

RESPONSES

CHARTING THE COURSE: TRIPS-PLUS AGREEMENTS AND THE INTERSECTION OF INTELLECTUAL PROPERTY WITH DIGITAL TRADE

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This is a Response to Professor Trimble’s article Unjustly Vilified TRIPS-Plus?: Intellectual Property Law in Free Trade Agreements. It builds upon the analysis of TRIPS-plus developments in Free Trade Agreements (FTAs) that have often been criticized in the existing literature and offers a more nuanced perspective on these advances in international intellectual property (IP) law. We complement Professor Trimble’s arguments with insights gleaned from our own empirical research with the TAPED (Trade Agreements Provisions on Electronic-commerce and Data) dataset, which analyzes digital trade rulemaking in the entire body of FTAs, including in the IP domain. Evident in this respect is the growing disconnect between these two fields of law (digital trade and IP). We argue that this disconnect may have negative implications, as it further fragments the regulatory landscape. An adequate interface of international IP and digital trade rulemaking is critical particularly under the conditions of data-driven economies and artificial intelligence development, and it may call for policymakers and trade negotiators to look across previously

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discrete topics in order to design forward-looking regulatory frameworks that still maintain the precarious balance between strong IP protection and its social cost.

The regulation of international intellectual property (IP) protection through Free Trade Agreements (FTAs) has transformed and significantly exceeded the minimum standards established in multilateral treaties. Such an evolution is embedded in the system, as the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) itself explicitly permits WTO Members to “implement in their law more extensive protection than is required . . . , provided that such protection does not contravene the provisions of this Agreement.”¹ WTO Members have used this flexibility to design far-reaching IP protection regimes at home, but also to negotiate IP provisions in FTAs. These treaties have become an often-sought avenue to agree on cutting-edge IP rules, which frequently go beyond the minimum standards of protection and cover a wider scope of issues (the so-called “TRIPS-plus”).²

As Marketa Trimble correctly notes in her article *Unjustly Vilified TRIPS-Plus?: Intellectual Property Law in Free Trade Agreements*, the coverage, depth, and impact of such provisions have “attracted much criticism and relatively little praise.”³ In particular, TRIPS-plus agreements have been consistently criticized because they link IP law to trade—an original sin in the view of some that involves questionable tradeoffs, changes the dynamics of IP rulemaking, and fragments international IP law.⁴ This criticism has also been compounded by the inherently secretive and opaque nature of FTA negotiation processes, which are often conducted without public scrutiny and under the strong influence of corporate lobbying in favor of increased IP protection and stronger enforcement mechanisms. Indeed, due to the

1. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 1.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

2. See Srividya Jandhyala, *International and Domestic Dynamics of Intellectual Property Protection*, J. WORLD BUS., Oct. 2014, at 287 (discussing how domestic “economic groups” leverage WTO commitments to broaden and strengthen domestic IP protections); Henning Grosse Ruse-Khan, *The International Law Relation Between TRIPS and Subsequent TRIPS-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities?*, 18 J. INTELL. PROP. L. 325, 327–28 (2011) (explaining the changing view on TRIPS, both positively and negatively, as countries negotiate TRIPS-plus obligations in FTAs).

3. Marketa Trimble, *Unjustly Vilified TRIPS-Plus?: Intellectual Property Law in Free Trade Agreements*, 71 AM. U. L. REV. 1449, 1452 (2022).

4. *Id.* at 1526–27.

highly technical nature of IP rulemaking, it has been one of the prime examples of regulatory capture.⁵ Furthermore, as FTAs raise the multilateral standards of IP protection and introduce new and/or more detailed obligations, they often limit the flexibility of States to regulate at home, including with regard to critical issues, such as access to medicines or climate change.⁶ More broadly, TRIPS-plus agreements have been perceived to disrupt the already precarious equilibrium between IP protection and its social cost.⁷ The criticism is amplified by the interpretation of IP (and TRIPS-plus standards) as protected investments within international investment agreements.⁸ Such an interpretation opens the gateways for claims against a State through Investor-State Dispute Settlement mechanisms, placing an almost exclusive stress on economic rights.⁹

5. See Susan K. Sell, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* 75–76, 83 (2003) (discussing how, specifically in the United States, the private sector plays a large role in IP protection and has linked IP protection to international trade); WILLIAM PARTY, *MORAL PANICS AND THE COPYRIGHT WARS* 26 (2009) (analyzing how corporate copyright owners largely control everything tied to their works and leave no choices to the consumer, and how the economic impact of copyright infringement is exaggerated in political debates).

6. See Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 12 (2007); Daniel Benoliel & Peter K. Yu, *Introduction*, in *INTELLECTUAL PROPERTY, INNOVATION, AND ECONOMIC INEQUALITY* 2–3 (Daniel Benoliel, Peter K. Yu, Francis Gurry & Keun Lee, eds., 2024) (describing how the TRIPS Agreement illustrates a “textbook example of global inequality” in IP); Daniel J. Gervais, *Climate Change, the International Intellectual Property Regime, and Disputes Under the TRIPS Agreement*, in *RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND CLIMATE CHANGE* 54, 60–61 (Joshua D. Sarnoff ed., 2016) (outlining the judicial enforcement mechanisms that the TRIPS Agreement obligates WTO Members to conduct); *THE GLOBAL GOVERNANCE OF HIV/AIDS: INTELLECTUAL PROPERTY AND ACCESS TO ESSENTIAL MEDICINES* 90–91 (Obijiofor Aginam, John Harrington & Peter K. Yu, eds., 2013) (questioning whether the TRIPS Agreement’s “specific conception of rights” undermines human rights norms and standards).

7. See, e.g., Eric W. Bond, *The Economics of International Trade Agreements and Dispute Settlement with Intellectual Property Rights*, in *INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME* 831, 833–34 (Keith E. Maskus & Jerome H. Reichman, eds., 2005) (analyzing the adverse effects of IP protection in developing countries, including the higher prices at which foreign firms must sell products).

8. See Peter K. Yu, *The Investment-Related Aspects of Intellectual Property Rights*, 66 AM. U. L. REV. 829, 851 (2017) (discussing the drawbacks of Investor-State Dispute Settlements).

9. See *id.* at 851–54 (explaining four weaknesses of Investor-State Dispute Settlements on developing countries: (1) the high cost of arbitration; (2) the

Departing from this conventional and highly critical approach to TRIPS-plus agreements, Professor Trimble provides a more positive view on the implications and potential of the inclusion of IP provisions in FTAs. We agree, as she puts it, that “just as a wholesale endorsement is not appropriate, neither is a wholesale vilification of the [TRIPS-plus] developments.”¹⁰

In fact, given the variety of reasons that obstruct international cooperation, TRIPS-plus developments can be seen as the only advances occurring in the field of international IP law. One of those reasons is the apparently impossible task, given contemporary geopolitics, to renegotiate multilateral treaties, such as the TRIPS.¹¹ The TRIPS Agreement is almost thirty-years-old and has not undergone any substantial adaptation, even when faced with disruptive technological developments, such as digitization.¹² The few updates that have occurred have been highly controversial, showcasing the difficulty in finding common ground on IP protection, even when at stake are key societal interests often linked to a state of emergency, such as a global pandemic.¹³ It is against this backdrop that FTAs have provided a more flexible avenue to bilaterally or regionally modernize the international IP rules.

Aiming at comprehensiveness, Professor Trimble’s article explores the various degrees of IP provisions found in FTAs—from minimalistic to fully-fledged ones.¹⁴ For this purpose, she relies on the WTO’s Regional Trade Agreements Database, which has kept track of all

unaccountability of arbitrators; (3) the secrecy of the proceedings; and (4) the possibility of frivolous lawsuits).

10. Trimble, *supra* note 3, at 1454.

11. Jide Nzelibe, *The Breakdown of International Treaties*, 93 NOTRE DAME L. REV. 1173, 1180–81 (2018).

12. WTO, MODULE XI: CURRENT TRIPS ISSUES 212, https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules11_e.pdf [<https://perma.cc/QC8Y-ABZ6>].

13. See generally Peter K. Yu, *The COVID-19 TRIPS Waiver and the WTO Ministerial Decision*, in INTELLECTUAL PROPERTY RIGHTS IN TIMES OF CRISIS 16–17 (Jens Schovsbo ed., 2024) (discussing the proposed suspension of the TRIPS Agreement by South Africa and India in the wake of COVID-19 and the ensuing debate); INTELLECTUAL PROPERTY, COVID-19, AND THE NEXT PANDEMIC: DIAGNOSING PROBLEMS, DEVELOPING CURES (Madhavi Sunder & Haochen Sun eds., 2024) (forthcoming May 31, 2024) (highlighting IP reforms that would assist with future pandemics).

14. Trimble, *supra* note 3, at 1457 (“The articles range from minimalistic—such as a ‘rendezvous clause’ in which countries simply agree to negotiate various matter, including IP matters—to highly elaborate—such as Article 31 of the EU-Turkey FTA.”).

regional trade agreements (including FTAs) notified to the WTO Secretariat.¹⁵ Based on the analysis of 337 FTAs, Professor Trimble highlights positive aspects of TRIPS-plus developments, including: transparency provisions; cooperation among IP offices; procedural minima for administrative and judicial proceedings; limitations on future increases of IP protection; clarification and updating of TRIPS provisions; and provisions addressing matters not covered in TRIPS, such as traditional knowledge and folklore.¹⁶ Such positive elements, or even the mere experimentation in legal design linked to them, Trimble argues, can be of substantial value to the global IP protection regime and may be worth replicating and expanding in future trade deals.¹⁷

In this Response, our main intention is to complement Professor Trimble's excellently researched and thoughtful piece with some considerations that arise from our own empirical work stemming from the analysis of trade agreements. As Professor Trimble notes, "[i]t is important to be aware of negotiated and concluded FTA IP provisions and to monitor the coherency of the FTA web."¹⁸ We continually contribute to these efforts through the TAPED (Trade Agreements Provisions on Electronic Commerce and Data) Dataset, which maps all FTA provisions that directly or indirectly deal with issues of digital trade, including rules on IP.¹⁹ To date, TAPED has kept track of 432 preferential trade agreements, which were concluded or signed between January 2000 and December 2023.²⁰ 214 of those treaties contain provisions relevant to electronic commerce and digital trade, 122 of which have dedicated e-commerce/digital trade

15. *Regional Trade Agreements Database*, WTO OMC, <https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> [<https://perma.cc/5BMA-4PMU>]; see Trimble, *supra* note 3, at 1454–55.

16. See Trimble, *supra* note 3, at 1482–526 (discussing these provisions and their respective benefits).

17. *Id.* at 1449, *passim*.

18. *Id.* at 1466.

19. See Mira Burri, María Vásquez Callo-Müller & Kholofelo Kugler, *TAPED: Trade Agreement Provisions on Electronic Commerce and Data*, TAPED 1, 3 (2023) [hereinafter Burri et al., *TAPED*], https://www.unilu.ch/fileadmin/fakultaeten/rf/burri/TAPED/Codebook_TAPED_Burri_Vasquez_Kugler_November_2023.pdf [<https://perma.cc/P5Z6-T62E>] (describing the methodology for collecting information for the TAPED dataset).

20. *Id.* at 4; Mira Burri, María Vásquez Callo-Müller & Kholofelo Kugler, *The Evolution of Digital Trade Law: Insights from TAPED*, 22 WORLD TRADE REV. 5 (2024) [hereinafter Burri et al., *Evolution*].

chapters.²¹ However, only a few trade agreements clarify the relationship between digital trade and IP rules. In fact, it is particularly in the interface between these two fields of law (digital trade and IP) that we observe a growing disconnect in international law—in the sense that IP rules do not account for advances in digital trade rulemaking. We argue that this disconnect may have negative implications, as it further fragments the regulatory landscape.

The gap between digital trade and IP occurs despite the fact that data has become the indispensable factor of production of the contemporary digital economy,²² and that data is a prime candidate for IP protection, particularly through copyright and trade secrets.²³ The intrinsic link between digital trade and IP rulemaking in a datafied economy is perhaps best illustrated by data's role in the current and future development of Artificial Intelligence (AI), and more recently, generative AI, which might radically transform international trade.²⁴ Recent litigation in the United States, where different copyright holders have challenged the use of their works in the training of AI systems—in some cases even requesting the destruction of those systems based on the argument that they are trained on copyright

21. See Burri et al., *Evolution*, *supra* note 20, at 5 n.32. The cut-off date for the collected data is Dec. 1, 2023. For updates, see *TAPED Agreements*, UNIV. OF LUCERNE, <https://www.unilu.ch/taped> [<https://perma.cc/X5LB-NTTN>].

22. See Mira Burri, *The Regulation of Data Flows Through Trade Agreements*, 48 GEO. J. INT'L L. 407, 408–48 (2017) [hereinafter Burri, *Regulation of Data Flows*] (articulating how FTAs and other plurilateral agreements regulate digital trade and impact the digital economy); Mira Burri, *Data Flows and Global Trade Law*, in *BIG DATA AND GLOBAL TRADE LAW* 11, 11, 15 (Mira Burri ed., 2021) [hereinafter Burri, *Data Flows and Global Trade Law*] (discussing how the intersection between cross-border data flows and international trade law impacts the global economy).

23. See Burri, *Regulation of Data Flows*, *supra* note 22, at 431–32 (explaining how the Trans-Pacific Partnership (TPP) provides for “heightened protection of trade secrets” and aims to enable digital trade through digital copyright provisions); Trimble, *supra* note 3, at 1510–11 (discussing how some FTAs require countries to protect against copyright infringers on the internet).

24. Joshua P. Meltzer, *The Impact of Foundational AI on International Trade, Services and Supply Chains in Asia*, 19 *ASIAN ECON. POL'Y REV.* 129 (2024); see Ulises A. Mejias & Nick Couldry, *Datafication*, 8 *INTERNET POL'Y REV.* 1, 6 (2019) (defining “datafied” as a person or thing that is “treated as an open domain for data extraction”). See generally Shin-yi Peng, Ching-Fu Lin & Thomas Streinz, *Artificial Intelligence and International Economic Law: A Research and Policy Agenda*, in *ARTIFICIAL INTELLIGENCE AND INTERNATIONAL ECONOMIC LAW: DISRUPTION, REGULATION, AND RECONFIGURATION 1* (Shin-yi Peng, Ching-Fu Lin & Thomas Streinz eds., 2021) (discussing fundamental questions about the “nature, scope, and transformative potential of AI”).

infringing copies²⁵—is just the most obvious example of how IP rules can test technological developments. This litigation also evidences how important it is to understand what the relevant international and national legal frameworks permit.²⁶ Given the key role that copyright (and other IP rights) play in the development of AI, it thus seems only natural that digital trade negotiations should open the way for interfacing IP and digital trade in a more concrete way. To further exemplify the interface between IP and digital trade law, it can be noted that digital trade chapters in FTAs already include provisions on source code. These rules prohibit requirements on the transfer of, or access to, source code of software owned by a person, as a condition for the import, distribution, sale or use of such software.²⁷ Twenty-two of the 432 preferential trade agreements coded in TAPED contain a provision on source code, with twenty-one provisions being legally binding.²⁸ Rules on source code in FTAs are also often linked to trade secret protection, leading to the question of whether States retain the capacity to examine the robustness and security of software and algorithms, or whether they are prevented from doing so under trade secret considerations.²⁹

25. See Pamela Samuelson, *How to Think About Remedies in the Generative AI Copyright Cases*, LAWFARE (Feb. 15, 2024), <https://www.lawfaremedia.org/article/how-to-think-about-remedies-in-the-generative-ai-copyright-cases> [https://perma.cc/A9FU-9CXB] (noting that by February 15, 2024, four of the sixteen generative AI copyright complaints filed in the United States, “explicitly ask courts to order generative AI defendants to destroy the models that were trained on their works”).

26. See, e.g., Complaint at 2, *N.Y. Times Co. v. Microsoft Corp.*, No. 1:23-cv-11195 (S.D.N.Y. Dec. 27, 2023) (alleging that Microsoft created its artificial intelligence service using “millions of The Times’s copyrighted news articles, in-depth investigations, opinion pieces, reviews, how-to guides, and more”).

27. See Ioana Vasii & Lucian Vasii, *Backdoor Man: A Radiograph of Computer Source Code Theft Cases*, 18 J. HIGH TECH. L. 1, 10–11 (2017) (describing “source code” as “difficult to define,” but ultimately is “[h]uman-readable programming language text that defines software, firmware, or electronic hardware descriptions and/or instructions”).

28. Burri et al., *Evolution*, *supra* note 20, at 8. TAPED includes both TPP and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), but since CPTPP replaced TPP, TPP is not included in this figure. *Id.*

29. See Burri et al., *TAPED*, *supra* note 19, at 21 (describing how FTAs, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), include provisions precluding access to source code as a condition for doing business in a country); see, e.g., *Agreement Between the United States of America and Japan Concerning Digital Trade*, OFF. OF THE U.S. TRADE REPRESENTATIVE 14, <https://ustr.gov/sites/>

Beyond IP-specific rules on copyright and trade secrets, there is also little clarity on whether FTAs are extending or curtailing the existing IP limitations and exceptions.³⁰ This lack of clarity can have an impact on the balance between IP protection and access to data, which is of key importance for data-driven industries but can also affect other traditional economic sectors that have become dependent on data, such as logistics or manufacturing.³¹ For example, certain agreements include provisions on the balance in copyright and related rights systems, which provide more flexibility than the multilateral limitations and exceptions to copyright enshrined in TRIPS Article 13.³² In some

default/files/files/agreements/japan/Agreement_between_the_United_States_and_Japan_concerning_Digital_Trade.pdf [https://perma.cc/FD7N-DRM3] (prohibiting one Party from requiring “the transfer of, or access to, source code of software owned by a person of the other Party” in Article 17); *Digital Partnership Agreement Between the Government of the Republic of Korea and the Government of the Republic of Singapore*, SING. MINISTRY OF TRADE & INDUS. 23 (Nov. 21, 2022), <https://www.mti.gov.sg/-/media/KSDPA-Text-in-English-Signed.pdf> [https://perma.cc/TF5X-TTFH] (prohibiting one Party from requiring “the transfer of, or access to, source code of software owned by a person of the other Party” in Article 14.19).

30. See James Manyika, Michael Chui, Brad Brown, Jacques Bughin, Richard Dobbs, Charles Roxburgh et al., *Big Data: The Next Frontier for Innovation, Competition, and Productivity*, MCKINSEY GLOBAL INST. (May 1, 2011), <https://www.mckinsey.com/capabilities/mckinsey-digital/our-insights/big-data-the-next-frontier-for-innovation> [https://perma.cc/4297-4GVJ] (“Policies related to privacy, security, and even liability will need to be addressed in a big data world.”).

31. See *id.*; *Data Excellence: Transforming Manufacturing and Supply Systems*, WORLD ECON. F. 5 (Jan. 14, 2021), https://www.weforum.org/docs/WEF_Data_Excellence_Transforming_manufacturing_2021.pdf [https://perma.cc/3LYD-VD5R] (summarizing a report finding that three-quarters of 1,300 surveyed manufacturers viewed advanced data and analytics to be critical for business success); Yuxia Guo, Huiying Mao, Heping Ding, Xue Wu, Yujia Liu, Hongjun Liu et al., *Data-Driven Coordinated Development of the Digital Economy and Logistics Industry*, 14 SUSTAINABILITY 2 (2022), <https://www.mdpi.com/2071-1050/14/14/8963> [https://perma.cc/SRN8-ZLK8] (discussing how the “digital transformation of the logistics industry” improves efficiency and ultimately grows the digital economy).

32. *E.g.*, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018, Ausl. Gov’t Dep’t of Foreign Affs. & Trade [hereinafter CPTPP].

Article 18.66: Balance in Copyright and Related Rights Systems:

Each Party shall endeavor to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exceptions that are consistent with Article 18.65 (Limitations and Exceptions), including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar

cases, these clauses may explicitly state that fair use may be compliant with the TRIPS three-step-test, which gives broad guidelines for domestic copyright limitations and exceptions but does not prescribe any specific ones.³³ These types of provisions could potentially enable a more flexible copyright space, one that could support digital innovation and even establish a package of “user rights.”³⁴ User rights can be conceptualized as affirmative, rather than merely defensive, rights to use and re-use copyrighted materials, and they can be particularly critical in the digital space, where often copyright limitations and exceptions become overridden by private ordering and technological protection measures.³⁵

Despite the anecdotal evidence of these intersections, it should be underscored that FTAs do not address the relationship between IP and digital trade explicitly. This is contrary to what has occurred in other

purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.

Id. art. 18.66.

33. *E.g.*, María Vásquez Callo-Müller, *FTAs' Contribution Towards a More Flexible Copyright Space: Possibilities and Limits*, 38 AM. U. INT'L L. REV. 159, 166, 195 (2023) (providing an example of a clause that explicitly states that fair use may be compliant with the TRIPS three-step-test: “a Party may adopt or maintain limitations or exceptions to the rights referred to in paragraph 1 (resembling the three-step-test) for fair use”); *see* Australian Law Reform Commission, *Copyright and the Digital Economy* (Report No. 122, Nov. 2013) 116–18 [4.136–37, 4.139] (describing the three-step-test as the general international law standard for assessing the permissibility of copyright exceptions, which requires exceptions on exclusive rights to be limited to “(1) ‘certain special cases’; (2) which do ‘not conflict with a normal exploitation’ of the copyright material; and (3) do ‘not unreasonably prejudice the legitimate interests’ of the rights holder”).

34. *See* Daniel J. Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1, 6–7 (2005) (exploring the shift in the use of copyright due to digital technology); Christophe Geiger, Daniel J. Gervais & Martin Senftleben, *The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, 29 AM. U. INT'L L. REV. 581, 589 (2014) (describing the three-step test as a flexible framework); Pamela Samuelson & Kathryn Hashimoto, *Is the U.S. Fair Use Doctrine Compatible with Berne and TRIPS Obligations?* 13, 16–17 (Aug. 22, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3228052 [<https://perma.cc/2GLB-E8FX>] (explaining one school of thought that conceptualizes the doctrine of fair use as providing the right to use the copyrighted material in certain ways, rather than just as a defense to infringement).

35. *See* Christophe Geiger & Elena Izyumenko, *The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!*, 51 INT'L REV. INTELL. PROP. & COMP. L. 282, 296–98 (2020) (describing the academic, and later legal, recognition that copyright exceptions and limitations are affirmative user rights).

legal domains affected by digitization, such as personal data protection.³⁶ This disconnect occurs despite the “gravitational pull” that digital trade chapters in FTAs exert,³⁷ whereby different subject-matters—such as source code protection and its interface with trade secrets, and in some cases, the liability of internet platforms—become incorporated into the text of the agreement.³⁸ Moreover, when there is a provision on the relationship between the electronic commerce/digital trade chapters and the IP chapters, the IP chapter’s provisions tend to take precedence.³⁹

Another significant development showcasing the growing disconnect between international IP and digital trade rulemaking is the emergence of the so-called “Digital Economy Agreements” (DEAs).⁴⁰ Since 2019, the following five DEAs have been signed: (1) the United States–Japan Digital Trade Agreement (DTA), 2019;⁴¹ (2)

36. Mira Burri, *Interfacing Privacy and Trade*, 53 CASE W. RES. J. INT’L L. 35, 35–36, 68–69 (2021).

37. This gravitational pull of digital trade agreements is true even for issues that are outside of the conventional trade law domain, such as privacy protection. *See, e.g., id.* at 35–36, 47 (suggesting while privacy law was traditionally conceptualized as “provid[ing] for individual rights’ protection against the state” and trade law as “enabl[ing] the flow of goods, services, [and] capital . . . across borders,” as technology has progressed, the need for trade agreements that “establish effective privacy protection” and avoid “barriers to information flows” has grown). *See generally* Anupam Chander & Paul Schwartz, *Privacy and/or Trade*, 90 U. CHI. L. REV. 49, 50, 52–53 (2023) (summarizing conflicting views on incorporating privacy measures into trade agreements).

38. *See* Andrew D. Mitchell & Neha Mishra, *WTO Law and Cross-Border Data Flows: An Unfinished Agenda*, in *BIG DATA AND GLOBAL TRADE LAW* 83, 86–87 (Mira Burri ed., 2021) (discussing domestic laws with provisions affecting cross-border data flow); Mira Burri, *Digital Trade and Human Rights*, 117 AJIL UNBOUND 110, 114–15 (2023) (highlighting the increased inclusion of source code provisions as well as “interactive computer services” provisions found in U.S. deals, limiting “the liability of intermediaries for third party content”).

39. *See* Burri, *Regulation of Data Flows*, *supra* note 22, at 420 (explaining how, in many agreements, if there is a conflict between the provision of an e-commerce chapter and an IP chapter “the provisions of the e-commerce chapters will thus be overridden”).

40. *See* Burri et al., *Evolution*, *supra* note 20, at 13 (showcasing that a recent development of digital trade rulemaking is the emergence of DEAs); *see also* Michelle Warren & Ziyang Fan, *Digital Economy Agreements Are a New Frontier for Trade—Here’s Why*, (Aug. 24, 2022), <https://www.weforum.org/agenda/2022/08/digital-economy-agreements-trade> [<https://perma.cc/ZQ5S-BJPG>] (explaining the goals of DEAs as seeking to “modernize rules and tackle digital policy fragmentation”).

41. Agreement between the United States of America and Japan Concerning Digital Trade, Japan-U.S., Oct. 7, 2019.

the Singapore–Australia Digital Economy Agreement, 2020 (SADEA);⁴² (3) the Digital Economy Partnership Agreement (DEPA) among Chile, New Zealand and Singapore, 2020;⁴³ (4) the United Kingdom–Singapore DEA, 2022;⁴⁴ and (5) the Korea–Singapore DEA, 2022.⁴⁵ Except for the United States–Japan DTA and the DEPA, which are stand-alone treaties, the other three agreements are part of, or upgrade, an existing FTA.⁴⁶ Notably, neither of the stand-alone DEAs contains rules on IP, while the other three DEAs have not resulted in substantial reformulation of their respective FTAs’ IP chapters to account for developments in the digital economy.⁴⁷ Moreover, it is important to highlight that in the case of the two stand-alone DEAs, neither of these agreements were notified to the WTO.⁴⁸ In this sense, it appears that countries interested in setting international frameworks for digital trade tend to isolate those rules from the international IP realm, either intentionally, for the sake of moving more swiftly towards an agreement, or unintentionally.

Beyond these aspects, the changed geopolitical landscape—in particular the retreat of the United States as the main driver behind TRIPS-plus agreements—is another important development to

42. Australia-Singapore Digital Economy Agreement, Austl.-Sing., Dec 8, 2020.

43. Digital Economy Partnership Agreement, Chile-N.Z.-Sing., June 12, 2020.

44. Digital Economy Agreement Between the United Kingdom of Great Britain and Northern Ireland and the Republic of Singapore, U.K.-Sing., June 14, 2022.

45. Digital Partnership Agreement Between the Government of the Republic of Korea and the Government of the Republic of Singapore, S. Kor.-Sing., Nov. 21, 2022.

46. Australia-Singapore Digital Economy Agreement, Austl.-Sing., art. 3, Dec 8, 2020 (amending the Singapore-Australia Free Trade Agreement); Digital Economy Agreement Between the United Kingdom of Great Britain and Northern Ireland and the Republic of Singapore, U.K.-Sing., art. 2, June 14, 2022 (amending the U.K.-Singapore Free Trade Agreement); Digital Partnership Agreement Between the Government of the Republic of Korea and the Government of the Republic of Singapore, S. Kor.-Sing., Nov. 21, 2022, art. 3 (amending the Korea-Singapore Free Trade Agreement).

47. DEAs tend to cover all aspects contained in the CPTPP e-commerce chapter and add new issues of relevance for the digital economy. The DEA with the largest number of provisions is the Digital Economy Partnership Agreement (DEPA), which is structured around “modules” covering different areas of digital trade negotiations. None of DEPA’s modules deals with IP. For an overview of DEPA, see Joo Hyoung Lee & David Collins, *The Digital Economy Partnership Agreement (DEPA): Accession to the Digital-Only Regime*, in RESEARCH HANDBOOK ON DIGITAL TRADE (David Collins & Michael Geist eds., 2023).

48. See *WTO Notifications Portal*, WORLD TRADE ORG., <https://notifications.wto.org/en> [<https://perma.cc/RZ5H-F6DR>] (indexing agreements notified to the WTO, but noticeably missing the two stand-alone DEAs).

consider in the context of the evolution of FTAs and its implications for the further establishment of TRIPS-plus rules. It is well acknowledged that the U.S. blueprint for IP provisions in FTAs has influenced small and large agreements.⁴⁹ However, the future development of TRIPS-plus provisions will be defined not by the United States, but by the new dynamics of selective regionalism unfolding around the world. The emergence, and in some cases expansion, of mega-regional agreements that include neither the United States nor the European Union, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) or the Regional Comprehensive Economic Partnership (RCEP), are prime examples in this regard.⁵⁰ These new dynamics challenge previous criticisms that “have presented developing countries in particular as victims of the [U.S.] ‘maximalist agenda.’”⁵¹ The diversity of economic interests underpinning these mega-regional agreements, may also lead one to ponder whether certain areas of the U.S. blueprint may remain, but with added novel features, such as flexibilities.⁵² Future FTA IP chapters, particularly arising from developing countries’ treaty-making, will also test whether there may be structural or capacity problems preventing developing countries from coming up with an offensive TRIPS-plus strategy.

Professor Trimble aptly notes that “[e]xisting FTAs should not be idealized; they are a compromise that favors stronger parties over weaker ones” and that a “country’s negotiators cannot be expected to do less than promote the country’s own IP law at the international

49. See Trimble, *supra* note 3, at 1474 (critiquing “the prominent role that the United States has held in trade negotiations,” which “enables it to . . . revise the national IP of other countries to conform to the U.S. standard”).

50. See CPTPP, *supra* note 32 (naming the eleven countries party to the agreement: Australia, Canada, Japan, Mexico, New Zealand, Singapore, Vietnam, Peru, Malaysia, Chile, Brunei Darussalam); Regional Comprehensive Economic Partnership, Nov. 15, 2020, Austl. Gov’t Dep’t of Foreign Affs. & Trade [hereinafter RCEP] (listing the diverse membership of the ratifying countries, which include both developed and developing nations, such as Australia, Cambodia, New Zealand, and China).

51. Trimble, *supra* note 3, at 1474.

52. CPTPP, *supra* note 32 (noting the United Kingdom formally requested to join the CPTPP in 2021, which includes a variety of other countries such as Canada, Japan, New Zealand, and Mexico); RCEP, *supra* note 50 (describing the development of the agreement as building upon the membership of the Association of Southeast Asian Nations (ASEAN) and its free trade agreement partners: Australia, China, India, Japan, New Zealand, and South Korea).

stage.”⁵³ While we echo these observations, we also note that the process of TRIPS-plus negotiations (as well as the negotiators themselves) often need evidence-based research to support informed policy decisions. Only the systematic analysis of TRIPS-plus provisions can contribute to achieving this goal. In this sense, we do commend the initiative to look at the positive aspects of IP provisions in FTAs and the possibilities they offer going forward. More clarity about the spectrum of policy choices that are available to trade negotiators can help update and fine-tune international IP law, striking a delicate balance between fostering innovation and permitting room for safeguarding legitimate public interests, which may differ across countries.

In addition, we highlight the need, particularly urgent in the era of AI, for an adequate interface of international IP and digital trade rulemaking. Only through a deep understanding of the mutual influence of these domains will we be able to discern the areas of the international IP agenda that require reformulation to align with the progressive digital trade agendas embraced by many countries. In this sense, the ongoing international and domestic effort of IP calibration remains imperative but has perhaps even become more challenging, as policymakers and trade negotiators must look across previously discrete topics, such as IP and electronic commerce, and adequately interface them in a data-dependent world.

53. Trimble, *supra* note 3, at 1534.