NAFTA and Intellectual Property Rights: Regionally Strapped?

Introduction

NAFTA leadership in developing and protecting intellectual property rights (IPRs) is not by accident. On the one hand were the local reasons: as the first compact between developed countries (DCs) and less developed countries (LDCs), safeguarding Mexico’s fledgling IPR protection regime became more than a priority for NAFTA, and part and parcel of that concern was to ensure, through the rules of origin (ROO), that Mexico did not become a global production platform for the world’s largest market—that of the United States. On the other, though the major Internet copyrights and protection movement would literally take off after the 1994–2014 period being studied here, it was clear from the outset that protecting Internet-based information would become an IPR Achilles’ heel for NAFTA: they involve more than simply trade and investment—the two dominant integrative sectors, and an independent treatment would help bring that exclusive feature out better. Having just concluded a discussion of NAFTA arrangements addressing various types of disputes, we find that both the above IPR rationalizations actually expose the emergence of a special breed of disputes stepping beyond dumping/countervailing and typical investment cases, thereby necessitating yet another evaluation.

Given Alan B. Rugman’s apt observation that NAFTA was written by businessmen, IPR growth and protection necessitated not only a broader than regional playground, but also expanding state controls. Starting from scratch on the IPR front, Mexico would become the face of the new developments.
With intellectual property constituting “the most important asset” to businessmen, NAFTA became “the first international trade agreement to include obligations to protect intellectual property rights,” securing for its Chapter 17 provisions a very honorable place. Having tipped the WTO to the launching pad, NAFTA became the model that the WTO’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) followed. Two observations should nonetheless be made here for any empirical or theoretical study of regional economic integration: NAFTA’s IPR treatment hugged its multilateral IPR counterpart so closely that North American regional economic integration could not have been seen as an end in itself but more the means toward broader integrative compacts, that is, broader than just North American (reflecting, in this sense, an identity with NAFTA Chapter 11 investment dispute settlement’s International Convention for the Settlement of Investment Disputes [ICSID] moorings); and although North American economic asymmetry placed the region behind the steering wheel of IPR developments in the early twenty-first century, any direction the region took would ultimately be dictated by the stiff competition from outside the region, given the increasing cross-border production networks, so vivid with automobiles and semiconductors, but also spreading to agriculture (reflecting, in this second instance, greater identity with NAFTA Chapter 19 dumping/countervailing configurations). With Japan and a half a dozen other countries registering more patents than the United States, IPR generation and protection needed individual actions as much as collective within North America—both to serve North America and to move beyond the region, one of the many indications within the NAFTA document of it being a vehicle to somewhere else rather than a final accomplishment.

IPR Genesis

Even though the 1970s were riddled by preferential trade relations, only three had IPR connections: patent, copyright, and trademark laws. Initially they were protected by national legislations, such as the 1974 US Section 301 and the 1984 US Generalized System of Preferences. It was but a short step from there either to retreating from multilateral commitments toward selective free trade agreements (FTAs) or, if a country was already utilizing regional trade provisions, as the European Community was, to strengthening regional over multilateral commitments. To be sure, by CUFTA Article 2004, Canada and the United States joined hands to “cooperate in the Uruguay Round of multilateral trade negotiations” and “improve intellectual property,” as opposed to building an exclusive regional arena. As observed, the NAFTA leap linked the domestic to the