



**geneethics**  
working for a GM-free future

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**To: DFAT ISDS Review** <[BITreformsuggestions@dfat.gov.au](mailto:BITreformsuggestions@dfat.gov.au)>

Hello DFAT Team:

**Thanks for the opportunity to lodge these remarks** for your favourable consideration. GeneEthics advocates, campaigns and educates for GM-free futures. Our constituency is over 14,000.

**GeneEthics foresees** the potential for imminent ISDS actions arising from denial of deployment and use of vanguard technologies and their products. They may have substantial economic, social, environmental, and ethical impacts that can't be ameliorated, except with bans or strong, restrictive regulation that may reduce profits. e.g. biotechnologies, information technologies, nanotechnologies, artificial intelligence, robotics, drones, other military and civil uses, etc.

**Heightened uncertainties** of global governance make action on ISDS a top priority. We reject any pretexts for further delays in eliminating or neutering ISDS. DFAT must proactively, immediately, and urgently engage with all other relevant governments to expedite mutual action. We do not accept as valid any claims that trade partners are reluctant to also cooperate on eliminating ISDS. All governments are at risk.

**We also reject the vacuous claims** that without ISDS some corporations would be reluctant to consider investing. Unfortunately, Australia is a more than generous gravy train which most corporations and other enterprises are eager to board.

### **Recommendations**

**GeneEthics recommends** that DFAT and the Australian Government expedite reviews of the ISDS provisions in all trade agreements, to remove or neutralise all ISDS provisions. ISDS must not be included in any new trade agreements. This is not negotiable!

**As a minimum**, government must expedite the following:

- renegotiate agreements with all trading partners to exclude ISDS from all trade agreements;
- review and revoke ISDS provisions in all trade and investment agreements with all countries;
- protect Governments' rights to exercise precaution on all new and existing technologies and to strongly regulate them in the public interest.

**We are very shocked** that nothing appears to have been done to protect the Australian Governments' powers to act in the national and public interests, following the plain packaging ISDS debacle, fourteen years ago. It is a reprehensible policy failure that government failed to heed the warnings, revise relevant policies, and take immediate action, after Philip Morris's contrived ISDS case was lodged.

**DFAT failed in its clear duty** to horizon scan and foresee the urgent need to prevent further cases. Only now, with Clive Palmer suing Australian Governments for \$410 billion, using the same bogus ISDS strategy

that the tobacco company employed, does DFAT now appear to act belatedly.<sup>1</sup> The processes for Australia's entire disengagement from ISDS exposure must now be expedited.

**Though the tobacco company's case** was dismissed nine years ago, the need to future proof trade agreements against further ISDS claims should have been obvious, foreseen, and acted on. It is scandalous that only now is DFAT seeking to quarantine the nation from further vexatious claims.

**The capricious and unfair ISDS system** is not fit-for-purpose and should be abolished.

**The review of trade agreements** with Argentina, Pakistan, Türkiye, and other partners must, without exception, be uncompromising on the exclusion of ISDS provisions from all trade agreements. Removing or nullifying their potential negative effects must be expedited as we cannot envisage any positive advantages for governments and communities, disbarred from taking any comparable actions themselves.

**No-one must pander** to self-interested and self-serving capitalist enterprises that seek to exploit public resources, shirk their many responsibilities, and unfairly exploit and oppose positive public policies. They absolutely depend on the goodwill and forbearance of communities which must not be exploited. We do not accept that reckless and irresponsible enterprises can continue to be granted social licences to operate at all.

**ISDS is grossly misused** when it endeavours to extort payments and profits from governments for the possible loss of speculative, future, unearned, profits. This is irrational, never justified, and undermines public trust and the public interest.

**We share the concerns of others** that ISDS tribunals are flawed, since they lack:

- Clarity on the duration and cost of ISDS proceedings
- Transparency of proceedings and documentation
- An early dismissal mechanism for meritless claims
- A counterclaim mechanism for respondent states
- Consistency between similar ISDS decisions.<sup>2</sup>

**If ISDS tribunals and their present arrangements continue**, as a minimum all of these flaws must be remedied. Complainants and respondents must share equal rights and responsibilities, and all must be required to behave in the public interest. The actions of irresponsible and vexatious litigants must be sanctioned, censured, and all the costs must be awarded against them.

## **New Technologies and ISDS**

**GeneEthics foresees** that new and emerging technologies and their products may now and in future be triggers for ISDS claims, if ISDS clauses continue to be in trade agreements. A proliferation of claims for loss of commercial benefit may result from rejection or restriction of new technologies and their products.

**DFAT must formally acknowledge** this threat and take every step to ensure that it is prevented.

**GeneEthics recommends to government** the formation of an independent Office of New Science and Technology Assessment (ONSTA) to advise parliament, the government, science, industry and the public on the potential of new and emerging technologies. It would analyse their prospects of becoming practical and commercial successes, with their inevitable costs, risks and hazards. It would assess and report on options for meeting genuine community needs, while exercising precaution to protect our environments and public

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<sup>1</sup> Singh K. ISDS Arbitration Upholds Australia's Plain Packaging Laws, Australian Institute of International Affairs, Jan 15, 2016. <https://www.internationalaffairs.org.au/australianoutlook/isds-arbitration-upholds-australias-plain-packaging-laws/>

<sup>2</sup> King and Wood Mallesons, Explainer ISDS, <https://www.kwm.com/global/en/insights/latest-thinking/investor-state-dispute-settlement.html>

health. Before research and development is funded, ONSTA would evaluate existing evidence and use foresighting processes to:

- inform and rationalise the risk/benefit of competing calls on R&D funds;
- evaluate the likelihood of success for competing proposals; and
- investigate the hazards, risks and costs of various innovations.

**Without ONSTA, Governments are ill-prepared** for the impacts of vanguard technologies and related systems that may deliver some benefits but come with multiple risks, hazards, and costs for society and our existential support systems. We must retain all powers to say ‘no’ to technologies and their products without fear of ISDS reprisals.

**For instance**, the release of Genetically Manipulated and Genome Edited organisms – humans, animals, plants, insects and microbes – may require restrictions when the Precautionary Principle is applied, to protect environments, public health, and society. A Gene Drive organism – developed in Australia with overseas commercial partners – might be rejected for general release on environmental or public health grounds. It may pose unacceptable risks of biodiversity loss, ecosystem disruption, and species extinction. Yet the commercial partners - an international corporation or patent holder - may create a pretext for an ISDS claim if the ISDS option remains open.

**Similarly, some commercial uses** of heritable (germline) human genome manipulation in the IVF industry, artificial intelligence, nanotechnology, robotics, and drones are just some of many examples of disruptive and dangerous applications of new methods that will need strong regulatory and policy settings. Some of them will require banning and there should be no recourse to sue under ISDS. Giving into such threats must not be permitted.

## **Conclusions**

**We recommend** the removal or neutralisation of all ISDS provisions in all Australian trade agreements and treaties. This project requires DFAT and the Australian Government to take urgent and immediate action.

**The Australian government must also support** the international initiatives of other countries for the coordinated withdrawal from ISDS clauses in other trade and investment agreements.

Yours sincerely,

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[Redacted name]

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