

**Comments of
The National Association of Manufacturers
On India's Draft National IPR Policy**

The National Association of Manufacturers (NAM) appreciates the opportunity to provide the following comments regarding India's December 19, 2014 Draft National IPR Policy ("Draft Policy").

The NAM is the largest manufacturing association in the United States, representing businesses small and large in every industrial sector and in all 50 states. Our membership includes multinational businesses with operations in many countries, as well as small and medium-sized firms active in international trade. Across the United States, manufacturing employs nearly 12 million women and men and accounts for two-thirds of private sector research and development.

Importance of IP for India's Economic Growth and Competitiveness

Robust intellectual property (IP) protections are increasingly important for manufacturing, particularly as demand for knowledge-intensive goods grows. The NAM welcomes the Draft Policy's recognition of the critical role that IP plays in fostering innovation and promoting economic growth. We appreciate India's initiative to create a distinguished IPR Think Tank of experts to prepare the policy.

Manufacturing will play an increasingly important role in India's competitiveness. We welcome the attention the Government of India is giving to building capabilities in this regard. Innovation has become inextricably linked to manufacturing, a sector that depends on intellectual property to thrive. To provide unique insight into opportunities and challenges facing industry, we recommend expanding the Think Tank to include a representative from India's knowledge-intensive manufacturing sector.

As described below, the Draft Policy outlines several valuable steps that could result in an environment more conducive to India's economic growth and competitiveness. At the same time, however, it does not set forth a concrete strategy with clear and explicit IP goals and specific steps to advance India's innovation potential. For example, while the Draft Policy seeks to "raise India's position in the global indices of innovation and competitiveness," it does not appropriately recognize the role effective IP policies would play in achieving that goal.

As the Draft Policy acknowledges, India continues to trail other emerging economies in a number of globally respected surveys. In the most recent World Economic Forum Global Competitiveness Index, India fell from 60th to 71st place, ranking behind every G20 country but Argentina.¹ Similarly, India has fallen eight places on the World Bank's Doing Business Report (from 134th to 142nd place out of 189 countries), which is more than 50 places behind China.² Indeed, as U.S. President Obama recently highlighted during his visit to India, U.S.-India trade

¹ World Economic Forum, "The Global Competitiveness Report 2014–2015," http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf, at 13.

² World Bank Group, "Doing Business 2015: Going Beyond Efficiency," <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB15-Full-Report.pdf>, at 4.

valued at \$100 billion a year still lags well behind U.S.-China trade valued at \$560 billion a year.³

These results are consistent with a recently-released survey of more than 3,700 businesses by the U.S International Trade Commission (ITC). The ITC found that more than 60 percent of firms affected by regulatory and IP barriers in India have responded by directing fewer resources to the Indian market and making other strategic changes. However, eliminating trade and investment restrictions and raising IP protection standards in India would increase U.S. exports to that country by two-thirds and more than double U.S. investment.

Raising IP protection standards and establishing predictable and effective IP frameworks is critical for the growth of India's manufacturing economy. As one study has shown, the knowledge-intensive portion of global goods flows is growing 1.3 times faster than the rate of labor-intensive goods flows that account for the bulk of India's current exports.⁴ If India wants to grow and attract investment in advanced manufacturing, as well as address barriers to doing business in India, its IP policy should identify concrete steps necessary to achieve that goal.

Strong IP protection and enforcement also provide powerful incentives for solutions to global challenges, including increasing energy efficiency and pollution control, promoting life-enhancing technologies, and delivering the next generation of lifesaving medicines. Strong IP protection and enforcement benefits consumers, patients and innovators alike. Yet rather than acknowledge this critical connection, the Draft Policy appears to suggest IP and consumer benefits are somehow in tension.

The Draft Policy should reflect the important contributions of innovation and IP to society and fully embrace the Draft Policy's proposed "Creative India; Innovative India" motto by promoting investment in and development of new inventions to the benefit of consumers in India and beyond.

IP Protections

The NAM welcomes the Draft Policy's recognition of the need for laws that address gaps in its existing trade secret protection framework. Securing strong protections against trade secret theft and effective enforcement and deterrence mechanisms is a priority for manufacturers around the world. We recognize that an earlier 2012 draft National IPR Draft Policy also recommended the need to improve India's trade secrets regime and hope this new Draft Policy provides momentum to move forward with trade secret law reform.

We recommend the Draft Policy provide more specific direction on improvements necessary to facilitate the growth of India's knowledge intensive industries. In particular, we suggest the inclusion of national legislation that protects against trade secret misappropriation by a broader range of actors than is possible today.

³ The White House, "Remarks by President Obama at U.S.–India Business Council Summit" (Jan. 26, 2015, 7:24 PM), <http://www.whitehouse.gov/the-press-office/2015/01/26/remarks-president-obama-us-india-business-council-summit>.

⁴ McKinsey Global Institute, "Global flows in a digital age: How trade, finance, people, and data connect the world economy" (April 2014), http://www.mckinsey.com/~media/McKinsey/dotcom/Insights/Globalization/Global%20flows%20in%20a%20digital%20age/MGI_Global_flows_Full_report_April2014.ashx, at 3.

The NAM also welcomes the Draft Policy's recommendation that India's Department of Industrial Policy and Promotion (DIPP) "study the role of IPRs in setting standards in the various areas of technology" and "actively participate in standards setting processes at national, international and industry Standard Setting Organizations' levels and to encourage the development of global standards that are influenced by technologies and IP generated in India." We encourage the DIPP to commit to strong enforcement of FRAND duties and obligations, which require companies that voluntarily gave FRAND commitments to license any essential patents incorporated into an industry standard on fair, reasonable, and non-discriminatory terms.

Today, many manufactured products require seamless interoperability – a feature that would be impossible without Standard Setting Organizations (SSOs). SSOs create industry standards that allow every company that manufactures standard-compliant products to participate in the market with confidence that their products will work with all other standard-compliant technologies. Voluntary FRAND commitments make widespread interoperability possible by ensuring any company can license the patented technology necessary to practice and industry standard on reasonable terms.

Robust investment in and protection of industry standards are key requirements for an innovative, high-tech economy. As India develops its National IPR Policy for the future, it must ensure companies cannot abuse SSOs and gain monopoly power by allowing their patents to be incorporated into industry standards and then violating their FRAND commitments once those standards are adopted. At the same time, care should be taken that participation by innovators in standards-setting activity does not undermine the value of the related IP.

In many other areas, we are disappointed that the Draft Policy seems to promote and reinforce the status quo, while failing to address particular challenges with India's current IP framework. For example, India's stated goal to avoid "TRIPS plus provisions" is out of step with the practice of many other countries, which have adopted more robust protections than those enshrined in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) more than 20 years ago. That goal also seems to contradict other objectives set out in the Draft Policy, including revisiting India's IP laws to keep up with "global developments" and "progress in science and technology".

In another example, while the Draft Policy specifically embraces protecting "small inventions", it fails to address serious concerns that manufacturers are facing under India's existing patent law. Under TRIPS, patents must be granted for inventions that are new, involve an inventive step and are capable of industrial application. However, Section 3(d) of India's patent act creates a fourth hurdle for patentability: "enhanced efficacy." It does not reflect the fact that much innovation is incremental, appears contrary to India's goal of making patents easier for 'small inventions' and comes at the expense of India's own innovators. As India increases its local research and development activities, the ability to patent "small inventions" will become increasingly important in furthering India's innovative capacity.

We appreciate that paragraph 3.6 of the Draft Policy calls for further study on certain policy developments including with respect to any ambiguities and inconsistencies in India's IP laws and also exceptions and limitations. Within this context, we strongly encourage India to address its laws and policies that encourage compulsory licensing, including the National Manufacturing Policy, on the basis that a product is not "worked" or manufactured in India. Such requirements appear to be inconsistent with India's TRIPS obligation not to discriminate against imports and to create uncertainty for innovative industries seeking to invest in India.

We also want to highlight concerns with paragraph 3.6.3, which proposes that protection of undisclosed information not extend to data exclusivity. Such protections are critical for manufacturers. Without protections for undisclosed test or other data generated to secure marketing approval for pharmaceutical and agricultural chemical products, innovative companies in India do not have the ability to prevent others from copying a product and seeking marketing approval immediately thereafter. This significantly undermines investment incentives necessary to develop and bring such products to market.

Other Issues

The Draft Policy sets forth detailed goals for improving the effectiveness of India's IP administration. As the strategy itself notes: "As intellectual property increases in significance and contributes to economic development, the importance and role of IP administration and management has also expanded." We agree that it will be important for India to continue to modernize offices responsible for administering IP rights, promote greater digitization and address backlogs and encourage the government to provide the needed resources to carry out these tasks.

One such challenge is the significant harm caused to industry and consumers by piracy and counterfeiting and the urgent need to improve enforcement, as recognized by the Draft Policy. The Draft Policy also prioritizes the strengthening of enforcement and adjudicatory mechanisms for combating IP violations. As noted in the Draft Policy, the harm caused by counterfeiting and piracy to IP owners and consumers alike is significant. While there are a number of useful elements discussed in this part of the strategy, it is highly important that India provide for and secure penalties sufficient to deter future infringements.

Conclusion

Thank you again for the opportunity to review and offer comments on this Draft Policy. We strongly support the Government of India's work to promote greater attention to and transparency surrounding the protection and enforcement of IP rights in India. In light of the recent, constructive meetings between President Obama and Prime Minister Modi, now is an opportune time to build from this initial Draft Policy to develop a strong strategic, result-oriented approach that will concretely advance a shared agenda to promote increased trade, innovation and investment in our economies. The NAM looks forward to working with you to advance these important goals.