Statement of the U.S. Chamber's Global Intellectual Property Center

ON: United States International Trade Commission Section 332 Investigation on Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy

TO: United States International Trade Commission

BY: U.S. Chamber of Commerce

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The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

Statement
to the
UNITED STATES INTERNATIONAL TRADE COMMISSION
on behalf of the
U.S. CHAMBER OF COMMERCE
Thursday, January 30, 2014

Thank you for providing industry with the opportunity to comment on the U.S.-India trade relationship. The Global Intellectual Property Center (GIPC) was established in 2007 as a division of the U.S. Chamber of Commerce. As the Chamber's intellectual property champions, the GIPC strives to highlight the importance of intellectual property, or IP, in creating jobs, saving lives, advancing economic growth and development around the world, and generating breakthrough solutions to global challenges.

IP is a critical driver of trade, jobs, competitiveness, investment, and overall economic growth. Several studies clearly demonstrate the positive and cumulative economic impact of IP in the United States and abroad. According to the U.S. Department of Commerce, U.S. intellectual property industries accounted for $5 trillion or 34.8 percent of U.S. GDP, 60 percent of U.S. exports, and 40 million American jobs, with 42 percent higher wages than in other industries.

Similarly, the European Patent Office and the European Union Office for Harmonization in the Internal Market recently released a similar study, which found that IP-rights intensive industries created 35% of all jobs available in the EU and produced 39% of the EU's GDP, worth nearly €5 trillion.

While studies have shown the importance of IP to fostering jobs, stimulating economic growth, and creating knowledge economies, the Indian government continues to disregard protecting intellectual property. Over the last 18 months, these policy, regulatory, and legal decisions have deteriorated India's investment climate, particularly its IP environment, making India an outlier in the international community.

The Chamber recently released the 2014 edition of the International IP Index, *Charting the Course*, which maps the IP environment in 25 countries around the world based on existing international standards and best practices[i]. The Index provides a comprehensive review of all policy sectors where IP is important, including patents, trademarks, copyright, trade secrets and ratification of international treaties. The scores are benchmarked based upon 30 indicators, which officials from a range of industry sectors identified as the criteria important to driving innovation, creating jobs, and attracting foreign direct investment. The Index is not intended to be a tool to name and shame countries with poor IP protections, but rather to provide a roadmap for countries looking for specific ways to strengthen their IP environments.

Both the inaugural report, released in 2012, and the 2014 edition found that India ranked last overall behind Brazil, Thailand, and well below China among most indicators. The study, which is produced by an independent research firm, reflects what many in industry are already experiencing: the Indian government has demonstrated a pattern of behavior which led to the rapid deterioration of the IP environment, making India an outlier in the international community. While the then-President of India declared the next 10 years to be India's "Decade of Innovation" in 2010, clearly India's policies are inconsistent with the former President's rhetoric.

Please find below specific policy examples across a range of industry sectors which are affecting the IP community in India and causing concerns throughout the business community.

Multi-Industry Concerns:

India has an extensive copyright industry, producing more feature films, than any other country in the world. However, the government's copyright legislation fails to adequately protect Indian creators and innovators. While the Indian government passed greatly needed copyright legislation last year, this legislation contains many deficiencies that cause it to fall short of its intended purpose of implementing the WIPO Copyright Treaty. The GIPC Index found that the copyright legislation both fails to comply with the Berne three-step test, which protects the right of exclusive reproduction, and lacks adequate measures relating to digital rights management. The absence of both provisions in the legislation could severely undercut the rights of India's creative industries.

The motion picture industry continues to face further challenges relating to piracy in India. The revised copyright legislation fails to provide adequate and effective protections to prevent the unauthorized copying of movies in theaters and optical disc piracy. India is among the top ten countries in the world for Internet piracy. According to a study released by the Motion Picture Distributor's Association (MPDA), pirated films out of India appear on the Internet in an average of 3.15 days, making India one of the top ten worst countries in the world. In addition, in 2012, the Entertainment Software Association (ESA) reported that India is sixth in the world in terms of number of connections by peers participating in the unauthorized file sharing of certain ESA member titles on public peer-to-peer networks. Lastly, camcording incidents in India continue to be a serious problem, with India accounting for 53 percent of all forensic matches in the Asia Pacific in 2012.

The film industry is not the only victim of piracy in India. The recording and music groups estimate a total of $431 million in lost revenue in 2011 to piracy, and the reported rate of PC software piracy in 2011 was 63 percent in India, with the commercial value of unlicensed U.S. software in India estimated to be more than $2.9 billion.

The green technology sector also faces challenges India. According to India's new National Manufacturing Policy, a domestic clean tech company has the option to ask the government to issue a compulsory license for a patented technology under one of the following two conditions: (1) if the patent holder is not providing the technology at a reasonable rate, or (2) if the technology is <u>not</u> being "worked on" in India.

India's tax policies provide further concern to industry, specifically, the policies related to compensation for captive development centers. U.S. multinationals generally assign routine development work to their India development centers. The development centers bear no financial risk for their development work and do not own any of the resulting IP rights. Accordingly, they are compensated on the internationally accepted cost-plus method. India's tax authorities are increasing their application of the profit-split method to determine development center compensation, effectively allocating a portion of the U.S. parent's IP profit to India. India's development centers operate similarly to other international development centers and should be similarly compensated on the internationally-recognized cost-plus basis to reduce controversy and minimize double taxation.

In addition, in spite of recent calls for greater investment by foreign industry, the Indian government continues to demand forced local content requirements.

Finally, within the bio-pharmaceutical industry, there have been many recent examples and a clear pattern of deterioration of IP rights. In March 2012, the Indian Patent Board issued a compulsory license on Nexavar, a Bayer drug used for cancer treatment. While the Patent Board claimed to be acting in accordance with the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, the fact that Nexavar is not manufactured locally is not a condition for issuing a compulsory license under TRIPS.

In April 2013, the Indian Supreme Court denied a patent on a Novartis cancer drug, Glivec, even though the patent is recognized and valid in 40 other countries. In July 2013, the Intellectual Property Appellate Board (IPAB) revoked GlaxoSmithKline's patent on the cancer drug Tykerb. In August, IPAB also revoked two Allergan products for treating glaucoma, Ganfort and Combigan.

Yet, despite what some will have you believe, India's actions are not about access to medicine. In many of these cases, the drug maker gave the drug to Indian consumers either free of charge or at a greatly reduced cost. In the case of Glivec, Novartis provided the leukemia drug to 95 percent of the 16,000 patient population for free, while the remaining 5 percent was heavily subsidized. The annual cost for Glivec generic treatment is approximately $2,100 or three to four times the average annual income in India. Thus, it is actually more expensive for Indian patients to obtain access to these medicines after the patent revocation than it was before.

Patent revocations also go beyond the pharmaceutical sector. In July 2013, IPAB denied Monsanto's patent application for a genetically-engineered method of increasing climate resilience in plants, the first such denial under Section 3(d) for a patent not related to pharmaceuticals. The continued deterioration of the Indian IP environment will have far-reaching implications on foreign direct investment, technology transfer, and economic growth.

Implications of a Poor IP Environment

The U.S. Chamber's GIPC currently serves as the co-chair of the Alliance for Fair Trade with India (AFTI) with the National Association of Manufacturers. The Alliance represents 18 industry associations that continue to have concerns with a range of the policies in India. For these IP-intensive industries, the protection of IP rights is one of the most important factors to consider when investing in a particular market. While India continues to be an important market, the lack of IP protections has significantly damaged industry's confidence that its IP will be protected.

This lack of confidence directly impacts India's foreign direct investment[ii]. In 2011 and 2012, $35.1 billion of foreign direct investment flowed into India; by 2013, that number dropped dramatically to $22.4 billion, according to India's Department of Industrial Policy and Promotion[iii]. Further, World Bank data indicates that charges and receipts from IP-based assets increase economic growth. While payments to Indian residents for the use of IP assets was $300 million in 2011, the payments to the other BRIC economies ranged from between $600 million to more than $1 billion, placing India at a significant competitive disadvantage[iv].

However, there are leaders in India that recognize the importance of investment in innovation. On May 11, the current President of India noted that "India's innovation bottom line is not very encouraging as the number of patent applications filed annually in leading countries like U.S. and China is roughly 12 times more than that of India." He then called on the private sector to increase their share of spending on research and development to the levels prevalent in other economies such as the United States, Japan, and South Korea. The Chamber commends the President for his vision and urges his government to implement IP policies to match the President's rhetoric.

To encourage private sector investment in India, the government must consider implementing IP protections at the same levels as enjoyed by the United States, Japan, and South Korea.

We applaud the U.S. International Trade Commission's decision to begin a Section 332 investigation into India's trade practices, and we urge you to consider the implications of the deteriorating IP environment on the U.S.-India trading relationship.

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[i] U.S. Chamber of Commerce, "Charting the Course", GIPC International IP Index (2014), Washington DC

[ii] A study by the Organisation for Economic Co-operation and Development (OECD) concludes that a 1 percent change in the strength of a national IP environment, based on a statistical index, is associated with a 2.8 percent increase in foreign direct investment inflow.

[iii] Wolfgang, Ben, "U.S. drug industry upset with Indian policies on patents," *Washington Times* September (2013) http://www.washingtontimes.com/news/2013/sep/26/us-drug-industry-upset-with-indian-policies-on-pat/

[iv] World Bank, Databank, Science and Technology Indicators, Charges for the use of intellectual property, receipts (BoP, current US$), indicator source note