

THE SYSTEMIC PROBLEMS OF USING AN INVESTMENT ARBITRATION TO HANDLE INVESTMENT DISPUTES RELATING TO MATTERS GOVERNED BY OTHER CHAPTERS UNDER AN FTA

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ABSTRACT

How to resolve investment disputes relating to subject matters that clearly fall into the scope of other chapters in an FTA (e.g., trade, environment, labour or competition chapter) presents an important systemic challenge. Based on NAFTA case-law, a liberal reading of a measure “relating to” an investor or investment might invite a broad range of regulatory matters governed in other chapters that fall under the coverage of the investment chapter and are likely to be the subject of an investment claim. Consequently, the regulatory purposes and the legal security of other chapters in an FTA might be frustrated and the risks of the use of an investor-state arbitration can be increased. The boundaries between separate chapters would also become significantly blurred. This result might not be desirable from the perspective of achieving the objective of an FTA. In order to provide a more sensible solution for handling such an investment dispute, this paper proposes to establish a stricter legal test for the determination of an investment measure under the investment chapter. The stricter legal test is expected to safeguard the legal regime created by other chapters to a certain degree. In addition, this paper proposes to make some procedural arrangements under an investor-state arbitration so as to accommodate more features of other chapters. It is suggested that establishing a better, predictable and coherent FTA regime through mutually supportive chapters should be of systemic value for states which have a desire to conclude FTAs in the future.

KEYWORDS: *Free Trade Agreement, the investment chapter, non-investment chapter, dispute*

settlement, investor-state arbitration