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# Pre-Hearing Statement

**of Linda Dempsey**

Vice President, International Economic Affairs  
National Association of Manufacturers

Before the U.S. International Trade Commission

Hearing on

“Trade and Investment Policies in India: 2014-2015”  
Inv. 332-550

Submitted on April 23, 2015



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Chairman Broadbent, Vice Chairman Pinkert, and Commissioners, I welcome the opportunity to be here today on behalf of the National Association of Manufacturers (NAM) on “Trade and Investment Policies in India.”

The NAM is the nation’s largest industrial association and voice for more than 12 million women and men who make things in America. Manufacturing in the U.S. supports more than 17 million jobs, and in 2014, U.S. manufacturing output reached a record of nearly \$2.1 trillion. It is the engine that drives the U.S. economy by creating jobs, opportunity and prosperity. The NAM is committed to achieving a policy agenda that helps manufacturers grow and create jobs.

The NAM’s primary objective is to promote policies that enable manufacturers to compete successfully in an ever-changing global economy. At home, we seek outcomes on tax, infrastructure, innovation, workforce and other issues that will attract manufacturing growth. From an international perspective, the NAM is a leader in promoting open markets, new Trade Promotion Authority legislation and trade and investment agreements in Asia and with Europe that will eliminate barriers and set in place core rules of non-discrimination and fairness. Additionally, we work to make sure that all governments, including our own, play by the rules.

Manufacturers in the United States have long sought to be partners in India’s growth and development. As India pursued economic reforms launched in the 1990s and opened important sectors to new investment, manufacturers from the United States expanded bilateral commercial ties and sought to grow commercial partnerships.

As I testified last year, while the NAM has continued to hear positive stories from some manufacturers, such as in the defense and aerospace sector, businesses across many manufacturing sectors reported substantial concerns with a deteriorating business, trade and investment climate in India over the last several years.

Many of these concerns and experiences were reflected in the International Trade Commission’s review of those issues in its report issued in December 2014.<sup>1</sup> This view is also echoed in the most recent World Economic Forum Global Competitiveness

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<sup>1</sup> Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy, USITC Pub. 4501 (December 2014), accessed at [http://usitc.gov/publications/332/pub4501\\_2.pdf](http://usitc.gov/publications/332/pub4501_2.pdf).

Index, where India fell from 60<sup>th</sup> to 71<sup>st</sup> place, ranking behind every G20 country but Argentina.<sup>2</sup> Similarly, India fell eight places on the World Bank's Doing Business Report (from 134<sup>th</sup> to 142<sup>nd</sup> place out of 189 countries), which is more than 50 places behind China.<sup>3</sup>

Today, I will focus on the issues that Commission is examining in this new investigation – significant changes by the new Indian government to India's trade and investment policies. Despite the election of Prime Minister Narendra Modi last year on an "open for business" platform, the Indian government has taken very few concrete steps to improve the trade and investment relationship with the United States other than engaging in high-level dialogue with the U.S. government. While dialogue is highly important, such engagement has not produced substantial improvements in key areas of longstanding concern, including India's import policies, its protection and environment of intellectual property (IP) rights, its climate for foreign investment and its discriminatory forced localization policies. In fact, as detailed in this statement and expanded in our post-hearing brief, the NAM continues to hear from many of its members of a deteriorating trade, investment and property protection environment for manufacturers across many sectors since Prime Minister Modi took office.

I will focus briefly on four fundamental issues in the U.S.-India commercial relationship and the NAM will provide additional information in a post-hearing brief.

### Tariffs and Trade Facilitation

India continues to maintain a complex and non-transparent tariff system with average applied tariffs that are at least three times higher than equivalent U.S. rates, according to data compiled by the World Trade Organization (WTO). The Modi government has continued these tariff policies and has continued to increase tariffs.<sup>4</sup> As part of the 2014-2015 Union Budget, the government of India issued Customs Notification 11/2014. This notification increased tariffs from zero percent to ten percent on four broad categories of telecommunications equipment and technologies.<sup>5</sup> Given that these goods appear to be covered by the WTO Information Technology Agreement, to which India is a Party, imports of these products should be provided duty-free treatment entering the Indian market.

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<sup>2</sup> World Economic Forum, **The Global Competitiveness Report 2014–2015** (Dec. 2014), [http://www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport\\_2014-15.pdf](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf) at 13.

<sup>3</sup> World Bank Group, **Doing Business 2015: Going Beyond Efficiency** (Oct. 29, 2014), <http://www.doingbusiness.org/-/media/GIAWB/Doing%20Business/Documents/AnnualReports/English/D15-Full-Report.pdf>, at 4.

<sup>4</sup> **World Tariff Profiles 2014**, WTO, accessed at [https://www.wto.org/english/res\\_e/booksp\\_e/tariff\\_profiles14\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/tariff_profiles14_e.pdf).

<sup>5</sup> Office of the United States Trade Representative (**USTR**) **2015 National Trade Estimate Report on Foreign Trade Barriers**, accessed at <https://ustr.gov/sites/default/files/2015%20NTE%20Combined.pdf>; Telecommunications Industry Association (TIA); **TIA Public Comments Regarding the 2015 National Trade Estimate Report on Foreign Barriers to Trade** (Oct. 29, 2014) (TIA Comments), accessed at <http://www.tiaonline.org/sites/default/files/pages/TIA%20Submission%20for%202015%20NTE%20Report%20-%20USTR-2014-0014%20-%20Final.pdf>.

Equally critical to international trade flows are the customs and related trade facilitation measures that countries impose. For over a decade, the WTO worked to create an international agreement to reduce significantly the barriers that countries face in moving goods by expediting the movement, release and clearance of goods, and providing for the effective cooperation on trade facilitation and customs compliance issues. As documented by the World Economic Forum, those barriers are mostly found in developing countries and impose the highest costs on other developing countries. In December 2013, the WTO concluded a new Trade Facilitation Agreement (TFA) after providing the former Indian government assurances on unrelated food security issues. At that December 2013 WTO Ministerial Council, the Council adopted a decision directing the WTO General Council to formally approve and start implementation of the TFA protocol of accession in July 2014.

Unfortunately, rather than embracing a strong trade facilitation agenda, one of the first major acts by the new Modi government on the international stage was to almost derail this important agreement. India prevented the WTO General Council from adopting the TFA by the end of July 2014 by consensus and made its support (which had already been accorded by the prior Indian government) contingent on additional and unrelated demands that the WTO provide India additional leeway to continue its distortive food policies and subsidies. As a result of India's action, the TFA was delayed months, until November 2014. Ultimately, the WTO and India agreed to another set of assurances on food practices and India finally agreed to allow the WTO General Council to adopt by consensus decision the implementation of the TFA on November 27, 2014 and open it up for ratification.<sup>6</sup> While the United States has already implemented the TFA and many other countries have moved towards implementation, India has yet to move forward concretely to implement the TFA, although its customs and border practices are highly cumbersome, restricted, and non-transparent, which affects not only U.S. and many other countries' exports into India, but India's ability to participate successfully in global supply and production chains.

### Intellectual Property

Robust intellectual property (IP) protections are increasingly important for manufacturing, particularly as demand for knowledge-intensive goods grows. India's IP protection and enforcement have been weakening in recent years, with India's deviation from basic and internationally recognized rules. The Modi government has not reversed any of these policies and the environment has deteriorated with several patent denials and revocations in the last six months. On a positive note, the Modi government has begun engaging in some high-level discussions with the United States on IP issues for the first time in a long time and convened a think tank on these issues since taking office. Yet, there is no concrete change in the protection of innovation and intellectual property in India. As reported recently by the *Times of India*, many innovative startups are moving their innovation and intellectual property out of India and into countries such

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<sup>66</sup> WTO, **Trade Facilitation**, accessed at [https://www.wto.org/english/tratop\\_e/tradfa\\_e/tradfa\\_e.htm](https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm).

as Singapore and the United States because of the lack of certainty in IP protection in India.<sup>7</sup>

On April 30, 2014, the Office of the United States Trade Representative (USTR) kept India on the Priority Watch List, recognizing India's "weak IPR legal framework and enforcement system"<sup>8</sup> and announced an Out-of-Cycle Review (OCR) to assess India's progress in constructive engagement with the United States on these issues.<sup>9</sup> USTR found in its December 2014 OCR conclusion that India had begun to engage with the United States, including by establishing a high-level working group on IP as part of the U.S.-India Trade Policy Forum.

Beyond engagement, however, the OCR did not identify any specific actions by India to address longstanding IP protection and engagement concerns and the NAM has not seen any concrete improvement in the IP environment in India over the last year. In fact, significant and growing challenges to securing and enforcing IP rights remain for industries across the manufacturing and other sectors. India has taken no concrete steps to bring its law into line with international rules and norms and manufacturers have seen the continued erosion of patent rights as India promotes actions designed to benefit its own domestic industries at the expense of patent holders and other IP rights holders in the United States and elsewhere. For example:

- Over recent years, India denied, revoked or compulsory licensed patents for more than 20 innovative health therapies that are patented in many other countries around the world and shows no indication that it is changing course in the treatment of U.S. and other foreign products. India has continued to deny and revoke patents over the last year, including three revocations since December 2014, including for a rheumatoid arthritis treatment. The order revoking the patent on that product coincided with the launch of a generic version by an Indian company.<sup>10</sup>
- Similarly, there has been no change from India's 2011 National Manufacturing Policy that encourages the compulsory licensing of green technology that is "not available at reasonable rates" or is not manufactured in India.<sup>11</sup>
- As well, India's National Competition Policy requires IPR owners to license all "essential facilities" which appear to include a wide range of technologies with

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<sup>7</sup> E. Fok and V. Aggarwal, "One Reason Startups Are Moving out of India," **Times of India** (Apr. 10, 2015), accessed at <http://timesofindia.indiatimes.com/tech/tech-news/One-reason-startups-are-moving-out-of-India/articleshow/46877840.cms>.

<sup>8</sup> USTR, **2014 Special 301 Report** (April 2014), accessed at <https://ustr.gov/sites/default/files/USTR%202014%20Special%20301%20Report%20to%20Congress%20FINAL.pdf>.

<sup>9</sup> USTR, **Statement by the Office of the U.S. Trade Representative on the Out-of-Cycle Review of India**, (Dec. 2014) accessed at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/December/Statement-by-the-Office-of-the-USTR-on-Out-of-Cycle-Review-of-India>.

<sup>10</sup> Bloomberg Government, **India Revokes Humira Patent After Petition by Generic Drugmaker**, January 2015.

<sup>11</sup> Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, **National Manufacturing Policy**, November 2011.

correspondingly broad application.<sup>12</sup> The right to exclude is a key component of IPR, and the National Competition Policy's blanket curtailment of such rights may damage the incentives intellectual property is intended to create for advanced manufacturers in India and in many other countries around the world.

- Data protection remains a serious problem in India. USTR's Special 301 Report consistently has highlighted India's failure to provide adequate and effective protection against unfair commercial use, as well as unauthorized disclosure, of undisclosed test or other data.
- Copyright piracy is widespread across India, despite reforms passed in 2012. Nearly two-thirds of all software, valued at \$2.9 billion, is not properly licensed.<sup>13</sup>
- India does not provide adequate and effective protection for trade secrets, meaning that businesses abroad may have little recourse against contract service providers in India that misappropriate trade secrets. While India recognized the need to improve its trade secrets regime in its 2012 and 2014 drafts of a National IPR Policy, the country has not taken concrete steps in this area.

On December 19, 2014, India released a draft National IPR Policy<sup>14</sup> prepared by a distinguished think tank of experts. The NAM welcomed the Draft Policy's recognition of the critical role that IP plays in fostering innovation and promoting economic growth and India's initiative to create a panel of distinguished experts to prepare the policy. As the NAM detailed in comments<sup>15</sup> submitted on January 30, 2015, 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, the Draft Policy 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. In many respects, the Draft Policy was a missed opportunity for India to develop a plan to turn around a weak and worsening IP climate.

### Local-Content Requirements

Forced localization poses a serious and growing threat to manufacturing and jobs in the United States, blocking trade in strategic and innovation-intensive sectors and

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<sup>12</sup> National Competition Policy, Section 5.1(vi). Technologies include at least "electricity, communications, gas pipelines, railway tracks, ports, IT equipment.

<sup>13</sup> BSA, The Software Alliance, **The Compliance Gap - BSA Global Software Survey** (June 2014), accessed at [http://globalstudy.bsa.org/2013/downloads/studies/2013GlobalSurvey\\_Study\\_en.pdf](http://globalstudy.bsa.org/2013/downloads/studies/2013GlobalSurvey_Study_en.pdf).

<sup>14</sup> **National IPR Policy**, submitted by IPR Think Tank (19 Dec. 2014), accessed at [http://documents.nam.org/IEA/India\\_IPR\\_Policy\\_24December2014.pdf](http://documents.nam.org/IEA/India_IPR_Policy_24December2014.pdf).

<sup>15</sup> Comments of The National Association of Manufacturers on India's Draft National IPR Policy, National Association of Manufacturers (Jan. 30, 2015), accessed at [http://documents.nam.org/IEA/FINAL\\_NAM\\_Comments\\_IndiaIPRPolicy.pdf](http://documents.nam.org/IEA/FINAL_NAM_Comments_IndiaIPRPolicy.pdf).

undermining hard-won technology and productivity gains that have made our nation one of the most competitive producers in the world.

India's longstanding array of forced localization barriers poses a particularly serious unfair competitive challenge to manufacturers in the United States and one that has not abated, and in fact has grown, over the last year. These barriers add to the cost and complexity of exporting to one of the closed G20 nations.

As the NAM explained in last year's investment, India has systematically forced the local production of everything from information technology and clean energy equipment to medicines and medical devices pursuant to the manufacturing policy issued in late 2011. Since the new Modi government took office, there has been no significant relaxation of these barriers; rather, new measures are being imposed that continue to impose localization requirements contrary to international rules and norms.

For example, India has indicated that it is moving to implement local testing and certification for telecommunications equipment that would limit access of foreign telecommunications equipment. These discriminatory and unnecessary restrictions are exacerbated by India's inadequate testing and certification services.<sup>16</sup>

In addition, India's Department of Electronics and Information Technology has not only continued implementation of its September 2012 order mandating the compulsory registration of categories of electronic and information and communications telecommunications (ICT) goods that entered into force in January 2014, it has expanded by 15 categories the electronics and ICT goods covered by this rule in late 2014.<sup>17</sup> These procedures impose highly burdensome, costly and cumbersome requirements on U.S. exports of electronics and ICT equipment by requiring that even products certified by internationally recognized laboratories must go through duplicative testing and registration requirements by the Bureau of Indian Standards (BIS), which lacks the capacity to administer this program.

In addition to prior imposition of localization barriers on solar energy developers, India reportedly is considering forced localization rules for power generation that would require developers of so-called "ultra mega power projects" to source from a few local companies.

Other existing barriers and local registration requirements on cosmetics, biotechnology, and food products have been continued by the Modi government without improvement.

### Barriers to Foreign Direct Investment in India

India maintains substantial barriers to investments, including equity caps and performance requirements that limit investment based on requirements for local

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<sup>16</sup> USTR, **2014 NTE Report** and TIA Comments, *supra* note 3.

<sup>17</sup> USTR, **2014 NTE Report**, *supra* note 3.

production or sourcing. The Modi government took two steps to allow more foreign investment in manufacturing and related industries in August 2014, allowing 100 percent ownership in railway infrastructure (without prior government review) and raising the cap for foreign direct investment in the defense sector to 49 percent from 26 percent (without prior government review). The Indian government, however, prohibited foreign investors from controlling joint ventures to manufacture defense equipment and foreign manufacturers had hoped to see the foreign equity cap raised to at least 51 percent.

In April 2015, India released its draft Model Bilateral Investment Treaty (BIT).<sup>18</sup> BITs are important instruments in the global rules-based system and more than 3,000 BITs have been adopted by countries globally to attract and ensure basic rules are guaranteed to foreign investors in their economy, and enforced by neutral dispute settlement procedures. High-quality, market-opening BITs play a strong role in helping countries to attract investment, particularly when there are substantial challenges in a market.

As the NAM explained in its [detailed comments](#), India's proposed new treaty deviates substantially from global standards and India's own investment treaty practice. It contains:

- A highly limited scope, that excludes new investment, intellectual property, and the type of investment contracts vital to countries seeking to grow infrastructure investment;
- Weak or non-existent standards on the core issues of protection; and
- Limited and restrictive provisions and procedures on dispute settlement.

In its present form, the draft Model Indian BIT fails to provide adequate levels of protection, market opening or enforceability for existing or future investment. In a world where there is substantial competition for investment flows to promote economic growth, India's proposed movement backwards in investment treaty practice sends precisely the wrong signal to manufacturers in the United States and other investors. If adopted in its present form, the draft BIT would detract from, rather than enhance, India's ability to attract new investment given the signal it sends that India is not even willing to maintain basic rule-of-law standards from its earlier investment treaty practice. In short, the draft Model Indian BIT does not form an acceptable basis for the United States and India to continue BIT negotiations.

## Conclusion

The NAM appreciates the continued leadership of the House Way and Means and Senate Finance Committees in seeking information on how India's policies and activities affect the trade and investment relationship with the United States and in particular the U.S. manufacturing sector. We welcome the Commission's review and

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<sup>1818</sup> Draft Model Indian Bilateral Investment Treaty, accessed at [https://mygov.in/sites/default/files/master\\_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf](https://mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf).

investigation and look forward to working with the Commission as it examines in depth India's continuing and increasing discriminatory and burdensome policies and activities that negatively impact U.S. manufacturing, manufactured exports and foreign sales, investment and innovation.