

introducing TAPED: a new dataset for digital trade rules in PTAs



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deep transformations in trade due to digitization

- **global value chains (GVCs)**
- **servicification**
- **data flows**
- **data must cross borders:**
 - cross-border data flows now generate more economic value than traditional flows of traded goods
 - cross-border data flows fuel digital innovation
- **e-commerce < digital trade**



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- like other factors of production, such as natural resources and human capital, it is increasingly the case that **much of modern economic activity, innovation and growth cannot occur without data**
- the transformative potential is great and refers not only to new 'digital native' areas, such as search or social networking but also to 'brick-and-mortar' businesses

new digital trade barriers

- localization measures
- data privacy and protection measures
- intellectual property related measures
- censorship
- cybersecurity
- **rise of digital protectionism and data sovereignty**

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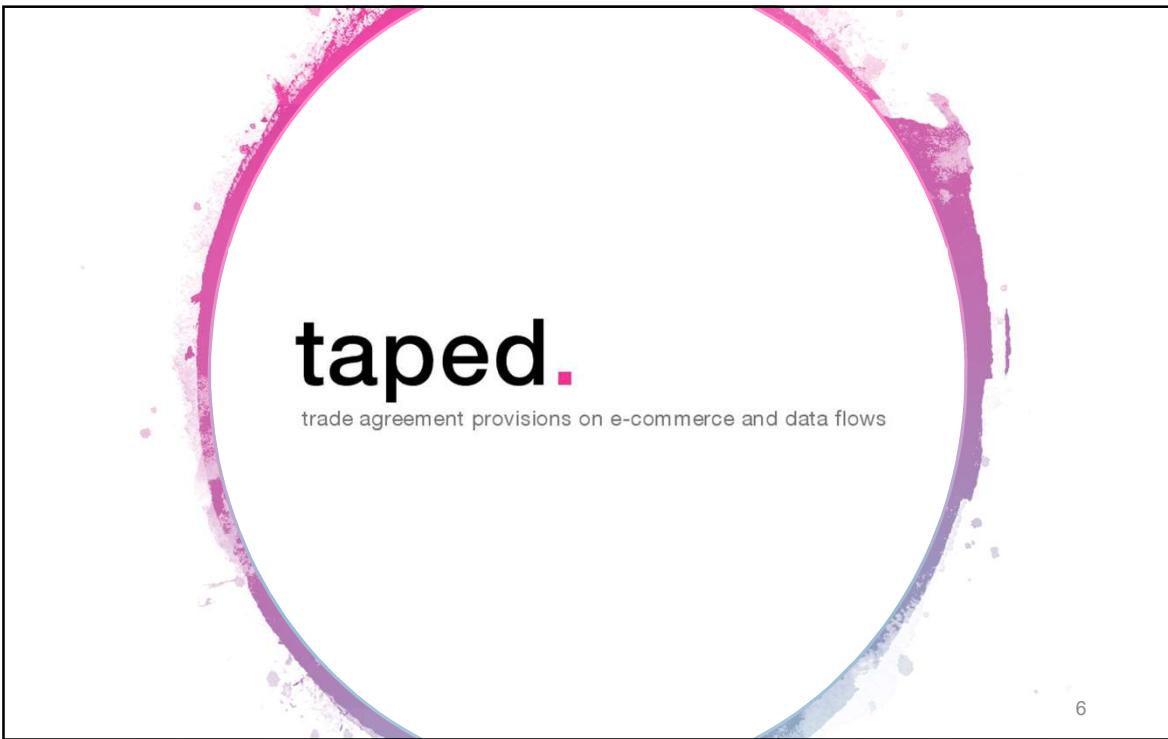
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WTO and digital trade: failed adaptation

- **the 1998 WTO E-Commerce Programme:** great forward-oriented thinking
>> no action
- **no agreement even on basic issues, such as that the WTO rules apply to trade online let alone on more complex matters, such as classification:** goods vs. services; telecom vs. audiovisual vs. computer-related services
- **some compensation through the case-law**
(*US-Gambling; China-Audiovisual Products*)
- **>> venue-shopping triggered**

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taped.

trade agreement provisions on e-commerce and data flows

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digital trade provisions in PTAs

- the final dataset includes 345 PTAs concluded between 2000 and June 2019
- a total of 84 different items were coded
- manual double-coding plus digital coding
- 182 PTAs include provisions that are related to digital trade
- 107 PTAs have specific e-commerce provisions
- 77 PTAs have dedicated e-commerce chapters

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e-commerce chapters: coding

- applicability of WTO rules to e-commerce
- non-discriminatory treatment of digital products: NT / MFN
- permanent moratorium on duty free treatment of electronic transmission
- specific exceptions
- non-conforming measures
- reservations
- Domestic Electronic Transaction Framework:
 - Consistency of domestic framework with UNCITRAL Model Law on Electronic Commerce 1996
 - Avoidance of unnecessary regulatory burden on electronic transactions by domestic Electronic Transaction Framework
 - Facilitation of input in development of electronic commerce (legal framework for electronic transactions)
- Electronic Authentication, Electronic Signatures and Certificates
- Consumer Protection
- Data Protection
- Paperless Trading
- Principles on Access to and Use of the Internet for Electronic Commerce
- Cross-Border Transfer of Information by Electronic Means ('free flow of information')

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e-commerce chapters: coding

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- Internet Interconnection Charge Sharing
- Data Localization / Location of Computing Facilities
- Unsolicited Commercial Electronic Messages
- Cooperation on issues regarding Electronic Commerce
- Cybersecurity
- Source Code
- Dispute Settlement
- Size of the e-commerce chapter
 - number of articles
 - number of words
- E-commerce in the same chapter with services (yes: coding of chapter no: N/A)
- Resemblance with model (US: 0 / EU: 1 / Mixed: 2)
- Extent of legalization (soft/hard)

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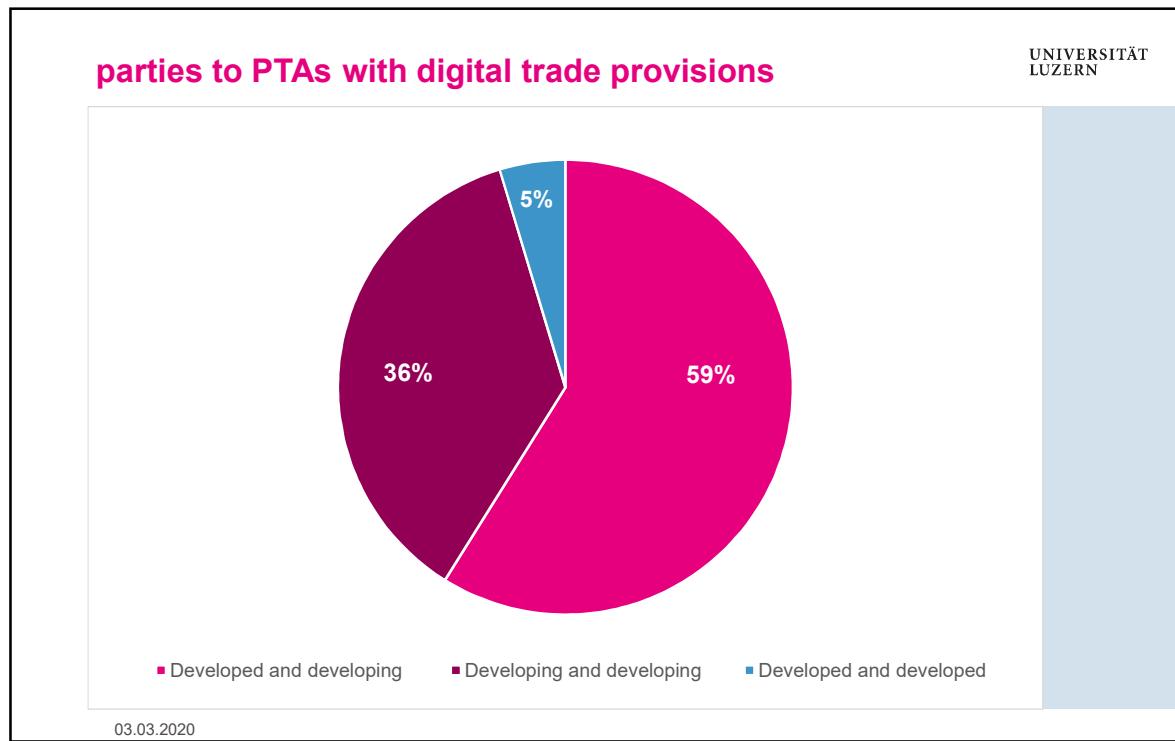
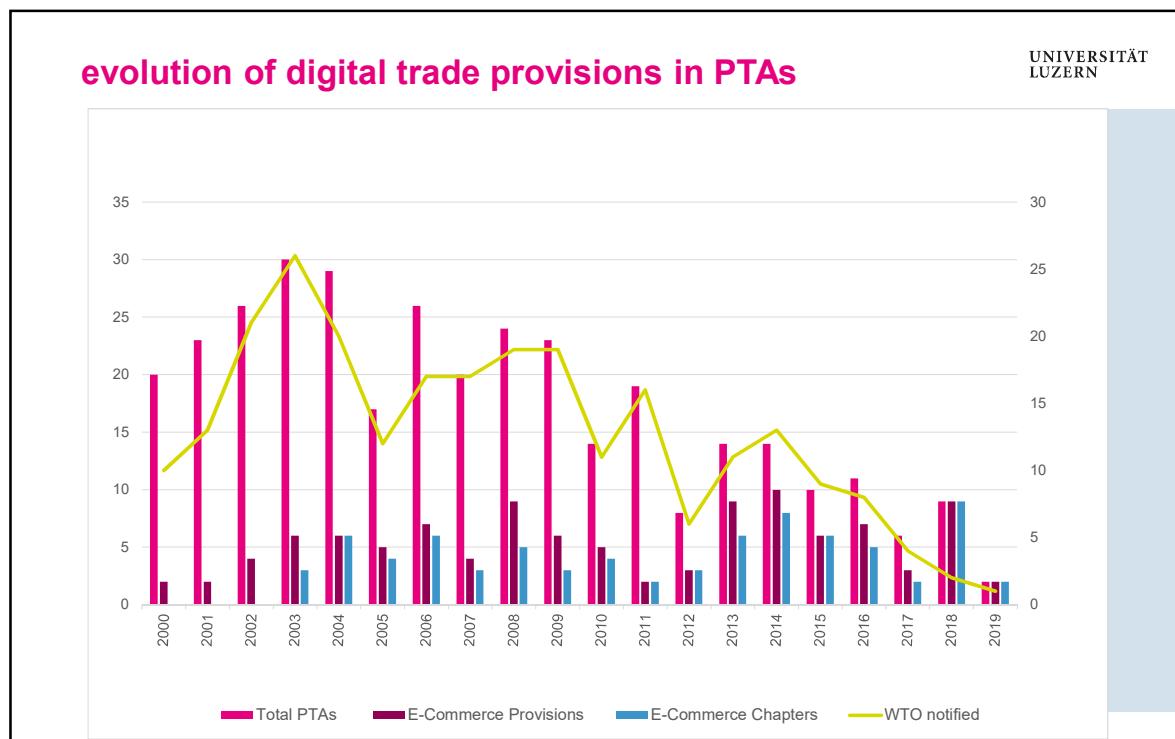
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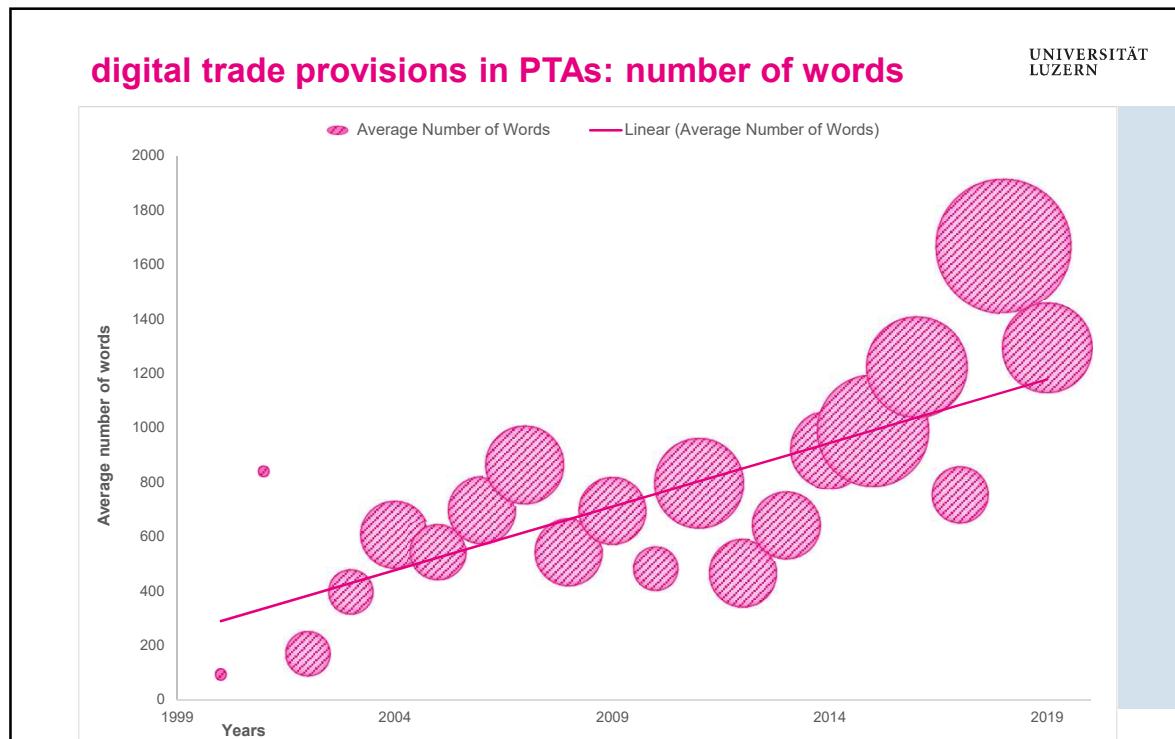
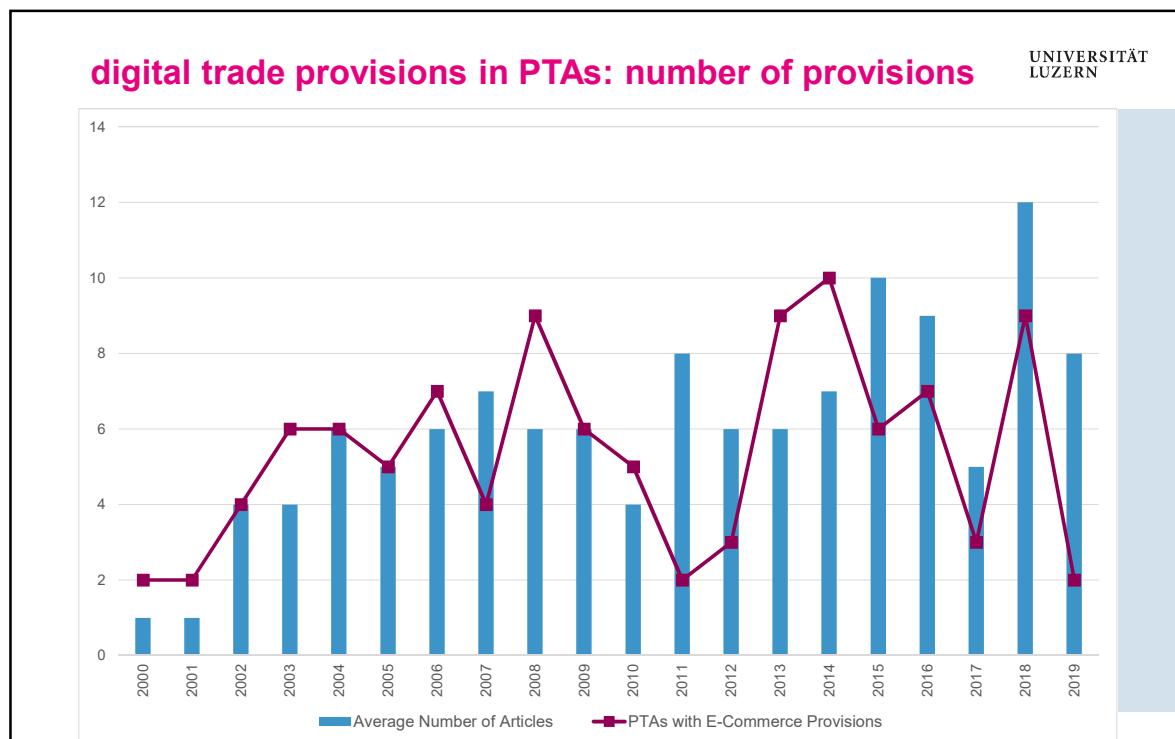
evolution of digital trade provisions in PTAs

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- **first e-commerce provision:** Article 7, Jordan-US FTA, signed 24 October 2000
- **first e-commerce chapter:** Singapore-Australia FTA (SAFTA), signed 17 February 2003
- **first general provisions on data flows:** Korea-US FTA (KORUS), signed 30 June 2007
- **first specific provisions on data flows:** New Zealand and Singapore Closer Economic Partnership Agreement (CEPA), signed 14 November 2000, on transfer of financial information and financial data processing
- **new advanced templates on digital trade with CPTPP and USMCA**

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Comprehensive and Progressive Agreement for Transpacific Partnership (CPTPP)

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- the CPTPP chapter on e-commerce is the most comprehensive so far
- identical with the TPP e-commerce chapter and in essence US-driven
- **substance:**
 - ban on customs duties on electronic transmissions, including content transmitted electronically
 - non-discriminatory treatment of digital products
 - a legal framework governing electronic transactions consistent with the principles of the *UNCITRAL Model Law on Electronic Commerce 1996* or the *UN Convention on the Use of Electronic Communications in International Contracts 2005*
 - electronic authentication and electronic signatures
 - online consumer protection
 - paperless trading
 - spam
 - source code
 - net neutrality
 - cooperation, including on cybersecurity

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CPTPP: specific provisions on data flows

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- **explicit ban on data protectionism:** 'Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person'
- **localization measures prohibited**
- **restrictions are permitted only for legitimate purposes** if they do not amount to 'arbitrary or unjustifiable discrimination or a disguised restriction on trade'
- **policy space of domestic data protection regimes**

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post-CPTPP developments

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- similar hard rules on data flows incorporated in other trade agreements, largely following the same wording: the 2016 **Chile-Uruguay FTA**, the 2016 **updated Singapore-Australia FTA (SAFTA)**, the 2017 **Argentina-Chile FTA**, the 2018 **Singapore-Sri Lanka FTA**, the 2018 **Australia-Peru FTA**, the 2018 **United States-Mexico-Canada Agreement (USMCA)**, the 2018 Brazil-Chile FTA, and in the 2019 **Australia-Indonesia FTA**
- the 2018 **EU-Japan Economic Partnership Agreement (EPA)**, and in the Modernisation of the Trade part of the **EU-Mexico Global Agreement**, the Parties commit to “reassess” within three years of the entry into force of the agreement, the need for inclusion of provisions on the free flow of data into the treaty
- 17 may 2019: launch of **Digital Economy Partnership Agreement** between Chile, NZ and Singapore

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highlighting trends (1)

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- emergence of **a specific trade regime tailored to digital products and services**
- digital trade **not so much about market access but about interfacing domestic regimes**
- **regulatory entrepreneurs**: US but templates have spread; Singapore, Japan and Australia at the forefront; less known agreements such as Singapore-Sri Lanka have detailed e-commerce chapters
- it is trendy to be ‘pro-digital trade’ – many central and south American countries endorse strong e-commerce rules (Chile, Colombia, Costa Rica)
- **still, the regulatory framework patchy**

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highlighting trends (2)

- experience gathered on multiple digital trade issues
- agreement on digital trade enablement issues, such as paperless trading, electronic contracts, custom duty moratorium
- data flows **versus** the protection of privacy and national security

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- **forthcoming:** Burri/Polanco, Digital Trade Provisions in PTAs: Introducing a New Dataset, *Journal of International Economic Law* 23: 1 (2020)
- **full access to TAPED**, incl. codebook, available at: www.unilu/taped (at the date of JIEL advanced access publication)
- **thank you for your attention !**
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