



THE COMMITTEE ON ENERGY AND COMMERCE

MEMORANDUM

June 25, 2013

To: Commerce, Manufacturing, and Trade Subcommittee

From: Majority Committee Staff

Re: Hearing on “A Tangle of Trade Barriers: How India’s Industrial Policy is Hurting U.S. Companies.”

The Subcommittee on Commerce, Manufacturing, and Trade will hold a hearing on Thursday, June 27, 2013, at 10:00 a.m. in 2123 Rayburn House Office Building, entitled “A Tangle of Trade Barriers: How India’s Industrial Policy is Hurting U.S. Companies.” Witnesses will be by invitation only.

I. Witnesses

Linda Menghetti Dempsey
Vice President International Economic Affairs
National Association of Manufacturers

Mark Elliot
Executive Vice President
Global Intellectual Property Center, U.S. Chamber of Commerce

Roy Waldron
Chief Intellectual Property Officer
Pfizer Inc.

John Smirnow
Vice President, Trade and Competitiveness
Solar Energy Industry Association

Robert Hoffman
Senior Vice President of Government Relations
Information Technology Industry Council

Rohit Malpani
Director of Policy and Advocacy
Médecins Sans Frontières - Access Campaign

II. Purpose

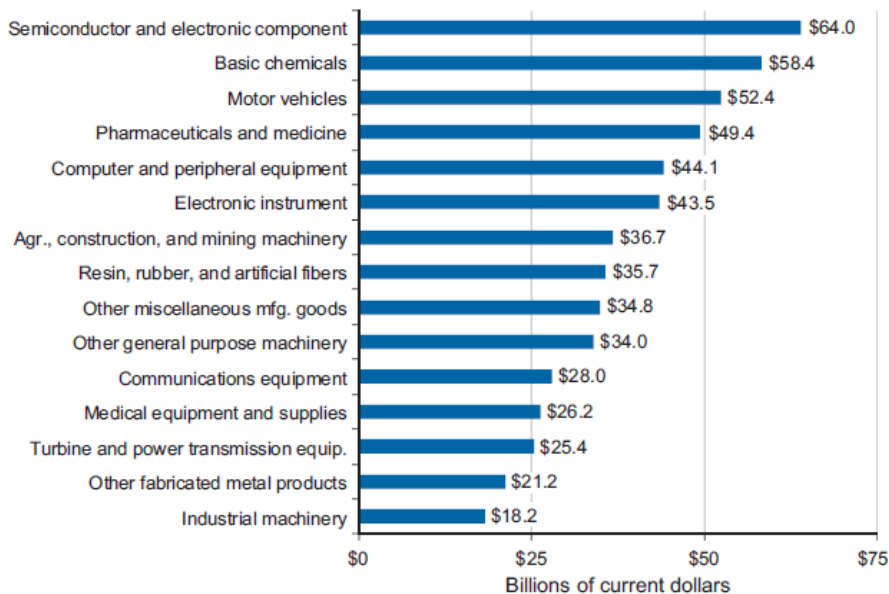
The United States and India have a strong and growing trade relationship, with India ranking as the United States' 13th largest trading partner in 2011. This important trade partnership is being threatened, however, by India's recent adoption of discriminatory trade practices, including forced localization requirements and other policies that do not comport with internationally accepted intellectual property standards. The hearing will provide Members an opportunity to investigate how India's recent actions are affecting U.S. companies, manufacturers, jobs, and the economy.

III. Background

Contribution of Intellectual Property to the U.S. Economy

Intellectual property (IP) is one of the key competitive strengths of U.S. companies. A joint 2012 report prepared by the U.S. Patent and Trademark Office and the Economics and Statistics Administration estimated IP-intensive industries supported 27.1 million direct jobs and another 12.9 million jobs indirectly, or approximately 27.7 percent of all U.S. jobs, in 2010.¹ In that same year, these industries contributed over \$5 trillion dollars to the U.S. GDP, accounting for nearly 35 percent of GDP.² Further, the report estimates merchandise exports of IP-intensive industries totaled nearly 61 percent of all merchandise exports.³

Figure 9. Merchandise Exports of Selected IP-Intensive Industries, 2010



¹ Econ. and Statistics Admin. and the U.S. Patent and Trademark Office, *Intellectual Property and the U.S. Economy: Industries in Focus* at vi (March 2012), http://www.uspto.gov/news/publications/IP_Report_March_2012.pdf.

² *Id.* at vii.

³ *Id.*

International Agreements on Intellectual Property Protection and Enforcement

The U.S. pursues the protection of intellectual property rights (IPR) mainly through the World Trade Organization (WTO), the successor organization to the unofficial GATT organization.⁴ The WTO administers both the General Agreement on Tariffs and Trade (GATT) and the 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”),⁵ which together establish minimum IPR protection and enforcement standards with which all member countries must comply.⁶

The central principles of the agreements are national treatment and most-favored nation (MFN) treatment.⁷ The national treatment obligation prohibits a country from discriminating against imports, usually through the imposition of non-tariff barriers, while MFN treatment requires member-countries be treated equally.⁸ The Agreements permit certain exceptions to the national treatment rule under GATT Article XX, such as when necessary to protect public morals, public health, national treasures, or natural resources,⁹ or under GATT Article XXI’s national security exceptions,¹⁰ so long as those the measures are not discriminatory, arbitrary, and unjustifiable.¹¹ The TRIPS Agreement expanded on the GATT exceptions to the IPR rules. Of particular importance to this hearing is Article 31, which permits a member country to employ compulsory licenses and government use of patents without the owner’s authorization under certain conditions.¹²

U.S. – India Trade Relations and Alleged Discriminatory Practices

Trade with India has flourished over the past two decades since it adopted open and non-discriminatory trade. Bilateral trade in goods has increased from less than \$6 billion in 1992 to \$57.8 billion in 2011, with the U.S. exporting over \$21 billion in goods and importing more than \$40 billion.¹³ Bilateral trade in services totaled \$28 billion in 2011 for a total bilateral trade of

⁴ World Trade Organization, *Understanding the WTO: Basics, What is the World Trade Organization?*, http://www.wto.org/english/thewto_e/whatise/tif_e/fact1_e.htm (last visited June 24, 2013).

⁵ World Trade Organization, *Understanding the WTO: Basics, The Uruguay Round*, http://www.wto.org/english/thewto_e/whatise/tif_e/fact5_e.htm (last visited June 24, 2013).

⁶ The U.S. also pursues standards that exceed the TRIPS Agreement floor through bilateral and regional free trade agreements.

⁷ Shayerah Ilias and Ian Fergusson, Cong. Research Serv., RL34292, *Intellectual Property Rights and International Trade* (2011), <http://www.crs.gov/pdfloader/RL34292>.

⁸ World Trade Organization, *Understanding the WTO: Basics, Principles of the trading system*, http://www.wto.org/english/thewto_e/whatise/tif_e/fact2_e.htm (last visited June 24, 2013).

⁹ General Agreement on Tariffs and Trade art. XX, July 1986, http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf.

¹⁰ *Id.* at 38.

¹¹ United Nations Conf. on Trade and Dev., *Dispute Settlement* at 67, http://unctad.org/en/Docs/edmmisc232add33_en.pdf (last visited June 24, 2013).

¹² Agreement on Trade-Related Aspects of Intellectual Property Rights, (Apr. 15, 1994) http://www.wto.org/english/docs_e/legal_e/27-trips.pdf; World Trade Organization, *Frequently Asked Questions about TRIPS in the WTO*, http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm (last visited June 24, 2013).

¹³ U.S. Census Bureau, *Trade in Goods with India*, <http://www.census.gov/foreign-trade/balance/c5330.html#2013> (last visited June 24, 2013).

\$86 billion¹⁴ The U.S. is India's second largest export market while India is the 18th largest export market for U.S. manufacturers.

Unfortunately, many policies--primarily those related to intellectual property--adopted by the government of India over the past 2 years have raised serious concerns about the future of the trade relationship. In fact, India remained on the U.S.'s Special 301 Priority Watch list in 2012 because it had "made limited progress on IPR protection and enforcement."¹⁵

Some of India's trade barriers protect its own fledgling industries in certain areas. For example, the government enacted a number of policies that favor domestic Indian companies over U.S. exporters in an effort to bolster domestic manufacturing. Additionally, India has taken positions on intellectual property rights adversely affecting a number of U.S. industries, including pharmaceutical, communications, and information technology. Potentially of greatest harm is the negative effect India's actions could have on global trade should other countries follow suit with protectionist or retaliatory measures that slow global growth.

The trade policy actions by the government of India creating the most concern include:

➤ *Localization/Domestic Content Requirements*

Under India's National Solar Mission (NSM), local suppliers are given preference over imports (U.S. exports). Specifically, the proposed mandates would require solar energy producers to source 50 percent domestic-made solar cells and modules for projects using crystalline silicon technology, which is the technology most domestic Indian manufacturers employ, to qualify for subsidies.¹⁶ Developers using thin film technology are free to source from anywhere. The U.S. challenged this barrier at the World Trade Organization (WTO) on February 6, 2013. Japan and Australia asked to join the dispute.

The government of India also announced a Preferential Market Access mandate for electronic goods in February 2012. The mandate sets locally manufactured content requirements for electronic goods with "security implications for the country" in procurements by both government and private sector entities. The quotas begin at 30 percent and rise over time. Observers have raised concerns that the mandate, as applied to the private sector, violates Article III of the GATT (incorporated into the WTO rules), which prohibits member nations from discriminating against foreign competitors by forcing "buy local" contracts with domestic suppliers. Additionally, India has excluded foreign vendors from participating in its national fiber optic project, valued at \$4 billion dollars. Although India is not a signatory to the WTO's Government Procurement Agreement, it has been an observer since 2010.

¹⁴ Office of the U.S. Trade Representative, *U.S-India Bilateral Trade and Investment*, <http://www.ustr.gov/countries-regions/south-central-asia/india> (last visited June 23, 2013).

¹⁵ U.S. Trade Representative, *2012 Special 301 Report*, http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report_0.pdf (last visited June 23, 2013).

¹⁶ Akshay Jaitly, *A good case for India to Lose?*, Business Standard (May 11, 2013), http://www.business-standard.com/article/opinion/a-good-case-for-india-to-lose-113051100630_1.html.

➤ *Compulsory licensing*

The India Patents Controller issued four compulsory licenses since the beginning of 2012 for cancer therapies researched and developed by companies in the United States. India based its actions on the argument that: 1) the prices of the drugs were too high; 2) the domestic market (India) was not being supplied adequately; and 3) the drug was not adequately manufactured in India. India also revoked three pharmaceutical patents it alleged did not demonstrate an inventive step. In one instance, India denied a patent application for a cancer drug that was successfully patented in 75 other countries. Even as these drugs are produced by Indian companies, however, the prices of the medications remain cost-prohibitive for the vast majority of its population.

➤ *Foreign Direct Investment Restrictions (FDI)*

While the government of India has generally liberalized restrictions on FDI, it adopted a requirement in 2011 that foreign acquisition of Indian pharmaceutical companies must be approved by the Competition Commission of India. Similarly, foreign banks are limited in their ability to expand and compete against the state-owned banks under the branch authorization policy, which requires foreign banks to submit their expansion plans each year. No U.S. bank has been granted a license to expand since 2009. Given the stance it has taken on IPR, it is not surprising that FDI to India in the information and communications technologies dropped dramatically by 85 percent for FY 2013 compared to FY 2012. Similarly, FDI in pharmaceuticals dropped 65 percent during the same time period.¹⁷ Overall, the OECD ranked India fifth worst on the 2012 regulatory restrictiveness index.¹⁸

IV. Topics for Discussion

- How are India's recent discriminatory trade practices affecting U.S. manufacturers and employment?
- Can India be prevailed upon to reverse its recent foray into protectionism and if so, how?

Please contact Brian McCullough, Gib Mullan, or Shannon Taylor of the Committee staff at (202) 225-2927 with questions.

¹⁷ Somesh Jha, *Govt reforms unable to stem fall in foreign direct investment*, Business Standard (June 24, 2013) <http://www.rediff.com/business/report/govt-reforms-unable-to-stem-fall-in-foreign-direct-investment/20130624.htm>.

¹⁸ Organization for Economic Development, *FDI regulatory restrictiveness index 2012*, http://www.oecd.org/daf/inv/ColumnChart-FDI_RR_Index_2012.pdf (last visited June 24, 2013).