

Key ISDS health cases

Eli Lilly vs Canada – Government won but deciding was ambiguous

Pharmaceutical company Eli Lilly used the ISDS provisions of NAFTA to claim compensation for a Supreme Court decision that found a medicine was not sufficiently different from existing medicines to deserve a patent, which gives monopoly rights for at least 20 years. Canada has a higher standard of patentability than the US and some other countries. The Canadian government won the case, but the tribunal decision was ambiguous on some key points.

A summary of the case and decision can be found [here](#).

Philip Morris tobacco company vs Australia – Government won but on technicality

Even if a government wins the case, defending it can take years and cost tens of millions of dollars. For example, tobacco companies lost their claim for compensation for Australia's 2011 plain packaging legislation in Australia's High Court. The US-based Philip Morris company did not accept this decision under Australian law. The company could not sue under the US-Australia FTA because that agreement had no ISDS clause. The company found a Hong Kong-Australia investment agreement containing ISDS, shifted some assets to Hong Kong, claimed to be a Hong Kong company and sued the Australian Government, claiming billions in compensation. It took over four years and millions in legal fees for the tribunal to decide the [threshold issue](#) in December 2015 that Philip Morris was not a Hong Kong company.

Although the tribunal in July 2017 eventually awarded a proportion of the legal and arbitration costs to Australia, [the proportion and amount of the costs were blacked out](#) in the tribunal's cost [decision](#). This is a failure of public accountability both by the tribunal and the Australian government, as taxpayers have a right to know the costs of defending ISDS cases. [Community organisations](#) called for the Australian government to reveal the costs. The government initially appealed an [Australian Information Commissioner decision](#) that it should reveal the costs, but finally revealed on July 2, 2018 that the legal costs were \$39 million. The proportion of costs awarded to Australia has still not been revealed.

This confirms that, even if governments win ISDS cases, defending them takes years (in this case seven years before costs were awarded) and tens of millions of dollars.