Jurisdictional Overlaps

FTAs Enforcement, Consecutive and Parallel Litigation -Options-

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XIX EIPPI Congress - 2018
- November 2017, 445 FTA in force notified to the WTO
- When WTO was created (1995) only 30 FTA were in force

![Graph showing the Evolution of Regional Trade Agreements in the world, 1948-2017.](chart.png)

**Legend**
- Red: Notifications of RTAs in force
- Blue: Cumulative Notifications of RTAs in force and inactive RTAs
- Black: Cumulative Number of Physical RTAs in force
- Dashed blue: Notifications of Inactive RTAs

**Note:** Notifications of RTAs: goods, services, and accessions to an RTA are counted separately. Physical RTAs: goods, services, and accessions to an RTA are counted together.

The cumulative lines show the number of notifications/physical RTAs that were in force for a given year.

Source: RTA Section, WTO Secretariat, 20 June 2017.
There are more than 150 FTAs with relevant IP provisions. Since the early 2000s, from 6 to 14 FTAs enacting relevant IP obligations annually enter into force.

(X. Seuba, 2013)
Jurisdictional dispute settlement: possibility to request an arbitral panel, deepening “the proliferation of uncoordinated and apparently unintegrated tribunals” (R. Teitel & R. Howse, 1999)

All US, EU, EFTA, Japan, Australia and Mexico (53) bilateral PTAs:

- Combine diplomatic and jurisdictional means of DS
- A first phase of consultations is compulsory, afterwards it is possible to request the creation of an arbitral panel

Proliferation of adjudication forums

- All FTAs address dispute settlement and create bodies of different nature
- Governing or administrative bodies competent on diplomatic dispute settlement are created
  - “joint committee” “trade commission”
  - “IP rights sub-committee”
  - “pharma committee”
Utility vs industrial application in Colombia

1. Andean Community Decision 486, 14 Sept 2000

2. FTA with EFTA, entry into force 2011

3. FTA with US, entry into force 2011


5. Decision of the Andean Secretariat rejecting utility, 2013


US could force the initiation of arbitral dispute settlement

EFTA could respond to an eventual amendment to recognise again “utility” in the sense that the FTA standard is that of industrial application.

arbitral dispute settlement
two or more disputes concern the same matter when they involve the same parties to the dispute, refer to the same measure and deal with the same substantive violation

319.3 EU-Colombia&Peru

Jurisdictional conflict
Jurisdictional overlaps in IP involving FTAs

1. Courts of universal jurisdiction *ratione personae* and general competence *ratione materiae* vs Regional or bilateral specialized courts

2. Universal specialized courts vs Regional or bilateral specialized courts

3. Regional or bilateral specialized courts vs Regional or bilateral specialized courts
**Forum Selection**

- Parties choose among competent DSB
- Plaintiff chooses among competent DSB
- Parties cannot use specific DSB
- The treaty establishes mandatory competence of the forum

**Simultaneous & Consecutive Proceedings**

- *Lis alibi pendens*: during the pendency of proceedings, it is not possible to commence competing proceedings

- *Res iudicata*: “the Party shall not bring a claim seeking redress of the identical obligation under the other Agreement to the other forum”

- *Electa una via*: once the party has selected a procedure, she is precluded from seizing any dispute settlement body
Heterogeneity and Insufficiency

- Heterogeneous practice across FTAs and across FTAs concluded by the same state
  - Concurrent mandatory forums
  - Preference for allowing the plaintiff to choose (US FTA)
  - Not clear whether agreement of the parties is necessary to select the forum (EU)
  - Only a small number of FTAs enact *lis alibi pendens*
  - *Res iudicata* frequently mentioned and recognized... but also sometimes explicitly rejected (by the same party)!
  - Different grades of *electa una via*: sometimes the *res iudicata* aspect is qualified

- These rules are useless when parties do not coincide
### Standard clauses to manage overlap (and reinforce multilateralism)

1. **Standard conflict clause for “same matter” disputes**

   - “Once a dispute settlement proceeding has been initiated under one treaty with the compromise of both parties, the forum selected shall be used to the exclusion of the others. If parties do not agree on the selection of forum, the controversy shall be referred to the WTO DSS”
     - Consensual choice of forum
     - *Electa una via*
     - Promotion of multilateralism

2. **Standard forum choice clause for “different matter” disputes**

   - “Whenever the controversy touches upon a subject addressed in the TRIPS Agreement, and has already been litigated by one of the parties in another international forum, it will be mandatorily sent to the WTO DSS unless parties agree otherwise”
     - Controversy relating TRIPS and already litigated by one of the parties in a different FTA
     - Combines forum choice with mandatory referral to the WTO
Carve-out for certain IP claims

- “the revocation, limitation or creation of intellectual property rights do not constitute expropriation”

Comity

- “The arbitration panel shall also take into account relevant interpretations in reports adopted by the WTO Dispute Settlement Body”

Knowledge of PIL

- Members of the panel must include jurisconsults of recognized competence in international law
Concluding remarks

• It may be a threat, but so far FTA jurisdictional dispute settlement has not been used in IP
  • In reality, “diplomatic” means of dispute settlement may be more persuasive... and remain unnoticed
• Not to confuse jurisdictional pluralism with the pluralism of the normative systems
  Courts can coexist in relative peace thanks to:
  • Common use of secondary norms of public international law
  • Common application of general international law
  • Systemic interpretation of international obligations
“Lack of hierarchy does not mean lack of normative rationality or anarchy” (R. Howse, R. Tietel, 2014)