



gene ethics
working for a GM-free future

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DFAT: BITreforms submissions@dfat.gov.au

Comments: review ISDS in ASEAN/Australia NZ Trade Agreement (AANZFTA)

Please favourably consider and act on our representations. We make this submission on behalf of our ~13,000 members, donors, and constituents.

Introduction

- 1. GeneEthics calls on the Australian government** to urgently implement its policy to eliminate ISDS (Investor-State Dispute Settlement) from all trade agreements. There are many compelling reasons to expedite this process, in the public interest.
- 2. We don't agree** that trade and foreign investment would be adversely affected with ISDS eliminated from treaties. Governments must be able to legislate to protect their citizens and the national interest, unencumbered by threats of corporate reprisals.
- 3. Like Phillip Morris before him**, Clive Palmer registered his company abroad, attempting to use this inherently unfair system for his personal and corporate gain, at public expense. There is a serious asymmetry between the rights of our governments to protect the public interest and the powers of those who seek to operate in Australian jurisdictions. ISDS tribunals are kangaroo courts that threaten the economic viability of even some small nations while enriching corporations.

Our case to end ISDS

- 4. ISDS (Investor State Dispute Settlement)** clauses are optional in AANZFTA and some other trade agreements. They allow foreign (not local) investors to claim \$ billions from governments in compensation for changes to precautionary laws or policies that serve the public interest ahead of corporate profits. Our governments and communities must not remain vulnerable to unfair ISDS provisions and practices, so we call for urgent ISDS elimination from trade agreements. They taint the principles of fair and free trade.
- 5. A majority of the ISDS cases** adjudicated to date relate to government decisions on the operations of extractive industries, seeking to mitigate their inevitable health, environmental, social, and other deleterious impacts. Threats of ISDS litigation must not be allowed to dissuade our governments from taking concerted actions, especially on existential threats such as climate change or biodiversity loss. They challenge the survival of all humans on Earth and we should heed Greta Thunberg who castigated ineffectual delegates with "How dare you!!!"

6. **GeneEthics primary concerns** relate to possible future ISDS cases. We note the cases that rest on government refusals to licence new technologies, their products, and the various systems on which they operate. With AI, robotics, nanomaterials, biotechnologies, gene editing, and invitro gametogenesis emerging and converging, we see this as likely a growing trend with great potential for litigation in the near future. Corporations that own and control multiple new and emerging technologies command financial resources and influence even larger and more aggressive than the extractive industries that have used ISDS to further their aims in the past.
7. **Elon Musk, for instance**, as of early 2026 has the primary ventures: brain-chip startup Neuralink, AI firm xAI, social media platform **X**, electric vehicle maker Tesla, aerospace conglomerate SpaceX which includes Starlink, and infrastructure enterprise **The Boring Company**.ⁱ He is involved in high-stakes litigation, including a lawsuit against OpenAI and Microsoft for up to \$134 billion over claimed contract breaches and is appealing his restored Tesla compensation package.ⁱⁱⁱⁱⁱ The case was reportedly dismissed on February 24, 2016.^{iv} Lawsuits against him include his \$1 million voter sweepstakes and challenges over X content policies. These are a mixture of corporate, constitutional, and political litigation. Musk is the biggest player but there are a multitude of other billionaires and corporate entities that would revel in making governments pay up, using ISDS as their weapon.^v
8. ISDS has been used and tested as a pathway to seek compensation for **lost prospective profits** tied to IP rights underpinning biotechnology and pharmaceutical business models. Some have failed but government must not remain complacent about future cases and their likely outcomes as high-tech sectors grow, proliferate, and converge. Convergence of AI with many other vanguard technologies appears to be a potential driver of ISDS claims.
9. **Pharmaceuticals and gene therapies**, for example, are areas in which we envisage disputes arising. These industries are very rapidly introducing potentially hazardous, risky, and expensive new technologies and techniques and may seek through ISDS to redress for their claims of being hindered or sustaining losses. “This pro-investor mechanism has serious implications for governments of member states that choose to adopt pro-public health or pro-public interest measures. Such measures are prone to challenge by corporations if they negatively impact their profits.”^{vi} Allowing corporations to challenge sovereign decisions regarding public health would be inimical to the public interest e.g. enforcing strict patentability standards or issuing compulsory licenses to lower drug prices.

Examples of Relevant Cases

10. **Some high tech cases** have already been litigated, serving as further evidence and a warning that eliminating ISDS provisions from trade agreements must be accomplished as soon as possible.

IP-intensive innovation (pharmaceutical and biotech patents)

Eli Lilly v Canada (NAFTA Chapter 11) - patent invalidation / IP standards affecting expected returns:

- **Claim:** Eli Lilly sought ~US\$500m compensation. The claim was based on Canadian courts' invalidation of patents for the drugs Zyprexa and Strattera, which Eli Lilly argued was an expropriation of their investments and a violation of fair and equitable treatment. It is often cited as a leading "IP-as-investment" case i.e. using ISDS to claim compensation for losing expected monopoly returns.^{vii}
- **Outcome:** Canada won and the claims were dismissed.^{viii} Though Canada won the case, it highlighted the potential for ISDS to be used to target IP-based business models.

Ag-biotech / chemical regulation ("innovation" restrictions)

Dow AgroSciences v Canada (NAFTA Chapter 11) - herbicide ban (2,4-D)

- **Claim:** challenge to a provisional ban. Typical treatment / expropriation arguments and claimed business losses.^{ix}
- **Outcome:** settled without compensation. Canada reports claimant withdrew without compensation and the measures stayed.^x

Chemtura v Canada (NAFTA Chapter 11) - pesticide restrictions (lindane)

- **Claim:** sought compensation for regulatory action. Tribunal assessed if the regulatory process was fair or a substantial deprivation.^{xi}
- **Outcome:** claims dismissed.

Methanex v USA (NAFTA Chapter 11) - chemical additive ban; "lost profits"

- **Claim:** Methanex claimed it was owed profits it would lose if MTBE (Methyl tert-butyl ether) were phased out or banned.^{xii}
- **Outcome:** claims dismissed. The tribunal ordered Methanex to pay the US legal costs.^{xiii}

Telecoms / spectrum / digital infrastructure - precursors of other digital tech

CC/Devas v India (Mauritius–India BIT) - satellite spectrum/broadband

- **Claim:** cancellation of a satellite/spectrum-related arrangement allegedly destroyed the business model. Concerned future profitability and projected revenues i.e. if profits were too speculative, licensing risk, etc.^{xiv}
- **Outcome:** the tribunal awarded damages but disputes continue in multiple jurisdictions over the amount of the awards and enforcement.

Vodafone v India (Netherlands–India BIT) - telecom investor; regulatory/tax measure affecting investment value

- **Claim:** That India's retrospective tax demand violated treaty standards, in this major tech-sector FDI dispute.^{xv}
- **Outcome:** award in Vodafone's favour but India has challenged it.^{xvi}

Conclusions

ISDS cases are time wasting, resource intensive, expensive, and high stakes exercises for governments, which never have anything to gain and a lot to lose from unpredictable ISDS judgements.

GeneEthics again urges the Australian government to urgently implement its policy to eliminate ISDS (Investor-State Dispute Settlement) provisions from all trade agreements. Overwhelmingly, the many compelling reasons to expedite this elimination process in the public interest far outweigh the risks of more ISDS claims as the result of further stalling.

Yours sincerely,



Bob Phelps
Executive Director

References

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