

October 21, 2013

Douglas M. Bell  
Chair, Trade Policy Staff Committee  
Office of the United States Trade Representative  
600 17th Street, NW  
Washington, DC 20508

**RE: Comments Regarding the 2014 National Trade Estimate Report on Foreign Trade Barriers (USTR- 2013-0027)**

Dear Mr. Bell:

Below are comments on behalf of Advanced-Manufacturing Coalition for Technology and Innovation (ACTI) highlighting numerous foreign trade barriers with a particular focus on threats against U.S. advanced manufacturing technology and intellectual property rights (IPR). Our comments are broken down into two parts:

1. Country-specific concerns regarding IPR, technology, and advanced manufacturing trade;
2. Cross-cutting issues, including overarching concerns about the lack of or limited effectiveness of trade secrets protection around the world; and our concerns about global IPR erosion efforts in a range of international fora and negotiations including the UNFCCC, WHO, WIPO, and the WTO.

We conclude by discussing a few key positive steps that we believe can and should be undertaken and further supported by the U.S. Government and others to strengthen the protection of advanced manufacturing IPR and technology worldwide, and to further expand and protect the competitive position of the U.S. advanced manufacturing sector, U.S. investments, and U.S. jobs. This includes ongoing efforts in the TPP and TTIP negotiations (particularly with respect to trade secrets and bilateral IPR cooperation), and expiration of the moratorium on TRIPS Non-Violation Nullification and Impairment claims.

We thank you for your leadership in addressing trade barriers and protecting advanced manufacturing and industrial IPR worldwide. We look forward to working with you to address the issues listed below.

## **About ACTI**

The *Advanced-Manufacturing Coalition for Technology and Innovation (ACTI)* includes some of the world's largest advanced industrial, manufacturing, and technology companies. Collectively, ACTI members employ hundreds of thousands of people, and have invested billions of dollars in innovation-driven manufacturing and industrial sectors worldwide, including clean technology, energy, medical technology, advanced chemicals, and industrial and

manufacturing-focused internet products and services. ACTI's members include 3M, AirLiquide, Dupont, ExxonMobil, General Electric, INVISTA, Philips, Siemens, and Vestas.

## Country-Specific Trade Barriers and IPR Threats

### India

India is an important and growing market for U.S. companies. The country draws heavily on global investment and trade, and counts innovative industries including ICT, infrastructure, services, healthcare, and entertainment, as increasingly important contributors to economic growth. However, as described below, India is pursuing an agenda of forced technology transfer in contravention of a fundamental principle governing international trade – national treatment – while seeking to weaken IP rules and frameworks domestically and internationally. India is also systematically denying U.S. companies the protection and opportunities afforded its own industries, including with respect to IPR. These efforts not only threaten to diminish the country's ability to innovate and attract investment but they also unfairly disadvantage American businesses. The consistent use and threat of compulsory licensing, as well as a continued lack of effective trade secrets protection are additional core issues of concern.

**National Manufacturing Policy:** The Government of India is taking measures across sectors, including pharmaceuticals and green technologies, to advance a program to compulsory license foreign proprietary technology, in direct contravention of the more limited scope of compulsory license provisions in the WTO TRIPS Agreement. One primary purpose appears to be to enable domestic industries to avoid paying commercial rates for technologies. For example, India has announced its intention to engage in policies that would violate the intellectual property rights of foreign green technologies in order to favor domestic companies. Section 4.4 of India's National Manufacturing Policy (NMP), for example, 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.” The National Manufacturing Policy lists healthcare-related technology as another strategic industry, alongside clean technology.

**Trade Secret Protection/National IPR Strategy:** India released a draft National IPR Strategy in 2012,<sup>1</sup> which is broad in scope and appeared to represent an effort to tackle some of the important weaknesses that remain in India's IPR policy and enforcement. Publication of the Policy was a hopeful sign, but no concrete action has been taken thus far.

Trade secret protection is one example of the inaction that followed publication of the National IPR Strategy. One key problem in India continues to be the lack of an effective trade secrets protection regime. Although the National IPR Strategy recognizes that a “predictable and recognizable trade secret regime will improve investor confidence,” it fails to call for greater protection of trade secrets and simply asserts that they are already “protected through the contract law in India and [are] part of the concept of protection against unfair competition.” To ensure full market access and non-discriminatory treatment of Indian and non-Indian companies,

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<sup>1</sup> [http://dipp.nic.in/English/Discuss\\_paper/draftNational\\_IPR\\_Strategy\\_26Sep2012.pdf](http://dipp.nic.in/English/Discuss_paper/draftNational_IPR_Strategy_26Sep2012.pdf)

and in order to ensure full TRIPS-compliance, it would be critical for India to adopt an effective, codified, trade secret act. This would reduce the uncertainty now often faced by companies and the difficulties in protecting their proprietary technologies and confidential data. As such, it would give U.S. companies greater confidence to invest in India, and to collaborate, share technology and know-how, and engage in mutually beneficial technology supply and partnership contracts with Indian partners and customers.

**Other Instances of Forced Technology Transfer, Compulsory Licensing, and a Failure to Provide Effective IP Protection:** India's National Manufacturing Policy and its draft IPR Policy are not the only evidence of the government's failure to provide for effective IPR protection and enforcement. Other examples include a 2010 discussion paper published by a department in the Ministry of Commerce (DIPP) and which argued 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.<sup>2</sup>

Additionally, India's patent statute 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.<sup>3</sup> Not only is this "Form 27" process highly burdensome from an administrative point of view, but we are concerned that the information that is provided could be used at some point to justify compulsory licenses in a variety of industries, as specifically contemplated in the Form. Recently, submissions of Form 27 have become publicly available likely for this purpose.<sup>4</sup> Moreover, a majority of the questions in Form 27 are only directly answerable in a one-patent-one-product context and cannot clearly be answered for information technology technologies, for example. Notwithstanding the impracticality of attributing a specific commercial value to one patented feature of a complex technology, the form calls for criminal and civil penalties for submission of false information.

Since 2012, India has infringed, overridden, or revoked nearly a dozen pharmaceutical patents held by foreign firms, in part because the patented product was manufactured outside of India. These and other instances of broad compulsory licensing are based on Section 84 of India's Patent Act<sup>5</sup> and pose a clear risk not only to U.S. pharmaceutical industries, but to advanced manufacturing, industrial, and other innovative U.S. businesses as well.

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<sup>2</sup> See [http://dipp.nic.in/.../Discuss\\_paper/CL\\_DraftDiscussion\\_02September2011.doc](http://dipp.nic.in/.../Discuss_paper/CL_DraftDiscussion_02September2011.doc).

<sup>3</sup> Known as Form 27, Statement Regarding the Working of the Patented Invention on Commercial Scale in India, available at: [http://ipindia.nic.in/ipr/patent/patent\\_formsfees/Form-27.pdf](http://ipindia.nic.in/ipr/patent/patent_formsfees/Form-27.pdf).

<sup>4</sup> See <http://ipindiaservices.gov.in/workingofpatents/>

<sup>5</sup> Some of these actions have been 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 compulsory licensing restrictions, for instance Article 31(h) requiring pricing to be based on the "economic value of the authorization."

Finally, the Indian Government has so far failed to pass the National Innovation Act,<sup>6</sup> which could have been a positive step towards providing a more robust IPR environment. The Innovation Act would include a range of measures to promote innovation (including an annual “Science and Technology Plan” and provisions to aid public/private partnerships, promote innovation financing and establish special innovation zones). It would also codify rules on the protection of confidential information, which to date relies on common law principles, meaning that the scope of protection is unpredictable.

**Third Party Access to Essential Facilities:** We commend efforts of the Indian Government’s Committee of the Ministry of Corporate Affairs to formulate a National Competition Policy for India that has evolved into a comprehensive and helpful framework for fair competition. One particular issue, however, is a serious cause for concern. Section 5.1(vi) of the Competition Policy contains a blanket requirement for dominant infrastructure *and IPR owners* to grant third party access to “essential facilities” on “agreed reasonable and nondiscriminatory terms”, without being in any way more specific about the situations in which this may or may not be justified.<sup>7</sup>

Blanket application of an “essential facilities” doctrine to IPR owners has been heavily criticized by experts and its application severely curtailed around the world. A broad international consensus exists that the unconditional, unilateral refusal to license a technology rarely raises competition concerns. In addition, the decision not to license a technology is considered to be the most fundamental right conveyed under the IP rights laws – namely, the right to exclude. To impose a blanket duty to license on IPR owners could effectively nullify IP rights and impair or remove the economic, cultural, social and educational benefits created by them. The blanket inclusion of IP rights currently foreseen in the Policy is directly at odds with international competition standards and fundamentally irreconcilable with TRIPS. Although industry consultations with the Minister and Joint Secretary yielded a solution in which the Ministry agreed to review the essential facilities language, the final National Competition Policy has still not been passed or made public.

**International Fora:** In addition to domestic policy actions such as those outlined above, we continue to be very concerned about India’s policy position on intellectual property in a range of international fora. India has played a leading role in driving an IP weakening agenda at the UNFCCC, WTO, and WIPO, where government officials consistently represent intellectual property rights as a barrier to economic advancement and access to technology for developing countries even though the evidence does not support this view. These claims threaten to undermine not only U.S. innovation and industries, but economic development and innovation in India, where domestic companies are in the process of maturing their capabilities in the IP generation and policy advocacy space. They also continue to distract negotiators in these and other fora from the real technology, trade, environmental and healthcare-related issues that they are or should be seeking to address.

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<sup>6</sup> <http://www.dst.gov.in/draftinnovationlaw.pdf>.

<sup>7</sup> [http://www.mca.gov.in/Ministry/pdf/Revised\\_Draft\\_National\\_Competition\\_Policy\\_2011\\_17nov2011.pdf](http://www.mca.gov.in/Ministry/pdf/Revised_Draft_National_Competition_Policy_2011_17nov2011.pdf)

## China

Further action is needed for China to achieve an open, fair, and non-discriminatory innovation policy that does not discriminate against non-indigenous companies or give substantive or procedural advantages to companies that develop or own their IP locally within China. Examples of discriminating or otherwise harmful policies that are currently in place include indigenous innovation accreditation; China's current treatment of "services inventions"; continued government-driven standard setting that often includes discriminatory elements; and onerous government-driven technology transfer and licensing policies, such as through MOFCOM's Import-Export Rules. Additional critical concerns include "junk patent" litigation and enforcement concerns emanating from the Fourth Amendment of China's Patent Law, as well as China's continued lack of effective trade secret protection.

**China Innovation Policy:** We were encouraged by the agreement at the 2013 Strategic and Economic Dialogue (SED) to foster an open and fair trade and investment relationship and, particularly, to recognize the importance of trade secret protection (discussed separately below) in developing an innovative Chinese economy. We also welcome recent efforts by China to limit the use of indigenous innovation policies in government procurement and to liberalize foreign company access to government-run or semi-governmental projects including, for example, in the wind power sector. We are further encouraged by China's commitment to delink "its innovation policies" from government procurement preferences. We note that this commitment has been implemented from national to local level through a State Council directive and notices issued by the Ministry of Science & Technology, National Development & Reform Commission and the Ministry of Finance.

Despite these positive developments, foreign invested companies continue to face innovation policy-related difficulties. For example, Indigenous Innovation Product Accreditation systems impose onerous and discriminatory requirements on companies seeking to sell into the Chinese government procurement market, and contravene multiple commitments of China's leadership to resist trade and investment protectionism and promote open government procurement policies. Another example is forced disclosure of trade secrets in a regulatory context. We believe it is important that China follows through on its SED commitments in this and other related areas.

**Chinese Service Inventions:** China has been developing a new regulation on "service inventions" that are created during an inventor's employment. The draft regulation, if passed, will negatively affect the ability of U.S. companies to make commercial choices about how to exploit IP assets derived from Chinese inventions and will increase legal and financial risks. For example, under Article 19.2, the Regulations could take away an employer's ability to contract around SIPO's default rules and replace the current autonomy that an employer has with extremely onerous regulations. Employers are also required to make a decision about how best to protect an asset very quickly, even if an invention has not been fully conceptualized by the inventor. Moreover, the draft regulation also applies to technical secrets, which will greatly disadvantage the technical secret owner, should there be any disputes between the inventor and the technical secret owner. We were somewhat encouraged by a Shanghai court's promulgation of certain guidelines in June 2013, which were meant to clarify and improve elements of the Regulation, but believe the further development of this policy merits close ongoing scrutiny.

These are just a few illustrations of how the Regulations would create unpredictability to the detriment of U.S. and other foreign rights-holders in China's business environment.

**Patents and Technical Standards:** China's standard-setting practices continue to be a cause of significant concern. As part of its National IP Strategy, China has focused on improving its standards-related policies, including regulating "the process of turning a patent into a standard." In 2012, the Standardization Administration of China (SAC) issued its revised draft Disposal Rules for Involvement of Patents in National Standards (draft Disposal Rules) and requested comments from stakeholders. The draft Disposal Rules remove some problematic articles such as free licensing due to failure to disclose patents involved. The key remaining issues are whether the patent applications that are required to be disclosed include non-published applications, and a lack of clarity regarding legal liabilities for failure to disclose. Separately, since foreign invested companies can participate in the standard setting process by invitation only, most American companies and their Chinese subsidiaries are unable to participate in the standard setting process. This obviously impacts their ability to be heard as part of the standard-setting process, and their competitive opportunities in the Chinese market due to possible non-compliance with (future) product standards or the setting of standards that are specifically geared towards a Chinese competitor's technology advantage.

**MOFCOM Import-Export Rules:** China's Ministry of Commerce (MOFCOM) Technology Import-Export Administrative Regulations impose greater risks and liabilities on foreign technology licensors than what China's Contract Law imposes on domestic licensors. For example, a foreign licensor is liable for infringing a third party's rights due to the licensee's use of the licensed technology and also could not own the improved technology made by the licensee. Moreover, with respect to foreign licensors, it is unclear whether the Regulations are applicable only to the assignment of patents and the right to apply for patents or are broad enough to cover all technical information communicated across the Chinese border. This uncertainty carries significant potential risk for American and other non-Chinese technology and advanced manufacturing companies and is another example of a policy apparently aimed at encouraging companies to develop technology locally.

**Fourth Amendment to the Chinese Patent Law/"Junk Patents":** China's patent system includes the issuance of IP assets, including utility models and design rights, without examination of the substance. Unlike other rights like invention patents, the quality of unexamined assets is unknown, regularly resulting in the granting of "junk patents." The vast majority of these unexamined rights are held by Chinese domestic companies and individuals. Since no substantive review of unexamined assets is required prior to their assertion, they represent a significant business risk to innovation-driven American (and Chinese) companies.

China issued a draft Fourth Amendment to its Patent Law in August 2012. In the draft amendment, there is a significant focus on administrative enforcement of unexamined rights. As such, one of the effects of the draft Fourth Amendment will be to allow primarily Chinese domestic entities or individuals to assert their "junk patents" more effectively, and to disrupt foreign-owned patents and the activities of their owners or licensees.

Rather than further extend the problem of unexamined “junk” patents, China’s patent system should be reformed so as to prevent the granting of utility models and design patents without effective substantive review. To be more effective, China’s patent system should further allow for recourse to civil litigation for patent infringement to the exclusion of any administrative enforcement remedies, which are often political, unprofessional or commercial and discriminatory in nature. Doing this would help rights holders who can actually demonstrate the innovative nature of their patent or other rights to address, *inter alia*, the problem of junk patents before competent (and less political) adjudicators and courts. Finally, China’s patent system should be reformed so as to ensure that infringement litigation that is based on unexamined rights cannot proceed until the validity of the utility model and design involved is finally determined through the Patent Reexamination Board’s examination and judicial review.

**Trade Secret Protection:** The U.S. International Trade Commission has estimated the value of U.S. IP stolen by Chinese entities to total \$48 billion, including lost sales (76 percent of the total) and lost royalties and license fees (24 percent).<sup>8</sup> Civil and administrative protection for trade secrets in China relies on the Anti-Unfair Competition Law (AUCL), which was promulgated in 1993. The AUCL applies to trade secret theft by a “business undertaker”, which creates the problem of initiating enforcement actions against current or former employees, who misappropriate the company trade secrets without actually conducting a business. It also applies only to information that has “practical applicability”, which imposes an additional evidentiary burden.

In addition to these substantive concerns, there is no preliminary injunction order available under the AUCL. With respect to criminal protection, according to Art. 219 of the Chinese Criminal Law, the crime of trade secret theft is focused on consequences, not conduct (*i.e.*, causing direct economic loss in the amount of RMB500,000 (USD83,000); or causing bankruptcy of the trade secret owner; or the infringer receiving illegal benefits in the above-mentioned amount). Without criminal investigation, the evidence proving any of the criminal thresholds cannot be secured, and without such evidence, the police cannot start the criminal investigation, which creates a serious challenge for criminal trade secrets prosecution in China.

We remain hopeful that recent Civil Procedure Law reforms will address some or all of the problems that companies face in enforcing trade secrets protection in China. We also urge the U.S. Government to continue pressing China to implement commitments on trade secrets enforcement agreed to at the 2013 Strategic & Economic Dialogue talks, including strengthening procedures and remedies.

**International Fora:** China continues to support IP weakening agendas in a range of international fora, including the UNFCCC, WIPO, and WTO, as discussed in greater detail at page 11 below.

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<sup>8</sup> USITC, *China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy*, USITC Publication 4226, May 2011.

## **South Africa**

The South African Ministry of Trade and Industry recently published a draft National Policy on Intellectual Property (“National IPR Policy”).<sup>9</sup> While we welcome many positive perspectives and positions reflected in the draft National IPR Policy, the draft National IPR Policy contains a number of positions and observations on IPR that are a cause for serious concern and that would be counterproductive and should be removed and qualified. This includes endorsement of weaker IPR in certain fields; suggestions that weak IP protections can be an effective part of a country’s industrial policy (as opposed to being reserved for extraordinary circumstances); and adoption of a broader narrative that developing countries have gained little from the protection of IPR, despite evidence of the profound benefits that such protections bring by way of increased FDI and technology diffusion, including in South Africa today.

## **Brazil**

The Center for Strategic Studies and Debates of the Brazilian Chamber of Deputies, which is affiliated with the Brazilian Parliament, recently produced a study entitled *The Revision of the Patent Act: innovation towards national competitiveness*<sup>10</sup>, which raises several issues of concern. For example, the study proposes eroding existing IP rights by expanding the use of compulsory licensing and proposes the creation of an administrative entity called CODIPI, under the Chief of Staff (Casa Civil), that would enjoy binding authority. If established, Brazil’s patent office (INPI) would become subject to this new body instead of using its expertise to apply Brazil’s patent law. The proposals in this study, if implemented would drastically reduce the ability of U.S. companies to achieve a return on their investments made in Brazil.

## **Cross-Cutting Issues**

In the previous section, we discussed a number of country-specific trade barriers and IPR-related threats faced by advanced manufacturing and industrial technology companies in key countries around the world. Additionally, however, a number of issues continue to be a cause for broader, more cross-cutting concern.

### **Trade Secret Protection and State-Sponsored IP Theft**

Protecting trade secrets from increasingly sophisticated theft is a growing concern for U.S. advanced manufacturing industries, not just in the countries discussed above, but in jurisdictions and business relationships around the world. Typical examples of trade secrets include manufacturing processes, designs, and proprietary formulae. Unfortunately, trade secret protection is still inadequate or virtually non-existent in a range of countries and regions around the world. This puts U.S. advanced manufacturing and industrial know-how and technology at risk, and makes it harder and more risky for U.S. companies to trade, do business and collaborate with local partners and suppliers in countries around the world.

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<sup>9</sup> Draft National Policy on Intellectual Property, September 4, 2013, *accessed at* [http://www.thedti.gov.za/invitations/36816\\_4-9\\_TradeIndustry.pdf](http://www.thedti.gov.za/invitations/36816_4-9_TradeIndustry.pdf).

<sup>10</sup> Available at: [http://bd.camara.gov.br/bd/bitstream/handle/bdcamara/14797/brazils\\_patent\\_reform.pdf?sequence=2](http://bd.camara.gov.br/bd/bitstream/handle/bdcamara/14797/brazils_patent_reform.pdf?sequence=2)



Trade secrets form an increasingly important part of the intellectual property mix on which U.S. companies and industries rely. This is particularly true in many of our most innovative, technologically advanced, and competitively successful sectors. Many industries rely on trade secrets as an alternative to patents due to the fact that they can be held under in-house protections, as opposed to being disclosed; and in light of the high cost of protecting patents around the world (this is an issue for smaller and mid-sized business in particular). In addition, industrial and other advanced manufacturing sectors often rely disproportionately on technical know-how and expertise for their global competitive and cost-advantage. In many instances, such competitive advantages cannot be protected through traditional patent or other IPR protections alone.

A 2010 consulting study found that trade secrets comprise an average of two-thirds of the value of firms' information portfolios; in knowledge-intensive industries like manufacturing, information services, and professional, scientific, and technical services, that rate increases to approximately 70 to 80%.<sup>11</sup>

Trade secret theft and misappropriation and economic espionage, however, are a growing challenge. In aggregate, the value of trade secrets is immense: one U.S. Government estimate placed the value of losses from economic espionage between \$2 billion and \$400 billion.<sup>12</sup> While trade secrets possess great value, that value is easily destroyed. Traditional economic espionage and trade secret misappropriation continue to be rampant, often involving employees or a company's (foreign) suppliers, subcontractors, or business partners. Moreover, the same technological advancements that have enabled globalization and the digital information age have also left many companies vulnerable to unauthorized digital data access, network intrusions, and cyber-theft.

In some instances, competitors have attempted to recruit current or former employees or licensees of U.S. competitors to reveal trade secrets. In other cases, employees have downloaded vast troves of trade secrets from their employers in order to begin their own companies. U.S. companies and research institutions have also increasingly fallen victim to cyber attacks by state-sponsored entities (or state-supported private entities), as well as to traditional means of espionage. Finally, some foreign governments openly aim to weaken intellectual property rights through compulsory licensing processes, or they force companies to disclose trade secrets and other confidential information through various forms of unwarranted by government-imposed disclosure, forced localization, *e.g.*, as part of licensing or standard-setting frameworks, or mandated cooperation with local partners, often as a condition of market access.

Despite the value of trade secrets, trade secret protection is underdeveloped and, in some markets, effectively non-existent. At the international level, the WTO mandates protection of proprietary information by means of Article 39 of the Agreement on Trade-Related Intellectual

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<sup>11</sup> Forrester Consulting, "The Value of Corporate Secrets," March 2010, at 4-5.

<sup>12</sup> The Office of the National Counterintelligence Executive (ONCIX), "Foreign Spies Stealing US Economic Secrets In Cyberspace," November 2011, at 4.

Property Rights (TRIPS),<sup>13</sup> but international protections and enforcement have been uneven. In some countries, including India, Malaysia and Singapore, trade secret protection is only available on a contractual basis (*i.e.*, it cannot be effectively enforced unless the trade secret owner and the misappropriator are in a contractual relationship with each other). In other countries, some laws are on the books, but actual protection and enforcement are uneven, very costly and cumbersome, or practically non-existent. Trade secrets and global trade and investment are intimately interrelated. We urge the U.S. Trade Representative's Office and other parts of the U.S. Government to continue to exert leadership in this regard and help expand the worldwide protection of U.S. and other trade secrets, confidential technology, and know-how.

### **IP-Related Threats in International and Multilateral Fora**

Apart from country-specific concerns highlighted above, and the broad, cross-cutting issue of trade-secrets protection, the global framework of intellectual property rights and protections, particularly with respect to clean technology, energy and advanced manufacturing IP rights, is being challenged in a range of international fora. The global threat of IPR erosion is real.

**UNFCCC:** Several countries, including India, Bolivia, the Philippines and Venezuela, along with outside stakeholders, continue to call for compulsory licensing or other forms of “flexibilities” in the context of global climate change negotiations that are taking place under the auspices of the United Nations Framework Convention on Climate Change (UNFCCC). These countries and others misrepresent IP rights as barriers to international technology transfer despite the proven positive effects of stable IP and legal regimes to enable and encourage innovation, development, dissemination and deployment of existing and new technologies. Calls to weaken IP and to make discussion of IP an agenda item have consistently been a negotiating tool that these countries have used against the United States and other developed countries.

Calls for IPR weakening have been rejected repeatedly during several high-level COPs. We expect IPR issues to continue to cloud the negotiating agenda in the years ahead and they may complicate the work of certain implementing bodies such as the Technology Executive Committee (TEC) and the Climate Technology Centers & Network (CTCN). We look forward to working with the U.S. Government to continue to address and neutralize such challenges.

Clean technology IP rights are a key driver of U.S. exports, private sector investment, growth and jobs. They are also critical to achieving global climate change and energy-related objectives, and are exhaustively regulated in the WTO TRIPS Agreement. Efforts to weaken clean technology patent rights, or to misappropriate trade secrets, are counterproductive and will stymie innovation, and the development and diffusion of technology. Any efforts to alter or amend the IPR regime in a UNFCCC context, moreover, would undermine the central role that the WTO TRIPS Agreement plays in this respect and cause legal and political confusion, and

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<sup>13</sup> Article 39 TRIPS provides that WTO “Members shall protect undisclosed information ... and data submitted to governments or governmental agencies.” In particular, “Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information: a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; b) has commercial value because it is secret; and c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.”

uncertainty for businesses, innovators, investors and consumers, not just in this, but in many other sectors as well.

**WIPO:** We remain concerned that publications and capacity-building activities of the World Intellectual Property Organization (WIPO) increasingly reflect IP-skeptic perspectives despite its formal mandate and role as an IPR-focused organization. For example, WIPO has organized regional training sessions for government officials on use of exceptions and limitations to patent rights. These sessions focus on public health, exploring the various possible ways that IPR for pharmaceuticals can be curtailed under national laws and regulations. Such training sessions could provide a basis for IP weakening and pose a threat to innovation and public health in the event that such policies are enacted. At a minimum, it is crucial for WIPO to contextualize policies that would weaken patent rights by highlighting the negative impact that such policies have on innovation, partnership, investment, technology transfer, and other contributing factors to economic advancement, and by opening up to the full range of evidence on the record. Industry expressed concern on these issues as early as 2011, when the first training session on exceptions and limitations was organized in Bangkok; yet, sessions continue to be organized under WIPO's auspices with no particular improvements or change in direction in sight. In addition, industry participation is often very limited, making it very difficult to ensure that a more neutral, balanced view is heard.

**WHO and Other Trade & Public Health Fora:** Activities at the World Health Organization (WHO) also deserve close scrutiny given the problematic text that was adopted as part of the U.N. Global Strategy for the Prevention and Control of Noncommunicable Diseases (NCD) and NCD Action Plan, which suggested IPR could be a barrier to countries' and patients' access to NCD treatment, despite a complete lack of evidence to that effect.<sup>14</sup> In general, IP-related trade issues are most appropriately addressed in the WTO, not at the WHO or other non-specialized UN bodies. This is particularly the case given the absence of evidentiary support for any kind of IP-skepticism in the NCD context; the lack of any kind of detailed, empirical work that has been performed in this respect; and broad support for the positive role IPR plays in a range of WHO and other international publications and studies on the topic.<sup>15</sup>

**WTO:** We continue to be concerned about suggestions by some countries at the WTO that IPR constitute a barrier to the development, dissemination and deployment of "clean technology". In this regard, we note a paper presented by the Government of Ecuador at the TRIPS Council in particular.<sup>16</sup> We note that the paper's overall conclusions lacked effective evidentiary support and are in fact contradicted by a range of studies, papers and analyses. In fact, patents, trade secrets and other forms of IPR allow innovators to capture the value of R&D activity, stimulating

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<sup>14</sup> The Declaration in that context called on members to consider the "full use of trade-related aspects of intellectual property rights (TRIPS) flexibilities" with respect to "affordable, safe, effective and quality medicines and diagnostics and other [medical] technologies."

<sup>15</sup> See, e.g., WHO, WIPO, and WTO, "Promoting Access to Medical Technologies and Innovation: Intersections Between Public Health, Intellectual Property, and Trade" (2012); World Health Organization Report of the Commission on Intellectual Property Rights, Innovation and Public Health, "Public Health, Innovation and Intellectual Property Rights" (2006).

<sup>16</sup> Communication from Ecuador, "Contribution of Intellectual Property to Facilitating the Transfer of Environmentally-Sound Technology," IP/C/W/585, February 27, 2013.

investment in innovation that might not otherwise occur.<sup>17</sup> They also provide private companies a means to distinguish their products from those of their competitors and offer the commercial and economic incentives and assurances for firms and innovators to share technology, know-how and the ability to use it. Trade, foreign direct investment, joint ventures, and other forms of commercial and public-private partnership play a particularly important role and allow developed, emerging and developing countries to become true partners in a global technology and advanced manufacturing value chain.

## **Opportunities to Improve Global IPR Protection and Enforcement**

Apart from the challenges highlighted above, we see some real near-term opportunities to strengthen the global framework for advanced manufacturing and industrial IPR as well.

**WTO/TRIPS NVNI Moratorium:** U.S. trade related IP diplomacy must be able to use all of the tools at its disposal to insist that trading partners respect existing global IP rules, as reflected in the WTO TRIPS Agreement and elsewhere, to prevent the erosion of the IP rights that support U.S. competitiveness and innovation. This may include consideration of possible WTO action within relevant policy committees or at the Dispute Settlement Body (DSB).

In this regard, ending the moratorium on TRIPS-related Non-Violation Nullification and Impairment (NVNI) disputes (Article 64:2 TRIPS) could be a helpful tool to help address challenges to the economic value of U.S. IPR. Lifting the moratorium would also send a strong and timely signal. The moratorium was originally foreseen to be short-term, but it continues to be extended by unanimous consent. We believe that it is important to work with governments around the world to end the moratorium soon.

**TPP and TTIP Negotiations:** Unique opportunities currently exist to raise the profile of trade secrets and IPR protections generally within the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP). The issue of trade secrets has already been included in draft negotiating agendas for both U.S. and EU negotiators in the TTIP negotiations. Including trade secrets in a future TTIP Agreement will provide additional leverage towards both the U.S. and EU policy process, and allow the U.S. and EU to set the “gold standard” for trade secrets protection worldwide. Trade secrets language has already been included in the TPP negotiations. Japan’s entry into the negotiations provides a further opportunity to strengthen trade secrets protection in the agreement and throughout the Asia-Pacific region. Finally, the TTIP negotiations in particular offer a unique framework for the U.S. and EU to further codify existing bilateral IPR-related cooperation.

**Other Institutions and Policies:** Beyond the WTO, TPP and TTIP efforts, we also welcome and support the U.S. Government’s ongoing efforts to encourage and improve global IPR policymaking, protection, and enforcement, and to drive innovation policies and market-based

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<sup>17</sup> For the positive role IPR plays in this area, see, e.g., Daniel Johnson, Kristina Lybecker, “Innovating for an Uncertain Market: A Literature Review of the Constraints on Environmental Innovation,” University of Colorado Working Paper 2009-06 (July 2009); Branstetter, Fishman, Foley, “Do Stronger Intellectual Property Rights Increase International Technology Transfer? Empirical Evidence from U.S. Firm-Level Panel Data” (July 2005), p. 2; UNFCCC, “Enabling Environments for Technology Transfer” (4 June 2003); World Trade Organization, “Trade and Transfer of Technology,” Background Note by the Secretariat, WT/WGTTT/W/1 (2002).

technology development, deployment and dissemination, at home, and abroad. A key challenge in the area of IPR is the continued lack of a broad, global understanding of the positive role patents, trade secrets, and other forms of advanced manufacturing and industrial IPR play – for businesses, workers, consumers, and even the environment, global health, and our economies as a whole. In this regard, we fully support the findings reflected in the President’s U.S. Trade Secrets Strategy that was presented earlier this year and that pointed out the critical importance of diplomatic efforts, education, training, and global capacity building, alongside domestic and foreign legislation, trade negotiations and other forms of policymaking and enforcement.

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