

Presentation to International Trade Commission October 6, 2010

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Global Standards for Global Trade: Fact versus Fiction

An introduction to the effect of standards as non-tariff barriers to international trade, use of national standards and practices, such as government procurement by some governments, to promote industrial policy goals in strategic sectors and to advance other national priorities which may distort domestic and international markets and impede global business and consumer interests, and the interplay of standards-setting, IPR and competition policy.



INTRODUCTION



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OVERVIEW

Part 1:

- Introduction and brief overview of Standards

Part 2:

- Truth about Standards & Examples of standards used by some governments as strategic tools of competition and tools of industrial policy to promote key sectors such as health, high tech, security

Part 3:

- Intersection of standards setting and intellectual property rights (IPR) policy



FREE vs. RESTRICTED TRADE



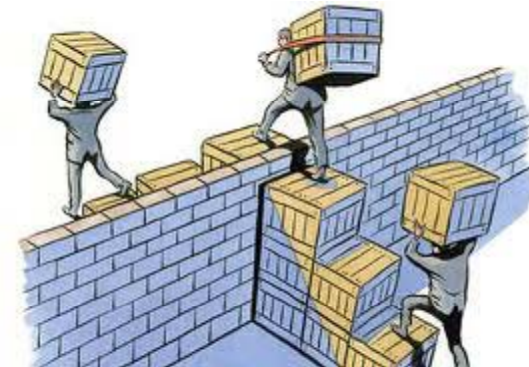
Free trade includes:

- trade of goods without taxes (including tariffs) or other trade barriers (e.g., quotas on imports or subsidies for producers)
- trade in services without taxes or other trade barriers
- The absence of trade-distorting policies (such as taxes, subsidies, regulations or laws) that give some firms, households or factors of production an advantage over others
- Free access to markets
- Free access to market information
- Inability of firms to distort markets through government-imposed monopoly or oligopoly power



RESTRICTED

Trade may be restricted by high tariffs on imported or exported goods, restrictive quotas, a variety of restrictive government regulations designed to discourage imports, and anti-dumping laws designed to protect domestic industries from foreign take-over or competition.



A NEW TRADE ORDER?

"The Doha Round marks a transition from the old governance of the old trade order to the new governance of a new trade order"

WTO Director-General Pascal Lamy

1 October 2010

www.wto.org/english/news_e/sppl_e/sppl173_e.htm

"The dramatic reduction in border barriers has exposed deeper structural differences between economies - in standards, regulations or legal systems - that are generating new "systems frictions" and, because they are more tied up with values-based domestic objectives, are proving harder to resolve"



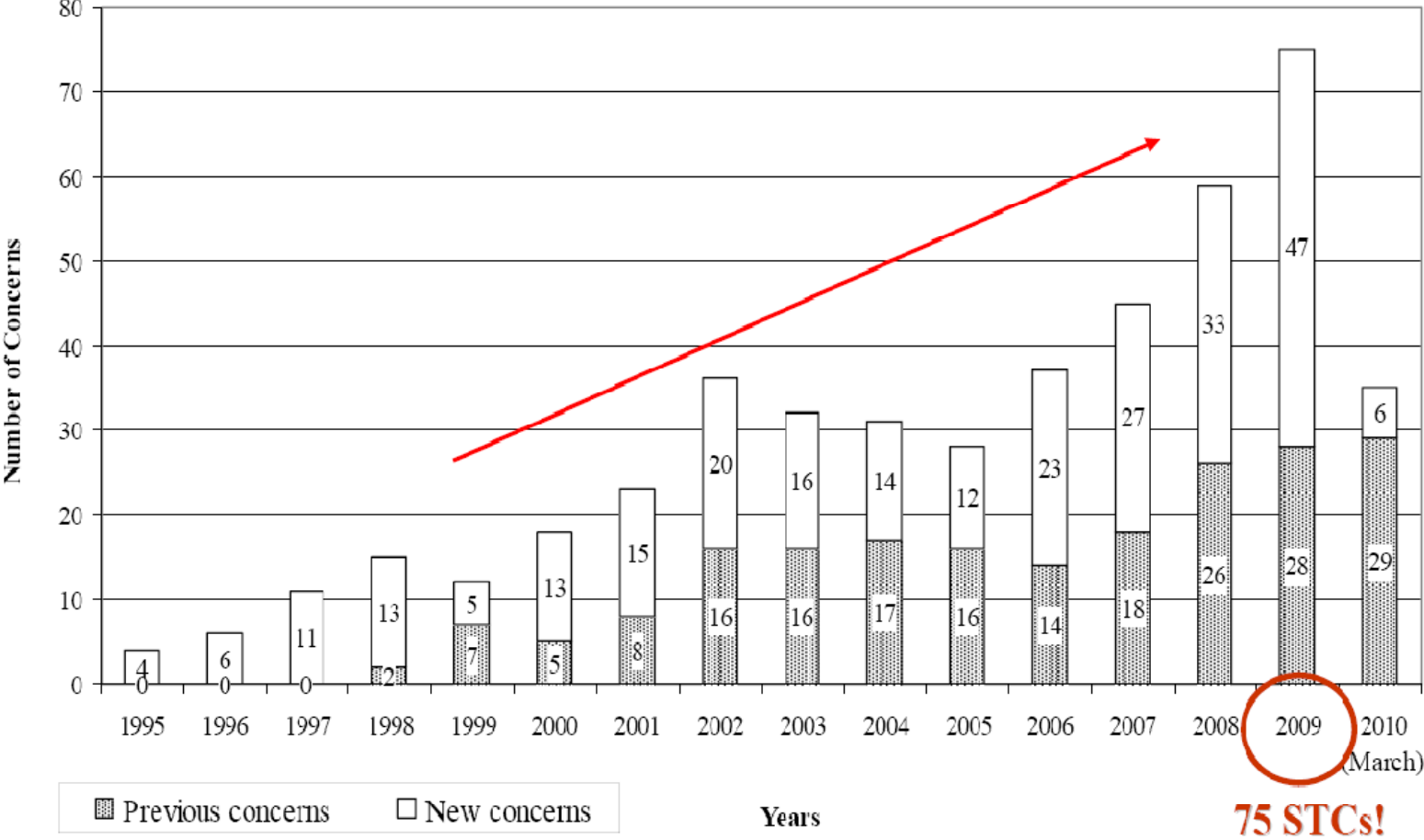
STANDARDS...



A Wolf in Sheep's Clothing?



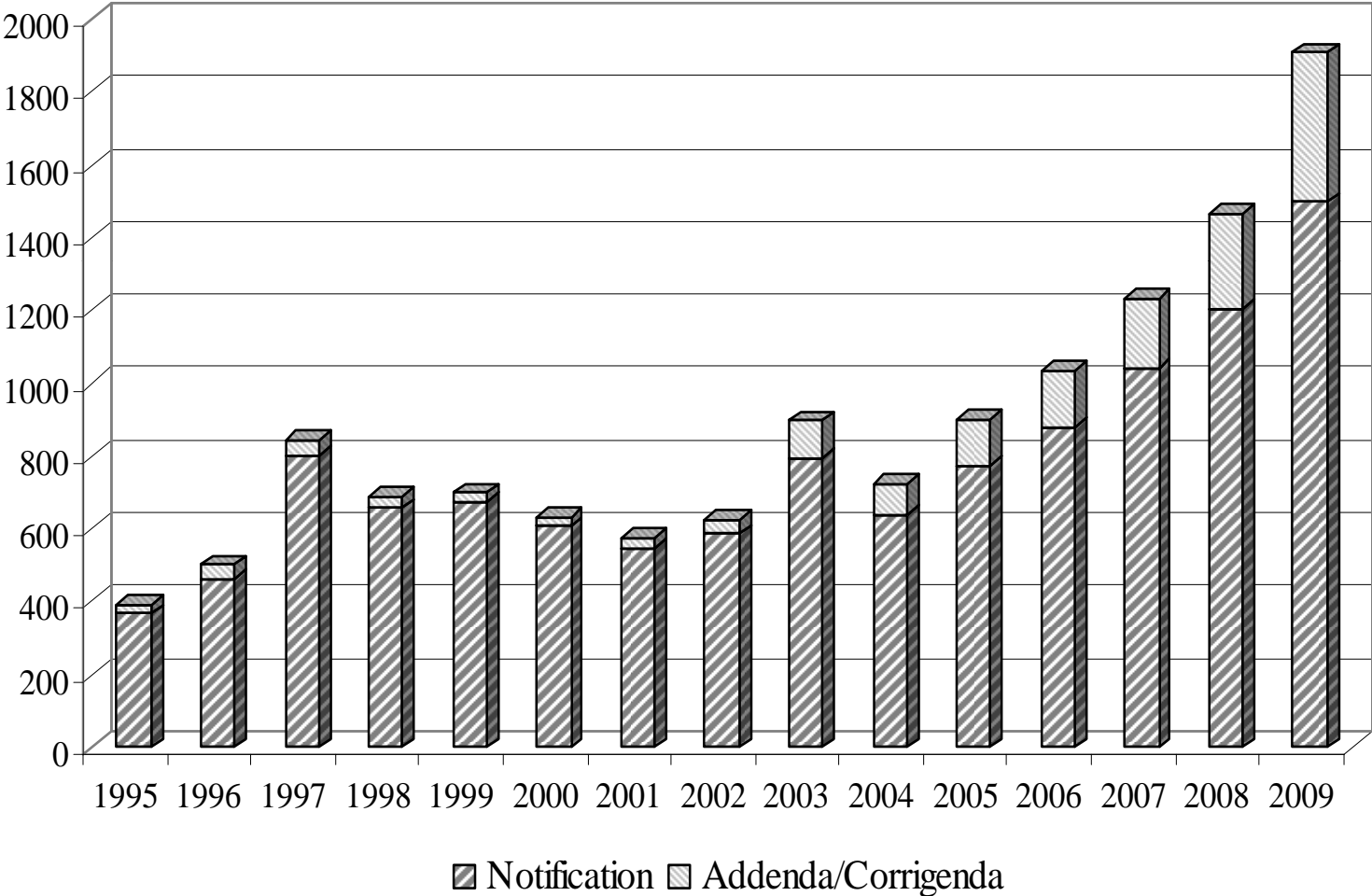
Number of specific trade concerns (STCs) raised per year in the WTO TBT Committee (WTO G/TBT/28)



The rise in the number of concerns raised reflects several factors – including an increase in the number of proposed measures that WTO Members have notified to the WTO, a heightened focus on standards-related activities, increased concern that standards-related measures may be used as a form of disguised protectionism ... USTR comment on WTO report



Notifications to the WTO of technical regulations and conformity assessment procedures (WTO G/TBT/28)





US TRADE ISSUES RELATED TO STANDARDS

- Solar panels – design requirements. U.S. officials raised concerns in 2009 that certain types of thin-film solar panels (TFSP) manufactured by U.S. industry cannot be placed on the Korean market.



- Ride-on lawnmowers – unique French requirements. The United States continues to have concerns with respect to the French Ministry of Agriculture’s (MoA) “skirt” requirement for ride-on lawnmowers, a measure that France never published as part of an official law or decree and that was not notified to the WTO.



- Toys and children’s articles – conformity assessment procedures. U.S. industry raised concerns about a proposed National Institute of Metrology, Standardization, and Industrial Quality (INMETRO) measure amending Brazil’s existing conformity assessment procedures for toys and children’s articles.



US TRADE ISSUES RELATED TO STANDARDS

- Provincial notifications. In 2009, Canada did not notify two provincial measures to the WTO that raised potential TBT concerns for U.S. exporters: the British Columbia Recycling Regulation (B.C. Reg. 449/2004) and the Ontario Electrical Safety Authority's product safety registration process for electrical products.



- Chemicals. While supportive of the EU's objectives of protecting human health and the environment, the United States has raised trade-related concerns with respect to the EU's chemicals regulation, REACH, which entered into force June 1, 2007.



USTR March 31 report 2010 REPORT ON TECHNICAL BARRIERS TO TRADE



Part 2:

TRUTH ABOUT STANDARDS AND EXAMPLES OF THEIR USAGE AS STRATEGIC TOOLS OF COMPETITION

Definitions and Purposes of Standards

Difference between Regulations and Standards

Policy of US Government

Global Standards Overview

**Examples of Standards as Strategic Tools of Competition
and in Industrial Policy to Promote Key Sectors**



TRUTH ABOUT STANDARDS

- Standards are ubiquitous and exist in every industrial products and services sector;
- Interoperability standards establish key interfaces between diverse industrial and product service sectors;
- Horizontal system standards applicable to management and environment and occupational safety and health and “social responsibility” can apply to any business, organization or agency
- Standards can make or break global markets for the technologies of tomorrow



TRUTH ABOUT STANDARDS

Key Terms for Today (1)

Standards

Market-driven technical specifications for a product, service, person, process or system, with which compliance is voluntary.

Documentary Standard and Measurement Standard

Specification and physical measure

Voluntary Standard and Mandatory Standard

Definitions; inconsistent; usage



TRUTH ABOUT STANDARDS

Key Terms for Today (2)

Technical Regulations

Technical specifications, which may include (or reference) particular standards, with which compliance is mandatory.

Conformity Assessment

Processes used to verify the compliance of a product, service, person, process or system to either a standard or a regulation.



STANDARDS-REGULATIONS

How are Voluntary Standards used in Regulations?

- US Government agencies use externally developed standards in a wide variety of ways (**Adoption, Strong Deference, Basis for Rulemaking, Regulatory Guides, Guidelines, Deference in Lieu of Developing a Mandatory Standard, Procurements, to Satisfy Grant’s Regulations, etc.**)
- **According to WTO TBT ...** For a government, avoiding unnecessary obstacles to trade means that when it is preparing a technical regulation to achieve a certain policy objective - whether protection of human health, safety, the environment, etc - the negotiations shall not be more trade-restrictive than necessary to fulfill the legitimate objective ...
- and “in respect of their technical regulations, products imported from the territory of any Member be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country” ... and importantly ***technical regulations in accordance with relevant international standards are rebuttably presumed “not to create an unnecessary obstacle to international trade”.***



STANDARDS-PROCUREMENTS

- How are standards use in Procurements?
 - Department of Defense
 - General Services Administration
 - Access Board
 - Department of Energy/EPA Energy Star
 - any government purchase or preference



Difference between a technical regulation and a standard according to WTO TBT

- *The difference between a standard and a technical regulation lies in compliance. While conformity with standards is voluntary, technical regulations are by nature mandatory.*
- *They have different implications for international trade. If an imported product does not fulfill the requirements of a technical regulation, it will not be allowed to be put on sale.*
- *In the case of standards, non-complying imported products may be allowed on the market, but then their market share may be affected if consumers' (or for example government procurements) prefer products that meet local procurement standards*

Source: www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm



Policy of US GOVERNMENT

- In the USA, most standards are developed within the voluntary, consensus based system.
- The U.S. standards system is primarily voluntary, private sector, sector-specific and marketplace driven with multiple standards developers taking an active role.
- **The U.S. Federal government participates as one of many stakeholders in the standards development process, not as the main driver of the process.**
- By comparison, governments in other nations play a more active role; and the process is more centralized. Although not a driver of the process, as noted above, the U.S. government is committed to reliance on voluntary standards for procurement and regulation, where such usage is consistent with regulatory and procurement objectives
- ***OMB Circular A-119 Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*** contains the key guidance:
 - “Your agency must use voluntary consensus standards, both domestic and international, in its regulatory and procurement activities in lieu of government-unique standards, unless use of such standards would be inconsistent with applicable law or otherwise impractical.”



TRUTH ABOUT STDS

Key Concepts in Standards Development

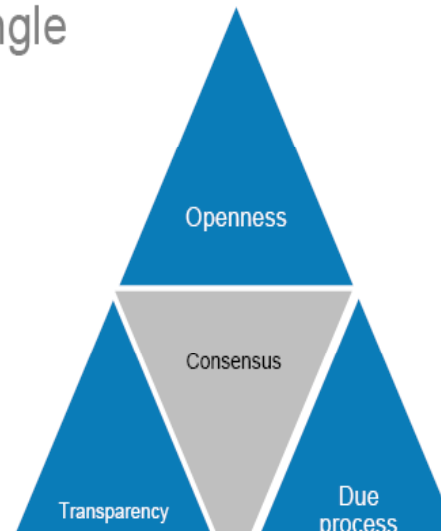
Openness

- all stakeholders may participate; no single interest may dominate

Transparency

- records/ processes open and publicly available

Due Process

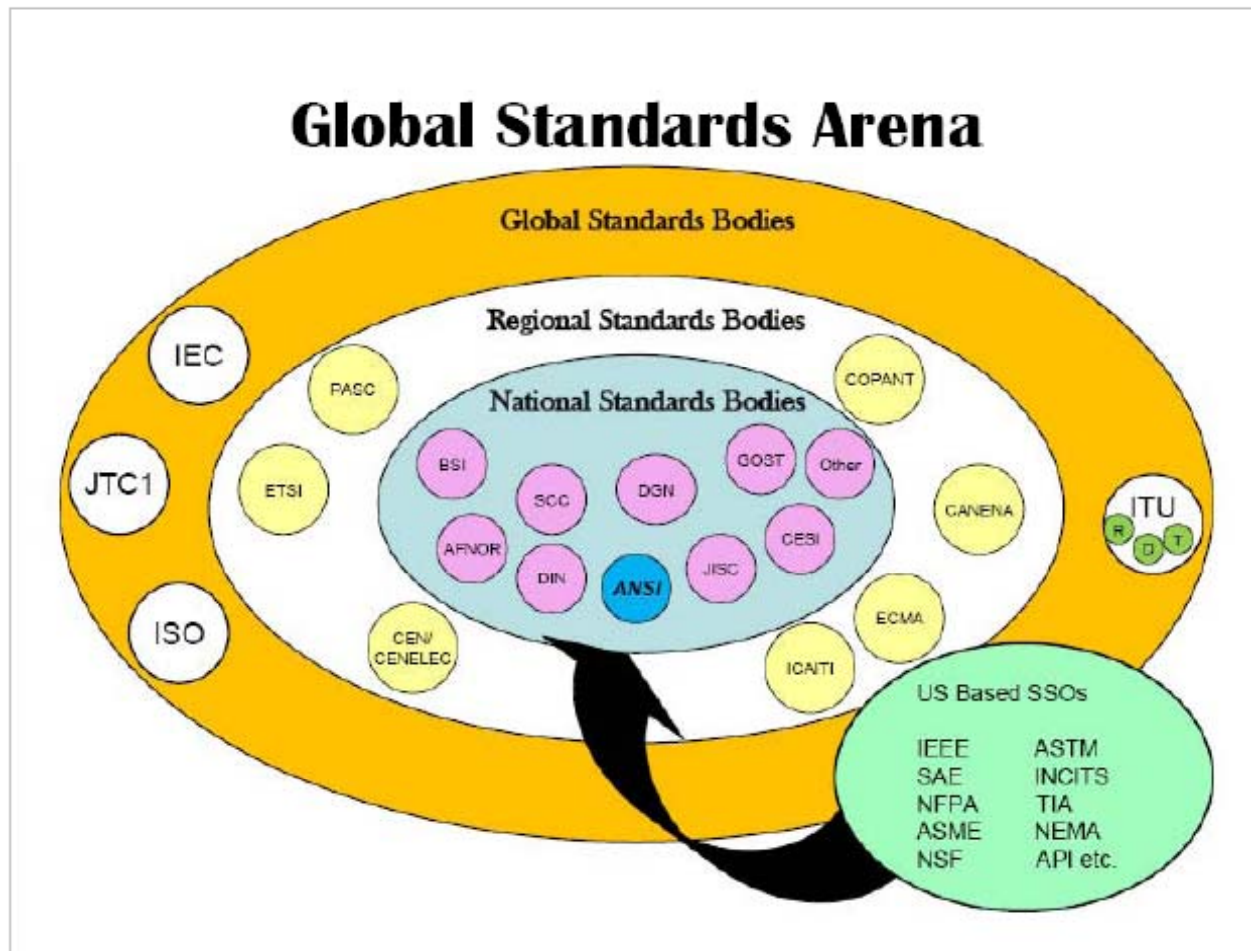


TRUTH ABOUT STDS

- Many criteria exist to evaluate so-called “good” standards procedures development
- ISO/IEC Procedures
- ANSI Essential Requirements
- WTO TBT Code of Good Practice
- ISO Guide 59 Code of Good Practice for Standardization
- Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the TBT Agreement, contained in document G/TBT/1/Rev.9
- Guidance in OMB Circular A-119
- Open Standard as defined by ITU and ANSI



GLOBAL STANDARDS OVERVIEW



<Figure 1 >

Source: based on diagram from Clyde Camp

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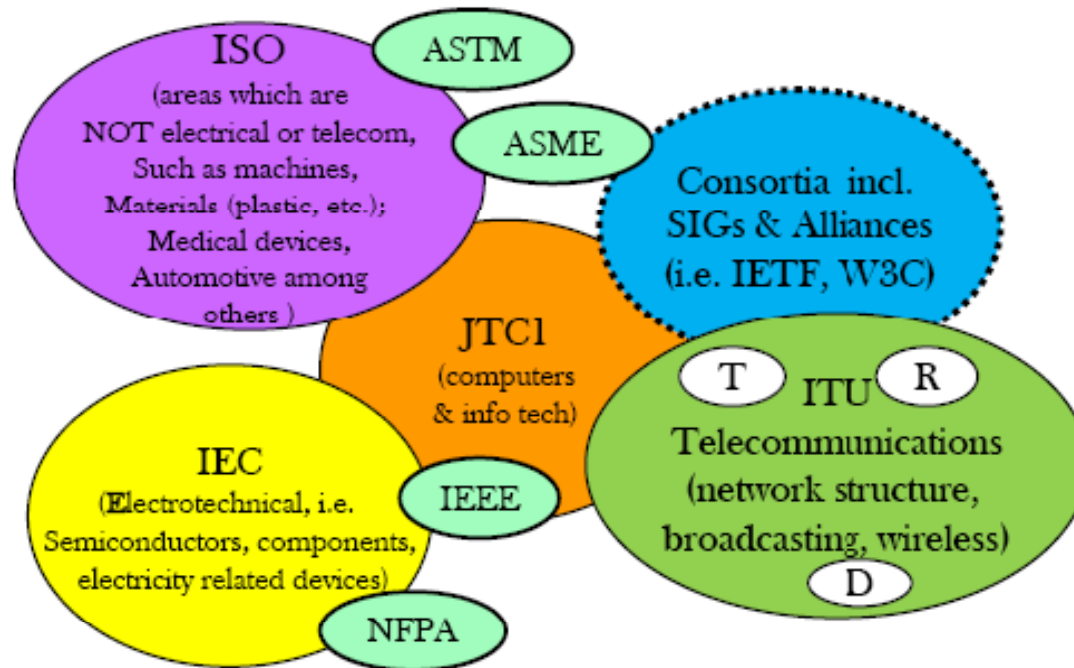
<http://www.crcamp.com>



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GLOBAL STANDARDS SIMPLIFIED

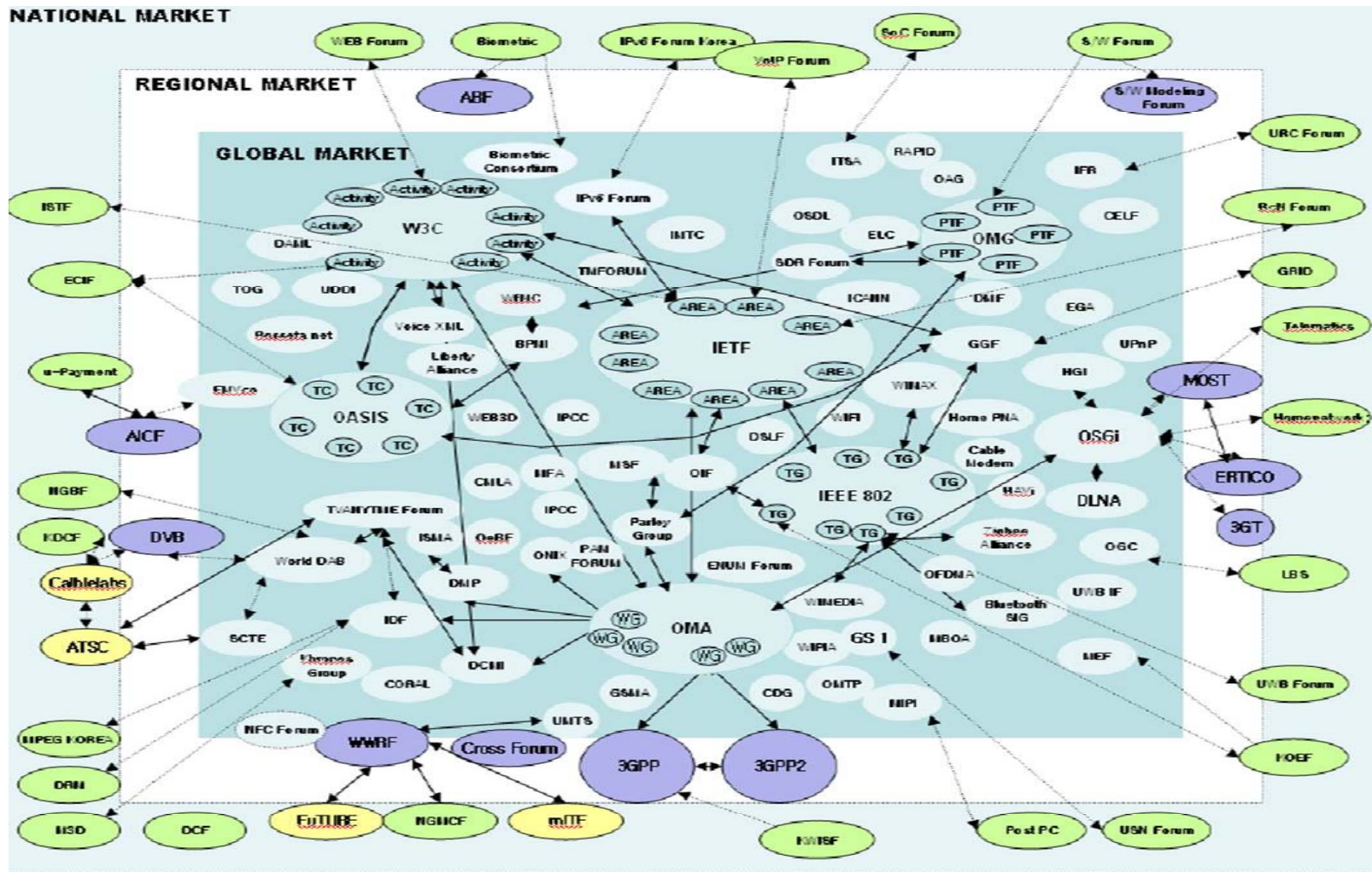
International SSO Landscape



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GLOBAL STANDARDS-REALITY



STANDARDS as STRATEGIC TOOLS OF COMPETITION

European Union's Approach to Standards and Conformity Assessment

- Several years after the completion of the 1992 European single market initiative, the European Commission announced its intention to encourage its trading partners to adopt standards and regulatory approaches based on, or compatible with, European practice.
- The European Commission noted in a 2007 strategy paper submitted to the European Council and Parliament that its single market can act as a global standard setter to enhance the competitiveness of European industry.
- This strategy paper recommended that the EU “promote greater global regulatory convergence – including where appropriate the adoption of European standards – internationally through international organizations and bilateral agreements.”

Source: Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - A single market for citizens - Interim Report to the 2007 Spring European Council



STANDARDS as STRATEGIC TOOLS OF COMPETITION

Mandatory Biotech Labeling

A growing number of markets around the world either require or have proposed mandatory retail labeling for food products that contain or are derived from biotechnology. Details, as well as implementation, of the regimes vary from market to market. However, the mandatory nature of these regimes has impeded or, in some cases, completely blocked U.S. exports of such food products to several countries. These countries include Australia, Brazil, China, EU Member States, Indonesia, Japan, Korea, Malaysia, New Zealand, Russia, Saudi Arabia, Thailand, and Taiwan. U.S. biotechnology crops are ubiquitous and include corn, cotton, and soybeans, as well as food produced or processed from these crops. Biotechnology crops are the core of U.S. agricultural exports, which totaled \$98.6 billion in 2009. source USTR doc



Efforts of ERIA in 2010FY

The aim to utilize ERIA* project is to disseminate the realistic testing standards which mirror actual use, such as Asian environment and climate by means of formulating the international standard in cooperation with Asian countries and Japan. The specific field of the standard is "environmental Technology" and "safety and security".

Effort in "Environmental Technology"

Energy Efficiency Products Agenda

In terms of performance testing standard of consumer products in each Asian economy, there is a possibility that several problems regarding confidence of examination results would be found. One reason is the performance testing national standard adopted by each economy has not been understood. The other is it does not fit in actual situation in Asia.

Utilization of ERIA project

- Investigate the present situation in terms of performance testing standard of refrigerator in several countries in ASEAN.
- Compare with the difference from methods and results of examination in round robin test in several countries in ASEAN.
- The results of the round robin test would reflect energy performance international standards with regard to situation of the usage in Asia.

Smart-grid Agenda

Smart-grid widely covers its relevant technical area. However, smart-grid lacks its horizontal cooperation because of recent active development in each economy.

Utilization of ERIA project

- Investigate China and India's activities in regard to smart-grid from the view of standards and conformity assessment and industrial promotion.

Effort in "Safety & Security" Technology

Accessible Design Agenda

In terms of accessible design which enable the aged and the handicapped to access social system as same as ordinary people, ISO is now preparing international standards. It is needed to cooperate with Asian economies in order to settle on international standards considering figures of Asian people.

Utilization of ERIA project

- Setting on WG which is involved in each economies' expert. Discussing and understanding deeply regarding accessible design in current Asian situation.
- It is expected that the WG would lead to set on international standards which apply to Asian people.

- Toward strengthening function of suggestion in ERIA's standards and conformity assessment.
- Unifying standards and conformity assessment in Asian region.
- Diffusing excellent products in the field of energy saving and safety performance.

* Economic Research Institute of ASEAN and East Asia



STANDARDS as STRATEGIC TOOLS OF COMPETITION ... US Example

Why another standards committee?

- Administration priorities include significant standards infrastructure:

- Smart Grid
- Electronic Health Records
- Cloud Computing
- Educational Technologies



Credit: Mercy Hospital

- Standards are integral to President's National Innovation Strategy
- Advent of multi-disciplinary, cross-cutting technologies
- Budgetary challenges – tighter Federal budgets

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Coordinating Federal Govt. Engagement in Documentary Standards:
www.nist.gov/director/vcat/upload/03_PAT_Standards_FINAL.pdf



US national Renewable Energy Standard (RES)?

“A bipartisan effort on RES needed to compete globally It is great to hear that senators are working together in a genuinely bipartisan fashion to pass a national renewable energy standard (RES). The news comes none too soon, as foreign competitors such as China, Germany and Japan are already working to aggressively build up their renewable-energy industries. Members of both parties can agree that a cleaner, more diversified energy economy is desirable in terms of our global competitiveness and national health and security”

- thehill.com/opinion/letters/121501-a-bipartisan-effort-on-res-needed-to-compete-globally By Clifton Yin - 09/28/10 07:22 PM ET



Part 3:
**INTERPLAY OF STANDARDS-
SETTING, IPR POLICY AND
COMPETITION POLICY**

IPR Policy Components

Trigger Policy for IPR Policy

Standards Process and IPR Policy

Intersection of Competition, Standards and IPR



IPR Policy in Standards Setting



A complex balance of interests among stakeholders underpin such IPR policies, procedures and precedents. Most fundamental is the balance of the interests of users of a standard to access and practice the standard without undue burden with the interests of the contributors of intellectual property to the standards setting process to benefit from that contribution.



Two main aspects of IPR policy

Patents & Essential Patent Claims ... Opportunity for those who wish to implement the standard to have access to a license to an essential patent claim(s) required for compliance with that standard
...

Copyright, ownership & availability of the standards document
... ownership of work products, sale versus free, support of standards infrastructure, public access right to text in laws/regulations, pirates (not focus of this presentation)

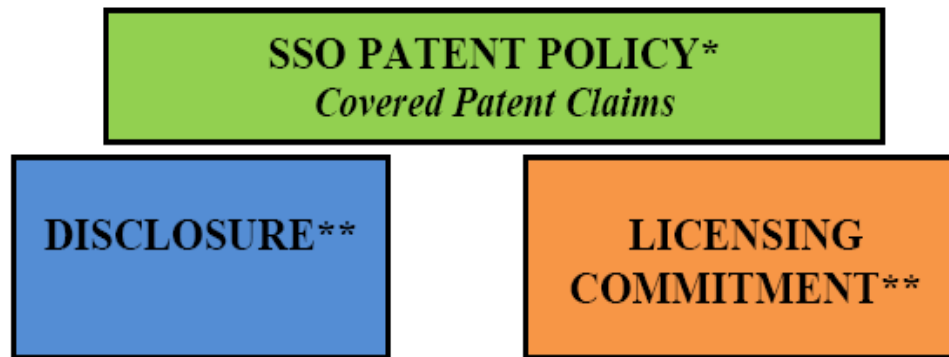
USING PATENTED TECHNOLOGY IN A STANDARD IS NOT A NEW ISSUE.

August 17, 1932 (ANSI) Committee on Procedure: *That as a general proposition patented designs or methods should not be incorporated in standards. However, each case should be considered on its merits, and if a patentee be willing to grant such rights as will avoid monopolistic tendencies, favorable consideration to the patent being included in the standard.*



IPR Policy Components

PRIMARY COMPONENTS OF AN SSO PATENT POLICY



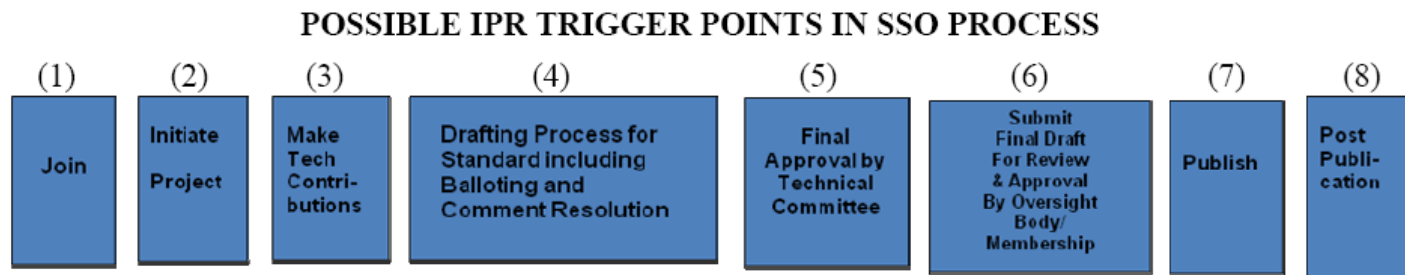
- * *The Patent Policy may contain either a disclosure or licensing commitment, or a combination of both.*
- ** *The specifics of each component, such as timing, what to disclose and/or commit, as well the mechanism and format, will vary for each SSO.*

<Figure 5 >

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Trigger Points for IPR Policy



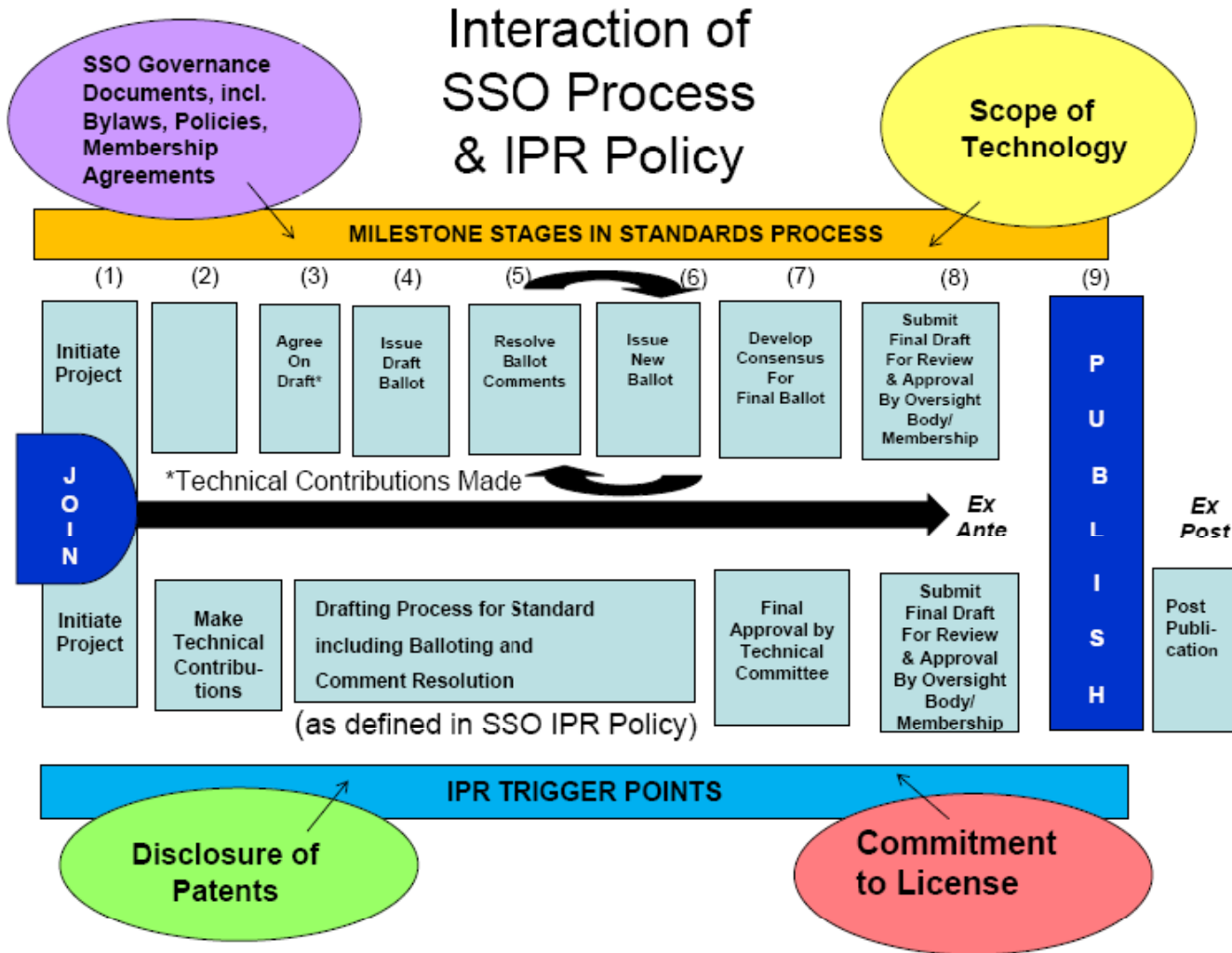
<Figure 6 >

Many steps in a typical standards process in which an IPR policy may indicate disclosure and/or licensing commitment expected. Each IPR policy will have different trigger points and timing depending on its membership and the scope of technology being standardized.

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Standards process & IPR policy

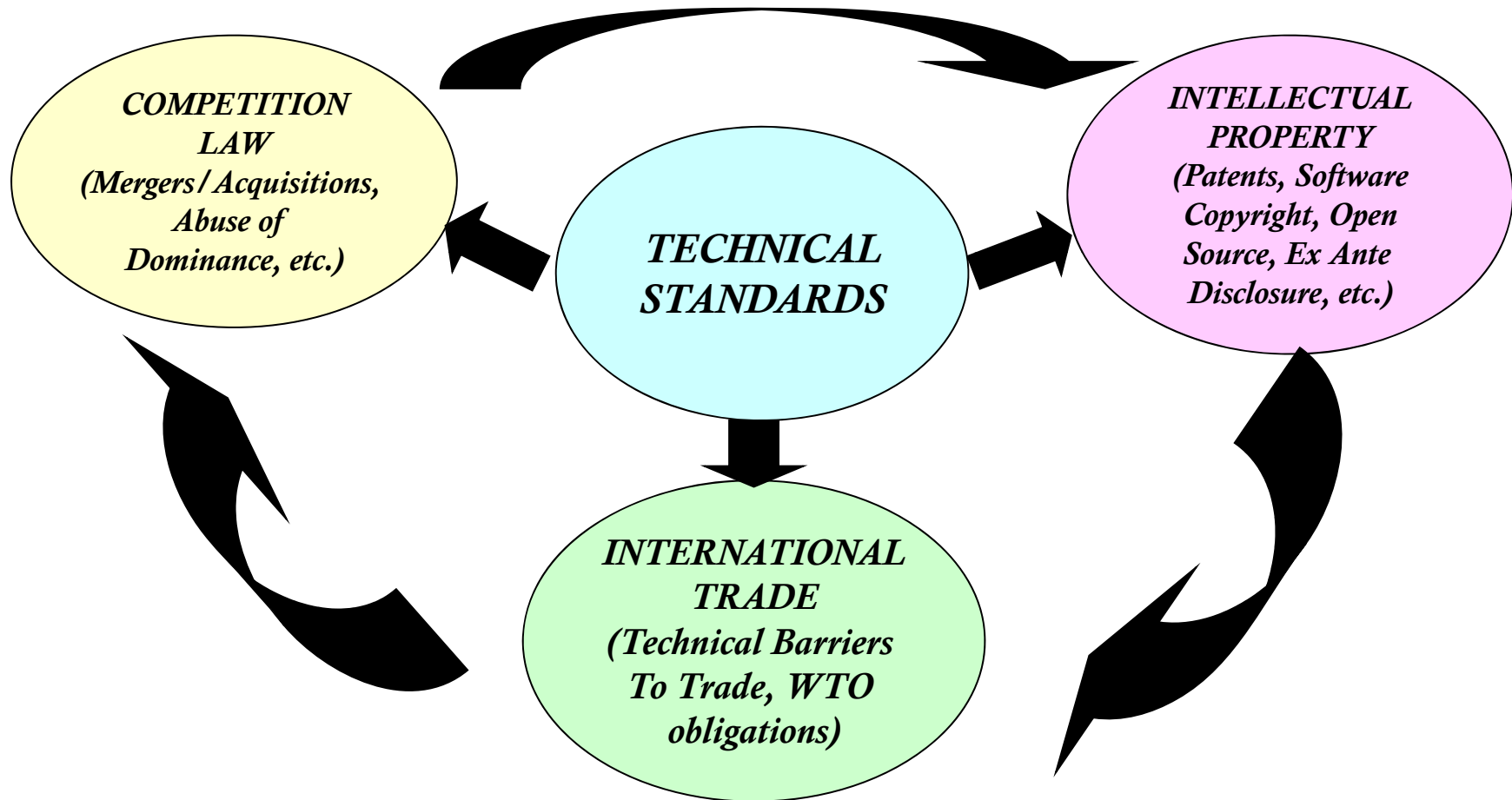


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INTERSECTION OF STANDARDS, PATENTS, COMPETITION, TRADE



Emerging Compulsory Licensing Trends

Intellectual property right not an end in itself: India

Geneva, Sep 23, 2010

- India says intellectual property rights should not become "an end in itself" at a time when countries are facing grave challenges in the areas of health and climate challenge ...

New Delhi will also consider granting compulsory licenses for patented green technologies or pharmaceutical products or IT software.

24/09/2010 MSN News

<http://news.in.msn.com/international/article.aspx?cp-documentid=4420086>



EMERGING TRENDS - India

- India: Policy on Open Standards for E-Governance issued by Min. of Communications and Information Technology (May 2010)
 - Egovernment Standards Portal egovstandards.gov.in/index.html
- Government of India “shall adopt a Single and Royalty-Free (RF) Open Standard progressively for a ‘specific purpose with in a domain’ to meet the laid down objectives of the Policy”(which are to facilitate interoperability and to be technology-neutral)
- May actually have the unintended consequence of less interoperability since often many global ICT standards may contain components which also permit FRAND/RAND based technology and/or may reference other standards that might not necessarily be based on Royalty Free (RF)-based licensing commitments



EMERGING TRENDS - Europe

- DG Informatics overseeing the proposal which supports the delivery of interoperable pan-European electronic public services. Interoperability Solutions for European Public Aministrations (ISA) is the successor of IDABC (which stands for Interoperable Delivery of European eGovernment Services to public Aministrations, Businesses and Citizens)
- Program administrators of ISA are currently in the process of trying to finalize two documents:
 - 1) *The European Interoperability Framework (EIF) 2.0*
<http://ec.europa.eu/idabc/en/document/7728>
 - 2) *the European Interoperability Strategy (EIS)*
<http://ec.europa.eu/idabc/servlets/Doc?id=32595>



EMERGING TRENDS - Europe

- EIF v.2 also may further articulate an approach to open standards and interfaces for the implementation of interoperability between systems, applications, business processes, and actors producing or using eGovernment services
- Ongoing debate as to whether there should be a preference for standards where the relevant patent holders must agree to make their patented technology freely available to all implementers , i.e. Royalty Free.



EMERGING TRENDS – Asia

- China's government considering plans that could force foreign auto makers to hand over cutting-edge electric-vehicle technology to Chinese companies in exchange for access to the nation's huge market, international auto executives say. China's Ministry of Industry and Information Technology is preparing a 10-year plan aimed at turning China into "the world's leader" in developing and producing battery-powered cars and hybrids, according to executives at four foreign car companies who are familiar with the ministry's proposal. The draft suggests that the government could compel foreign auto makers that want to produce electric vehicles in China to share critical technologies by requiring the companies to enter joint ventures in which they are limited to a minority stake, the executives say. Source: September 16, 2010 WSJ [NORHIKO SHIROUZU](#)

online.wsj.com/article/SB10001424052748704394704575495480368918268.html?KEYWO



EMERGING TRENDS – Asia

- The European Commission ruled on January 30, 2008 that approval for compulsory patent licensing for Philips "CD-Recordable (CD-R)" by the Intellectual Property Office of Ministry of Economic Affairs in Taiwan violated fair trade, so Taiwan must abolish the compulsory licensing or amend the Patent Law within two months, otherwise, the case would be filed to the World Trade Organization (WTO) for resolution of trade dispute. Source:
<http://www.tsailee.com/en/ipn/default01.asp?PKID=1000>



CONCLUSION (1)

- **No Single “Best Organization” or “Optimum Global Approach” for Standardization for all Industry Sectors**
 - *Global standardization goals are achieved in the United States through sector-specific activities and through alliances and processes provided by companies, associations, standards developing organizations, consortia, and collaborative projects.*
 - UNITED STATES STANDARDS STRATEGY
PUBLICAA.ANSI.ORG/SITES/APDL/DOCUMENTS/STANDARDS%20ACTIVITIES/NSSC/USSS%20-%20TEXT%20ONLY.DOC
 - *Fundamentally, whether a standard is relevant, effective and appropriate in fulfilling a Member’s particular regulatory or market need is not determined by which body developed it...
the diversity of bodies that develop standards promotes innovation and helps ensure that standards are of high quality and respond to regulatory and market needs.*
 - COMMUNICATION FROM THE UNITED STATES TN/MA/W/138 28 JUNE 2010 MARKET ACCESS FOR NON-AGRICULTURAL PRODUCT



CONCLUSION (2)

Successful International Standards Organizations' IPR Policy meet the needs of its members and industry by containing key elements:

INCLUSION OF ALL STAKEHOLDERS

FLEXIBILITY



BALANCE



CONCLUSION (3)

- Governments should not mandate compulsory licensing in legislation or policies except in limited cases as prescribed in TRIPs Article 31.
- Standards, the wolf in sheep's clothing, needs to be carefully monitored as an emerging technical barrier to trade.



ANNEXES



USTR Resources

- USTR March 31 report 2010 REPORT ON TECHNICAL BARRIERS TO TRADE
(www.ustr.gov/sites/default/files/REPORT%20ON%20TECHNICAL%20OBARRIERS%20TO%20TRADE%20FINALTO%20PRINTER%2025Mar09.pdf)
- 2010 REPORT ON SANITARY AND PHYTOSANITARY MEASURES
March 2010
([www.ustr.gov/sites/default/files/SPS%20Report%20Final\(2\).pdf](http://www.ustr.gov/sites/default/files/SPS%20Report%20Final(2).pdf))



Examples of US notifications to the WTO of Technical Regulations and Conformity Procedures

[United States of America USA/576 \(Televisions, test procedures \(HS 8525\)\)](#) Thursday, September 23, 2010, 8:00:00 PM

[United States of America USA/575 \(Organic foods\)](#) Monday, September 20, 2010, 8:00:00 PM

[United States of America USA/573 \(Residential water heaters, direct heating equipment and pool heaters \(HS 8516.10, 8516.21, 8419.11, 8419.19, 9506.99.55\)\)](#) Sunday, September 19, 2010, 8:00:00 PM

[United States of America USA/571 \(Safe transport of hazardous materials\)](#) Monday, August 30, 2010, 8:00:00 PM

[United States of America USA/569 \(Occupant crash protection; motorcoach definitions \(HS 8708.21\)\)](#) Thursday, August 26, 2010, 8:00:00 PM

[United States of America USA/565 \(Plants, plant products \(HS 6-1, 44\)\)](#) Tuesday, August 17, 2010, 8:00:00 PM

[United States of America USA/564 \(Baby cribs\)](#) Thursday, July 29, 2010, 8:00:00 PM

Source: http://gsi.nist.gov/global/index.cfm/L1-7/L2-28/A-413/R-3ECD24AE_619E_DF11_A974_0019B9C8C923



White House National Science and Technical Council Subcommittee on Standards

What will the SOS do?

- Initial SOS sub-groups:
 - Standards “playbook”
 - compilation of best practices and experiences of Federal agencies
 - develop metrics to measure effectiveness of agency engagement
 - coordinated by NIST and ?
 - Standards and IP –
 - focus USG efforts on the issue of standards and IP
 - significant impact on ability of the U.S. interests to innovate and compete
 - coordinated by PTO and DOJ

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Coordinating Federal Govt. Engagement in Documentary Standards:
www.nist.gov/director/vcat/upload/03_PAT_Standards_FINAL.pdf



EMERGING TRENDS – Asia (China)

- December 21, 2009 Take Two: China's Proposed Regulations For Patent-Involving National Standards
<http://www.ip-watch.org/weblog/2009/12/21/take-two-china%e2%80%99s-proposed-regulations-for-patent-involving-national-standards/> To be viable and relevant, standards whether mandatory or not must often make use of technology that itself often involves patents. The SAC patent policy proposal is unbalanced against an intellectual property owner's rights and will discourage participation from owners of intellectual property within and outside of China. Implementation of the SAC patent policy proposal as worded will place China in a position to have to accept and promote inferior technologies and/or more costly implementations for important standards.
- April 2010 China's Latest Draft Disposal Rules For Patents In Standards: A Step Forward? <http://www.ip-watch.org/weblog/2010/04/01/china's-latest-draft-disposal-rules-for-patents-in-standards-a-step-forward/> The proposed CNIS Disposal Rules strive to align with the harmonised patent policy of ISO/IEC/ITU.¹⁹ The concepts of disclosure and licensing are addressed at many stages in the standards process using a RAND licensing framework. By distinguishing between technically essential patents and technically essential patent claims in relation to disclosure and licensing statement obligations, clarifying the patent licensing declaration form and required supporting documentation, and to whom the policy applies, CNIS will be able to significantly enhance the current proposed rules



TRIPS Exemption

Article 31 of the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") Agreement provides that if a member nation's laws allow for the use of a patent without the authorization of the patent holder, including use by the government or third parties authorized by the government, the provisions governing such a compulsory license should include that: (i) prior to the grant of a compulsory license, the proposed user made efforts to obtain authorization from the patent holder on "reasonable commercial terms and conditions" and that such efforts were not successful within a "reasonable period of time"; (ii) if a national emergency arises, the requirement to make an effort to license the patent prior to obtaining a compulsory license may be waived; (iii) any compulsory license is not exclusive; (iv) a compulsory license is not assignable; (v) authorization of use will be limited to predominantly supplying the domestic market; and (vi) a patent holder will be paid "adequate remuneration." (www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm).

