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CANAAN BRIDGES MONTHLY

MONTHLY REGIONAL AND INTERNATIONAL IP, TRADE AND DEVELOPMENT UPDATES FROM CANAAN BRIDGES CONSULTING INC.

Canaan Bridges Consulting Inc.

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Old Strategies in a New Year: Thinking things Through

Twenty-two years ago, many persons were concerned about what the new century would bring - how different would it be from the 1990's, and what would development embody in the years ahead?

The Agreement on the Trade Related Aspects of Intellectual Property (TRIPS) was five years old, several economies would be on the verge of updating their intellectual property legislation, free trade agreements had yet to gain strong momentum globally, and the multi-lateral trading system was envisaged by many to be a stalwart of development in the years to come.

Then came the 2000's; the economic downturn in the early part of the twenty-first century, development woes faced by several economies in ensuing years, and yet a determination to remain vigilant where rising out of the shadows are concerned.

The sustainable development goals birthed in 2015 towards a 15 year tread to global development, saw and continues to see, optimism and activism towards full realization, despite pitfalls. The pandemic. Much has changed since the pandemic. Yet without a resilient outlook it will be difficult, if not impossible to move forward.

2022 will likely not be an easy year, but with a sound re-orientation of strategies towards realizable goals, navigating successfully through stormy waters may be possible. What is your anchor in 2022?

We hope that you will have a successful and healthy
New Year - the journey gets easier with every smart step taken, no matter how rocky the path is.

To goodness, your success and resilience: Happy New Year

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DE-BUNKING THE RELATIONSHIP BETWEEN FREE TRADE AGREEMENTS AND INTELLECTUAL PROPERTY RIGHTS

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Preferential free trade agreements (FTA) are agreement between two or more countries pertaining to subsidies, investments, customs, financial regulation, and other aspects of trade including labour, procurement and intellectual property (IP) rules. These agreements may be bilateral, regional or pluri-lateral in structure, ranging from dual partnerships to multi-party memberships covering different continents and regions. Examples of FTAs include the EU-Cariforum Economic Partnership Agreement, the United States Mexico, Canada agreement (USMA or NAFTA 2.0), and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. However, as of October 2021, there are over 370 regional trade agreements in effect (WTO 2021) globally. The multi-lateral trading platform has lost some significance in recent years. Whether this further plummets, there is likely to be a continued increase in FTAs and investment agreements in ensuing years.

Global IP Framework

Global IP rules were established under the Uruguay Round establishing the Marrakesh Agreement, in particular, the World Trade Organization (WTO) Agreement on the Trade Related Aspects of Intellectual property rights (TRIPS). This agreement established IP rules which each WTO member country must comply with when doing trade-related business with each other, and within their own jurisdictions. This system gives member countries the flexibility to implement IP protection and enforcement measures that are greater than that which is stipulated in the Agreement. Many countries have done so.

FTAs - a Change in Paradigm

Trade agreements serve various purposes. One of the effect of FTAs within contracting member countries, is the change it brings to a country's existing IP legal system. The IP provisions of FTAs have at least two impacts within contracting parties member countries. First, FTAs facilitate changes to a country's existing IP system, acting as an enabler to the implementation of specific IP rules or laws, where none previously existed. For example, the Comprehensive Economic Trade Agreement between Canada and the European Union requires that Canada becomes a signatory to the Singapore Treaty and the Madrid Protocol. The implementation of these treaties led to various amendments to Canada's Trademark Act to allow for, inter alia, the statutory recognition of sound marks, holograms and 3D marks as registrable, the availability of the Madrid System in Canada for the international filing of trademarks, and changes to how goods and services are classified by the introduction of the Nice Classification System.

Second, FTAs may introduce higher standards of protection and enforcement rules for IP within countries. For example, EU initiated trade or association agreements usually require contracting parties to recognise higher standards of protection for food and agricultural geographical indications, where these were previously at a minimum in recipient countries. This has led to enhanced levels of protection for food and agri-based geographical indications in several countries around the world including in the Caribbean, Latin and Central America, Japan and Canada.

Take the treatment of Geographical Indications concerning Feta Cheese as an example. In the EU-Cariforum Economic Partnership Agreement, producers are not allowed to use the name Feta on cheese which does not originate from Greece, and produced in accordance with certain specifications. Minimal protection for food based geographical indications is recognized under TRIPS. With TRIPS level of recognition, it would be possible, absent enhanced protection, for non-Greek producers to label their cheese as Feta style, imitation of Feta, Feta like, or of such similar variation. This is possible in the United States; there is no FTA between the United States and any country in the world that requires an enhanced level of protection for food based geographical indications. In contrast to this, the FTA between Canada and the European Union allows Canadian cheese producers who were making and selling cheese labelled as Feta prior to October 18, 2013 to continue doing so, by using qualifiers such as Feta style, or variations thereof. Therefore, in the context of food and agricultural geographical indications, FTAs may lead to either an expansion or restriction of rights in domestic jurisdictions.

Digital Trade

Rules pertaining to specific aspects of digital trade have also been introduced into domestic laws through FTAs. E-commerce has grown exponentially in recent years. The digital aspects of trade include platform as a service media such as online education, software applications such as healthcare delivery apps, and gaming and entertainment digital services.

More progressive FTAs have incorporated, as an aspect of their obligations, detailed provisions on digital trade. These rules may address how proprietary source codes are treated in technology transfer transactions; how data privacy is handled, place limits on the liability of internet service providers in certain transactions, imposes rules on data localization, and disposes of custom duties on online transactions (to name a few).

THE TAKEAWAY

FTAs and investment agreements have made significant changes to the IP eco-system of several countries globally. This move has facilitated a strengthening of IP protection and enforcement measures above the minimum standard of protection birthed through TRIPS. The challenge of how to balance owner rights with access to IP assets and how to integrate IP approaches into business and policy frameworks remains a live issue and cannot be addressed in silos.

FREE TRADE AGREEMENTS AND SOURCE CODES - WHAT GIVES?

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Both the international IP framework and many national legislation provide protection for source codes, whether as patented rights, or trade secrets. Recently, there has been concern that some countries require entrepreneurs to disclose source codes prior to the transfer of technologies embodying such codes. In these circumstances, and especially when source codes account for the crucial benefits derived from the technology, requirements to share such information with other parties can compromise the confidentiality of the proprietary know-how. At other times, source code disclosures may be necessary, based on regulatory or judicial specifications.

Several aspects of the digital economy are made possible by source codes. From mobile applications, to Internet of Things devices, to computer applications, source codes are an axiom to computer programming. They are human readable commands developed by programmers that allow the computer to execute specified tasks, culminating in a given outcome, - for example, uploading a pdf to LinkedIn, creating a meme coin, and what enables functionalities in video game creations.

FTAs and source codes

Over the last few years, several FTAs have included provisions that limit when a government body can require a foreign investor to disclose the source code in its technology. Three of these agreements are highlighted below, in the context of similarities and differences in source code disclosures.

The *Economic Partnership Agreement* between Japan and Mongolia is one of the earliest agreement (*2016*) to include substantive chapters on digital trade. One of the hallmarks of the agreement is the specification that both countries will not require the transfer of, or access to source codes as a pre-requisite to the import, distribution or sale of mass-market software (or products that include this software) in its countries.

The United States, Canada and Mexico Agreement, includes similar provisions on source code, but goes further in exemptions to source non-disclosures. If requested by a judicial or regulatory body for the purpose of an investigation, judicial proceeding, inspection, or examination, then the source code, or the algorithm in the source code can be accessed and shared *with these authorities.*

Another interesting take on source code disclosure is in the Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP). The pluri-lateral agreement is similar to the two mentioned above in its core non-disclosure mandates. However, the manner in which exceptions are listed is telling as to how source code disclosure is envisaged (or contemplated) between the parties to the agreement. Therefore, in a contract between commercial parties who are nationals of CPTPP member countries - should parties want to access or share source codes on terms and conditions that are mis-aligned with the spirit of the CPTPP, they are not precluded from doing so. In addition, if the laws of a country require a software to be modified prior to its sale, importation or distribution in the recipient country, the non-disclosure rule should not operate in such a way as to prevent this from happening.

In acknowledging that software applications may be patentable, the CPTPP further mandates that its exemption provision is not intended to hinder the disclosure of information required in patent applications, or requested by judicial order in patent disputes.

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The provisions in these FTAs change, or, for the first time will create laws on the extent of government's ability to arbitrarily access source codes (and algorithms within source codes) in import transactions. In addition, it is prudent to recognize exceptions to non-disclosure, where national security, regulatory and judicial orders so specify. Important in these instances is how broadly the information is shared, and the extent of disclosure that is required.

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UPCOMING EVENT

Canaan Bridges in collaboration with Arbitration Place:

Women Economic Empowerment Semi-Annual Training Workshop

March 09, 2022

Technology Monetization in Global Markets: IP and Trade Session

2.5 hours of learning content:

Free

Click here to register

or

www.womentechready.eventbrite.ca

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