

Key ISDS health cases

Philip Morris tobacco company vs Australia – when even winning is losing

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 [FOI case decision](#) that it should reveal the costs, but on July 2, 2018 released total figures for the High Court case and the Philip Morris case that showed a total of \$39 million.

The government refused to reveal the specific ISDS legal costs and what percentage of the total costs had been awarded to Australia.

The most recent FOI case on the ISDS costs, launched in 2017, took another two years to reveal in February 2019 that Australian taxpayers were awarded only [half of the costs](#) of almost \$A24 million in both legal fees and arbitration costs, despite the finding that the case was an abuse of process.

This cost decision reinforces the case against the ISDS system. Australia could afford to defend the case, but \$12 million is still a loss to taxpayers that could have been spent on health or other community services. Developing countries simply cannot afford these costs.

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Eli Lilly vs Canada – Government won but the decision was ambiguous and could weaken patent laws

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 after six years, but the tribunal decision was ambiguous on some key points about Canada's right to have distinctive patent laws.

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