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## **UK Trade Agreements: Negotiations with India**

### **Submission of the Chartered Institute of Patent Attorneys (CIPA).**

1. The Chartered Institute of Patent Attorneys (CIPA) is the professional and examining body for patent attorneys in the UK, representing virtually all the 2,500 registered patent attorneys in the UK, whether in industry or in private practice. CIPA is the largest intellectual property membership organisation in the UK with a total membership over 4,000, including judges, barristers, trainee patent attorneys and other professionals with an interest in IP. CIPA represents the views of the profession to policy makers at national, European and international level, with representatives sitting on a range of influential policy bodies and working groups in the UK and overseas.

### **Introduction**

2. We are wholehearted advocates of this Government's free trade ambitions and aspirations for the UK to become a leader in global trade policy. New markets represent new opportunities for our members, as well as the chance to grow the footprint of UK plc's strategic strengths around the world. CIPA has been pleased to submit evidence to various inquiries on CPTPP, Australia and New Zealand – and have been delighted to build a collaborative, positive relationship with Government in these areas.
3. In relation to India, CIPA members have a developed understanding of the Indian Intellectual Property sector, having frequently engaged in the Indian IP environment and with IP professionals there. Their activity in regard to India includes assisting clients (and sometimes employers) to develop global IP strategies, including for India, obtaining IP protection in India for their clients, and acting on instructions from attorneys in India to assist Indian companies in obtaining protection in the UK. In India, CIPA members are also involved in developing and implementing commercialisation and enforcement strategies for IP rights and in reviewing the impact of IP rights held by third parties on the plans and strategies of their clients for new products.

### **India does not have a modern IP system that functions to a high standard.**

4. This is a significant difference for the UK's negotiators to consider in discussions with India regarding a possible future FTA. Compared with the negotiations already in progress with countries such as Australia, New Zealand and the US, India has a comparatively less well-developed IP system.
5. The Indian system is arguably not even compliant with the minimum standards set by TRIPS. Problems exist at multiple levels in the Indian IP environment. There are examples of important types of protection not being available, e.g. data exclusivity. There are also examples of Indian law containing specific provisions designed to create additional hurdles for obtaining protection, e.g. relating to pharmaceutical inventions. In other areas, such as enforcement, the written law may appear acceptable, but it is not applied effectively in practice.

6. The UK should not be put in the position of appearing to endorse in any way the current lack of meaningful protection for IP in India. The inadequacies of the Indian IP system must be addressed if there is to be an IP chapter in a trade agreement between the UK and India.

**If it is not possible to persuade India to adopt acceptable levels of IP protection and enforcement, CIPA believes that it would be better not to include an IP chapter in a trade agreement.**

7. We have highlighted some particularly problematic areas of the Indian IP environment below, with a view to the impact this would have on the IP and UK businesses. We would welcome the opportunity for further discussions.
  - How are the terms of a new trade agreement between the UK and India likely to affect you, your business or organisation, or those that you represent?

### **Enforcement of IP rights**

8. Without requiring India to adopt a number of acceptable levels of IP protection, there could be issues in the enforcement of IP rights. Our members report severe difficulty in enforcing IP rights of all types in India. In part, this is simply due to courts being overburdened, in spite of the best efforts of those employed in the system. However, in some areas, there appear to be systematic biases against enforcing IP, notably in pharma/ healthcare technologies. Although the court system may appear to be adequate on paper, it does not operate effectively in practice. Litigants suffer excessive delays, bureaucracy and in some technology areas, it is almost impossible to enforce IP rights. Even where a litigant does succeed in getting a decision that their IP is infringed, we have multiple reports of the Indian courts being unwilling to grant injunctions. In the few cases where an injunction is obtained, it is difficult to bring it into effect in a meaningful way. For example, frequently another infringer will spring up, nearby and involving the same people or close associates and relatives of those individuals, to resume the infringing activities within a matter of days leaving the rights holder back at square one.

### **Patents**

9. In some fields, it is extremely difficult to get applications through the Indian Patent Office to grant. To a certain extent, this may simply be due to a shortage of trained examiners. However, in other areas, there appears to be a strategy to set up additional hurdles and barriers to prevent patents from being obtained. For example, in pharmaceuticals, there is in practice an additional hurdle to patentability, contrary to TRIPS. This requirement (Article 3d) is interpreted very broadly, such that new active entities are often considered to be derivatives of previous active entities and therefore excluded from patentability, when in fact they are new active substances. This is economically significant given the UK's strength in life sciences.
10. Another major problem is the stringent requirements for working patents in India and the severe consequences for not complying. While this may appear to the uninitiated to be merely a bureaucratic inconvenience, in practice, it causes real difficulties. It is not easy to determine exactly which patents are worked in complex multi-component products or methods and when that working commences. It appears that the system has been set up primarily to promote compulsory licensing. Other countries do not have similar requirements.

### **Trade Marks, Designs and Copyrights**

11. Our members concerns in these areas are primarily around lack of speed in procedures and in enforcement. See our comments above.

### **Data exclusivity/ patent term extensions**

12. India does not provide any meaningful regulatory data exclusivity protection for pharmaceuticals, nor does it provide extensions (such as supplementary protection certificates) to compensate for regulatory delays. The lack of these types of protection is significant for biotechnology and pharmaceutical products and again, appears part of a deliberate strategy to limit the intellectual property protection in these areas compared with international norms.

### **Summary**

13. In summary, it is currently difficult to obtain meaningful IP protection and even harder to enforce it effectively in the vast majority of cases in India. This is a problem for the UK as an innovative economy and for UK businesses.
14. A related difficulty is that UK businesses wishing to commercialise their innovations in India, are compelled to share the details with local players, due to the Indian government's requirements around company ownership or joint ventures. If the relationship subsequently breaks down, the UK business is then faced with the almost insurmountable hurdles for enforcing IP as mentioned above. CIPA believes this is another part of the eco-system that is set up to favour local Indian businesses at the expense of those from other countries. This must be addressed holistically.
15. CIPA participates in regular conversations with the DIT and the UK IPO and we have raised these issues in virtual meetings. We hope to continue our close collaboration with Government and stand ready to assist as negotiations proceed.

### **For further information please contact:**

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