NAFTA lessons bode ill for CETA
Canada’s experience with NAFTA amply illustrates the dangers of investment arbitration. There have been 37 investor-state claims against Canada under NAFTA, and the number continues to grow. So far, Canada has lost or settled eight claims and paid damages to foreign investors totalling over US$171.3 million. Canadian taxpayers have also paid tens of millions of dollars in legal costs defending against these claims.17

Ongoing NAFTA claims challenge a wide range of government measures that allegedly diminish the value of foreign investments, including a moratorium on fracking by the Quebec provincial government, a moratorium on offshore wind projects on Lake Ontario, provisions under the Ontario Green Energy Act to promote renewable energies, and a decision by a Canadian court to invalidate two pharmaceutical patents on the basis that they were not sufficiently innovative or useful (see Box 1). Cumulatively, foreign investors are currently seeking several billions of dollars in damages from the Canadian government.18

EU and Canadian investors are among the main users of investment arbitration. Almost two-thirds (or 463) of all know investor-state disputes globally were brought by investors from the EU and from Canada.

Canadian investors rank fifth among the users of investment arbitration, outnumbered only by investors from the US, the Netherlands, UK and Germany.19

BOX 1
SOME OMINOUS INVESTOR–STATE DISPUTES UNDER NAFTA

Corporations against environmental treaties – SD Myers vs. Canada: Canada is a signatory to the international Basel Convention, which stipulates that hazardous waste should be disposed of in the country of origin of the waste. Canada put a temporary ban on the export of toxic PCB wastes from November 1995 to February 1997. It was applied generally, and not just to any particular country or company. Nonetheless, US waste disposal firm SD Myers launched a successful NAFTA suit against the ban. The arbitration panel ruled against Canada and awarded the investor compensation of US$6.05 million plus interest.11

Corporations against environmental and health protection – Ethyl vs. Canada: When the Canadian Parliament banned the import and transportation of a toxic petrol additive on environmental and health protection grounds in 1997, the US producer Ethyl sued on the basis of the NAFTA agreement for US$201 million in compensation. Canada agreed in a settlement to pay US$13 million and withdrew the ban.12

Corporations against fracking moratoria – Lone Pine vs. Canada: In 2011, the government of the Canadian province of Quebec responded to concerns over water pollution by implementing a moratorium on the use of hydraulic fracturing (‘fracking’) for oil and gas exploration. In 2012, the Calgary-based Lone Pine Resources energy company filed an investor-state lawsuit based on the North American Free Trade Agreement (NAFTA), challenging the moratorium. Lone Pine, which filed the case via an incorporation in the US tax haven Delaware, is seeking US$109.8 million plus interest in damages.13

A close analysis of this case revealed that this dispute could still be launched under ICS, the investor-state dispute settlement (ISDS) mechanism in the revised investment chapter of CETA.14

Corporations against court rulings on medicine patents – Eli Lilly vs. Canada: The US$370 million15 NAFTA claim launched in 2013 by US-based pharmaceutical giant Eli Lilly shows how ISDS is increasingly a challenge to domestic courts and law. Under Canadian law, the Federal Court of Canada is the ultimate arbiter of the validity of patents. Eli Lilly disagrees with the court’s decision to reject its supplementary patent applications for two reformulated drugs (olanzapine and atomoxetine) because they were not sufficiently innovative. In total, nine different Canadian judges have heard Eli Lilly’s arguments and the company has lost at every stage. If Eli Lilly wins a favourable ruling from the NAFTA arbitration panel, it will have effectively trumped the highest levels of judicial decision-making in Canada.16

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There is every reason to expect that CETA will pave the way for more such claims against the Canadian government, as well as against the EU and its member states. CETA’s investment chapter arguably grants even greater rights to foreign investors than does in NAFTA (most notably by protecting investors’ “legitimate expectations” under the so-called “fair and equitable treatment” clause and on investor-state disputes with regard to financial services (see Annex 1). CETA would significantly increase the risk of investor-state challenges to Canadian policies given that European investors have initiated 61 per cent of all known disputes (425 cases) as of mid-2016.20

**BOX 2**

**HOW EU CORPORATIONS USE INVESTOR-STATE ARBITRATION**

**EU corporations versus environmental protection – Vattenfall vs. Germany I & II:** In 2009, Swedish energy multinational Vattenfall sued the German government, seeking US$1.4 billion in compensation for environmental restrictions imposed on one of its coal-fired power plants. The case was settled after Germany agreed to water down the environmental standards. In 2012, Vattenfall launched a second lawsuit seeking US$5.14 billion for lost profits related to two of its nuclear power plants. The legal action came after Germany decided to phase out nuclear energy, following the Fukushima nuclear disaster. The German government has already spent over US$1.54 million to defend the case, and expects a total of US$9.98 million in legal costs. Both actions were taken under the Energy Charter Treaty.22

A close analysis of the dispute Vattenfall vs. Germany I (over a coal-fired power plant in Hamburg) revealed that it could still be launched under ICS, the investor-state dispute settlement (ISDS) mechanism in the revised investment chapter of CETA.23

**EU corporations versus anti-discrimination – Piero Foresti and others vs. South Africa:** In 2007, Italian and Luxembourg investors sued South Africa for US$350 million because a new mining law contained anti-discrimination rules from the country’s Black Economic Empowerment Act, which aims to redress some of the injustices of the apartheid regime. The law required mining companies to transfer a portion of their shares into the hands of black investors. The dispute (under South Africa’s investment treaties with Italy and Luxembourg) was closed in 2010, after the investors received new licenses requiring a much lower divestment of shares.24

**EU corporations against policies to combat economic crises – Investors vs. Argentina, Cyprus and Greece:** When Argentina froze utility rates (energy, water, etc.) and devalued its currency in response to its 2001-2002 financial crisis it was hit by over 40 lawsuits from investors. By January 2014, the country had been ordered to pay a total of US$980 million in compensation. Among the claimants were several EU multinationals, including Suez and Vivendi (France), Anglian Water (UK) and Aguas de Barcelona (Spain). Similar cases have now been brought against Cyprus and Greece.25

**Corporations against the minimum wage – Veolia vs. Egypt:** Since 2012, the French utility company Veolia has been suing Egypt based on the bilateral investment agreement between France and Egypt for an alleged breach of a contract for waste disposal in the city of Alexandria. The city had refused to make changes to the contract which Veolia wanted in order to meet higher costs – in part due to the introduction of a minimum wage. In addition, according to Veolia, the local police had failed to prevent the massive theft of dustbins by the local population. According to media reports, Veolia is seeking US$90.9 million in compensation.26