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A Tailor-Made (*Legal)* Suit? The Actual Scope, Power, and Functioning of NAFTA Chapter 11's Rules and Institutions for the Settlement of Cross-Border Disputes

¿Un traje (legal) hecho a la medida? Funcionamiento, capacidad y alcance reales de las reglas e instituciones del Capítulo 11 del TLCAN para resolver disputas fronterizas

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Abstract

Numerous scholars argue that the rules, mechanisms, and bodies established under NAFTA's Chapter 11 for the settlement of foreign direct investment disputes have undermined the policy-making capabilities of governments in the U.S., Mexico, and Canada for promoting public welfare in their countries. This article argues that Chapter 11 has instead contributed to reaffirming governments' power to enact and uphold social-oriented domestic laws. It demonstrates that Chapter 11's dispute settlement mechanisms were created and operate according to the interests of the national governments in facilitating and increasing the flows of trade and capital investment between countries without compromising their sovereignty and policy-making powers.

Key words: dispute settlement, NAFTA Chapter 11, North America, regional institutions.

Resumen

Numerosos académicos argumentan que las reglas, mecanismos y organismos establecidos con el Capítulo 11 del TLCAN para resolver las disputas de inversión extranjera directa han disminuido las capacidades de los gobiernos de Estados Unidos, México y Canadá para establecer políticas públicas dirigidas a promover el bienestar social en sus países. Este artículo argumenta que, por el contrario, el Capítulo 11 ha contribuido a reafirmar la capacidad de los gobiernos para promulgar e implementar leyes locales orientadas a lo social; demuestra que los mecanismos para solucionar disputas del Capítulo 11 se crearon y operan de acuerdo con los intereses de los gobiernos nacionales de facilitar e incrementar los flujos de comercio e inversión de capital entre los países sin comprometer su soberanía y sus facultades para instrumentar políticas públicas.

Palabras clave: resolución de disputas, Capítulo 11 del TLCAN, América del Norte, instituciones regionales.

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Introduction*

The North American Free Trade Agreement's Chapter 11 has been a subject of great interest for scholars. Its proposal, negotiation, and implementation have been widely analyzed and discussed in the literature (see Gantz, 1999; Dumberry, 2001; Brower, 2002; Hart and Dymond, 2002; Jones, 2002; Kurtz, 2002; Aguilar Álvarez and Park, 2003; Staff and Lewis, 2003; McRae and Siwiec, 2010; Karamanian, 2012). Most of that interest has arisen from the controversial nature of the rules, mechanisms, and bodies it established to protect foreign direct investment (FDI). The most common concern expressed by scholars with regard to this chapter relates to the operation of a dispute settlement mechanism that allows business actors to challenge the decisions and actions of North American national and sub-national governments that might have damaged their investments and, if successful, to receive compensation for them.

Some scholars argue that the operation –and even the mere existence– of such a mechanism has enabled investors and firms to undermine the power of North American governments to enact or uphold domestic social-oriented legislation that is, or might appear to be, unfavorable to their businesses (see Matiation, 2003; McBride, 2006; Clarkson, 2008; Wood and Clarkson, 2009). For instance, Runnalls and Fuller argue that the implementation of Chapter 11 has produced a "disturbing lack of balance between the protection of private interests and the need to promote and protect the public welfare" in North America (2001, p. viii). Similarly, Aguilar Álvarez and Park (2003) argue that Chapter 11 has caused a detrimental shift in domestic policy-making, which has moved away from the promotion of public interest toward the protection of private interests. These and other similar views have generated a consensus in the current scholarship on NAFTA, which classifies Chapter 11 as an instrument that "goes too far in favoring investors over [public] interests" (Van Harten, 2009, p. 43). A number of policymakers and non-governmental organizations (NGOS) express similar concerns over the operation of Chapter 11 and its dispute settlement mechanism. For instance, Elizabeth May (2013), leader of the Green Party of Canada, has stated,

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