

U.S. Corporations Launch Wave of NAFTA Attacks on Canada's Energy, Fracking, and Medicines Policies

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U.S. corporations have launched an alarming new offensive against Canadian health and environmental policies under the North American Free Trade Agreement (NAFTA). Three U.S. firms recently announced plans to use the “trade” pact to seek nearly one billion taxpayer dollars in private, NAFTA-created tribunals as compensation for Canadian policies on fracking, wind energy, and medicine patents.

Of the three corporate threats, perhaps most worrisome is the notice filed by U.S.-based pharmaceutical giant Eli Lilly, which became public this week. It marks the first attempt by a patent-holding pharmaceutical corporation to use the investment provisions in NAFTA (or any other U.S. FTA) as a tool to push for greater monopoly patent protections, which elevate the cost of medicines. (*See our [comments on the historic move](#) in a post yesterday over at [Pharmalot](#).*)

But how can a foreign corporation directly demand taxpayer compensation from a sovereign government over a democratically-determined policy? Meet [the “investor-state” system](#). Written into NAFTA, this system uniquely empowers foreign corporations to skirt domestic laws and courts and directly challenge a government’s public interest policies. The cases are decided by U.N. and World Bank tribunals typically comprised of three corporate lawyers. Private corporations have launched these cases against a wide array of health, environmental, financial, and other public interest policies that they allege as undermining “expected future profits.”

Such cases have soared over the last decade—last year the cumulative number of launched investor-state cases was [nine times](#) the cumulative investor-state caseload in 2000. When the foreign investor wins the case, the government must hand the corporation an amount of taxpayer money decided by the tribunal as compensation for the offending policy. Under NAFTA-style deals, private investors have already [pocketed \\$365 million in taxpayer money](#) via investor-state cases, while more than \$13 billion remains in pending claims.

As three more corporations get in line to use this audacious system against Canada, the country is ironically just joining negotiations for the [Trans-Pacific Partnership \(TPP\)](#), the NAFTA-style deal that would expand the investor-state system further. With Canada preparing to spend more taxpayer money to defend its environmental, energy, and patent policies, you’d think that the country might soon sour on the investor-state system. It wouldn’t be the first. [Australia has already publicly refused](#) to be party to the expansive investor-state provisions of the TPP or any other trade deal.

Here's a quick summary of the three disputes and the NAFTA-protected "rights" that each investor claims, with a few more wonky details on the particularly dangerous patent dispute:

A Gas Corporation's Right to Frack the St. Lawrence: In June 2011, Quebec passed a moratorium on the controversial practice of hydraulic fracturing, or fracking, for natural gas. The provincial government declared the moratorium so as to be able to conduct an environmental impact assessment of the extraction method [widely accused](#) of leaching chemicals and gases into groundwater and the air. Lone Pine Resources, a Delaware-headquartered gas and oil exploration and production company, had plans and permits to engage in fracking on over 30,000 acres of land directly beneath the St. Lawrence River. Lone Pine argues that the fracking moratorium nullified those permits. In November Lone Pine [formally accused](#) Canada of violating its NAFTA obligations by permitting Quebec's decision to conduct an environmental impact study before determining whether a foreign corporation should inject chemicals into thousands of acres of shale beneath the province's longest river. According to Lone Pine, such policymaking contravenes NAFTA's protections against expropriation and for "fair and equitable treatment." As compensation, Lone Pine would like a quarter billion taxpayer dollars.

An Energy Company's Right to a Convenient Energy Policy: Ontario's green energy policy, acclaimed for reducing carbon emissions and creating green jobs, has already come under attack at the World Trade Organization, resulting in [last month's regressive ruling](#) against the successful policy. Now a U.S.-based energy corporation named Windstream Energy plans to launch an investor-state case over its inability to participate in the green energy program. The corporation had contracted with Ontario's provincial government to provide energy generated by an offshore wind farm located in Lake Ontario. But in February 2011, the provincial government declared a moratorium on offshore wind production, stating that time was needed to study the environmental impacts of the relatively new energy source (currently [there are only a few](#) freshwater offshore wind farms in the world). Windstream's [formal notice](#) alleged that the moratorium "effectively annulled the existing regulatory framework" and thus contravened Canada's NAFTA obligations concerning fair and equitable treatment, expropriation, and discrimination (para. 36). As compensation for Ontario's cautious approach to clean energy policymaking, Windstream is pushing for nearly a half billion taxpayer dollars.

A Pharmaceutical Corporation's Right to Break Promises but Keep Patents: Indiana-based Eli Lilly, the [fifth-largest](#) U.S. pharmaceutical corporation, [has notified Canada](#) that it intends to launch an investor-state case against the decision of Canadian courts to invalidate the company's patent for Strattera, a drug used to treat attention deficit hyperactivity disorder (ADHD). A Canadian federal court and court of appeals both ruled that the patented drug failed to deliver the benefits that Eli Lilly had promised when applying for the patent's monopoly protection rights. The resulting invalidation of the patent paves the way for Canadian drug producers, such as Novopharm—the generic drug company that filed the domestic case, to produce a less expensive, generic version of the ADHD drug. Eli Lilly's notice argues that Canada's basis for the patent invalidation—that a pharmaceutical corporation should be required to deliver on its promises of a drug's utility in order to maintain the drug's patent—is "discriminatory, arbitrary, unpredictable and remarkably subjective" (para. 43). The company is pushing for \$100 million in taxpayer compensation.

Eli Lilly's attack does not just target Canada's particular treatment of Strattera, but the country's entire basis for determining patent validity (the "promise doctrine"—that a drug patent will be honored so long as promises regarding the drug's efficacy are also honored). As such, the outcome of the case is particularly critical, as a loss for Canada could expose the country to a slew of investor-state attacks from other drug companies with invalidated, promise-breaking patents eager to follow Eli Lilly's lead. Indeed, Eli Lilly mentioned in its notice another invalidated patent for an anti-schizophrenia drug named Zyprexa, which Canadian courts have similarly determined to fall short of promised benefits. Eli Lilly may be considering a second NAFTA investor-state case over that drug.

In addition, there are rumors that **Pfizer** may be considering launching its own investor-state case against Canada over, yes, Viagra. Canada's Supreme Court has [invalidated the Viagra patent](#) on the basis that Pfizer failed to disclose its active ingredient, thereby allowing generic firms to begin competing with Pfizer in production of the erectile dysfunction drug. While this suit has less to do with Canada's "promise doctrine," Pfizer could similarly seek to undermine the patent criteria of Canada's highest courts by turning to a NAFTA-created private tribunal to demand taxpayer compensation.

In its notice regarding the Strattera patent, Eli Lilly specifically argued that the patent invalidation violated Canada's NAFTA obligations concerning expropriation, a "minimum standard of treatment," and national treatment. If you're interested in weeds-level analysis, here's some for each claim:

Expropriation: Eli Lilly claims that the decision of Canadian courts to terminate its Strattera patent for lack of promised utility constituted an expropriation of its "intangible property"—part of NAFTA's broad definition of a protected "investment." NAFTA does not explicitly state that intellectual property (e.g., patents) falls under the definition of an "investment," though many have assumed the inclusion of patents to be implicit. But in the TPP, to which Canada is now a negotiating party, the investment chapter leaked earlier this year proposes to [explicitly name "intellectual property rights"](#) under the definition of a protected "investment." So if Eli Lilly thinks it can define patent invalidation as property expropriation under NAFTA, it certainly could do so under the proposed TPP text. Thus, if Canada plans to continue its rather incongruous commitments to the TPP and to sovereign determination over how patents are awarded, it should view Eli Lilly's dispute as a sign of things to come.

Minimum Standard of Treatment: Eli Lilly's second claim against Canada is that the rulings of its courts violated the "*minimum standard of treatment*" that NAFTA signatories are obliged to provide foreign investors. Sovereign states, such as the United States, have consistently argued that this standard means providing police protection and due process, such as that afforded to Eli Lilly when it defended its patent before Canada's courts. But investor-state tribunals have generated [increasingly inventive interpretations of the minimum standard](#), arguing that it also requires governments not to enact policies that could violate expectations foreign investors may have plausibly had upon investing. As the [United States argued in a previous investor-state case](#),

“if States were prohibited from regulating in any manner that frustrated expectations—or had to compensate for any diminution in profit—they would lose the power to regulate” (para. 576).

Yet, this extreme interpretation is precisely the one on which Eli Lilly relies, accusing Canada’s courts of “contravening” its expectations (para. 100). Such elastic interpretations have made the minimum-standard-of-treatment claim [the single most successful allegation](#) that investors can mount against a state—of every four investor-state cases launched under U.S. treaties in which the investor has won, three cited a “minimum standard of treatment” claim as the basis for the “win.”

National Treatment: In its final claim, that Canada violated NAFTA’s “national treatment” obligation, Eli Lilly surpasses even the runaway interpretations of past investor-state tribunals. The national treatment obligation requires governments to afford foreign investors treatment that is “no less favorable” than that afforded to domestic corporations “in like circumstances” (para. 105). But after quoting this NAFTA definition, Eli Lilly ignores it, inventing instead a standard that would require Canada to afford foreign investors treatment no less favorable than what Canadian companies could hypothetically receive in other countries. Such a speculative obligation is rather unprecedented, seemingly concocted by Eli Lilly itself.

The corporation also alleges that the courts’ patent invalidation violates national treatment by advantaging Canadian generic firms that can now create and market generic versions of Strattera. Here, Eli Lilly presumes to challenge Canadian courts’ removal of a patent on the incredible basis that patent removals help generics. First, a patent-holding firm and a generic firm plainly do not meet the “in like circumstances” requirement of a national treatment claim concerning a patent (the relevant comparison would be between Eli Lilly and Canadian patent-holding firms). But more importantly, of course the removal of patents advantages generic producers, but it does so regardless of whether they are foreign or domestic. Were Eli Lilly’s inventive logic to be accepted by the tribunal, it could jeopardize generic medicines in nearly any country that finds cause to terminate a patent but also finds itself subject to a NAFTA-style treaty.

In sum, the outcome of Eli Lilly’s claim is critical for those seeking to safeguard access to medicines, both in terms of what it means for Canada’s broader policy of ending patents found to not deliver promised results, and in the message it sends to pharmaceutical firms contemplating investor-state attacks on other governments’ policies to control medicine costs. The dispute, in addition to the investor-state attacks on Quebec’s fracking moratorium and Ontario’s offshore wind moratorium, should also make Canada think twice about the TPP. *While defending its pharmaceutical and environmental policies before unpredictable three-person tribunals created by NAFTA, Canada should reconsider signing up for an expansion of the system that placed those policies under such inordinate threat.*

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