



International Centre for Trade  
and Sustainable Development

# CONCERNS OVER THE PATENT SYSTEM AND STANDARDS IN THE INTERNATIONAL ARENA



*WTO: Intellectual Property Rights Issues and  
in Standardization International Seminar*

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# OVERVIEW OF THE PRESENTATION

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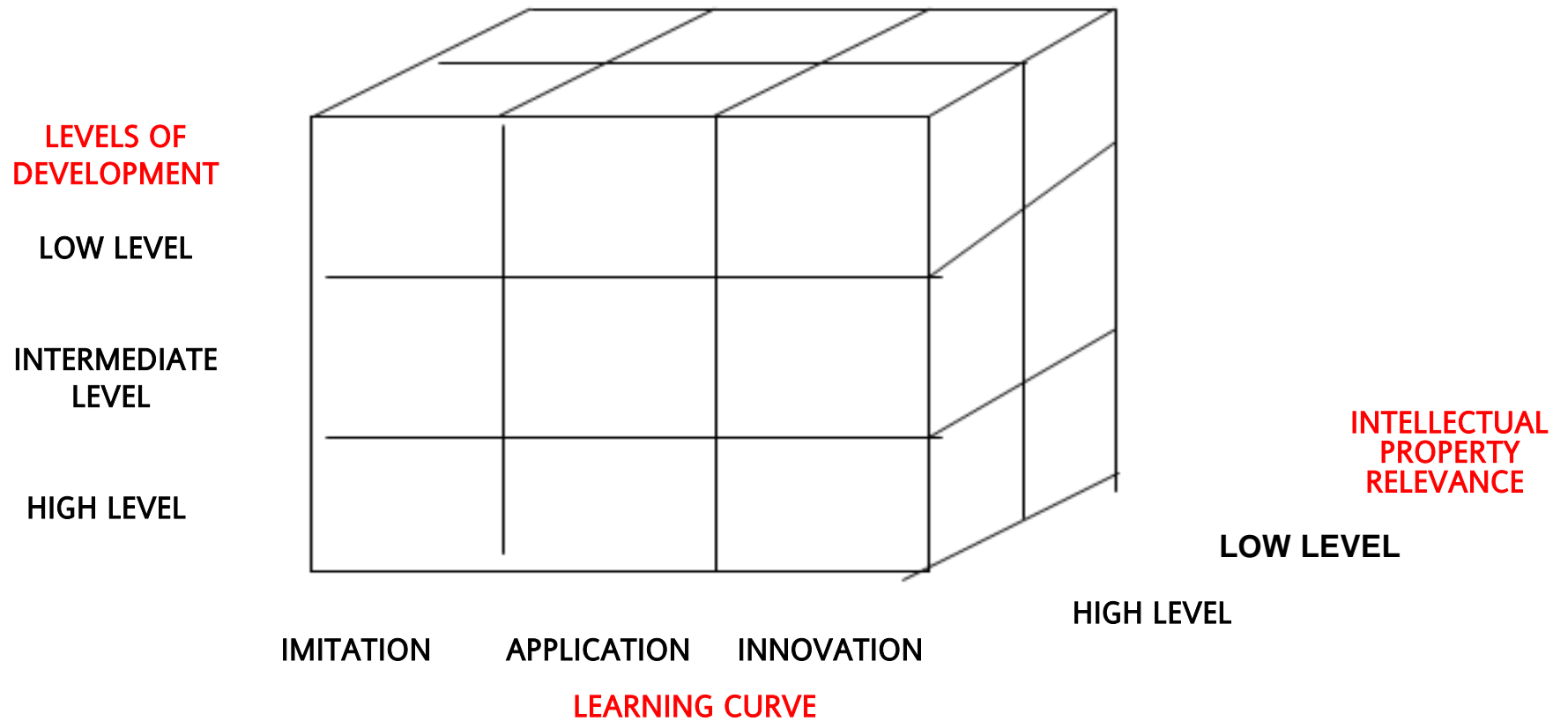
- **Brief historical and political appraisal of the patent system**
- **IP and Development: restating the relevance**
- **Concerns, causes and solutions over the patent system crises**
- **Discussions in the WTO: The China Proposal for the TBT**
- **The Debate in WIPO and links to the Development Agenda and the SCP**
- **Some conclusions**

# Brief Historical Appraisal of International Patent law

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- **The Paris Convention (1883)**
  - **The free traders vs the industrial developers**
  - **Patents was seen as form of industrial policy**
- **The creation of WIPO and The Patent Cooperation (1970)**
  - **UN IP organization / Global Technical cooperation**
  - **International application and pre-examination services**
- **The TRIPS Agreement (1996)**
  - **The globalization of IP**
  - **Minimum IP standards**
  - **Enforcement obligations**
- **The Patent Law Treaty (2000)**
- **WIPO's Patent Agenda: The SPLT process (2000)**
- **The Doha Declaration on TRIPS and Public Health (2002)**
- **The WIPO Development Agenda (2004)**

# IP and Development an integrated model



# Concerns, causes and solutions around the patent system I

MAIN CONCERNS	MAIN CAUSES	MAIN SOLUTIONS PROPOSED
<b>Negative effects over basic research and follow up innovation</b>	<ul style="list-style-type: none"><li>• Wide scope of patentability</li><li>• Loose patentability standards</li><li>• Low quality in examination</li></ul>	<ul style="list-style-type: none"><li>• Set limits on what is patentable</li><li>• Improve standards of patentability</li><li>• Improve patent examination</li><li>• Establish a pre-grating opposition phase</li><li>• Clarify the research exemption</li></ul>
<b>Limited access to essential goods</b>	<ul style="list-style-type: none"><li>• Lack of clear exceptions and limitations in patent law</li><li>• Lack of effective public interest balances</li></ul>	<ul style="list-style-type: none"><li>• Ensure development of flexibilities in-built in the system</li><li>• Ensure the existence of effective checks and balances</li></ul>

# Concerns, causes and solutions around the patent system II

MAIN CONCERNS	MAIN CAUSES	MAIN SOLUTIONS PROPOSED
<b>Negative effects over competition</b>	<ul style="list-style-type: none"><li>• Aggressive use of blocking and mining patents</li><li>• Exclusive rights</li><li>• Over broad claims</li></ul>	<ul style="list-style-type: none"><li>• Pro-competitive pre examination</li><li>• Compensatory liability regime</li><li>• Improved patent examination</li><li>• Creation of a “innovative commons” patent</li></ul>
<b>Uncertainty about patent infringement</b>	<ul style="list-style-type: none"><li>• New patent landscape (<math>N</math> numbers of patents and holders)</li><li>• Natural limitations of searches</li><li>• Presumption of validity of the patent</li><li>• Injunctive relief</li></ul>	<ul style="list-style-type: none"><li>• A universal patent database with notification requirements</li><li>• New private databases</li><li>• Shift the burden of proof</li><li>• Limit injunctive relief</li></ul>

# Concerns, causes and solutions around the patent system III

MAIN CONCERNS	MAIN CAUSES	MAIN SOLUTIONS PROPOSED
<p><b>Chilling effect over Manufacture</b></p> <p><b>High transaction costs For IP licensing</b></p>	<ul style="list-style-type: none"> <li>• New patent landscape</li> <li>• Burdensome and costly licensing procedures</li> </ul>	<ul style="list-style-type: none"> <li>• Cross licensing schemes</li> <li>• Patent pools</li> <li>• Open source systems</li> <li>• Automatic compulsory license/cross license</li> </ul>
<p><b>Disruption of in Standardization process</b></p> <p><b>Delays in launching of new products</b></p> <p><b>New forms of trade barriers</b></p>	<ul style="list-style-type: none"> <li>• New patent landscape</li> <li>• Overlap between standards and patents</li> <li>• Abuse of rights by titleholders</li> </ul>	<ul style="list-style-type: none"> <li>• Clarify the application of TBT rules to situations of overlap/conflict</li> <li>• Incorporate RAND principles to the code of good practices</li> <li>• Ex ante disclosure</li> <li>• Create collective societies for patents</li> <li>• Set non discriminatory Flat Royalties or Free Royalty systems</li> </ul>

# The WTO debate on Patents and standards

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- The Chinese submissions to the TBT (G/TBT/W/251 and add1)
  - Standards which can be met primarily through the use of technologies that are protected by IP could be difficult and burdensome to fulfill.
  - New technological products and applications rely heavily on patented and IP protected technology
  - If adequate rules are not set to deal with this problem the purpose of the standards will be defeated
  - VL Bus standards and 3G band were presented as an illustrative cases
  - It is proposed an information exchange that would provide the TBT Committee with relevant practices and experience on handling IP and licenses policies in standardization processes.
  - There is a need for an increase level of transparency and exchange of experience on how to deal with patents or other IPRs that could be relevant when developing new standards

# The WTO debate on Patents and standards

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## ■ Main reactions by Members of WTO in the TBT

- China's proposal has been the most controversial issue of the TBT agenda
- Supporters: Brazil and India
- Scepticals: US, the EC,
- Difficulties in considering this issue as part of Triennial Report of the TBT

## ■ TRIPS Council

- China has not presented its proposal in the TRIPS Council
- The reason might be that the negotiators are different

## ■ WIPO Development Agenda

- WIPO has organized seminars on IP and standard setting
- Position of the industry is not homogeneous
- The precedent of the negotiation shift in the draft Broadcasting Treaty Negotiations
- In WDA many concerns have been expressed on the impact that new trends in IP and licensing are generating over competition
- There are proposals to bring this issue to the agenda of the SCP

## Some conclusions

- Developing countries are quickly improving their technological and absorptive capacity
- The current nature of the patent system is raising many concerns over if it has gone too far
- Many of the systemic concerns apply directly to the debate over patents and standards
- There is a revisionist tendency to find options as well as check and balances inside and outside the patent system as to make it more responsive to research, development, and free trade
- This revisionist/reformist movement is taken place in various international organization including the WTO and WIPO
- Industry has not a homogeneous positions on all aspects of current patent law.
- There are many areas where industry and states can work together regardless of their the level of development: improve patent quality, facilitate standard setting and promote competition