

conditions including payment of compensation.

Section B of Chapter Eleven provides a mechanism for dealing with claims by investors that a NAFTA party has breached its obligations under Section A. The process envisages that the parties to a dispute attempt to settle a claim through consultation or negotiation. If an investor is to submit a claim to arbitration, the investor must first submit a notice of intent and then a notice of arbitration. Arbitration is by a three-person arbitral panel, and the panel must determine the dispute in accordance with the NAFTA and applicable rules of international law.

The rules applicable to the arbitration may be the ICSID (International Centre for the Settlement of Investment Disputes) Convention, the Additional Facility Rules of ICSID or the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules, depending on the circumstances of the particular case. As Canada is not a party to the ICSID Convention, disputes involving Canada can only be submitted to arbitration under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules. Chapter Eleven provides that the applicable arbitration rules govern the arbitration except to the extent that they are modified by Section B.

#### **NAFTA Chapter 11 Cases**

a) *S.D. Myers - PCB Interim Order*

S.D. Myers, a U.S. corporation, submitted a Claim to Arbitration on October 30, 1998 under the dispute settlement provisions of NAFTA Chapter Eleven. The Claim alleges that the *PCB Waste Export Interim Order* of November 1995 ("*Interim Order*") breached Canada's obligations under Articles 1102 (national treatment), 1105 (minimum standard of treatment), 1106 (performance requirements) and 1110 (expropriation), causing US\$20 million in damages to it and its Canadian investment. S.D. Myers operates a PCB waste treatment and disposal facility in Ohio and claims that it has an investment in Canada aimed at sourcing Canadian PCB wastes. U.S. legislation banned the importation of PCB wastes since the early 1980s. However, the U.S. Environmental Protection Agency ("EPA") announced in October 1995, and without any notice to Canada, that as of November 15, 1995, it would grant S.D. Myers an "enforcement discretion" effectively permitting it to import PCB wastes from Canada for disposal at its Ohio facility.

Canada issued the *Interim Order* prohibiting the export of PCB wastes effective November 20, 1995. The *Interim Order* was subsequently repealed with the coming into force in February 1997 of the *PCB Waste Export Regulations, 1996*, which permitted exports of PCB waste for disposal.

The Memorial of the Claimant was submitted on July 20, 1999. A motion by the Claimant challenging Canada's production of documents led to an order requiring Canada to make inquiries of ministers for documents in their possession and control and to provide further substantiation of its claim of Cabinet confidentiality for some documents. Canada's Counter Memorial was submitted to the Tribunal on October 5. The hearing on the merits is scheduled for the week of February 14, 2000.