



DOING BUSINESS IN INDIA: MYTHS AND REALITIES

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INTRODUCTION

In November 2017, President Donald Trump met with Indian Prime Minister Narendra Modi during the Asean Summit held in the Philippines. The two leaders discussed the comprehensive strategic partnership between the United States and India and their shared commitment to a free and open Indo-Pacific region. Specifically, they focused on economic issues, including trade and investment, expanding economic ties and improving market access for each other's nations. Shortly thereafter, the president's daughter, Ivanka, travelled to India as leader of the U.S. delegation to the Global Entrepreneurship Summit, which was co-hosted by the United States and India. During her visit, Ms. Trump touted the "...strong friendship" and "growing economic and security partnership between our two nations."

Strategically, there are many reasons why promoting a U.S.-India partnership is useful. Where the interests of the American worker are concerned, however, there is much room for improvement. The United States has a more than \$30 billion deficit with India. The most glaring need for improvement is opening markets for innovative American products.

The Trump Administration is well aware of America's global advantage in technology – indeed if the U.S. is going to reverse current trends of massive trade deficits it is going to do so in sectors where it has an advantage and where it currently has surpluses with other countries, such as software and healthcare technologies. Recognizing this, in August 2017, President Trump dropped the hammer on China, instructing the United States Trade Representative, Robert Lighthizer, to investigate any of the acts, policies, or practices of China that may be unreasonable

or discriminatory and that may be harming American intellectual property, innovation, and technology. The White House noted:

The President is also standing strong against the theft of American IP, including defense-related technologies. The costs of intellectual property theft alone to the U.S. economy are estimated to be as high as \$600 billion a year. Such thefts not only damage American companies, they also threaten our national security. Consequences of China's reported actions may include: lost or reduced U.S. sales, exports, and jobs in key technology sectors; loss of intellectual property or proprietary technology to Chinese companies; loss of competitive position in the marketplace or in business negotiations; and network security costs, legal fees, and other costs.

President Trump is committed to protecting America's intellectual property and technology.

Is India next on the block?

India's Bait and Switch Approach

India's purported commitment to free trade, investment and open markets is best illustrated by the "Make in India" program announced by the Modi government in late 2014. This initiative was designed to encourage foreign direct investment in India. In exchange, India promised investors a fair run at the Indian market. It is a potential win-win: India attracts investment to its industrial base while Americans benefit from new access to an economy with

more than one billion people growing at 9% per year. The program's parameters include (1) increasing the equity caps on foreign ownership, (2) expediting the approval of licenses by moving to on-line platforms, (3) reducing the time required to obtain an electrical hookup, (4) strengthening the legal rights of borrowers and lenders with respect to secured transactions, (5) reforming the bankruptcy code, and (6) relaxing other norms and procedures for doing business in India.

For an innovative American workforce, the "National Intellectual Property Rights Policy" released by the Government of India in 2016 was another welcome development. Importantly, this policy recognizes that "IPR promotes advancement in science and technology, arts and culture" and marks a public acknowledgement by the Government of India that intellectual property rights contribute to innovation. The report calls for creating state-level "IP cells" to enhance enforcement of existing IP rights, reducing processing times for patent and trademark applications, and passing needed legislation to protect trade secrets.

Sadly, it's all talk and little action. India is one of the world's worst offenders of American intellectual property rights. In 2017, India was once again at the top of the "Priority Watch List" of the so-called Special 301 report issued by the United States Trade Representative – an annual report that documents challenges and problems with protection of American intellectual property assets around the world. India has been on the list every year since the report came into existence. The U.S. Commerce Department certainly believes the goods do not live up to the hype of promised reforms. Export.gov notes:

India remains one of the world's most challenging major economies with respect to protection and enforcement of IP. Despite positive statements and initiatives upon which the Modi Administration has embarked, the pace of reform has not matched high-level calls to foster innovation and promote creativity. India has yet to take steps to address longstanding IP issues that are affecting innovative industries. India was listed on the Priority Watch List in USTR's Special 301 report for 2017. The country continues to remain the home to several "Notorious Markets" across the breadth of the country, according to USTR's latest report in [November 2016].

Across all industries, patent applicants face costly and time-consuming patent opposition hurdles, long timelines for receiving patents, and excessive reporting requirements. In the pharmaceutical and agricultural chemical sectors, India continues to lack an effective system for protecting against the unfair commercial use, as well as the unauthorized disclosure, of undisclosed test or other data generated to obtain marketing approval for such products.

In short, the USTR has concluded that India's overall levels of IP enforcement remain deficient, and the lack of uniform progress across the country threatens to undercut the positive steps that certain Indian states have taken. Further, India has so far failed to join important international treaties and agreements that could improve aspects of its IP regime, such as the World Intellectual Property Organization (WIPO) Internet Treaties and the Singapore Treaty on the Law of Trademarks.

There are three industries in the U.S. that disproportionately contribute to the Gross Domestic Product (GDP), support millions of jobs, pay on average more than \$100,000 per year, and are adding new jobs every day. By unfairly targeting these industries, India makes it all but impossible to reverse the growing trade deficit. Here are a few high-profile examples of India's bait-and-switch approach to luring U.S. companies into its market only to take advantage of American workers by stealing U.S. intellectual property or severely limiting the ability of innovators to compete fairly in India:

- **Software:** New guidelines for computer related inventions in India make it impossible to protect software inventions. 60% of software in India is pirated. There is perhaps no other sector more important to the health of the American economy than software. The software industry – data, applications, cloud computing and more – contributes more than \$1 trillion to U.S. GDP and supports nearly 10 million American jobs.
- **MedPharma:** India has targeted medical innovators, both to serve its growing middle class population and also to establish India as a destination for medical tourism. Once American innovators introduce their technologies into the market, however, India slaps medicines and devices with price caps. Every dollar that India refuses to spend on healthcare – currently accounting for less than one percent of GDP – is a dollar that Americans must spend. India is not paying for their share of medical innovation – they get a free ride on the backs of Americans. India's targeting of the American medpharma industry also threatens more than 5 million more high-paying American jobs.
- **Information and Communications Technology (ICT):** This year India installed onerous new localization and technology-transfer requirements under the guise of

telecommunications security. ICT providers from America must now hand over source code and other sensitive and highly valuable intellectual property to Indian regulators as a condition of entering the Indian market. The ICT sector in the U.S. is yet another crown jewel, supporting more than 6.5 million American jobs.

Beneath the laudatory U.S. rhetoric and public show of friendship from India, the Indian government has quietly allowed a dynamic to take hold that is inconsistent with open and transparent economic behavior. The country's high-profile quest for investment from America is tarnished in practice by unfair and opportunistic treatment of the very same U.S. corporate class investors it so assiduously pursues. Indeed, India seems to penalize those industries where America holds a comparative advantage and would benefit from access to the Indian market – those in high technology, innovative sectors and those dependent on valuable intellectual property. In particular, the Government of India has limited growth and opportunities for America software and Internet companies, telecommunications, pharmaceuticals and medical devices.

Clearly, there is a long road ahead before the Indian government's 'Make in India' initiative can be seen as more than symbolic rhetoric. Corporate investors from the U.S. and elsewhere require clarity and consistency in order to maintain a meaningful long-term presence in a new market. Until the 'Make in India' initiative begins to bring about better governance and rule of law in the Indian marketplace, foreign investors are likely to be ever more wary of its seductive market access promises.

CAN 'MAKE IN INDIA' BE RECONCILED WITH 'MAKE AMERICA GREAT AGAIN'?

Improving commercial relations with India is a top priority of the Trump administration since enhancing America's ties with India can support our long-term economic and strategic interests. To that end, the Overseas Private Investment Corporation (OPIC), a financial institution of the US government, has agreed to provide \$1 billion of financing to India for various infrastructure projects.

President Trump believes a democratic and diverse India can serve as a counterweight to China and other authoritarian regimes in Asia. If India desires to truly position itself as a trusted diplomatic partner for the U.S., as well as continuing to benefit from bi-lateral trade and investment with American investment partners, it must drastically and demonstrably improve its business climate, governance and transparency. India must cease hiding discriminatory practices under the cheerful guise of 'Make in India.'

ABOUT THE AUTHOR

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Dr. Weinstein studied public administration at Dartmouth College and received his A.B. in 1963. After a year of study at the London School of Economics and Political Science, he began graduate work in economics at Columbia University, receiving an M.A. in 1966 and a Ph.D. in 1973.

Dr. Weinstein has been a consultant to many companies, non-profit organizations and government agencies, and he testifies frequently before legislative, regulatory and judicial bodies. His clients have included AT&T, Texas Instruments, Reliant, Entergy, Devon Energy, Energy Futures Holdings, the Nuclear Energy Institute, the American Petroleum Institute, the U.S. Conference of Mayors, the Western and Southern Governors Associations, the Cities of Dallas and San Antonio, and the Joint Economic Committee of the U.S. Congress.

Dr. Weinstein was director of federal affairs for the Southern Growth Policies Board from 1978 to 1980 and served as director of the Task Force on the Southern Economy of the 1980 Commission on the Future of the South. From 1984 to 1987 he was chairman of the Texas Economic Policy Advisory Council and from 1987 to 1988 served as visiting scholar with the Sunbelt Institute in Washington, D.C. He is currently a panelist with the Western Blue Chip Economic Forecast. Dr. Weinstein is a member of the Dallas-Fort Worth Association for Business Economics and serves on the board of directors of Beal Financial Corporation. From 2011 to 2014 he was a Fellow with the George W. Bush Institute, and he is currently an Associate of the John Goodwin Tower Center for Political Studies at SMU and a Fellow of Goodenough College in London.