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**INTERNATIONAL IP IN THE AGE OF AI:
IMPLICATIONS FOR DIGITAL TRADE
GOVERNANCE**

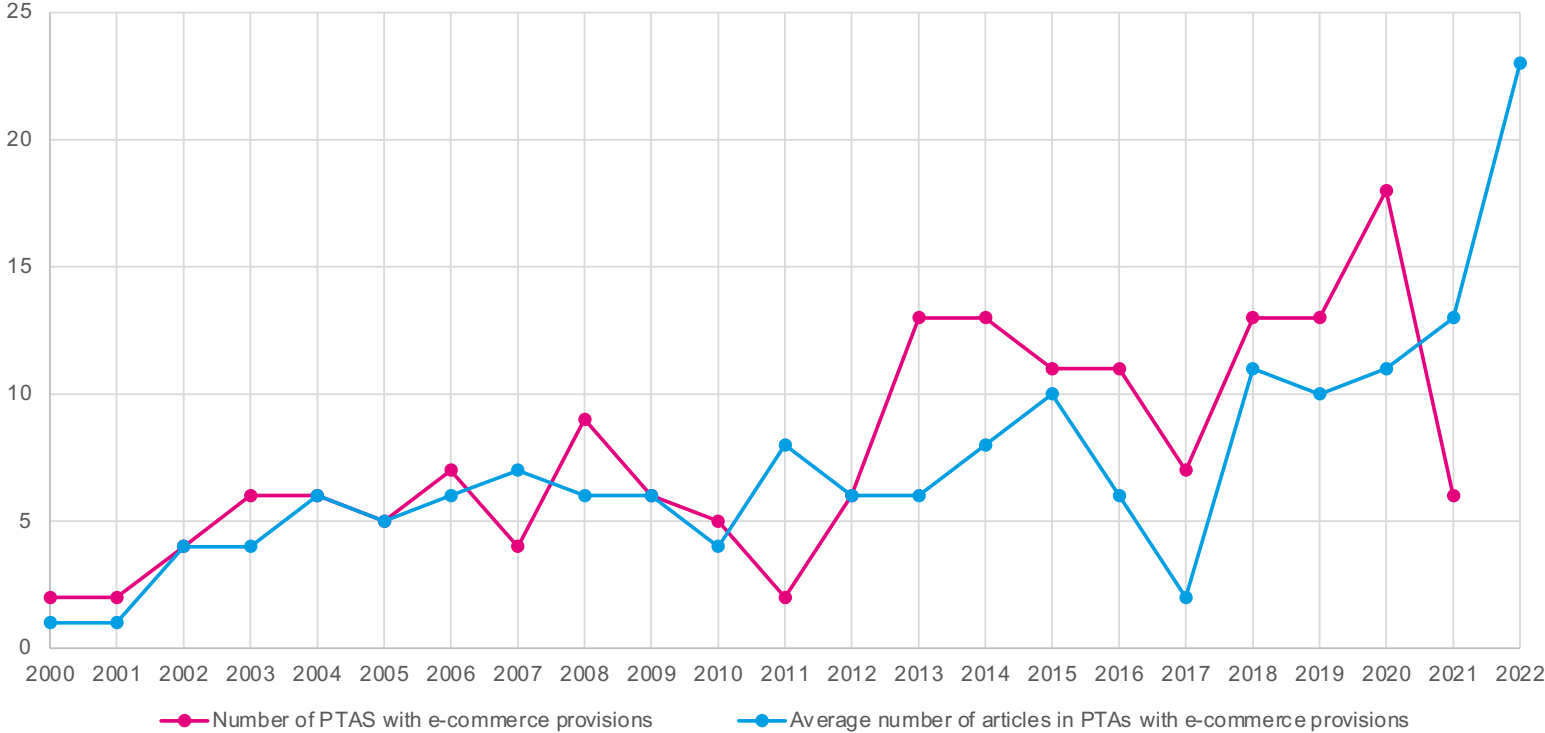
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GROWTH IN DIGITAL TRADE RULEMAKING

WHAT WE OBSERVE

GROWTH IN TREATY-BASED DIGITAL TRADE RULEMAKING



DEVELOPMENTS IN FTAs

- **total FTAs (2000-2024): 442**
 - FTAs with digital trade provisions: 212
 - FTAs with dedicated digital trade chapters: 122 (major growth in recent years)
- **recent trend (2020-2024):**
 - total PTAs concluded: 77
 - **dedicated digital chapters: 39 (50.6%)**
- **geopolitical insights:** high- and middle-income countries show increased interest in digital trade facilitation

- for data, see: <https://unilu.ch/taped>

taped.

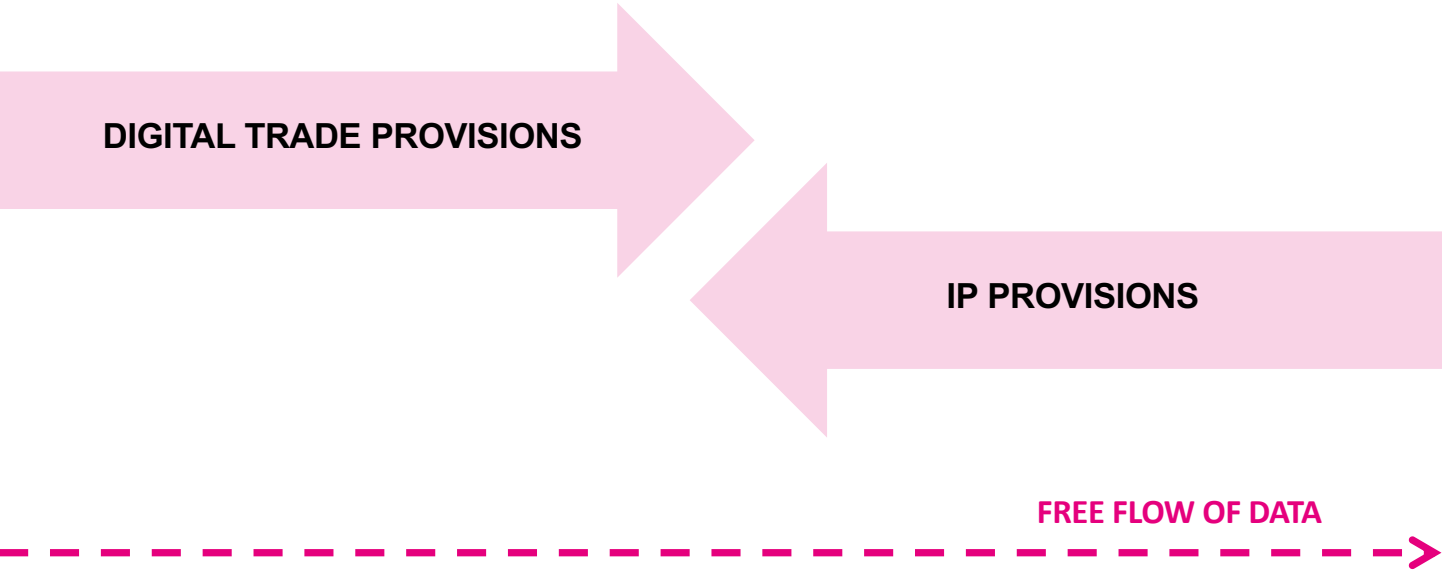
trade agreement provisions on e-commerce and data flows

IF WE LOOK AT IP ...

- **recent trend (2020-2024):**
 - total PTAs concluded: 77
 - FTAs with IP provisions: 33 (ca. 42%)
- **content of the agreed upon IP provisions:**
 - primarily reaffirm TRIPS minimum standards
 - limited innovation in IP rulemaking for digital technologies
 - flexibilities for digital environments have limited coverage in set of FTAs

THE IP–DIGITAL TRADE INTERFACE

MEETING POINT: THE CENTRALITY OF DATA AND THE REGULATION OF DATA



HOW IP MATTERS FOR DIGITAL TRADE?

- uncertainty around the apparent link between both fields
- **WHY?**
 - lack of empirical evidence
 - lack of knowledge about which IPRs we should be focusing on
 - lack of inclusion in academic/policy discourse

LACK OF EMPIRICAL EVIDENCE

- some economic indexes cover only measures related to discrimination against foreign firms on trademarks and copyrights and related rights, as well as enforcement procedures
- but levels of protection of undisclosed information also matters (Schultz and Lippoldt 2014; Linton 2015)
- patent, copyright and trademark are key IPRs for knowledge-intensive and business services (in high-income countries), as they facilitate the delivery of technology and business inputs (Ivus 2024); **this might be particularly relevant for digital trade**

WEAK LINKAGE IN POLICY DISCOURSE

- **1998 WTO Work Programme on Electronic Commerce**
 - protection and enforcement of copyright and related rights; the protection and enforcement of trademarks; and new technologies and access to technology
 - request to reinvigorate the Work Programme (South Africa) highlights measures to promote tech transfer
- **plurilateral Agreement on E-Commerce (under the current WTO Joint Statement Initiative)**
 - no mention of IPRs
- **EU Digital Single Market Strategy**
 - Digital Services Act (DSA) / Data Act / AI Act – copyrights and trade secrets?

IP SUPERFICIALLY MENTIONED ACROSS POLICY DOCUMENTS

- **2023 Handbook on measuring digital trade (IMF, OECD, UNCTAD and WTO)**
 - categories of services that are digitally deliverable:
 - **charges for the use of IP** (are quantified in cross-border digital-economy-related trade)
- **OECD Services Trade Restrictiveness Index**
 - exceptions to copyright can be a barrier to digital services trade
- **2020 World Bank report on the regulation of digital trade**
 - IP as part of enabling policies for e-trade
 - focus on **intermediary liability** and **fair use**

OVERALL LACK OF CLARITY

- **regarding which IPRs are relevant**
- **regarding the levels of protection**
- **regarding the flexibilities**
 - stringency of IPR protection for greater services export diversification depends on a country's state of IPR protection (Gnangnon 2024)
 - stronger levels of IPR protection may be beneficial for countries exporting knowledge intensive services, not for all (Ivus 2024)
- **so far: digital and IP inevitably go in bifurcated paths**

ARTIFICIAL INTELLIGENCE

WILL AI BE A CATALYST OF CHANGE?

- **AI trade is transnational**
 - models are trained in jurisdiction A (sometimes with copyrighted data from jurisdiction B) and deployed/exported to jurisdiction C
 - can jurisdictions compete as hubs for AI development based on strategic use of IP? (e.g. reforms to Japan's and Singapore's copyright laws)
- **considering this, isolating digital trade from other areas of regulation (such as IP) may backfire against AI development**
- **fora for possible reconciliation?**
 - WIPO?
 - WTO?
 - FTAs?

IF FTAs, WHAT ARE THE POSSIBLE PATHS?

FTAs clauses on 'balance' in copyright

Each Party **shall endeavour** to provide an appropriate balance in its copyright and related rights system, among other things by means of limitations and exceptions consistent with [paragraph 1][Article X, referring to three step test], [for] [giving due consideration to] legitimate purposes [such as, but not limited to] [which may include],[**education, research**], **criticism, comment, news reporting, and facilitating access to published works for persons who are blind, visually impaired, or otherwise print disabled**. [CPTPP, RCEP, HK-AUS FTA, Peru-AUS FTA, UK-AUS FTA, Cambodia – UAE CEPA]

[For greater certainty, a Party may adopt or maintain limitations or exceptions to the rights referred to in paragraph 1 (three step test) for **fair use**, as long as any such limitation or exception is confined as stated in paragraph 1.] [RCEP]

[For greater certainty, a use that has **commercial aspects** may in appropriate circumstances be considered to have a legitimate purpose under Article XX.XX (Limitations and Exceptions).] [CPTPP; UK-AUS FTA]

IF FTAs: GEOPOLITICAL CONSIDERATIONS

- the United States is no longer negotiating FTAs; will this change under the next administration?
- new legal entrepreneurs (e.g. Singapore)
- yet so far, there is little innovation in IP chapters (particularly south-south), except for a handful of exceptions
- reasons? way forward?

IF FTAs ...

- **FTAs' digital trade chapters could help to counterbalance exclusive rights against use of data for AI training**
 - consider provisions on open government data, public domain, data innovation, all included in DEPA
 - also consider that FTAs' digital trade chapters do not prevail in conflict with other chapters
 - freeing up data for AI training will also require reworking the IP chapters (inevitably)

thank you!

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