

FICPI – World Congress 2018

The WTO and the TRIPS Agreement
Dispute Settlement in the TRIPS area
TRIPS and FTAs

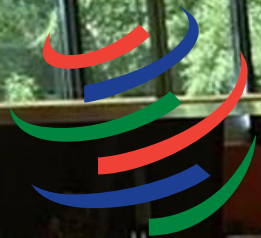
7 June 2018

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*No views or analysis to be attributed to
the WTO, its Secretariat or any of its Members*



WTO OMC

What is the WTO?

Somewhere to negotiate trade rules and apply the results

- a forum for **negotiations**
- with agreed rules, commitments
... with **basic principles** for trade
- ... and **dispute settlement**
- member-driven **decision-making**
... with supporting Secretariat

Negotiations



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Previous round: **Uruguay Round**

1986–1994

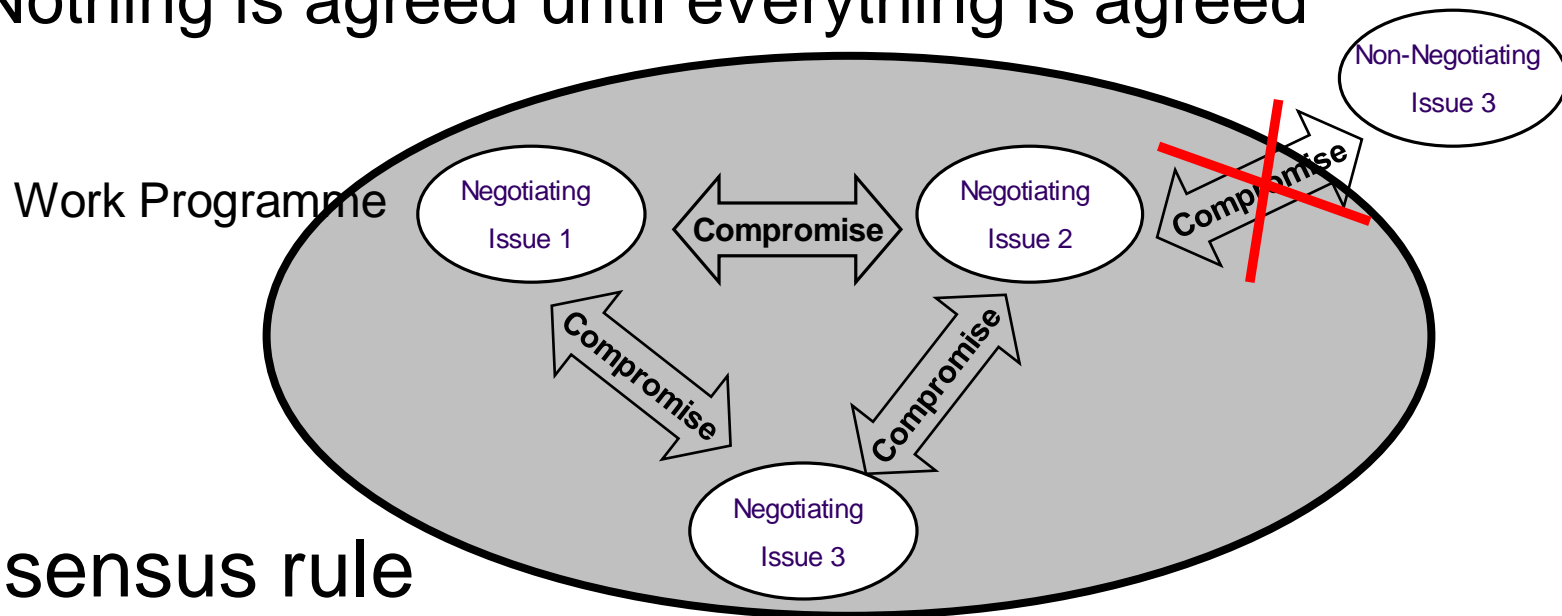
Eighth 'round' under GATT, since 1948

Result: In 1995

- Rules expanded: **goods (GATT) + services (GATS) + intellectual property (TRIPS)**
- **WTO formed, replacing GATT**

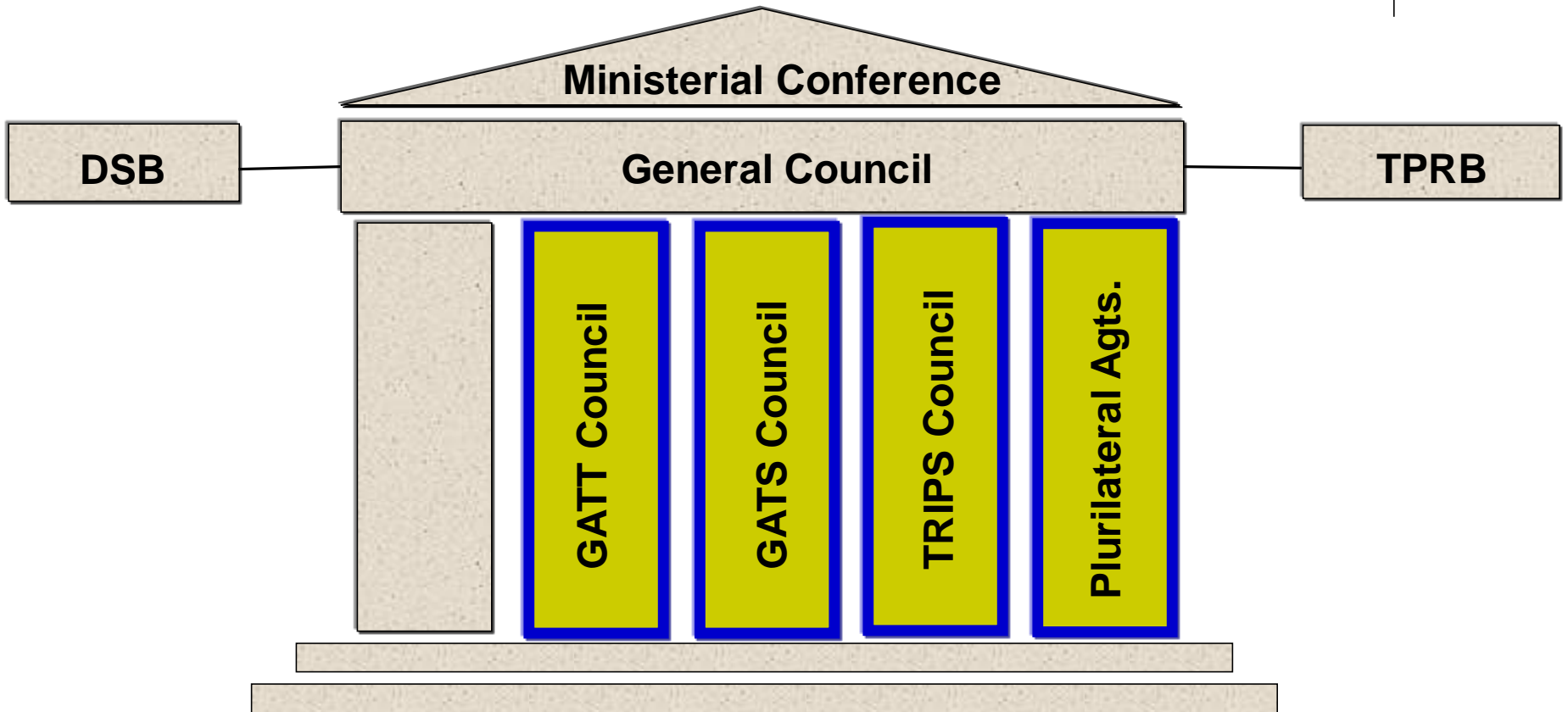
Negotiation and Decision making

- Single undertaking
 - “Nothing is agreed until everything is agreed”



- Consensus rule
 - Each Member can block consensus

Structure of the WTO



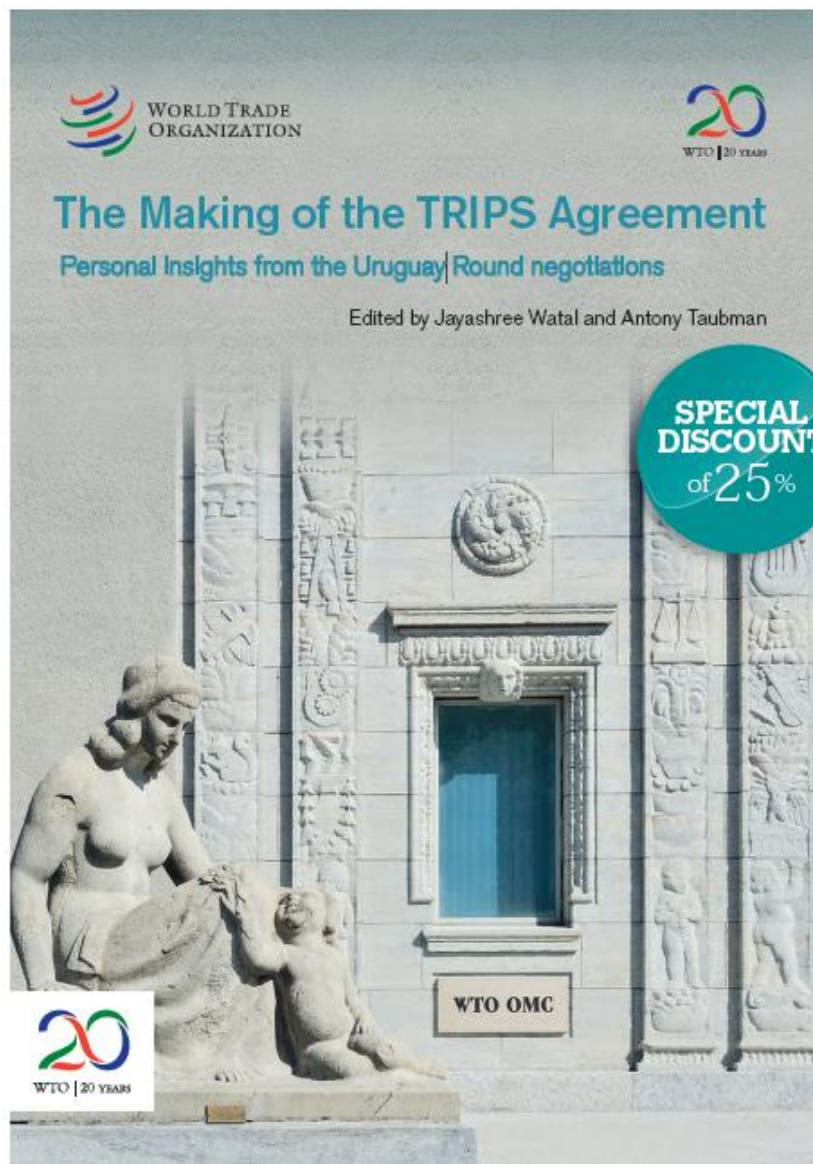
Functions of the WTO



WTO OMC

- Administering WTO trade agreements
 - Forum for trade negotiations
 - Handling trade disputes
- Monitoring national trade policies
- Technical assistance and training for developing countries
- Cooperation with other international organizations

The Making of the TRIPS Agreement



Personal Insights from the Uruguay Round Negotiations

The “Making of the TRIPS Agreement” presents for the first time the diverse personal accounts of the negotiators of this unique trade agreement. Their contributions illustrate how different policy perspectives and trade interests were accommodated in the final text, and map the shifting alliances that transcended conventional boundaries between developed and developing countries.

Free download from www.wto.org

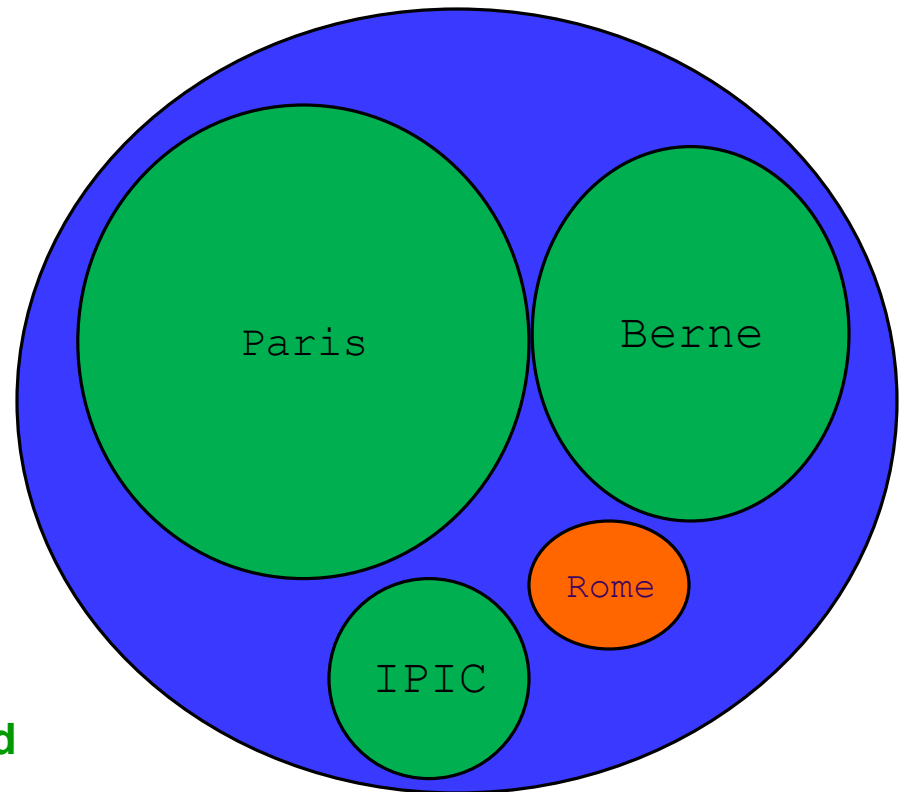
TRIPS: Main features (1)



- Coverage of TRIPS
 - most comprehensive multilateral agreement on intellectual property to date
 - incorporating substantive provisions of:
 - Paris Convention (1967)
 - Berne Convention(1971)
 - Rome Convention (1961)
 - Treaty on IP in Respect of Integrated Circuits (1989)

"Incorporation" Technique

- Build on existing conventions
- To avoid re-opening of existing texts
- To concentrate on negotiating the "plus" elements
- To have a short but comprehensive text



Conventions almost „fully“ incorporated
Conventions referred to
Berne/Paris *Plus* elements

TRIPS: Main features (2)

- Coverage of TRIPS

Areas of intellectual property covered:

- copyright and related rights
- trademarks including service marks;
- geographical indications including appellations of origin;
- industrial designs;
- patents including the protection of new varieties of plants;
- the layout-designs of integrated circuits; and
- undisclosed information, including trade secrets and test data.

TRIPS: Main features (3)

- Minimum Standards of Protection
 - Defines main elements of protection
 - the subject-matter to be protected,
 - the rights to be conferred and permissible exceptions to those rights, and
 - the minimum duration of protection.
 - Incorporation of substantive provisions of the main WIPO-Conventions (Paris/Berne)
 - Additional Provisions (“Berne/Paris plus”)

TRIPS: Main features (4)

- Enforcement Provisions
 - General Principles applicable to IPRs
 - Specifies Procedures that must be available
- Dispute Settlement
 - Part of the integrated Dispute Settlement System of the WTO
 - No unilateral action

TRIPS Basic Principles

- Freedom to determine the appropriate method of implementing the Agreement (Art. 1.1)
- National treatment (Art. 3)
- Most-favoured nation treatment (MFN) (Art. 4, 5)
- Exhaustion of rights (Art. 6); see (WT/MIN(01)/DEC/2)
- Objectives (Art. 7); see WT/MIN(01)/DEC/2
- Principles (Art. 8); see WT/MIN(01)/DEC/2

TRIPS - Transitional arrangements

- 1 January 1995: entry into force
- 1 January 1996: developed countries
- 1 January 2000: developing countries
- 1 January 2005: developing countries extend product patent protection to areas of technology not previously covered
- **1 July 2021**: least-developed countries
- **1 January 2033**: least-developed countries provide pharmaceutical patents
- Other provisions
 - non-backsliding provision
 - special transitional arrangements in certain cases
 - mail-box and exclusive marketing rights



II.

WTO Dispute Settlement in the TRIPS area

The WTO Dispute Settlement System

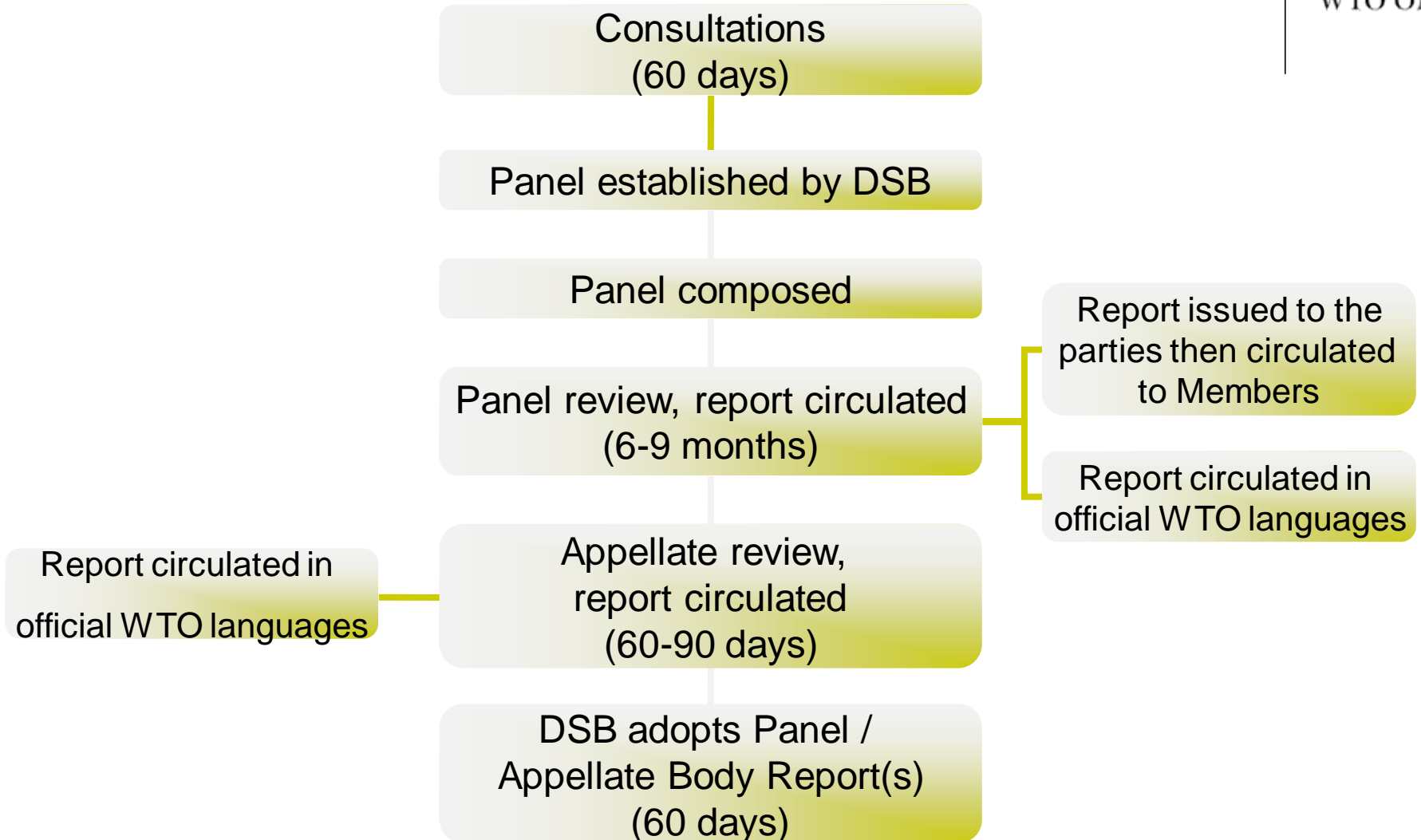


- r Disputes between governments about compliance with TRIPS are subject to the integrated dispute settlement system of the WTO (governed by the Dispute Settlement Understanding (DSU))
- r System designed to ensure the rule of law in international trade relations, including in the area of IP
- r Impartial and effective resolution of disputes
- r Under the DSU, governments **are bound**
 - r to have recourse to, and abide by, the multilateral WTO dispute settlement procedures
 - r not to make a determination that a violation has occurred except in accordance with these procedures
 - r not to retaliate except in accordance with authorization from the DSB

Main Stages of Dispute Settlement



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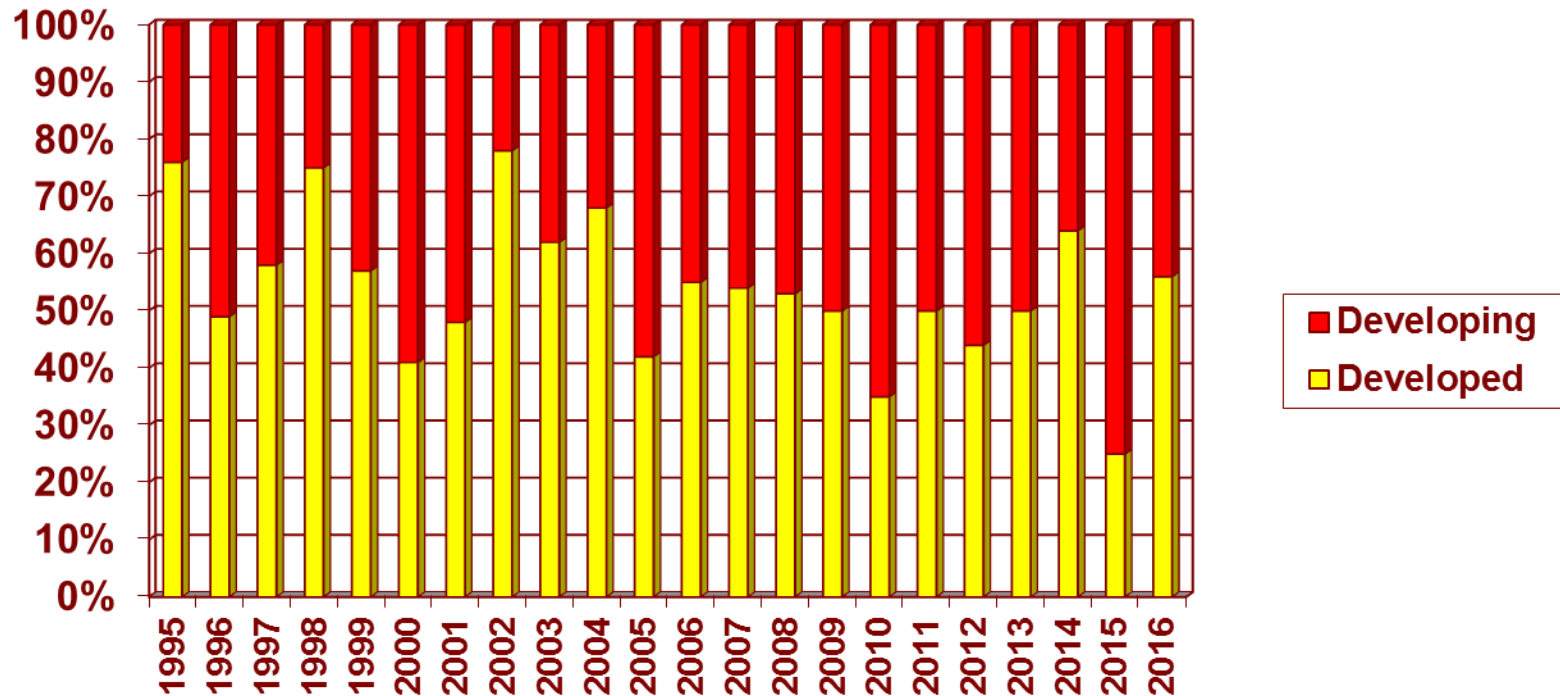
Performance

- Busiest “state-to-state” court:
 - **WTO:** 534 disputes in 22 years
 - **ICJ:** 152 disputes in 67 years
 - **GATT** era: 300 disputes in 48 years
- **98** Members participated as parties or third parties, approx. **62%**
- Developing/developed country participation approx. **50%**

Trends in the Use of the Dispute Settlement Mechanism



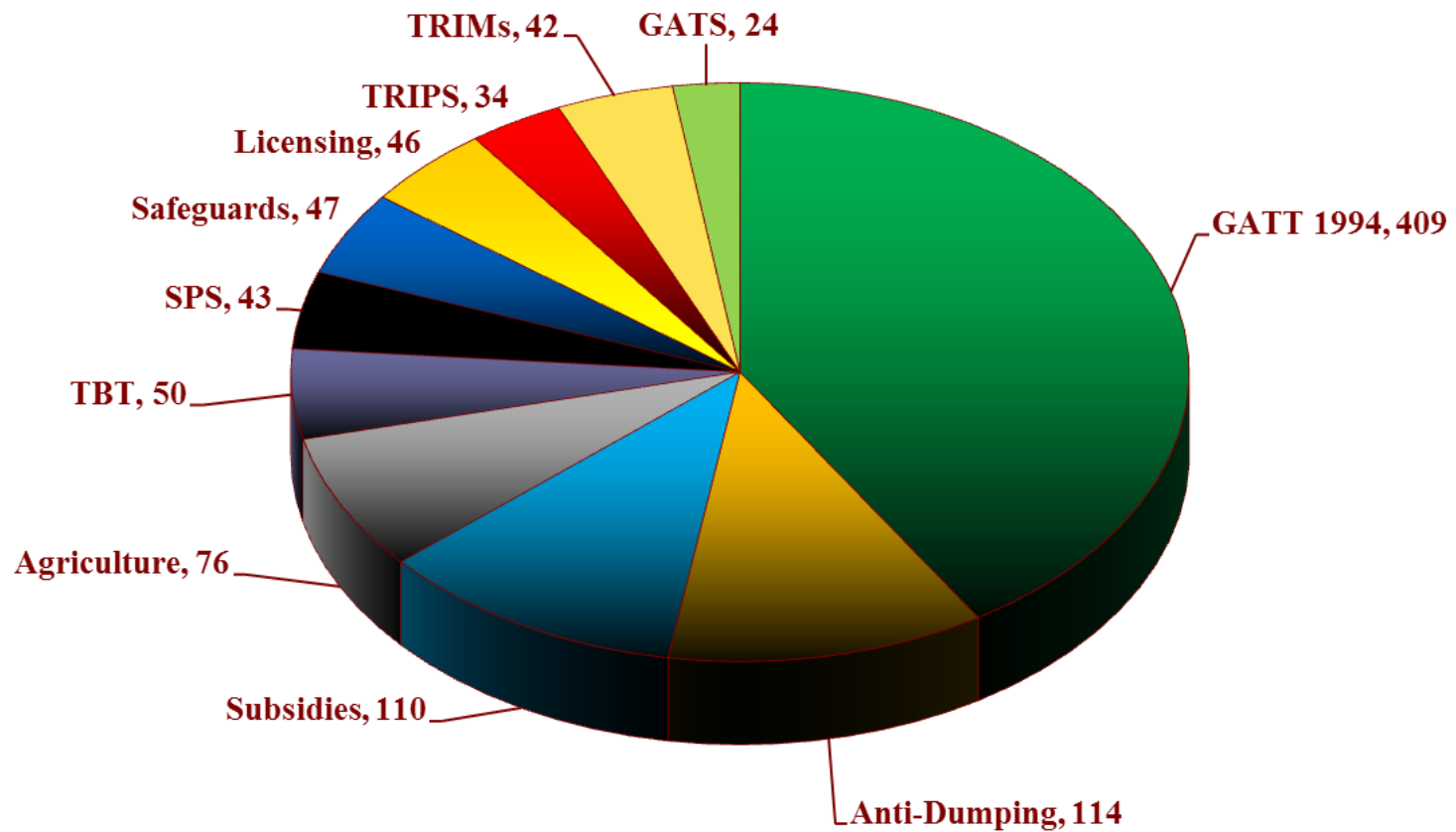
As respondents



Most frequent complainants/respondents

Member	No of cases initiated	Member	No of cases defended
US	116	US	130
EC / EU	97	EC / EU	99
Canada	35	China	39
Brazil	31	India	24
Mexico	24	Argentina	22
Japan	24	Canada	21
India	23	Japan	15
Argentina	20	Brazil	16
Korea	17	Korea	16
Thailand	13	Mexico	14

Consultations according to Agreement at Issue



TRIPS disputes – Statistics

- r 39 complaints, relating to 25 separate matters
 - r 14 settlements
 - r 10 panel and 3 AB reports adopted
 - r 6 panels established 1 panel lapsed
 - r 6 consultations pending
 - r 3 inactive
- r This represents about 7% of the total of 534 complaints lodged so far in the WTO Dispute Settlement System (Nov 2017)

Subject-matter of the cases (1)

Early cases on transitional matters

- *JAPAN – Measures Concerning Sound Recordings* (two cases settled): application of Berne Article 18 to pre-existing sound recordings
- *PAKISTAN – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (settled) and *INDIA – Patents I and II: “mail-box”*
- *PORTUGAL – Patent Protection under the Industrial Property Act* (settled) and *CANADA – Patent Term: application of Article 70 to pre-existing patents*

Subject-matter of the cases (2)

Scope of allowable exceptions and the balance found in TRIPS

- *CANADA – Pharmaceutical Patents*: three-step test under Article 30
- *US – Section 110(5) Copyright Act*: three-step test under Article 13
- *EC – Trademarks and Geographical Indications*: scope for “co-existence” of GIs with prior TM under Article 17

Subject-matter of the cases (3)

Non-discrimination

- *US – Section 211 Appropriations Act*
 - A Member free to choose not to recognize IPRs in its own territory relating to a confiscation of rights in another territory
 - However, the AB found violation of national and MFN treatment obligations
- *EC – Trademarks and Geographical Indications*
 - Required certain systems from other governments; hence foreign nationals didn't have guaranteed access to the EC system
 - Protection contingent upon another country adopting equivalent system and offering reciprocal protection

Subject-matter of the cases (4)

Enforcement

- *DENMARK and SWEDEN – Measures Affecting the Enforcement of IPRs* (two cases settled): availability of *ex-parte* search orders in civil procedures pursuant to Article 50.2
- *EUROPEAN COMMUNITIES and GREECE – Enforcement of IPRs in Motion Pictures and Television Programmes* (on the same matter, settled)
- *US – Section 211 Appropriations Act*: availability of fair and equitable procedures pursuant to Article 42
- *China – IPRs*: customs measures and criminal thresholds
- No jurisprudence on Article 41 “performance requirements”

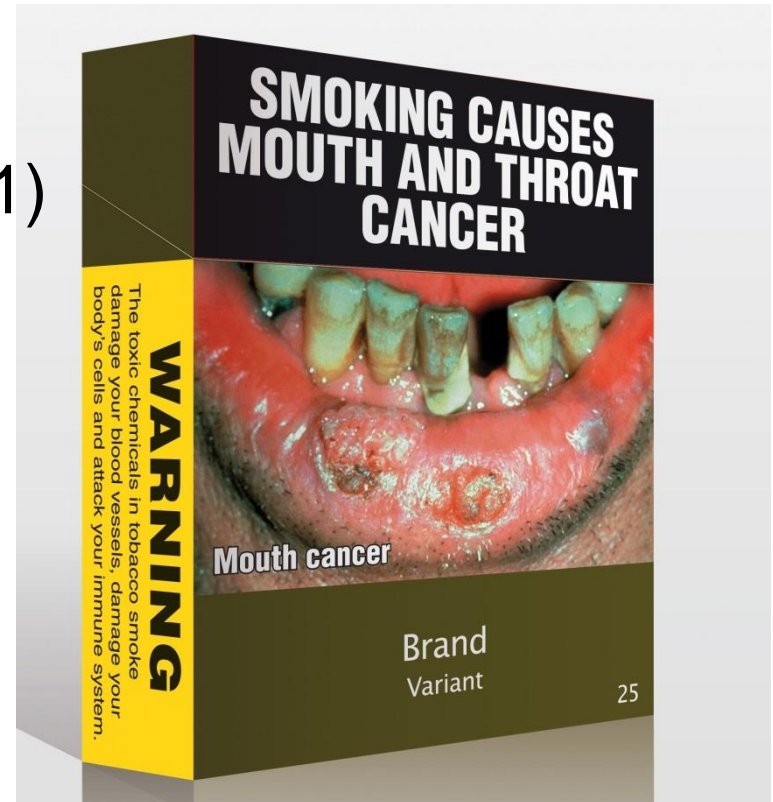
Subject-matter of the cases (5)

Provisions of WIPO Conventions incorporated into TRIPS:

- ❑ Effort to interpret TRIPS and WIPO provisions in ways which reconcile them and avoid conflicts between them
- ❑ Panels have sought factual information from WIPO about drafting history and subsequent practice in cases where WIPO treaty provisions have been invoked in WTO disputes

Ongoing Panel proceedings (1)

- Australia – Tobacco Plain Packaging
 - Ukraine (DS434) *suspended*
 - Honduras (DS435)
 - Dominican Republic (DS441)
 - Cuba (DS 458)
 - Indonesia (DS467)
- Issues raised (e.g.)
 - Art. 15, 16, 20 TRIPS - Trademark rights
 - Art 2.2 TBT – unnecessary obstacle to trade



Ongoing Panel proceedings (2)

DS 526: UAE – Measures relating to GATT, GATS and TRIPS

- Qatar, on 22 November 2017, requested the establishment of a panel to examine UAE's measures to economically isolate it. UAE claims that these measures were taken in response to Qatar's funding of terrorist organizations, and that
 - Art. 73 TRIPS allows Members to take action in the interest of national security
 - issues in the dispute were not trade issues.
- Requests for consultations also to Saudi Arabia and Bahrain

Pending Consultations (1)



- DS 408/409: Brazil and India challenging the EU's/NL's practice of stopping pharmaceutical **goods in transit** on the basis of patent infringement in the EU

- Measure at issue:

- EU Customs Regulation 1383/2003 and other EU / Dutch legislative provisions, as well as Dutch Court decisions

- Both requests refer to:

- GATT: Art. V (freedom of transit), Art. X:3

- TRIPS:

- Art. 28 in conjunction with Art.2 and Art.4bis Paris Convention, para.6(i) of August 2003 Decision (limits to patent rights conferred)
- Art.41, 42 (barriers to legitimate trade)
- Art. 31 in conjunction with August 2003 Decision (interference with right to grant CL for export under Para.6 System)
- TRIPS interpretation and implementation in light of Art.7 and 8, Doha Declaration on TRIPS and Public Health, as well as International Covenant on Economic, Social and Cultural Rights

Pending Consultations (2)



DS 542: China – Certain measures concerning the protection of Intellectual Property Rights

- On 23 March 2018 the United States requested consultations concerning certain measures related to IP protection.
- The United States claim that China's rules on **technology transfer** in the context of market access discriminate with respect to patent rights and thus appear inconsistent with
 - Article 3, 28.1(a) and 28.2 TRIPS Agreement.

WTO Dispute Settlement System: Suspension of Concessions

- Full implementation of Panels findings preferred
- Suspension of concession or other obligations ("retaliation") can be authorized if a Member fails to implement recommendations within the period fixed or to offer acceptable compensation
- Applicable principles – Article 22.3 DSU
 - Normally suspension of concessions in the same sector
 - If not practicable or effective, may seek to suspend concessions in other sectors under the same agreement
 - If not practicable or effective, may seek to suspend concessions under another covered agreement ("**cross-retaliation**")

WTO Dispute Settlement: TRIPS Cross-Retaliation Cases

- EC – Bananas III (DS27, 2000)
- US – Gambling (DS285, 2007)
- US – Upland Cotton (DS267, 2009)
- US Regime of agricultural domestic support and export subsidies found in violation of AG and ACSM
 - Level of nullification and impairment varies with level of US payments (USD 147.4m for FY 2006 plus USD 147.3 m/year)
- On 31 August 2009, the DSB authorized **Brazil** to suspend concessions, to the extent insufficient under GATT, under TRIPS (and GATS) in the areas of
 - Copyright and related rights, Trademarks, Industrial designs, Patents, Protection of undisclosed information.

Brazil – TRIPS cross-retaliation



- On 10 February 2010, President Lula enacted "Medida Provisória" No. 482 with immediate effect (later confirmed by Law 12,270 of June 24, 2010), which sets out the *categories of obligations* that can be suspended and *specific measures* that can be applied.
- Provides domestic legal basis for
 - reducing the term of protection of IPRs by delaying the start of protection;
 - reducing the IPR's term of protection at any time;
 - Issuing compulsory licences for public non-commercial use (with or without remuneration);
 - increasing fees, or creation of new fees, with respect to the "registration" and "maintenance" of IPRs;
 - freezing of the remittance of royalties or remuneration for use of IPRs;
 - imposing levies on the remuneration obtained by the IPR owner
 - imposing mandatory registration as a condition to obtain IPR ownership.
- within the limits authorized by the WTO Dispute Settlement Body
- A temporary arrangement in early 2010 provided for annual US payments of USD147.3million to Brazil Cotton Institute
- **US-Brazil Agreement reached on 1 Oct 2014:**
 - US one-time payment of USD300million / Brazil agrees to a peace clause on sanctions

Non-Violation and Situation Complaints



Art. XXIII of GATT 1947

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement **[Non-violation]**

(c) the existence of any other situation, **[Situation]**

the contracting party may, with a view to a satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned .

Non-Violation and Situation Complaints



Art. 64.2 TRIPS

2. Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 **shall not apply** to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.
 3. During the time period referred to in paragraph 2, the Council for TRIPS shall examine the **scope and modalities** for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 made pursuant to this Agreement, and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all Members without further formal acceptance process.
- Moratorium on non-application
 - extended repeatedly, most recently **until next Ministerial meeting planned for December 2019**

Non-Violation and Situation Complaints

IP/C/W/349/Rev.3 (November 2012)

Discussion on applicability under TRIPS:

- exceptional character
- purpose of non-violation complaints
 - TRIPS not a market access, but *sui generis* agreement
- systemic concerns
 - Positive/negative consensus
 - No general exception under TRIPS
 - Imbalance between Members and AB ?
- Nature of benefits accruing under TRIPS
 - Balance of rights between right holders and users
 - No benefits “beyond the boundaries of the text”
- “Competitive Relationships”
 - Traditionally used as indication of expected benefits
 - relationships complicated under TRIPS (user/right holder; domestic/foreign)

Current state of affairs

- Large majority of Members against application of non-violation and situation complaints under TRIPS
- Japan in favour of developing “scope and modalities”
- US and Switzerland in favour of full applicability of non-violation and situation complaints under TRIPS once the moratorium expires
- **Current moratorium expires at the next Ministerial (planned for 12/2019)**

RTAs by Non-Violation and IP provisions

238 RTAs notified to WTO and in force

49 RTAs containing non-violation provisions

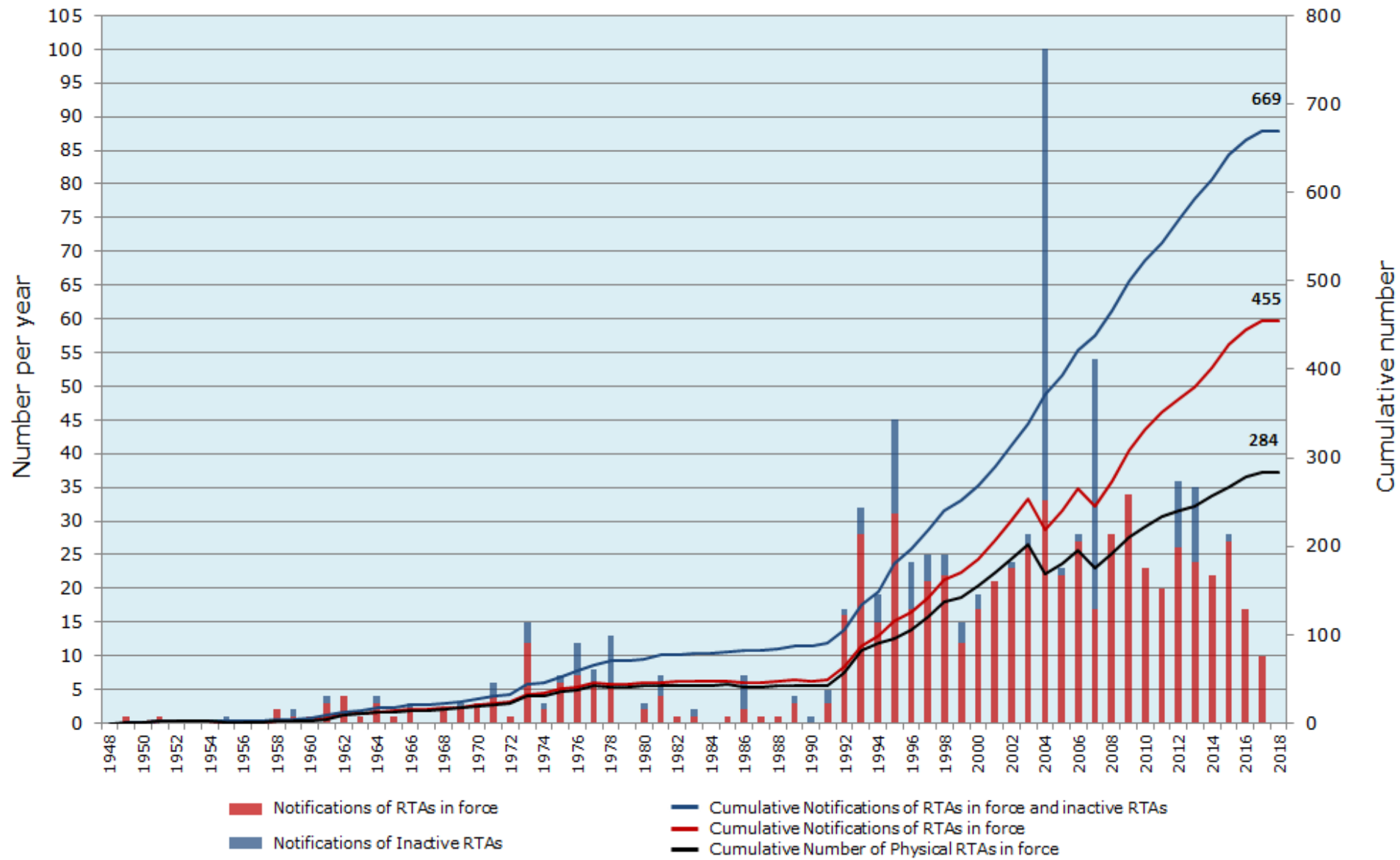
24 RTAs containing
NV provisions
applicable to IP

20 RTAs
containing NV
and significant
IP provisions

53 RTAs containing a significant
number of IP provisions

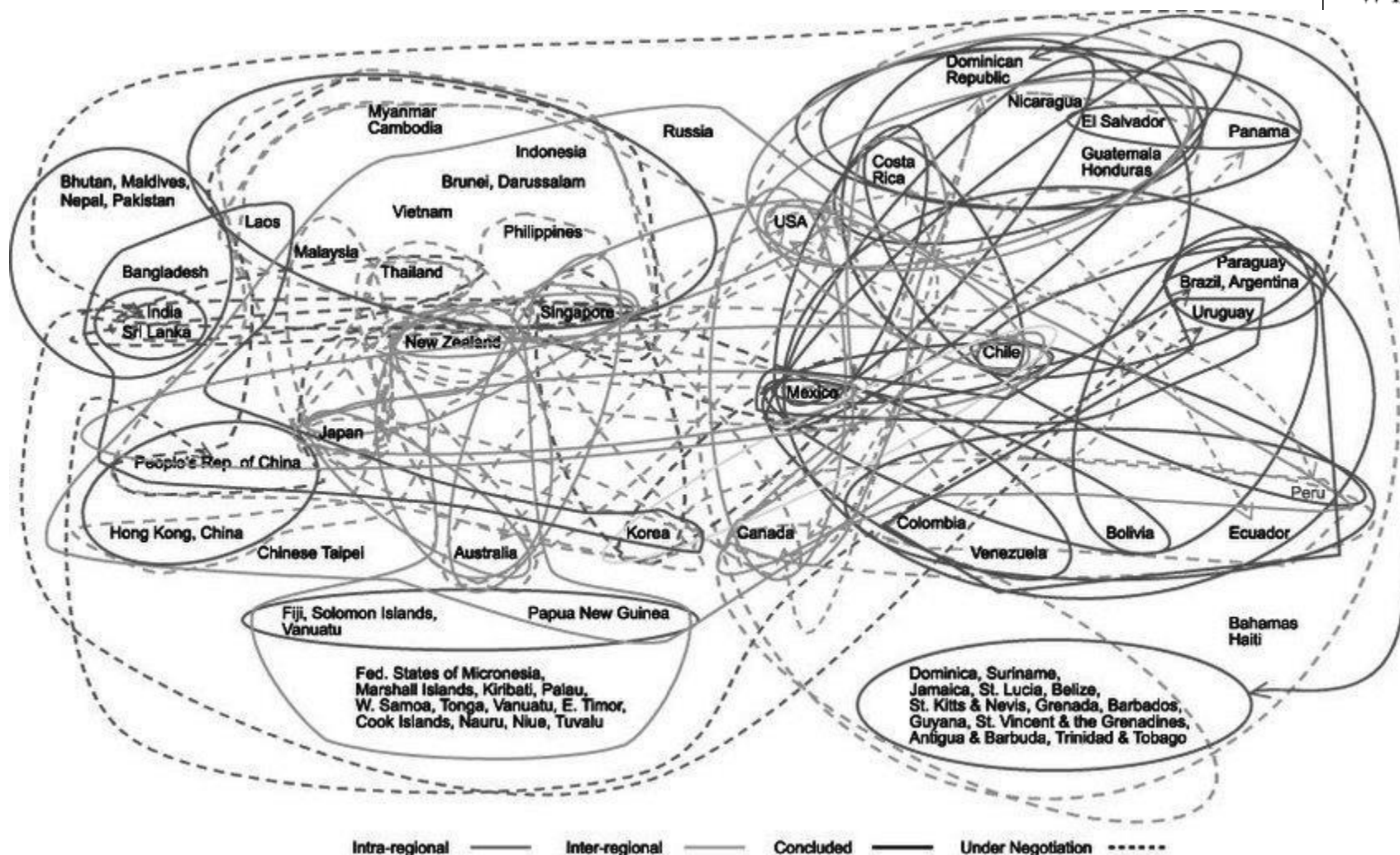
III. TRIPS and FTAs

Evolution of Regional Trade Agreements in the world, 1948-2018



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, 25-Jan-18.

Multiple overlapping RTAs





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WTO rules: Most Favoured Nation principle



The MFN principle is established in:

- **Article I of GATT – Trade in Goods**
 - Exception for RTAs: Article XXIV
- **Article II of GATS – Trade in Services**
 - Exception for RTAs: Article V
- **Article 4 of TRIPS – Intellectual Property**
 - **No Exception for RTAs**



TRIPS: minimum standard

- Article 1.1
 - ... Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. ...

TRIPS: Non-Discrimination Rules



- Article 4: Most-favoured-nation treatment
 - With regard to the protection of intellectual property, **any advantage, favour, privilege or immunity** granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.
 - Limited Exemptions
 - e.g. agreements pre-dating TRIPS; privileges deriving from general law-enforcement agreements not specifically aimed at IP; reciprocity permitted by Berne or Rome etc.; rights of performers, phonogram producers, and broadcasters not in TRIPS.

Scope of Article 4

Footnote 3:

For the purposes of Art. 3 and 4 «protection» shall include matters affecting the **availability, acquisition, scope, maintenance and enforcement** of intellectual property rights as well as those **matters affecting the use** of intellectual property rights **specifically addressed** in this Agreement.



WTO OMC



What are the implications of layers of obligations?



Mexico and
“test data
protection”
provisions as
an example...

EFTA - Mexico (2001)

The Parties shall ensure in their respective laws at least the following:...adequate and effective protection of undisclosed information consistent with the level provided for in the TRIPS Agreement, in particular Article 39

Colombia Mexico (1995)

Cada Parte dispondrá, ... que ninguna persona distinta a la que los haya presenta do pueda, sin autorización de esta última, contar con esos datos en apoyo a una solicitud para la aprobación de un bien durante un periodo razonable después de su presentación. Para este fin, por periodo razonable se entenderá normalmente un lapso no menor a cinco años contados a partir de la fecha en que la Parte haya concedido a la persona que produjo los datos, la aprobación para poner en el mercado su bien, tomando en cuenta la naturaleza de los datos y los esfuerzos y gastos de la persona para generarlos. Sujeto a esta disposición, nada impedirá que una Parte lleve a cabo procedimientos sumarios de aprobación para esos bienes sobre la base de estudios de bioequivalencia o biodisponibilidad.

NAFTA (1994)

6. Each Party shall provide that for data subject to paragraph 5 ... no person other than the person that submitted them may, without the latter's permission, rely on such data in support of an application for product approval **during a reasonable period of time after their submission**. For this purpose, a reasonable period **shall normally mean not less than five years** from the date on which the Party granted approval to the person that produced the data for approval to market its product, ...

TRIPS Agreement

Art. 1 Nature and Scope of Obligations

Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.

Art. 39.3

Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

What are the implications of layers of obligations?



EFTA - Mexico (2001)

Section 7: protection of undisclosed information

Article 39

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Implications?

Layers of obligations?



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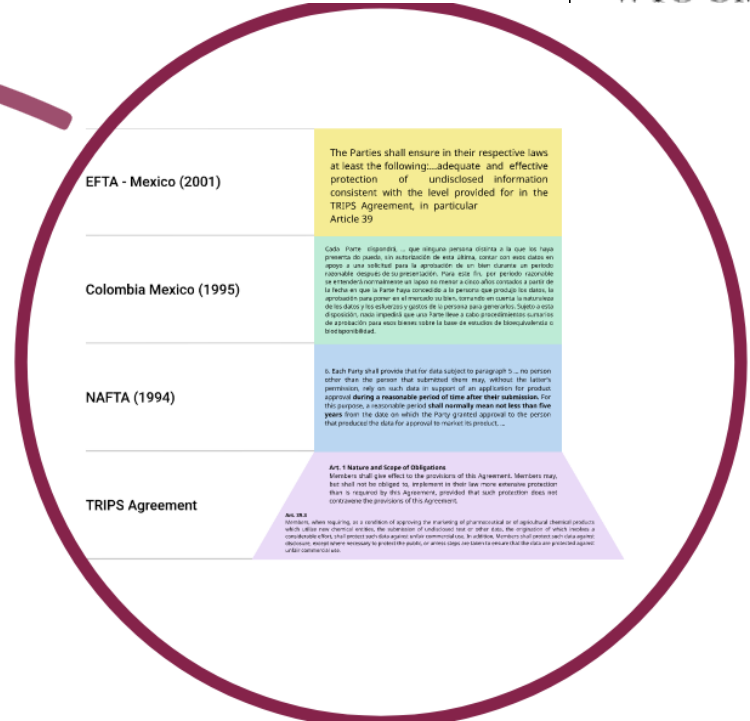
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What are the implications of layers of obligations?



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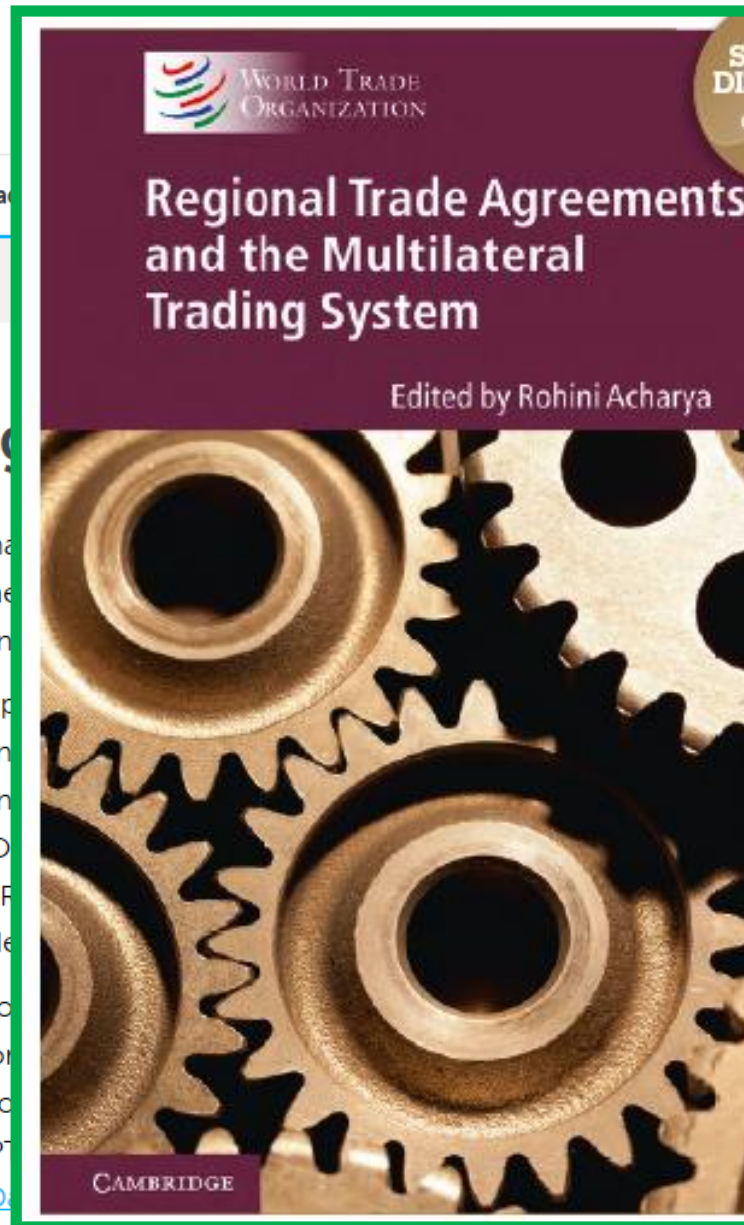


Regional trade agreements

Regional trade agreements (RTAs) have increased in large plurilateral agreements between Mongolia and Japan in June.

Non-discrimination among trading partners constitute one of the exemptions and with these rules, and also recognizing of RTAs' impact on interests of WTO members to gather information on the implications of RTAs for the wider.

What all RTAs in the WTO have in common is that they are open to more partners. Information on RTAs is available in the [Database](#). The WTO also receives notifications of RTAs. In the WTO, RTAs are notified to the WTO is available in the [PTA Database](#).



Search

WTO and you

Tweets



Do Rules of Origin hurt third countries? Paola Conconi, Professor of Economics at the Université Libre de Bruxelles, talks about her findings on this topic. Full lecture: youtu.be/3hECdU1hdvA#WTORTAspic.twitter.com/DnYdFm1WXm



Feb 10, 2018



Do Rules of Origin hurt third countries? Paola Conconi, Professor of Economics at the

IP provisions in RTAs vary widely in scope and breadth



Two Examples:

Provisions relating to copyright
infringement in the digital
environment



Ratification or accession to
WIPO Copyright Treaty
(1996) and WIPO
Performances and
Phonograms Treaty (1996)
(ex: *EU - CARIFORUM States EPA*)

Technological protection
measures and Internet
Service Provider Liability

(ex: *Korea, Republic of – United
States*)

Example: United States – Australia



Article 17.9 – Patents

1. Each Party shall make patents available for any invention, whether a product or process, in all fields of technology, provided that the invention is new, involves an inventive step, and is capable of industrial application.

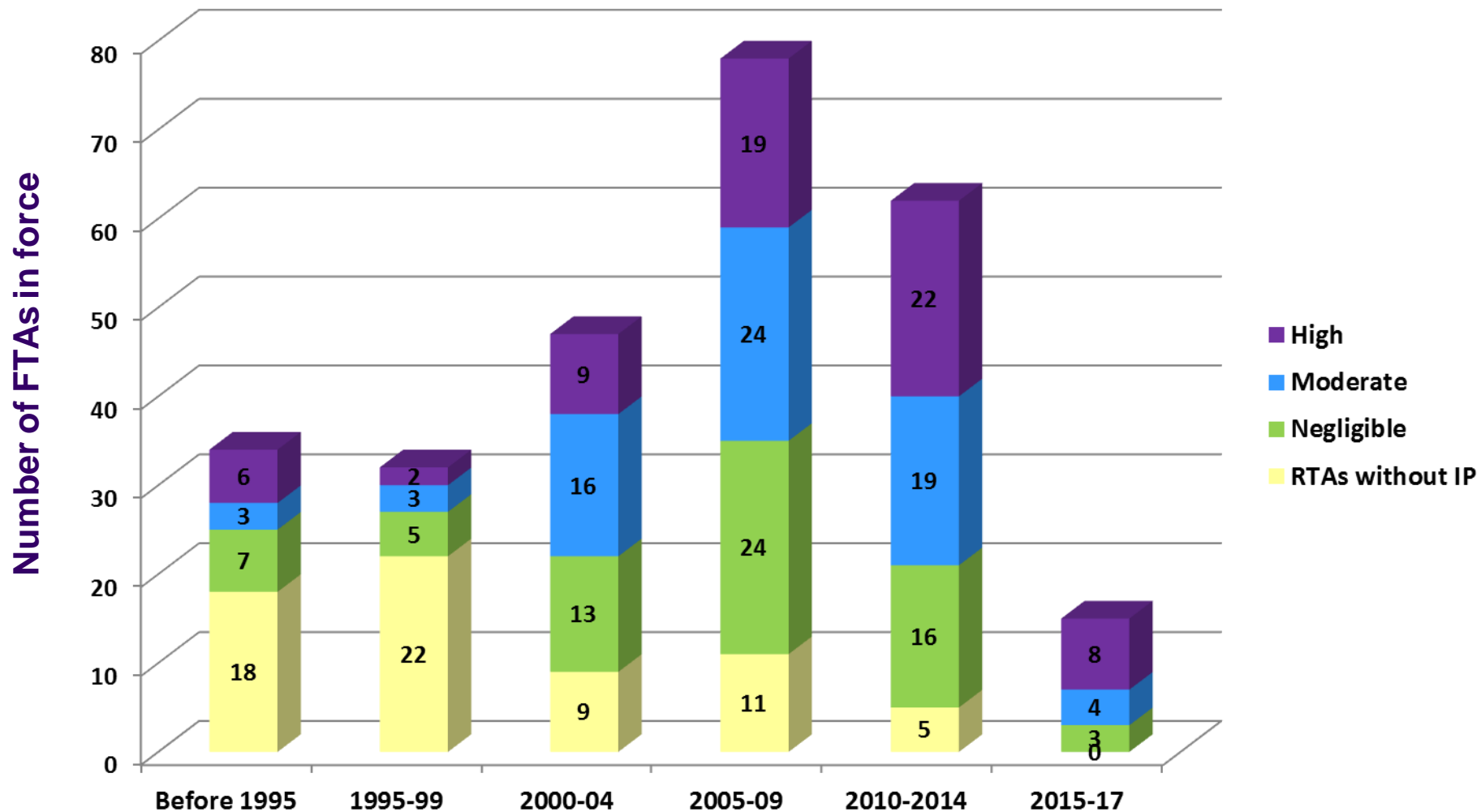
The Parties confirm that patents shall be available for any new uses or methods of using a known product. ...



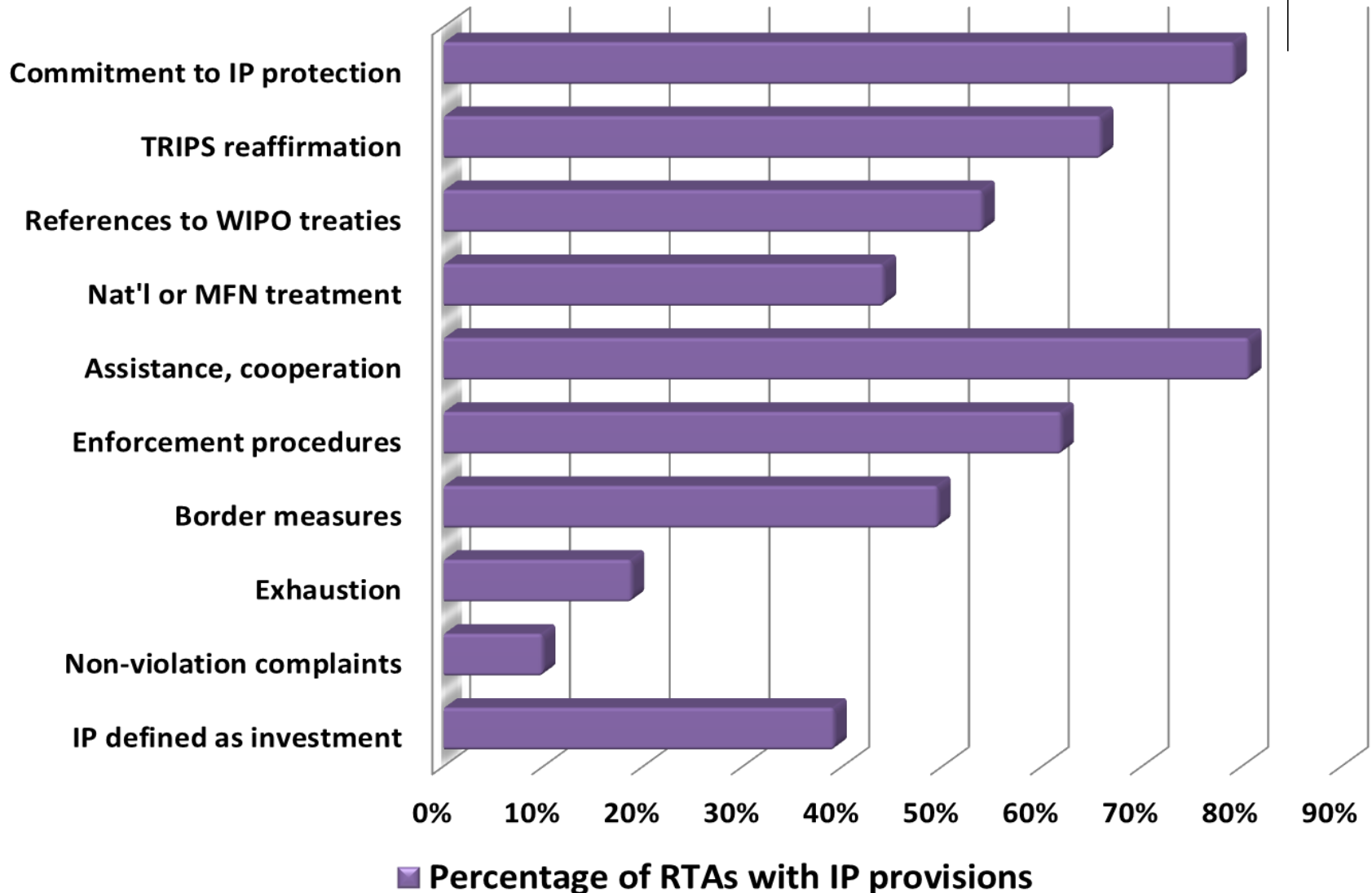
FTAs in Force – IP Content



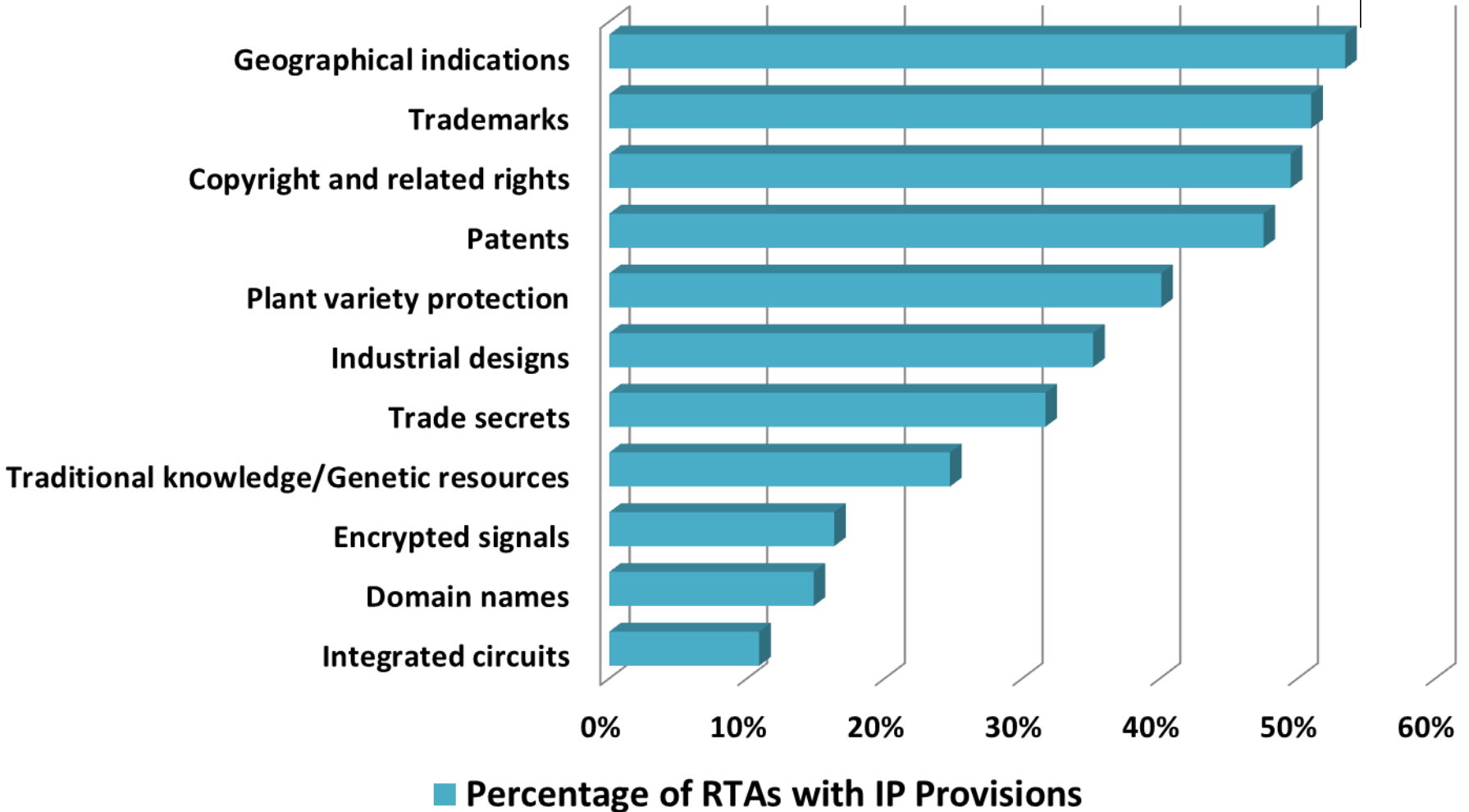
Breakdown by level of IP Content



Percentage of FTAs with General IP Provisions



Percentage of FTAs with *Specific* IP Provisions



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