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Ambassador Ron Kirk  
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Commissioner Karel De Gucht  
EU Commissioner for Trade  
European Commission  
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*Washington, DC / Brussels, 7 November 2012*

Dear Mr. Froman, Ambassador Kirk and Commissioner De Gucht,

**RE: Transatlantic Business Concerns about Indian Government IP Policies**

The TABD, U.S. Chamber of Commerce and BUSINESSEUROPE speak on behalf of the largest and most innovative companies in the United States and Europe. These companies do business in the highly significant transatlantic market, as well as in virtually all other regions and countries of the world.

We are concerned about India's use of compulsory licensing, in a manner that contravenes one of the fundamental principles governing international trade: national treatment. Our companies are deprived of the protection and opportunities afforded by India to its own industries, by means of targeting U.S. and EU businesses' intellectual property. Unfortunately, there appears to be a

belief among Indian policymakers that India's domestic industries are not capable of engaging in the type of R&D and innovation that our member companies engage in, and instead must rely on reverse engineering and copying instead of innovation as their primary commercial strategies. This mistaken belief has led to some attempts to weaken IP rules and frameworks also in the global context.

- **Compulsory licensing:** Against this backdrop, the Government of India appears to be launching a program to compulsorily license foreign proprietary technology, so that domestic Indian industries can avoid paying commercial rates for the technology they use. We are seeing such measures across sectors, starting with pharmaceuticals and now green tech. India has made clear its intention to violate the intellectual property rights of foreign green technologies in order to favor domestic companies. India's new National Manufacturing Policy (NMP) explicitly sets forth this stance in support of compulsory licensing and other forms of technology misappropriation. The legal basis for broad compulsory licensing is rooted in Section 84 of India's Patent Act. The planned compulsory licensing strategy constitutes a real and immediate threat not only to U.S. and EU pharmaceutical and clean technology industries, but to other advanced manufacturing and innovative U.S. and European businesses as well.
- **India's IP-skeptic positions in global forums:** In addition to domestic policy actions aimed at forcing technology transfer, we are concerned by India's policy position on intellectual property in international meetings and negotiations, including the UNFCCC where a major negotiating round, the COP18, is rapidly approaching. At the UNFCCC, WIPO, WTO, and WHO, India continues to represent intellectual property rights as a barrier to economic advancement and access to technology by developing countries, despite overwhelming evidence to the contrary. We consider this position to reflect India's own, short-term industrial policy and competitive gains only – not broader socio-economic development or long-term innovation concerns.

India is a key and growing market. Many of our companies have major investments in India, and we engage in substantial trade and collaboration with Indian partners, customers, and suppliers on a daily basis. India, moreover, is a country that draws heavily on such global investment and trade opportunities to advance its economy, create jobs, and improve living conditions. Innovative industries – including ICT, services, healthcare, and entertainment – are increasingly important contributors to India's economic performance, as its companies move up the industrial, technology, and commercial value chains. A number of Indian companies are now among the world's leading economic and technology powers. At the same time, the above-described policies are fundamentally unfair. Its policies on IPR and advanced manufacturing, in particular, hurt transatlantic business and commercial interests, cost us European and American jobs, and threaten continued investment in these innovative sectors. Moreover, over the medium- to long-term, these policies will harm India's own path to a more industrialized, manufacturing, innovative and technology-based economy.

The issues mentioned above, and described in the attached annex require urgent U.S. and European government action. As associations that represent leading innovators in the United States and Europe, we know first-hand how important technology and IPR protection are for the

continued strength and success of our U.S. and European industries, and the exports, jobs and commercial growth that they support. India's IPR policies and positions are a serious threat to these interests and we ask that you take a strong, coordinated stance against its efforts to weaken or otherwise "rebalance" IPR. We are of course ready to assist you in any way we can.

Sincerely,

BUSINESSEUROPE

TransAtlantic Business Dialogue

U.S. Chamber of Commerce

## **Annex**

### **India's National Manufacturing Policy**

India's National Manufacturing Policy (NMP) was first published in October 2011. It is an important policy document that sets out a range of critical strategic government policies aimed at advancing India's overall industrial and manufacturing output, and setting India's economy on a path of sustained and sustainable economic and societal growth. The NMP's treatment of IP Rights, however, is highly problematic and poses a serious risk for U.S. and EU clean technology companies.

Section 4.4 of the NMP specifically highlights the use of compulsory licensing as a preferred policy tool for the Government of India. It states that India-based clean technology companies "have the option to approach the Government for issue of a Compulsory License for the technology which is not being provided by the patent holder at reasonable rates or is not being worked in India to meet the domestic demand in a satisfactory manner." This policy is essentially one of forcing the transfer of foreign proprietary green technologies, to further India's industrial policy goals and increase the competitiveness of Indian companies.

Unfortunately, India's NMP is only the latest evidence of the government's increasing support for broad compulsory licensing and other forms of IPR weakening and technology expropriation. For example, in 2010, a department in the Ministry of Commerce (DIPP) issued a discussion paper which concluded that "compulsory licensing has a strong and persistent positive effect on domestic invention" and encouraged India's Controller General of Patents to grant a compulsory license if, among other things, he was satisfied that the patented invention is not being worked (i.e., manufactured) in India, or the working of the patented invention is hindered by imports of the patented article. The Controller now requires every patentee and licensee to furnish periodic statements that include significant details of how they are working each patented invention on a commercial basis in India or, if not worked, the reasons why and the steps being taken to work the invention. We are concerned that this information could be used at some point to justify compulsory licenses in a variety of industries.

In fact, in March of this year the Patent Controller issued a compulsory license to a domestic Indian producer to manufacture Nexavar, an oncology drug produced by Bayer, in part because the patented product was not manufactured in India. It is easy to see how such an approach could be applied to other technologies, a development of great concern – especially for smaller companies that lack the resources to produce locally in India.

The flawed reasoning in the Nexavar case could apply to any industry because it is based on Section 84 of India's Patent Act that states: "(1) At any time after the expiration of three years from the date of the [grant] of a patent, any person interested may make an application to the Controller for grant of compulsory licence on patent on any of the following grounds, namely:— (a) that the reasonable requirements of the public with respect to the patented invention have not been satisfied, or (b) that the patented invention is not available to the public at a reasonably affordable price, or (c) that the patented invention is not worked in the territory of India."

Section 84 of India's Patent Act violates the WTO TRIPS Agreement's national treatment provision in Article 3, which mandates that WTO members protect IP regardless of its origin, as well as TRIPS Article 27.1, which explicitly prohibits discrimination in national patent laws based on "whether products are imported or locally produced." Section 84 also exceeds several TRIPS CL restrictions, for instance Article 31(h) requiring pricing to be based on the "economic value of the authorization." The Government of India cannot use national law or policy to undermine patent rights established by TRIPS.

The NMP is not the only national policy to advance compulsory licensing. The draft National Competition Policy released early this year also promotes broad compulsory licensing that is inconsistent with international norms. Specifically, Section 5.1.vi of that policy would require "dominant infrastructure and intellectual property right owners to grant access to third parties their essential infrastructure and platforms . . . on agreed reasonable and nondiscriminatory terms and conditions aligned with competition principles" (emphasis added).

### **India's positions at the UNFCCC and other global forums**

The Indian Government has also continued to take a highly negative stance on Intellectual Property Rights at the UNFCCC, and in other global negotiating and policymaking bodies. This, in our view, goes against India's own medium and longer-term interests, but it is particularly harmful to the interests of U.S. and European companies.

A next major UNFCCC negotiating round will be held in Doha, Qatar (November 26 – December 7, 2012). While India's precise positions and demands are not yet known, we ask for your urgent support and engagement to ensure an appropriate response to any further anti-IPR rhetoric that India and others may express, and to any further requests for IPR issues to be added to the UNFCCC agenda (e.g. with respect to the Technology Executive Committee, the Climate Technology Centers & Network, and elsewhere).

In the UNFCCC, the Indian Government has actively pursued an IPR-weakening agenda that is fundamentally at odds with Indian industry's medium and long-term commercial and economic development interests, and with the very climate change and energy-related objectives that the UNFCCC climate negotiations are intended to pursue. The UNFCCC Conference of the Parties (COP17) in 2011 rejected efforts by India and others to make IPR a formal agenda item and include IPR-weakening provisions in its formal outcome documents. It thus sent a clear signal that IPR issues have no place in the UNFCCC climate change negotiation and that no consensus on such issues could be reached.

There is no reason to alter that decision in any way. IPRs are already exhaustively regulated in the TRIPS Agreement, as well as other global intellectual property and trade accords. There is no reason, nor any legal basis, to alter that existing legal framework. Moreover, because IPRs are a crucial driver of innovation and broad deployment of new clean technologies, any weakening of existing global IPR protections would be counterproductive to the "development" objectives purportedly pursued by India.