Revisiting NAFTA past Negotiations, from Trade to Intellectual Property

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The night before the U.S. presidential election, I saw on TV the closure speeches of both candidates. It was incredible for me, to realize that Donald Trump mentioned the word Mexico more times than any other, it was simply the most frequent word. Well, the unthinkable happened, and now I will analyze carefully the argument against NAFTA. While there is a deficit for the United States in its balance of trade in relation to Mexico, I think Mexican negotiators should put this "so called" advantage on perspective. Starting negotiations assuming or conceding that Mexico is the big winner and the U.S. is the looser part of the agreement is a wrong starting for Mexican negotiators.

Trade deficit numbers do not reflect the whole picture about NAFTA, because those numbers do not include Intellectual Property (IP). I mean, I do not see here the sales of the famous California smartphone in Mexico, because it is made in China. Neither those numbers include drug patents, nor earnings of U.S. IP based enterprises who sell several kind of services in Mexico, like famous restaurants, cafeterias, or a wide range of electronic platforms from transportation, music, shopping, to movies, you name it.

Those enterprises make millions of dollars in Mexico, and I do not have any kind of problem with that. After all, they bring jobs, good ideas, and good stuff to the country, not to mention that like almost everyone else in Mexico, I'm a consumer of almost all of them. The problem is that their earnings are not reflected in the balance of trade between Mexico and the United States.

During the international negotiations that derived in the creation of the World Trade Organization (WTO), starting in 1986, American negotiators put IP on the table, alongside the trade of goods. Obviously, not all countries agreed with that, because were net IP importers. However, such opposition was overcome due to the promised access to the U.S. market for products produced in those countries. That was the deal.

And here, is where different histories joined, NAFTA negotiators took WTO IP negotiating draft and put it almost literally in NAFTA, becoming its chapter seventeenth. After NAFTA, every U.S. bilateral commercial agreement put new stricter things on its IP chapter. It became the exchange coin, I will give access to the U.S. market, and you will put stricter IP rules on your legal system. After all, the biggest exporter of IP around the globe is the U.S.

This evolving ball brought the famous and failed Anti-Counterfeiting Trade Agreement (ACTA), and also the recently deceased Trans-Pacific Partnership (TPP). In both cases, there was an IP chapter draft, stricter than NAFTA IP chapter. One example, is the obligation to pass legislation in order to establish as crime several conducts that in this moment do not constitute crime in Mexico, like sharing music using peer to peer software, or watching a video uploaded without permission from the IP holder.

Moreover, several versions of the TPP IP chapter included protection as invention patent of surgical procedures. This patent protection of novel surgeries would make medical bills extremely high. This is not a good thing for Mexican public health, where there are a lot of poor people having a precarious access to health. Other TPP example, was the protection of the information gathered by laboratories when testing a new drug. This would result in adding other 10 years to the normal patent term of 20 years. And these are only three examples of how stricter IP rules have evolved after NAFTA.

It is obvious that U.S. negotiators will bring this new IP rules to NAFTA renegotiations. Why not? Mexico did not opposed seriously to those additions when TPP was negotiated before. No one in the Mexican government has even mentioned the subject. Probably they take it for granted. It is not my intention to give recommendations to Mexican negotiators, if there are; but I think they must remember that the exchange coin in the past was IP for U.S. market access. It was not free, by those times Mexico was a net IP importer, without much incentive to great IP protection. As a result, IP protection was weak, piracy was pervasive, and a patent was not even called patent but certificate of invention, just like in Russia, not covering drugs of course.

Mexican negotiators should not accept any modification to NAFTA IP chapter, if this come with new market barriers or new tariffs on Mexican goods. It could be one thing or the other, not both of them.