

NAFTA INVESTOR-STATE DISPUTE SETTLEMENT

Chapter Eleven of the North American Free Trade Agreement (NAFTA) establishes obligations of each of the NAFTA parties to investors of the other parties and provides a mechanism for settlement of disputes between investors and NAFTA parties in respect of such obligations. The substantive obligations to investors and the dispute-resolution process under Chapter Eleven are similar to provisions found in numerous other investment treaties that have been concluded between countries over the years, including Canadian foreign investment protection agreements and U.S. bilateral investment treaties.

The obligations to investors are contained in Section A of Chapter Eleven. Examples are obligations of a NAFTA party to provide to investments and investors of other NAFTA parties national or most-favoured nation treatment; an obligation not to impose requirements on investors or investments for domestic content or local preference; an obligation not to expropriate or take measures tantamount to expropriation of an investment except on certain conditions including payment of compensation.

Section B of Chapter Eleven provides a mechanism for dealing with disputes 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. For example, Canada is not a party to the ICSID Convention; therefore, 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.

In the case of Canada, of the four notices of intent received to date, only one (a claim by Ethyl Corporation Inc.) has proceeded to the stage where a claim was submitted to arbitration. Ethyl Corporation's request for arbitration of its claim was made in April 1997 and an arbitral panel was constituted in September 1997. Ethyl Corporation filed its statement of claim in October 1997