

Changing the Rules Of the Game Ex-Post: SDO Governance and Why it Matters

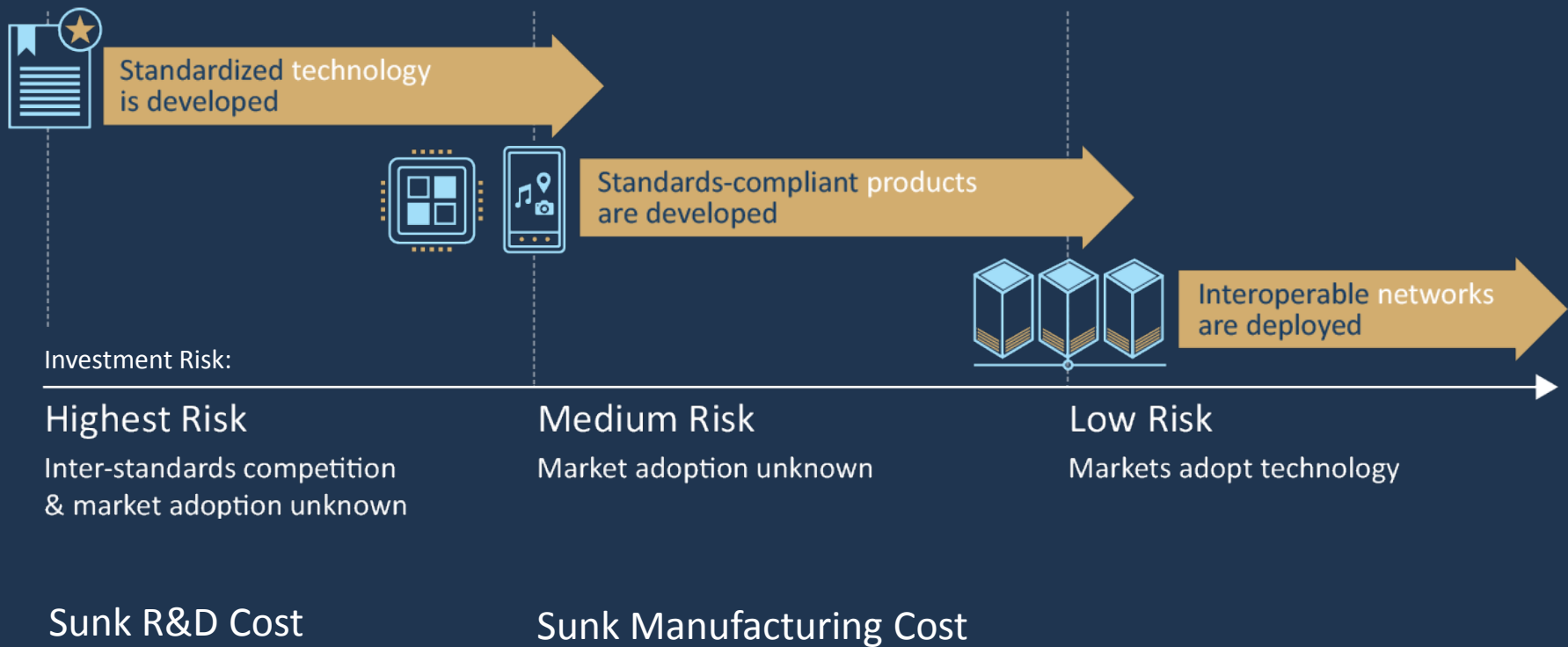
Dr. Kirti Gupta

Senior Director, Economic Strategy

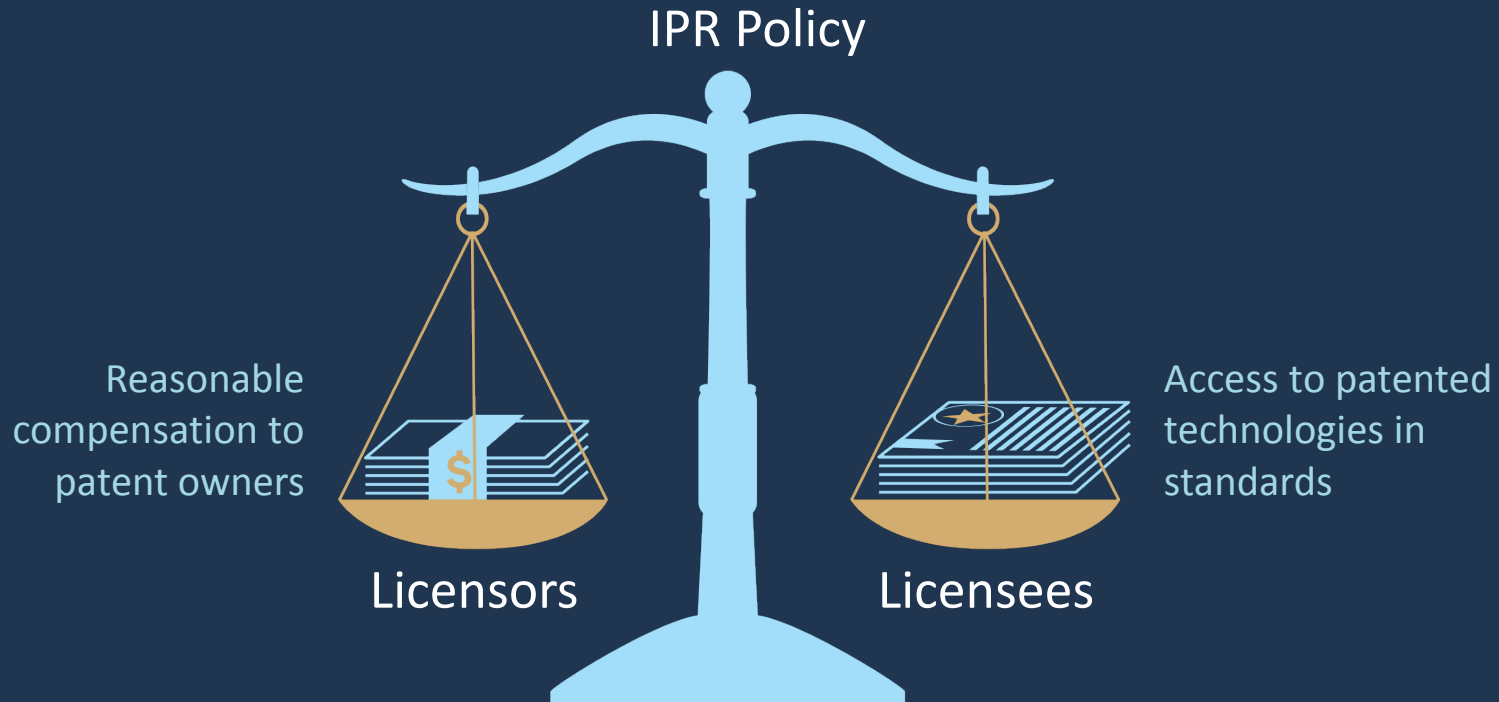
Qualcomm Inc.

Why Changing Rules Ex-post is Inefficient

Disrupts Incentives to Innovate



The Goal of IPR Policies: Provide Balance Between Licensors and Licensees



E.g., ETSI states that the purpose of its policy is to “reduce the risk that the investment in the preparation . . . of [standards] could be wasted as a result of an [essential] IPR . . . being unavailable” and that, “IPR holders . . . should be adequately and fairly rewarded for the use of their IPRs.”

EUR. TELECOMM. STANDARDS INST., ETSI RULES OF PROCEDURE at ann. 6 § 3.1 (2014), *available at* www.etsi.org/images/etsi_ipr-policy.pdf.

The Example of IEEE

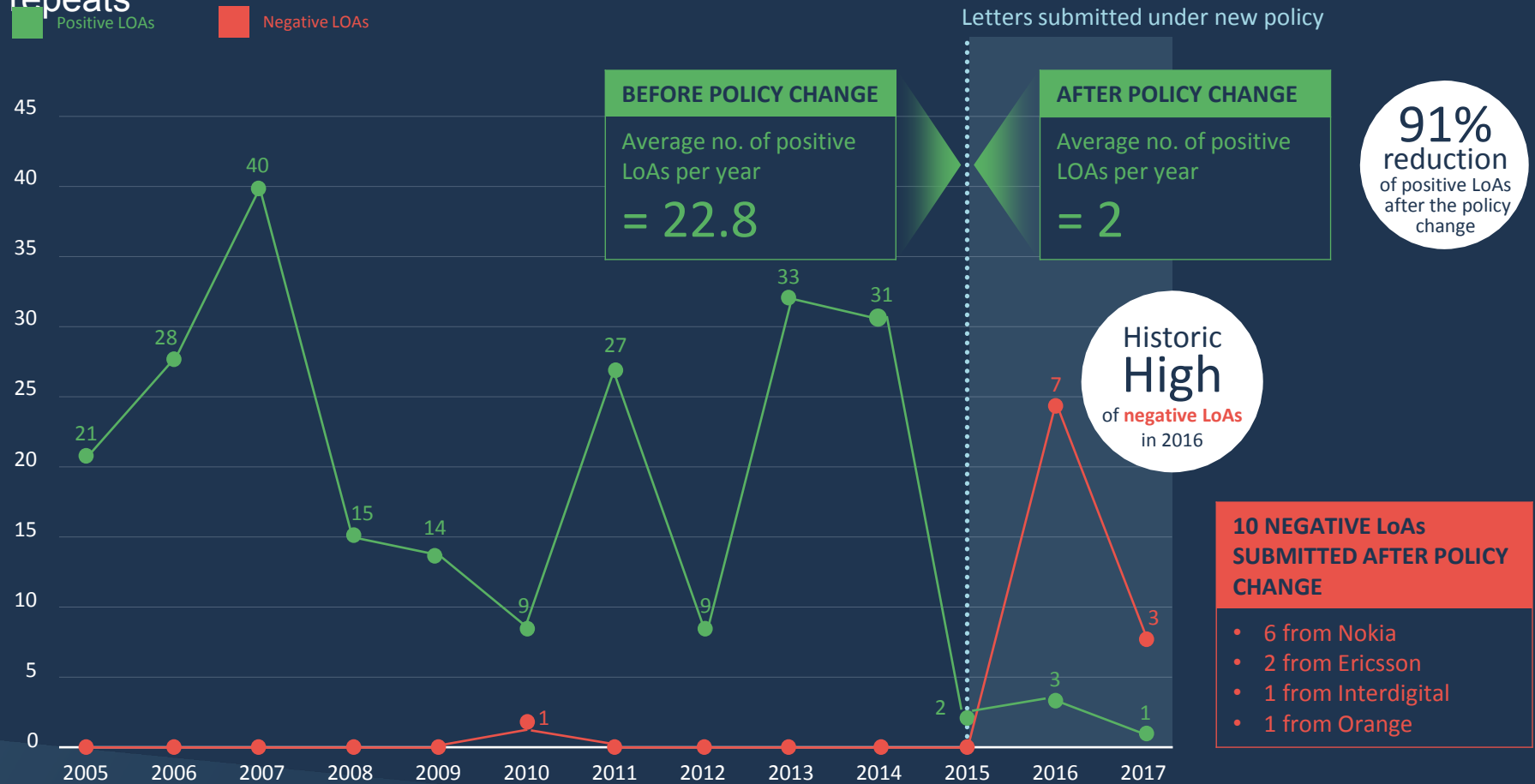
In March 2015, the IEEE-SA radically updated its patent policy, essentially changing the definition of licensing commitments **ex-post**:

- Defining reasonable royalties based on “smallest saleable component”, aka, reducing the royalty base.
- Reinterpreting FRAND obligations to mean offering licenses based on claim-by-claim review at smallest component level – impairing efficient portfolio level licensing, a common industry practice.
- Forcing patent owners to forgo seeking court injunctions (or exclusionary orders from ITC) until after an affirmative appellate decision.
- Excluding all past licensing agreements as comparable benchmarks (if reached under “the threat of an injunction”).

Empirical Findings

Significant changes in the numbers of LoAs after the policy change

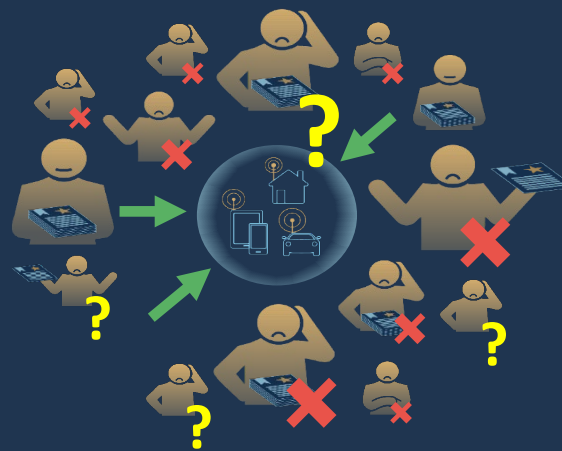
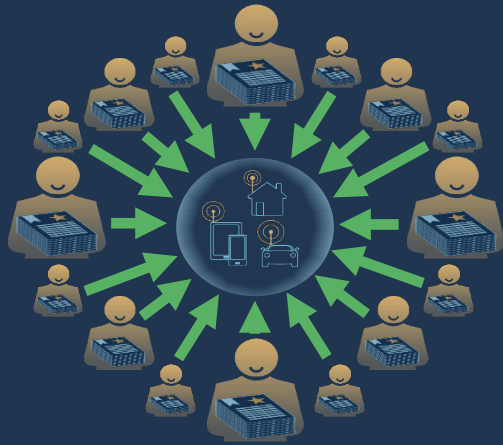
Count of i) positive LoAs, ii) negative LOAs (2005–2017); after removing duplicate and repeats



Lack of clarity under the new policy

“ This update is designed to provide greater clarity and predictability for patent-holders and implementers. ”

—[IEEE press release](#),
Feb. 8, 2015*



- In Dec 2016, IEEE – SASB approved two standards -- 802.11ah and 802.11ai with a mixed bag of LoAs**
 - 802.11ah – Negative LoAs from Nokia, Ericsson
 - 802.11ai – Negative LoA from Nokia. Missing LOAs from HP, IBM, Blackberry
- One ongoing project – 802.11ax – is subject to negative LoAs
 - 802.11ax – Negative LoAs from Interdigital, Ericsson

* https://www.ieee.org/about/news/2015/8_february_2015.html ** http://www.ieee802.org/11/Reports/802.11_Timelines.htm

What Did Other SDOs Do?

Many Other SDOs Considered a Similar Change But Did not Adopt It

Date	SDO	Policy Change Considered	Outcome
2014	ETSI	1) Reasonable royalties based on SSPPU 2) Limits on seeking injunctions	Not Adopted
2014	JEDEC*	1) Reasonable royalties based on SSPPU 2) Limits on seeking injunctions	Not Adopted
2015	C-ITS	Adoption of IEEE-SA policy change for new organization	Not Adopted
2015	TSDSI	Adoption of IEEE-SA policy change for new organization	Not Adopted
2015	ACCELERA*	Adoption of IEEE-SA policy change	Not Adopted
2015	IETF	Limits on seeking injunctions	Not Adopted
2016	5GAA	1) Reasonable royalties based on SSPPU 2) Limits on seeking injunctions 3) Licensing at the component level	Not Adopted
2016	IFAA	Adoption of IEEE-SA policy change	Not Adopted
2017	ANSI*	Licensing at the component level	Deferred to SDOs

Why Could One SDO Change Rules Ex-Post and Not Others?

SDO Governance Rules

Two Main Prongs in SDOs

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graph TD; A[Two Main Prongs in SDOs] --> B[Technical Development]; A --> C[Policy Development];
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Technical Development

- Open
- Consensus/ Majority Voting
- Transparent

Policy Development

- Not always open
- Not always based on consensus/majority votes
- Not always transparent

Non consensus/majority voting based governance rules can lead to suspect processes and lopsided policy outcomes

Technical Selection Process

Consensus or Majority Voting Based on Technical Merit



IEEE: Governance Rules Determining Policy

Partially Appointed
(by Board of Governors)

Board of
Governors

Appointed
(by nominations
committee, which is
appointed by Board
of Governors)

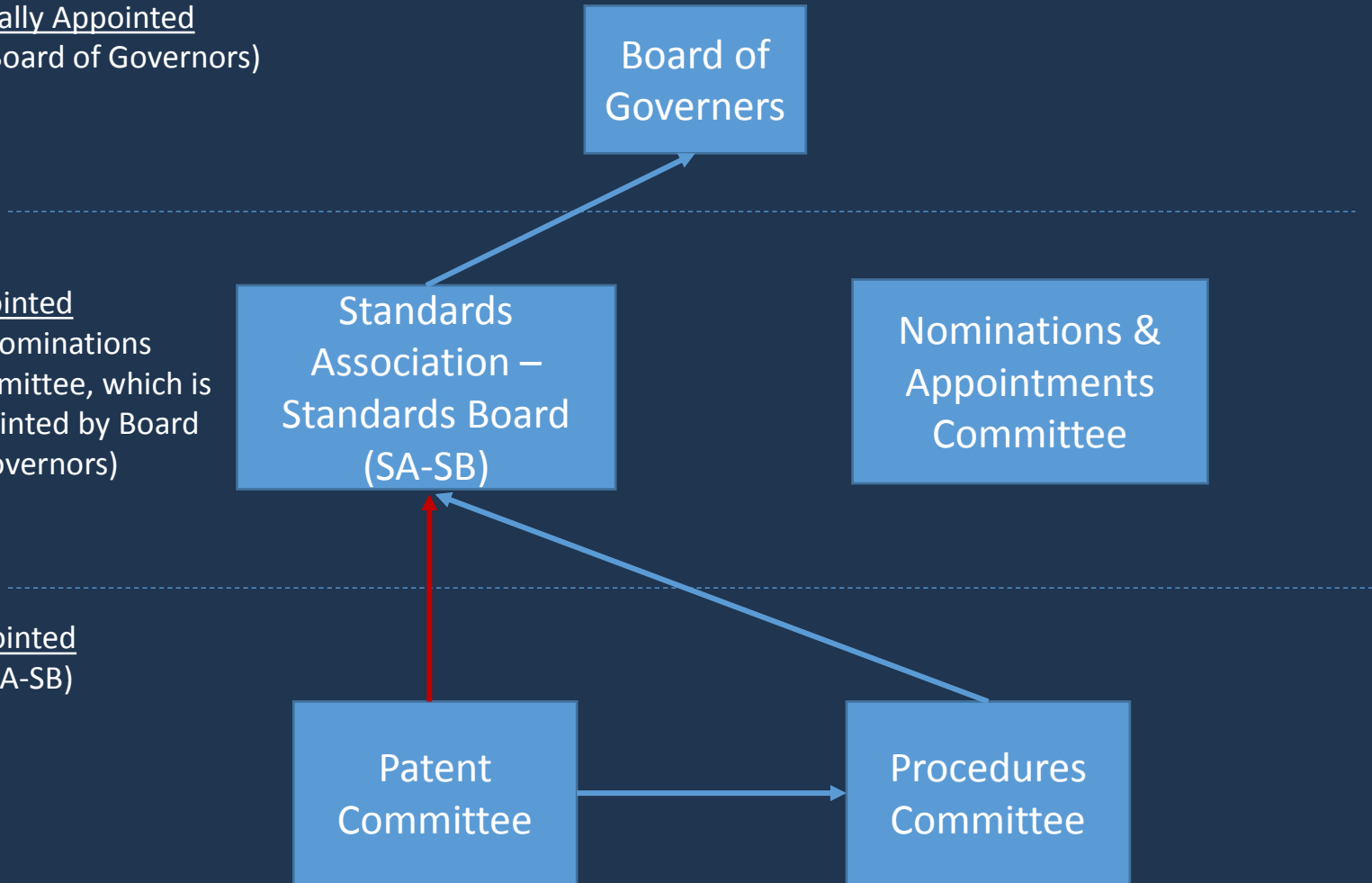
Standards
Association –
Standards Board
(SA-SB)

Nominations &
Appointments
Committee

Appointed
(by SA-SB)

Patent
Committee

Procedures
Committee



IEEE: Timeline of Key Events

March 2013

IEEE-SA Patent Committee (PatCom) forms a self-selected Ad Hoc committee to consider changes to Patent Policy

No meeting records kept by Ad-hoc committee

Aug '13 – June '14

Ad Hoc committee issues five drafts of Patent Policy revisions

Comments solicited.

Comments from non-members of Ad Hoc committee routinely rejected (Sidak (2016))

Aug '14 – Feb '15

Successive substantive appeals rejected on procedural grounds

Approvals at successive levels of IEEE hierarchy

Feb '15 Mar '15

DOJ issues Business Review Letter

IEEE formally adopts new patent policy

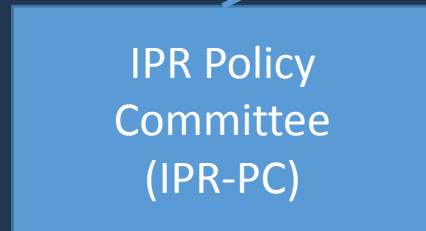
Endorses policy change under risk of "patent hold-up"

ANSI: Governance Rules Determining Policy

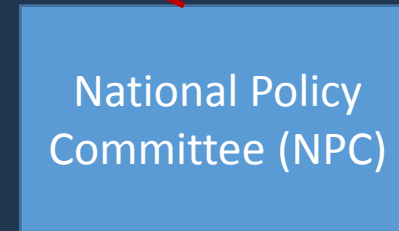
Partially Appointed
(by Board of Governors)



Appointed



Usually responsible
for IPR policy



Appointed



As of May 2017:
Responsible for
interpretation of the
IPR Policy