



Public Health Association
AUSTRALIA

Public Health Association of Australia submission to the Department of Foreign Affairs and Trade Review of Australia's Bilateral Investment Treaties

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Public Health Association AUSTRALIA

The **Public Health Association of Australia** (PHAA) is recognised as the principal non-government organisation for public health in Australia working to promote the health and well-being of all Australians. It is the pre-eminent voice for the public's health in Australia.

The PHAA works to ensure that the public's health is improved through sustained and determined efforts of our Board, National Office, State and Territory Branches, Special Interest Groups and members.

We believe that health is a human right, a vital resource for everyday life, and a key factor in sustainability. Health equity and inequity do not exist in isolation from the conditions that underpin people's health. The health status of all people is impacted by the social, cultural, political, environmental and economic determinants of health. Specific focus on these determinants is necessary to reduce the unfair and unjust effects of conditions of living that cause poor health and disease. These determinants underpin the strategic direction of the Association.

Our mission as the leading national organisation for public health representation, policy and advocacy, is to promote better health outcomes through increased knowledge, better access and equity, evidence informed policy and effective population-based practice in public health. Members of the Association are committed to better health outcomes based on these principles.

Our vision is for a healthy population, a healthy nation and a healthy world, with all people living in an equitable society underpinned by a well-functioning ecosystem and a healthy environment, improving and promoting health and wellbeing for all.

The reduction of social and health inequities should be an over-arching goal of national policy, and should be recognised as a key measure of our progress as a society. Public health activities and related government policy should be directed towards reducing social and health inequity nationally and, where possible, internationally.

Introduction

PHAA welcomes the opportunity to provide input to the review of Australia's bilateral investment treaties. The provisions in trade and investment agreements and bilateral investment treaties (BITs) can affect many aspects of health care and public health, including: (1,2)

- access to affordable medicines
- the equitable provision and quality of health care services
- the ability of governments to regulate health damaging products such as tobacco, alcohol and processed foods
- the nutritional status of populations
- access to many of the social determinants of health such as employment and income
- a nation's ability to protect the natural environment, a fundamental determinant of human health, prosperity and wellbeing.

PHAA has a policy position statement on trade agreements and health which notes that trade and investment agreements must: (3)

- prioritise equity within and between countries for global population health improvement
- not limit or override a country's ability to foster and maintain systems and infrastructure that contribute to the health and well-being of its citizens, nor penalise a government for doing so
- preserve policy space for governments to regulate to protect public health
- be negotiated in a transparent fashion, with opportunities for public and parliamentary scrutiny before commitments are made
- be subject to health and environmental impact assessments, carried out by parties independent of corporate interests.

The Association is also committed to advocating "for transparent trade negotiating practices and for the routine use of independent health, environmental and human rights impact assessment during negotiations, before agreements are finalised, and after implementation."

PHAA also supports the implementation of WHO Resolution 59.26, which mandates WHO to provide advice to governments regarding the implications of trade agreements for health (4).

PHAA calls for transparent trade negotiating practices and for the routine use of independent health, environmental and human rights impact assessment during negotiations, before agreements are finalised and after implementation.

PHAA Response to the Review

Investor-state dispute settlement and public health

Investor-state dispute settlement (ISDS) provisions, included in many of Australia's BITs, present potential problems for public health regulation.

ISDS is a legal mechanism that enables foreign investors to claim monetary compensation from governments over the introduction of policies and laws that they claim breach their investor rights under a trade/investment treaty. Policies and laws introduced by Federal, State and Territory or local governments can be subject to disputes.

Over the last decade and a half there has been a large increase in investment arbitration cases, from fewer than 10 in 1998 to more than 1,000 known cases at the end of 2019 (5).

Foreign investors have used ISDS provisions to sue governments over policies and laws implemented to protect health and the environment. For example, in the late 1990s the US firm Ethyl Corporation launched an ISDS case against the Canadian government over its decision to ban a petroleum additive toxic to human health. The Canadian government paid \$13 million to settle with Ethyl Corporation and as part of the settlement was required to reverse its ban (6). Mexico was required to pay \$16.2 million dollars to US waste-management company Metalclad which sued the government for refusing to grant the firm a construction permit for a toxic waste facility, citing environmental reasons (7). In 2013, the multinational pharmaceutical company Eli Lilly took the Canadian government to ISDS arbitration, claiming \$481 million in compensation over the Canadian court's decision to revoke its patents on two medicines that were found to not deliver the promised health benefits. Eli Lilly not only sought compensation (a claim which was ultimately unsuccessful), but challenged Canada's domestic intellectual property law, particular its criteria for determining patent validity (8,9).

Philip Morris's ISDS case against Australia over tobacco plain packaging is another example. In 2011 Philip Morris initiated a dispute with Australia through ISDS provisions in the Hong Kong-Australia Bilateral Investment Treaty. After four years of proceedings, Philip Morris lost its claim in December 2015. While the decision was praised as a win for public health, the case is not a clear test for the potential implications of ISDS for health policymaking. The tribunal found that it had no jurisdiction to hear Philip Morris' claim (10). This was based on the fact that Philip Morris had re-arranged its corporate structure to facilitate its Hong Kong subsidiary interests in the Australian tobacco market after Australia had announced its plain packaging policy (11). It remains unclear what the outcome would have been had the case not been dismissed on jurisdictional grounds.

Flaws in the ISDS process

The ISDS process is a fundamentally flawed and pro-investor system that lacks the safeguards of domestic legal processes. In the recent years, there has been an increasing trend to exclude ISDS from trade and investment agreements (12), and it has been removed from the Regional Comprehensive Economic Partnership (RCEP) as well (13). Furthermore, several United Nations reports state that ISDS is not compatible with human rights, because they limit governments' regulatory space and lack transparency, accountability, independence, and predictability (14,15).

Lack of impartiality and conflict of interest

Leading investment law experts have found that ISDS tribunals lack impartiality and independence (16,17). A report by Corporate Europe Observatory and the Transnational Institute (18) describes how the boom in investment arbitration cases over the last couple of decades has given rise to an elite investment arbitration industry dominated by a small number of investment law firms and arbitrators. Fifteen lawyers were involved in 55 percent of the total international investment cases known up to 2011 (19). Furthermore, the study finds strong ties between this specialised group of investment lawyers that serve on ISDS panels and multinational companies which are the benefactors of the ISDS system. According to this study, investment arbitration lawyers have encouraged governments to sign treaties with poorly worded ISDS clauses that expose them to legal cases, have encouraged corporations to use lawsuits and have actively prevented changes to the investment arbitration system. ISDS investment lawyers often rotate between serving as judges, lawyers for multinational companies, and expert counsel. As *Public Citizen* notes, "there are no meaningful conflict of interest rules with respect to arbitrators' relationships with, or investments in, the corporations whose cases

they are deciding” (19). It is unclear to what extent codes of conduct for arbitrators will address the issues of impartiality and conflicts of interest.

No effective review or appeal process

In addition, there is no appeal process for ISDS, meaning the decision of three individuals is binding on governments who have no room for recourse. This further raises the question as to whether small ad hoc ISDS panels “have enough legitimacy to assess the validity of sovereign state law, and de facto restrict the policy choices made by democratically elected legislators” (20). The Chief Justice of the Australian High Court (21) has cautioned against any potential undermining of the authority of domestic courts by ISDS arbitration.

Prohibitive costs

The costs of arbitration under ISDS can be very high. It can cost millions for countries to fight legal claims under ISDS, even if they successfully defend them. The Organisation for Economic Co-operation and Development (OECD) estimated in 2012 that the costs averaged more than \$8 million per case (22). The awards involved in ISDS cases are also often very high. The Czech Republic, for example, had to pay more than \$350 million USD in an ISDS case, which is reported to have almost doubled its public sector deficit (23). El Salvador has been sued for over \$300 million USD by Pacific Rim, a Canadian gold mining company over its refusal to grant permits for cyanide-based gold mining (24). In some cases awards have amounted to over a billion dollars. UNCTAD reported ISDS claims ranging from \$10 million to \$3.5 billion USD in 2019 (5).

Public health measures and regulatory chill

The threat of legal action, or even the existence of an ISDS mechanism, can deter governments from implementing public health policies and laws. Corporations can also delay the uptake of innovative public health policies and laws in other countries by launching ISDS claims against ‘first movers’ (the first country to introduce a new approach). Margaret Chan, the Director General of the World Health Organization, has noted that legal actions by tobacco companies have been “deliberately designed to instil fear” in countries trying to reduce smoking (25). For example, Canada withdrew a proposal for tobacco plain packaging regulation following the threat of ISDS arbitration under NAFTA (26).

For these reasons, PHAA believes that it is in the interests of public health for Investor-state Dispute Settlement processes to be removed from Australia's bilateral investment treaties and not to be included in future bilateral investment treaties. This may mean terminating or renegotiating some BITs.

Public health exclusions and other safeguards

In cases where it is not deemed feasible to remove ISDS from a particular BIT, the treaty should be renegotiated to include robust public health exclusions and other safeguards.

Completely excluding all measures that are designed and implemented to protect or promote public health is the most certain way to prevent ISDS claims against public health measures. Examples of these types of exclusions or ‘carve outs’ include the carve out for tobacco control measures in the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (27) and Footnote 17 in the Investment Chapter of the Peru-Australia Free Trade Agreement (28), which applies to the entirety of Section B (Investor-State Dispute Settlement), and states:

No claim may be brought under this Section in relation to a measure that is designed and implemented to protect or promote public health. For greater certainty, for Australia, such measures include: measures comprising or related to the Pharmaceutical Benefits Scheme, Medicare Benefits Scheme, Therapeutic Goods Administration and Office of the Gene Technology Regulator. A reference to a body or program in this footnote includes any successor of that body or program.

However, exclusions must be broadly framed to encompass any measure that is designed and implemented to protect or promote the health of the population (in its broadest sense) rather than limited to certain types of public health measures or institutions. Ideally, environmental protection measures should also be carved out in a similar fashion.

Other exceptions/safeguards should also be included that may reduce the likelihood that claims will be made or that investors will win cases against legitimate regulatory measures.

Conclusion and recommendations

The review of Australia's BITs provides an opportunity to reconsider the inclusion of ISDS in BITs, and take steps to remove them completely or at least mitigate their potential impacts on public health.

PHAA recommends that the Australian Government should:

- Where possible, remove ISDS from Australia's bilateral investment treaties in order to protect public health measures from unnecessary legal challenges or chilling effects.
- Where removal of ISDS is not feasible, renegotiate BITs to include robust exclusions for public health measures and other safeguards to mitigate the risks of ISDS.

The PHAA appreciates the opportunity to make this submission. Please do not hesitate to contact us should you require additional information or have any queries in relation to this submission.



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