



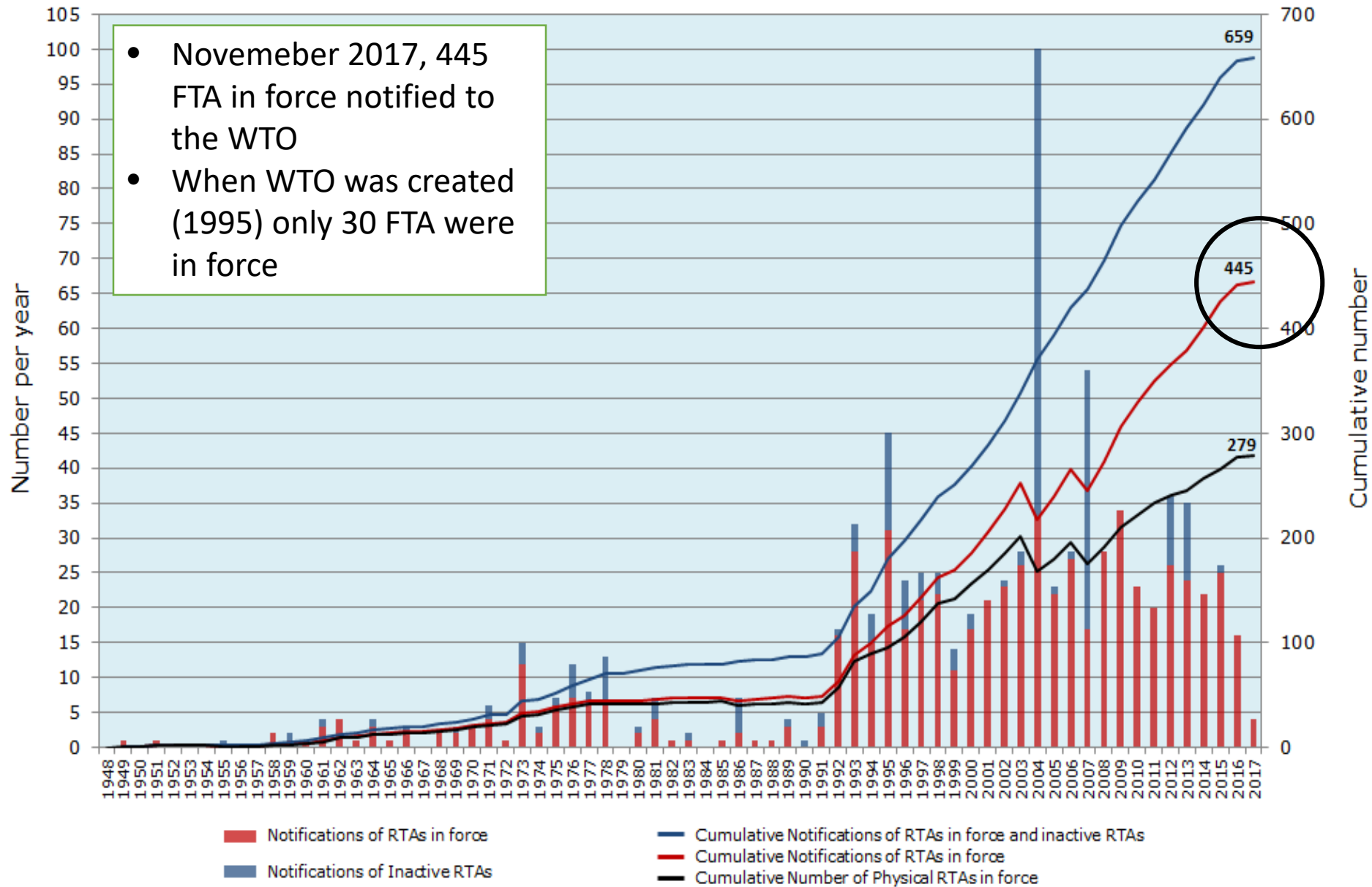
*FTAs Enforcement, Consecutive and Parallel Litigation
-Options-*

Xavier Seuba

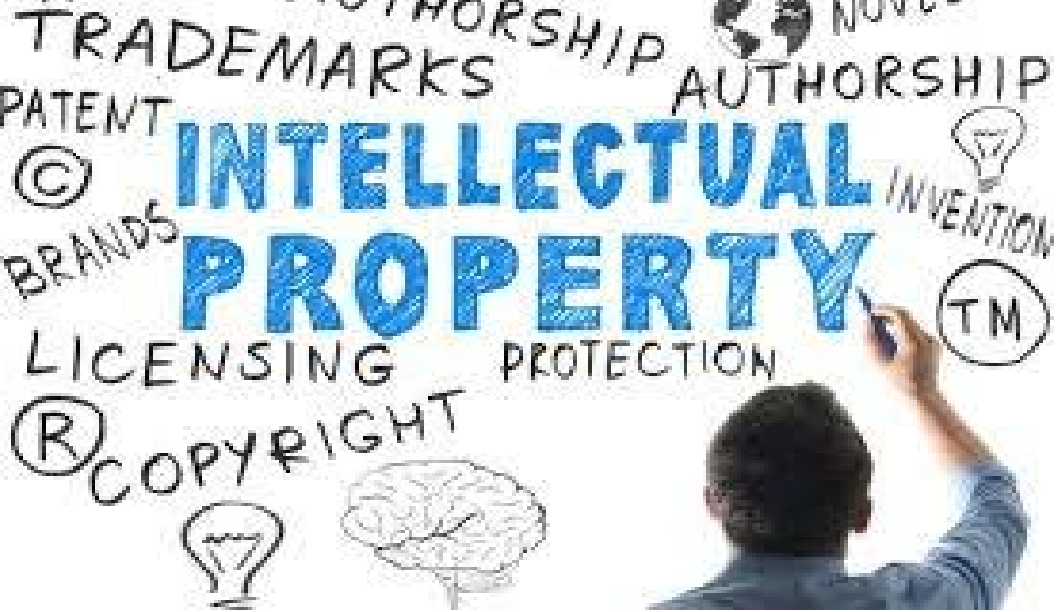
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Evolution of Regional Trade Agreements in the world, 1948-2017

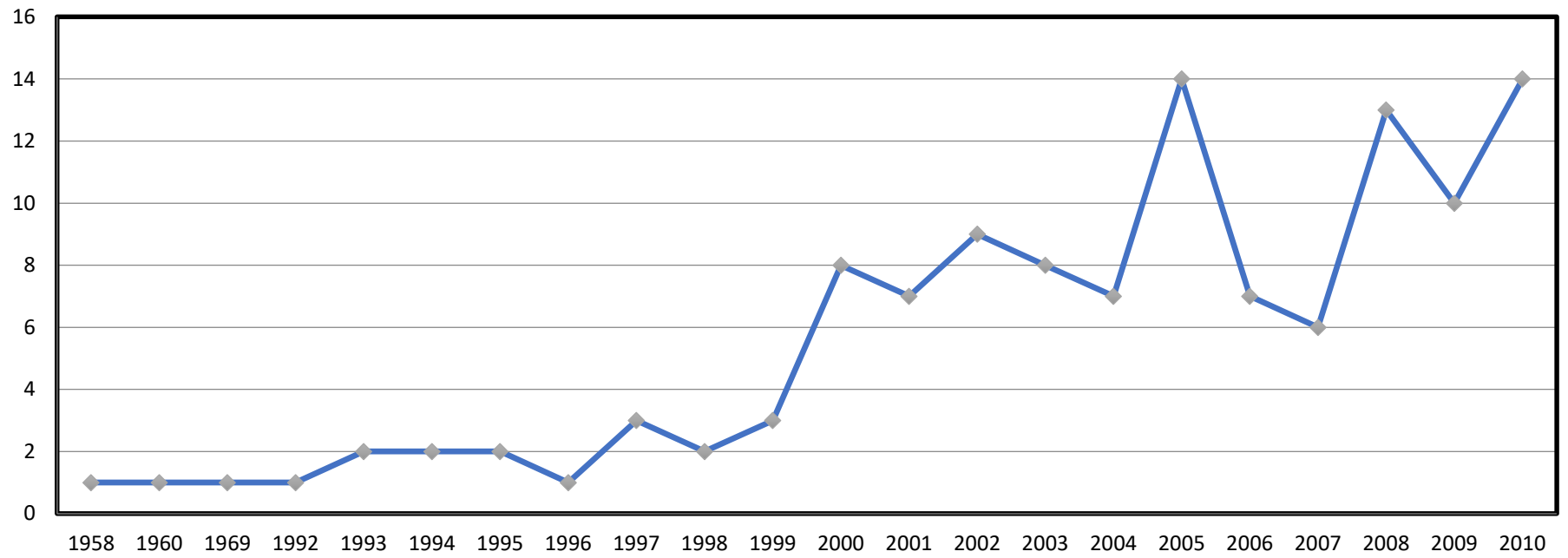


Note: Notifications of RTAs: goods, services & accessions to an RTA are counted separately. Physical RTAs: goods, services & accessions to an RTA are counted together. The cumulative lines show the number of notifications/physical RTAs that were in force for a given year.
 Source: RTA Section, WTO Secretariat, 20 June 2017.

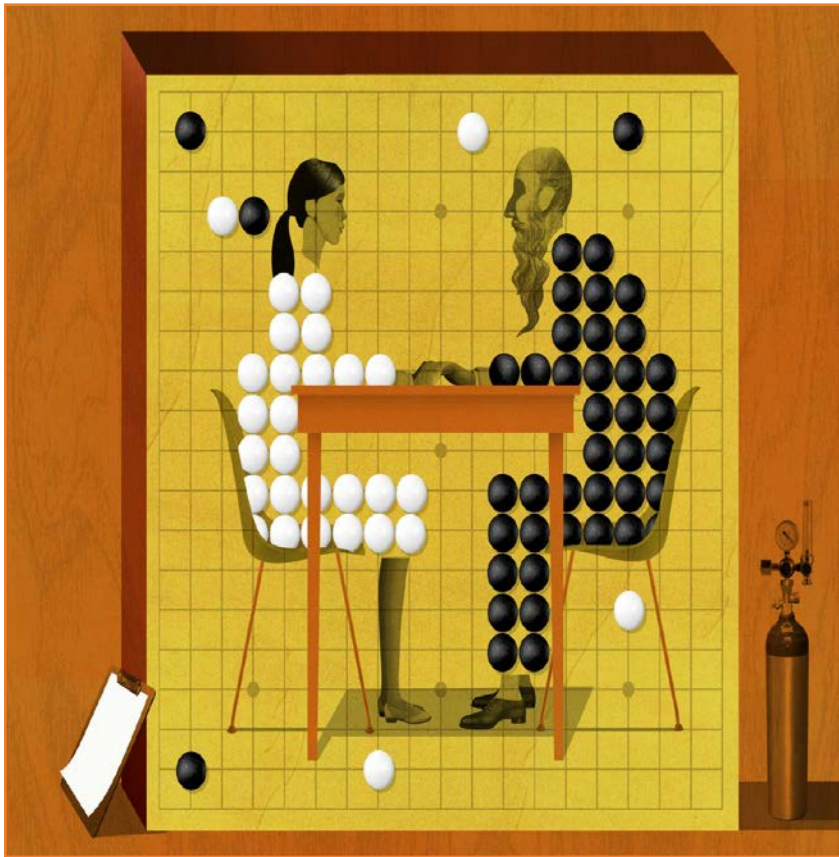


- There are more than 150 FTAs with relevant IP provisions
- Since the early 2000's, from 6 to 14 FTAs enacting relevant IP obligations annually enter into force

FTAs that regulate IP and enter into force annually



(X. Seuba, 2013)



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”

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

US

several possibilities. In the context of the FTA
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



Forum selection & Multiple proceedings

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

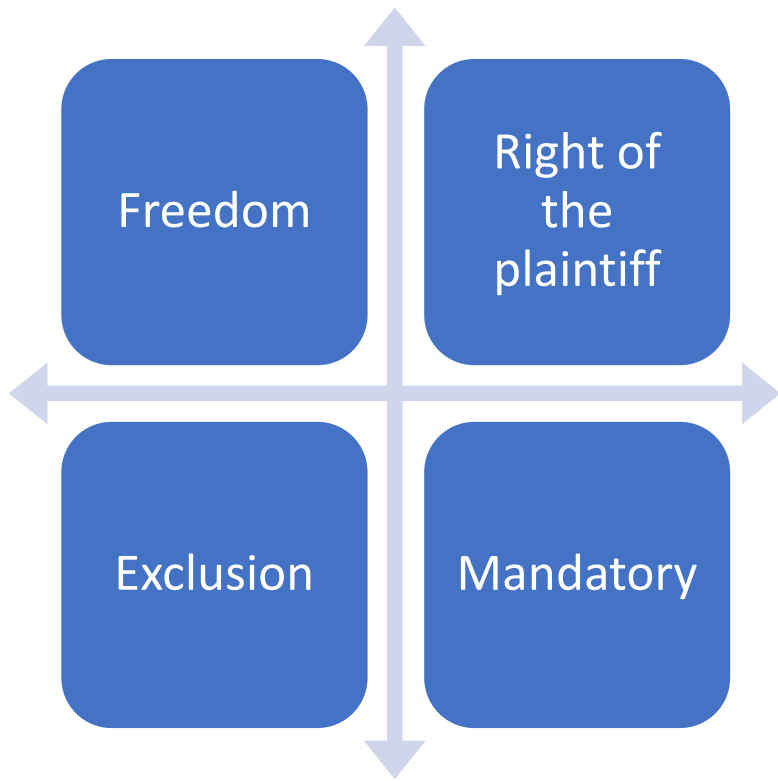


2. Universal specialized courts
vs
Regional or bilateral specialized
courts



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 the 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)

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