft. A few high-profile trade secret cases that have emerged suggest that trade secret theft may have tracked back to either state-owned enterprises or national champions with close ties to the government. As China continues to improve its policies regarding trade secrets, the NAM would like to see the treatment of trade secrets in the permitting, approval and enforcement process brought to a level that is on par with international norms.

Cybersecurity. Cyber-based economic espionage in particular constitutes a drain on U.S. IP, places targeted companies at a major competitive disadvantage, and ultimately threatens U.S. national security. Recent high-profile examples include unauthorized network breaches that a range of companies have experienced and are linked to state-sponsored entities and non-profits and allowed unauthorized access to the targets' network footholds and exfiltration of sensitive IP to remote servers. In cases such as these, perpetrators have stolen vast quantities of trade secrets, including design schematics, legal contracts, business negotiation plans and source code and highlight the magnitude of the global threat against trade secrets and underscore the need for policymakers and governments to respond. Strengthening cybersecurity requires increased collaboration and coordination among the United States, foreign governments, and industry. Industry-driven best practices can guide efforts to formulate broader cybersecurity policy and facilitate efforts to secure networks, increase penalties for cybercrime, and educate government officials, both in the United States and in other countries, about the high priority

manufacturers place on strong cyber security measures and the importance of protecting the privacy and security of information.

Top Country of Concern: China

NAM member companies report that the problems of IP theft and enforcement remain rife in China, and request that China remain under Section 306 monitoring.

Despite continued attention to this issue and some improvements in China's laws and IP enforcement over the years, many companies report that there has been little change in conditions over the past several years. NAM member companies continue to see significant challenges in IP protection and enforcement in several areas, including in consumer product counterfeiting, inadequate standards and protections for patented and copyrighted material, preferences for Chinese-created IP products, and limited enforcement action and penalties.

The NAM recognizes recent positive efforts by China to improve its enforcement capabilities related to counterfeiting, but several concerns remain on this front. Fundamentally, the NAM would like to see unified support throughout different levels of the Chinese government to improving their respective IP and trade secret regimes, as noted above. 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. However, trade secrets protection efforts need to receive a higher priority.

There remain concerns that China is protecting its domestic companies, to the detriment of foreign-invested enterprises, by favoring the acquisition of international technology and IP by local enterprises. IP used as a competitive tool is also a way to block foreign imports from China. Indigenous innovation is merely one of the issues.

There are a number of additional concerns relating to IP and innovation. The Multi-Level Protection Scheme, under the guise of national security, threatens to remove products with foreign intellectual property from use in many sectors. The lack of openness in China's standard setting process leaves room to restrict market access to foreign companies, giving locally developed IP another advantage. China Compulsory Certification (CCC), which first took effect in 2003, serves as yet another discriminatory barrier with expensive domestic testing and factory inspections that needs reform. Major infrastructure contracts often require transfer of technology to local enterprises, sometimes resulting in the creation of competitive Chinese technology as was the case with high-speed rail. Finally, though not yet applied, the recently revised Patent Law raises apprehensions for new provisions of compulsory licensing.

Other Countries/Trading Blocs of Concern

Australia: For mandating the destruction of an entire industry's trademarks (plain packaging) in contravention of its international trade obligations.

Canada: For failure to address counterfeit and pirated goods that are transshipped across the border with the United States and failure to deliver the improved laws, practices and enforcement that they have been discussing for several years.

Ecuador: For its continuing lax IP enforcement but more specifically for its blatantly pro-pirate policies with regard to patent protections for pharmaceutical and chemical products.

European Union: For the potential release back into commerce of counterfeit products seized by EU custom if the EU's draft Border Enforcement regulation COM(2011)285 is not amended, including by covering explicitly goods and transit and placing the burden of proof on the owner of the goods (rather than the right holder).

India: For remaining a major channel for the export of counterfeits to consumers worldwide and ineffectiveness of remedies through judicial delays and, in criminal cases, extremely low rates of conviction and consistently promoting the view that trade secrets (and patents) impede the free exchange of clean technology and compulsory licensing.

Russia: For the lack of a positive change with respect to the current Russian legal regime for compulsory licensing and enforcement and decriminalizing smuggling of contraband goods.

Ukraine: For its failure to effectively address piracy and counterfeiting and the transshipment of pirated and counterfeit products to third countries.

Venezuela: For continued decline in rule-of-law, respect for private property, and a market economy.

Ideas to Enhance IPR Enforcement and Protection

Strengthen IP Efforts and Coordination at U.S. Embassies: A positive development in recent years is the work of 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 IP 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 IP 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 company that 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.

Embassy Action Plans: We commend the efforts by the IPEC and other agencies, including the Departments of State and Commerce, in developing action plans at U.S. embassies and consulates to further the protection of IP in foreign countries. The NAM will continue to work with the IPEC to help deliver practical information on what a manufacturer should do when he discovers counterfeiting of his products. U.S. 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 IP 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 IP enforcement from USTR, IPEC and CBP to the Departments of State, Justice, and Commerce must be appropriated sufficient funds to carry out their responsibilities.

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. The World Customs Organization (WCO) has recognized the routine inspection of goods as the "most important method for Customs to detect" shipments of infringing products, accounting for 37 percent of seizures in 2008.[xvi] The authority to inspect shipments and goods is no less important with respect to goods in transit or goods in FTZs. Of the seizures that involved shipments using transit routes, 54 percent were seized en route to their final destinations, which shows that Customs should have the authority to conduct inspections and seizures over goods in transit and goods in FTZs.[xvii]

Identify and Fix Outdated U.S. Government Regulations and Policies: Last year, NAM called for the government to address the ill-advised decision of the Department of Homeland Security 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 CBP's 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 the government 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.

Conclusion

The manufacturing of many of the products with which we come into contact every day, and those we cannot touch or see, are the result of the innovation spawned by America's market economy and the innovation of management and workers. The resurgence of manufacturing in the United States is dependent on many variables; but the aggressive protection of IP rights must be one key component of that policy.

IP rights protection and the erosion of IP rights is truly a global concern for the NAM. The NAM is committed to ensuring that the United States and our trading partners strongly protect and enforce IP rights. 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.

Endnotes

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[i] U.S. Department of Commerce, **Intellectual Property and the U.S. Economy: Industries in Focus** (April 2012).

[ii] http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/ipr/ipr_communications/seizure/fy2012_final_stats.ctt/fy2012_final_stats.pdf

[iii] *Ibid.*

[iv] *Ibid.*

[v] Specifically, that Declaration now calls on UN members to the "full use of trade-related aspects of intellectual property rights (TRIPS) flexibilities" with respect to "affordable, safe, effective and quality medicines and diagnostics and other [medical] technologies".

[vi] 2012 Special 301 Report, Office of the United States Trade Representative, p. 15-16.

[vii] "Declaration on the Trips Agreement and Public Health," DOHA WTO Ministerial, WT/MIN(01)/DEC/2 (20 November 2001).

[viii] Several years ago the European Parliament called for a study on opening and amending TRIPS to provide compulsory licenses to IPR for "environmentally necessary" technology. *See* European Parliament resolution of 20 November 2007 on trade and climate change (2007/2003(INI)); available: http://www.europarl.europa.eu/sides/getDoc.do?Type=TA&Reference=P6-TA-2007-0576&language=EN. China also has "called for policy instruments to be considered, including 'compulsory licensing for patented ESTs (environmentally sound technologies), etc.'." Tim Wilson, "The Debate Surrounding Patents And Low Carbon Technology Is Heating Up," (4/20/09). *See also* China, Submission Of Views On The Elements Contained In The Bali Action Plan; available: www.unfccc.int.

[ix] *See, e.g.,* India Department of Telecommunications Revised Orders No. 10-15/2009-AS-III/193 (March 2010) (required service providers to mandate in their contracts that foreign equipment manufacturers transfer all critical equipment/software to Indian manufacturers within three years of signing the purchase order) and No. 10-15/209-AS.III/Vol.II (Pt.)(25) (July 2010) (mandated a template to be signed by vendors and operators for procurement of equipment that included a clause for escrowing source code). These regulations have since been amended due to significant opposition by foreign governments and industry.

[x] UNCTAD-ICTSD, RESOURCE BOOK ON TRIPS AND DEVELOPMENT 487 (Cambridge Univ. Press 2005) (emphasis added).

[xi] "Declaration on the Trips Agreement and Public Health," DOHA WTO Ministerial, WT/MIN(01)/DEC/2 (20 November 2001).

[xii] *See* Elizabeth A. Rowe, "Contributory Negligence, Technology, and Trade Secrets," 17 *George Mason Law Review* (2009), 1.

[xiii] Michael Risch, "Why Do We Have Trade Secrets?," 11 *Marquette Intellectual Property Law Review* (2007), 1.

[xiv] *See, e.g.* TRIPS Art. 28. Article 55 of China's Anti-Monopoly Law, for example, recognizes that it is not an abuse of IP if the IP holder is simply exercising its rights granted by Chinese IP laws.

[xv] The disparate treatment of trade secrets is perhaps best summarized by Mark Lemley:

> [N]o one can seem to agree where trade secret law comes from or how to fit it into the broader framework of legal doctrine. Courts, lawyers, scholars, and treatise writers argue over whether trade secrets are a creature of contract, of tort, of property, or even of criminal law. None of these different justifications has proven entirely persuasive. Worse, they have contributed to inconsistent treatment of the basic elements of a trade secret cause of action and uncertainty as to the relationship between trade secret laws and other causes of action. Robert Bone has gone so far as to suggest that this theoretical incoherence indicates that there is no need for trade secret law as a separate doctrine at all. He reasons that whatever purposes are served by trade secret law can be served just as well by the common law doctrines that underlie it, whichever those turn out to be.
>
> In this Article, I suggest that trade secrets can be justified as a form, not of traditional property, but of *intellectual* property (IP). . . .

Mark A. Lemley, "The Surprising Virtue of Treating Trade Secrets as IP Rights," 61 *Stanford Law Review* 311, 312 (2008) (citations omitted).

[xvi] World Customs Organization 2008 Customs and IPR Annual Report, p. 11.

[xvii] World Customs Organization 2008 Customs and IPR Annual Report, p. 10.