Turning the Tide:

How to Harness the Americas Partnership for Economic Prosperity to Deliver an ISDS-Free Americas

WHITE PAPER

Center for the Advancement of the Rule of Law in the Americas
GEORGETOWN LAW

Columbia Center on Sustainable Investment
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND COLUMBIA CLIMATE SCHOOL

rethink TRADE

AMERICAN ECONOMIC LIBERTIES PROJECT

OCTOBER 2023

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The authors thank colleague Martin Dietrich Brauch for his thorough review and feedback of the white paper. Thanks to Daniela-Olivia Ghicajanu, Lea Di Salvatore, and Katie Hettinga for the excellent research assistance. We also appreciate professors Tim Meyer, Kathleen Claussen, Lisa Sachs, and Ganesh Sitaraman for their invaluable comments. Their perspectives, assistance, and feedback improved this work in important ways. Errors and omissions are the responsibility of the authors.

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Executive Summary

In June 2022, during the Summit of the Americas, U.S. President Joe Biden announced the launch of negotiations for an Americas Partnership for Economic Prosperity (APEP). The Biden administration hopes this initiative can rebuild relationships with countries in the region by increasing cooperation to address economic development and inequality, climate, and other challenges affecting the entire Western Hemisphere. In January 2023, 11 countries announced their intention to participate: Barbados, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Mexico, Panama, Peru, and Uruguay.[1] The 12 APEP countries subsequently signed a joint declaration outlining ambitious objectives for the partnership. This includes pursuing an inclusive, human rights-based approach to economic policy that ensures no one is left behind; addressing climate change through mitigation, adaptation, and resilience strategies, as well as the promotion of clean and renewable energy and energy efficiency; improving access to and delivery of public services; and encouraging private sector investment that meets environmental, social, and governance criteria.[2]

These core objectives lie at the heart of APEP's vision, which is based on the advancement of democratic values, the rule of law, and the aspiration to promote sustainable high-quality investment across the region. **To fulfill this vision and its associated goals, the participating countries must address the severe challenges posed by the investor-state dispute settlement (ISDS) regime and its escalating threats to the transition to a post-carbon society and the establishment of resilient public health systems in the Americas. There are 43 legacy ISDS-enforced trade and investment agreements in the Americas now being used to attack such initiatives. This white paper explains how the APEP negotiating process can be leveraged to dismantle ISDS within the region. It includes original data describing the scope of the problem and provides pathways to address both the international and U.S. domestic law requirements for an effective ISDS exit.**

ISDS Empowers Foreign Investors to Undermine Democratic Governance: ISDS has gained notoriety for empowering foreign corporations to seek massive compensation from countries before ad hoc tribunals operating outside of domestic legal systems.

1 "Americas Partnership for Economic Prosperity," U.S. Department of State, accessed August 28, 2023, https://www.state.gov/americas-partnership-for-economic-prosperity/.

2 "Joint Declaration on The Americas Partnership for Economic Prosperity," The White House, accessed August 31, 2023, https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/27/joint-declaration-on-the-americas-partnership-for-economic-prosperity/.

Corporations base their claims in the actions or decisions of national governments, local authorities, or courts that supposedly affect their economic interests and potentially conflict with expansive and vague investor rights and protections provided in ISDS-enforced trade and investment agreements. The ISDS regime, now included in thousands of free trade agreements (FTAs) and bilateral investment treaties (BITs), is one-sided by design. Only foreign investors have rights and only foreign investors can initiate claims. Only governments have obligations, namely to provide special protections and rights, including those that extend beyond domestic law, to foreign investors. Cases are decided by ad hoc tribunals of arbitrators that are paid large sums by the hour with one selected by the investor, one by the government, and one by the initial two designees. A specialized club of well-paid ISDS lawyers has developed, with many serving as both legal counsel for corporations initiating ISDS claims against governments and as arbitrators deciding similar cases. This creates perverse incentives to continually expand the interpretation of investor rights. The arbitrators frequently lack in-depth training and understanding of the societies whose fates can be significantly affected by their decisions. No appeals are permitted on the merits of ISDS tribunals' decisions, and there are no limits on the amount of awards that tribunals can order governments to pay investors.

> The United States has agreements with ISDS with all APEP countries except two (Barbados and Canada). Plus, many APEP nations have additional investment agreements with ISDS among themselves. In total, APEP countries have signed 47 BITs and FTAs with an ISDS clause among themselves, with 43 of these agreements still in force.

These mechanisms also grant corporations the ability to seek compensation not only for the actual capital they invested, but also for potential future profits they claim that they could have hypothetically earned. It is noteworthy that corporations rarely invoke ISDS to protect against blatant expropriation or gross denial of justice, which the system was ostensibly designed to prevent. Instead, corporate actors have been consistently successful in exploiting the vaguely worded provisions within ISDS-enforced trade and investment agreements, such as "fair and equitable treatment" or "indirect expropriation," to initiate or threaten claims against democratic measures taken in the public interest that they believe have harmed their business interests. That such government policies may also apply equally to domestic investors and firms is not a defense in these cases. And because the tribunals can assign the costs of arbitration, which average USD 4.7 million, to be split between the investor and government, even when the government prevails, the mere filing of an ISDS claim often has a chilling effect on government action.

ISDS Attacks on Climate, Other Critical Public-Interest Policies Intensifying: Highly profitable corporations have used ISDS provisions against APEP countries' public-interest policies, including measures to stop the spread of the COVID-19 virus; initiatives to mitigate the economic impact of the pandemic; judicial rulings, including countries' high-court interpretations of their own constitutions and laws; policies governing access to natural resources and protecting the environment; and sovereign decisions aimed at securing critical infrastructure. Perhaps more importantly, ISDS is increasingly emerging as a profound threat to ambitious climate action. **Fossil fuel corporations and their shareholders have already been among the most prolific users of ISDS, often reaping the largest awards, some of which have totaled billions of dollars.**[3] **Scholars estimate that global efforts to combat climate change could generate more than USD 340 billion in ISDS claims from fossil fuel corporations alone.**[4] The USD 15 billion claim filed by the Canadian corporation TC Energy against President Biden's decision to halt the continental Keystone XL pipeline is a preview of the type of attacks that fossil fuel corporations can launch against green policies using ISDS mechanisms.

Billions Paid Out, a Trillion in ISDS Claims Pending in the Americas: Countries in the Americas have faced a barrage of ISDS challenges.

- To date, countries across the Americas have faced at least 401 ISDS cases.
- Claimants have sought a staggering sum of over USD 1.58 trillion in compensation.
- Among these cases, over 105 are still pending, with the demanded compensation amounting to more than USD 80 billion.
- So far, governments in the Americas have either been ordered or have agreed to pay foreign investors an alarming sum, surpassing USD 29.2 billion in awards and settlements.
- Just the 12 countries now participating in APEP have either been ordered or have agreed to pay foreign investors a substantial total of USD 2.7 billion.
- What is even more alarming is that the 12 APEP governments are currently facing at least 73 pending disputes, with a combined claimed sum of USD 46.9 billion. To put this figure into perspective: it exceeds Ecuador's entire national health budget for 2021 by nearly 17 times;[5] it surpasses more than half of Colombia's current national budget; [6] and it accounts for about **13% of the entire budget authorized by the U.S. Congress through the 2022 Inflation Reduction Act for climate action and clean energy investments to be distributed over the next decade.**[7]

3. Lea Di Salvatore, "Investor-State Disputes in the Fossil Fuel Industry," *International Institute for Sustainable Development*, December 31, 2021, https://www.iisd.org/publications/report/investor-state-disputes-fossil-fuel-industry.
4. See Kyla Tienhaara et al., "Investor-State Disputes Threaten the Global Green Energy Transition," *Science* 376, (May 2022): 701, https://www.science.org/doi/10.1126/science.abo4637.
5. Ecuador's public health national budget for 2021 was equivalent to USD 2.8 billion. See "Presupuesto General del Estado Prorrogado," Ministerio de Economía y Finanzas, 2021, https://www.finanzas.gob.ec/wp-content/uploads/downloads/2021/09/INFORME-TECNICO-PRESUPUESTO-PRORROGADO_VFINAL.pdf.
6. The Colombian Congress approved a USD 85.5 billion budget for 2023. See Carlos Vargas, "Colombia Congress Approves 2023 Budget Bill, increasing funding for social programs," *Reuters*, October 19, 2022, https://www.reuters.com/world/americas/colombia-congress-approves-2023-budget-bill-increasing-funding-social-programs-2022-10-19/.
7. The historic investment in clean energy approved by the U.S. Congress in 2022 adds up to USD 370 billion. See "Building a Clean Energy Economy: A Guidebook to the Inflation Reduction Act's Investments in Clean Energy and Climate Action," The White House, January 2023, Version 2, https://www.whitehouse.gov/wp-content/uploads/2022/12/Inflation-Reduction-Act-Guidebook.pdf.

The chances of APEP countries prevailing in the majority of pending ISDS challenges appear to be quite slim. To date, these countries have achieved a favorable outcome in only 32% of cases. Corporations have either won ISDS disputes or secured settlements in 42% of the proceedings against APEP countries that have reached a resolution. In addition, in 2% of the cases, arbitrators found that the country breached its obligations, even when the investor failed to prove any actual damages. Notably, almost a quarter of all ISDS cases have concluded with a tribunal decision dismissing the claim on the grounds of jurisdictional issues.

Promised Boost in Foreign Direct Investment Never Materialized: In essence, ISDS essentially offers corporations a form of government-subsidized, cost-free political risk insurance to move their capital across borders, and it does so largely irrespective of the investors' motives or the impacts of their investments.[8] Many countries entered into these agreements under the assumption that such investment protections and privileges would promote foreign investment flows. However, decades of econometric studies have found no conclusive evidence that investment agreements, of which ISDS is typically a prominent feature, actually result in increased foreign direct investment in host countries.[9]

Countries Around the World Are Exiting ISDS: Recognizing the inherent problems and undesirability of ISDS, many countries have retreated from the regime. The United States, Canada, and Mexico have taken steps to exit the ISDS framework within the context of the United States-Mexico-Canada Agreement (USMCA). As of July 1, 2023, the ISDS mechanism between the United States and Canada has been terminated. The United States and Mexico have replaced NAFTA's ISDS regime with a modified mechanism that requires the exhaustion of domestic remedies before resorting to ISDS and limits cases to direct expropriation and discrimination claims, with only limited exceptions.

Numerous other countries have taken steps to withdraw from ISDS. South Africa denounced its investment agreements in 2010, followed by Indonesia in 2014. India replaced many of its BITs with a new model in 2016 and withdrew from others. In 2011, Australia announced that it would no longer enter into agreements with ISDS and has more recently pledged to remove ISDS from all its existing agreements. In 2017, New Zealand indicated it would no longer negotiate agreements with ISDS. As a result, in 2018, the government agreed to the conclusion of the Comprehensive and Progressive Agreement for a Trans-Pacific Partnership, but opted out of ISDS. EU Member States have also agreed to roll back ISDS among themselves, following a ruling by the European Court of Justice that invalidated an ISDS award rendered against Slovakia. More recently, European nations have jointly announced their coordinated exit from the ISDS-enforced Energy Charter Treaty. Yet, despite the failure to deliver the promised boost in foreign investment and the ongoing plague of ISDS cases, numerous

8. Lise Johnson et al., "Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law," *Columbia Center on Sustainable Investment*, April 2018, https://ccsi.columbia.edu/content/clearing-path-withdrawal-consent-and-termination-next-steps-re-forming-international.

9. Josef C. Brada, Zdenek Drabek, and Ichiro Iwasaki, "Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis," *Journal of Economic Surveys* 35, no. 1 (February 2021): 9-10, https://doi.org/10.1111/joes.12392; Joachim Pohl, "Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence," OECD *Working Papers on International Investment* 2018, no. 1 (2018): 14-39, https://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f-85c3d-en.

ISDS-enforced legacy agreements still litter the Americas like a dangerous minefield left over from decades of neoliberal trade and investment negotiations.

ISDS Threatens the Goals and Purpose of APEP: Countries in the region initiated APEP with the goal of advancing the needs and interests of their working people; driving middle-out economic growth in the Americas; recovering from the impact of the pandemic; and developing new tools to address the economic, climate, and other challenges afflicting countries in the region today and in the decades to come. ISDS stands in stark contrast to these ambitions.

The International Legal Strategies the APEP Process Could Harness to Deliver an Americas ISDS Exit: This white paper explains how the APEP negotiation process and regular convenings could be leveraged to dismantle ISDS within the region. To free themselves from the ongoing liability and policy constraints of the existing investment agreements, the U.S. government and its APEP partners have three pragmatic options to explore in the short term:

1. Termination of BITs with an agreement to neutralize sunset clauses.
2. Amendment to remove the investment chapter, or the ISDS provisions only, from FTAs, with an agreement to neutralize the sunset clause, where applicable.
3. Withdrawal of consent to ISDS arbitration from BITs and FTAs.

These policy changes could be implemented through a comprehensive multilateral instrument that would take effect for countries in mutual agreement. This instrument could be integrated into APEP, or the APEP negotiating rounds could be used to develop a distinct legal instrument for this purpose. Such an instrument, which would include an agreement to neutralize the sunset clause within each impacted agreement, would provide each participating country the opportunity to indicate which of the three outlined options they wish to apply to their existing agreements: termination of a BIT, an amendment to remove the investment chapter from an FTA or an amendment to remove only the ISDS provisions from an FTA (or BIT), or withdrawal of consent to ISDS arbitration from a BIT or FTA. In cases where parties of the same agreement align, that chosen option becomes effective for that particular BIT or FTA. This approach enables countries to make the desired changes for each of their agreements based on their consent.

The U.S. Legal Considerations Related to Harnessing APEP for an ISDS Exit: When considering the legal aspects of executing an ISDS exit through the APEP process, U.S. policymakers should take into account that out of the nine U.S. agreements with APEP countries that include ISDS provisions, six are FTAs. The remaining three are BITs that the United States adopted with Ecuador, Panama, and Uruguay. Thus, the chosen legal vehicle must be able to neutralize ISDS in both treaty and congressional-executive agreement contexts. In a nutshell, considering the president's authority to terminate treaties, Congress's intent to grant broad discretion to the president concerning ISDS involvement, and the fact that an agreement withdrawing ISDS would not impose any new obligations on the United States nor limit the policy space for congressional or executive branch actions, much less necessitate changes to existing

U.S. law, there exists a legally viable pathway for the Biden administration to negotiate and adopt an executive agreement that eliminates ISDS liability among APEP partners.

Using the APEP process, or at least the structure of APEP negotiations, to develop such a multilateral instrument would create an efficient way to deal with all relevant BITs and FTAs among APEP countries through a consensual process. Such a process would clear the ISDS obstacles that now threaten the goals of the APEP.

From a U.S. standpoint, President Biden's commitment to exclude ISDS from trade agreements negotiated during his administration,[10] coupled with the quite extensive and bipartisan U.S. policymaker opposition to ISDS that has been growing for many years, offers a unique opportunity to advance this objective. Opposition to ISDS in the United States gained significant momentum during the Obama administration, which was pushing for a massive expansion of U.S. ISDS liability with scores of additional countries through the Trans-Pacific Partnership (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP). Public and policymaker opposition to ISDS played a pivotal role in the Obama administration's inability to secure congressional approval for the TPP in the year following its signing in 2015. That a Republican administration then used the 2019 USMCA to phase out ISDS between the United States and Canada and greatly scale back U.S.-Mexico ISDS only demonstrates the bipartisan antipathy to the ISDS regime.

A Biden administration initiative to harness APEP to eliminate ISDS would come in the context of governments in other APEP countries sharing concerns about the regime. For instance, President Gabriel Borich in Chile[11] and the Petro government in Colombia[12] have both voiced concerns about the impacts of ISDS in their countries. As well, this initiative would represent a "deliverable" for an APEP process that is as much geopolitical as economic. Namely, the U.S. government pushed the ISDS regime on its neighbors before neoliberal policies became contested and with this initiative would be acting as a real partner in seeking to undo the damage.

A regionally coordinated exit from agreements that include ISDS through the APEP process would be a remarkable win-win accomplishment. The Biden administration could champion this initiative to showcase how departing from decades of failed international economic policies can unlock advantages for people across the continent.

10. "Biden for President United Steelworkers Questionnaire," USW Voices, last modified May 17, 2020, https://www.uswvoices.org/endorsed-candidates/biden/BidenUSWQuestionnaire.pdf.

11. Alex von Baer, "Revisión de Acuerdos Comerciales: El Punto del TLC con Estados Unidos Que Boric Tiene en la Mira y Sus Implicancias," Ex Ante, October 18, 2021, https://www.ex-ante.cl/revision-de-acuerdos-comerciales-el-punto-del-tlc-con-estados-unidos-que-boric-tiene-en-la-mira-y-sus-implicancias/.

12. Lucety Carreño Rojas, "Lo Que Busca Revisar Colombia en el TLC con EE. UU.," El Tiempo, December 1, 2022, https://www.elespectador.com/economia/macroeconomia/lo-que-busca-renegociar-colombia-en-el-tlc-con-ee-uu/.

I. The Americas' Experience With ISDS:

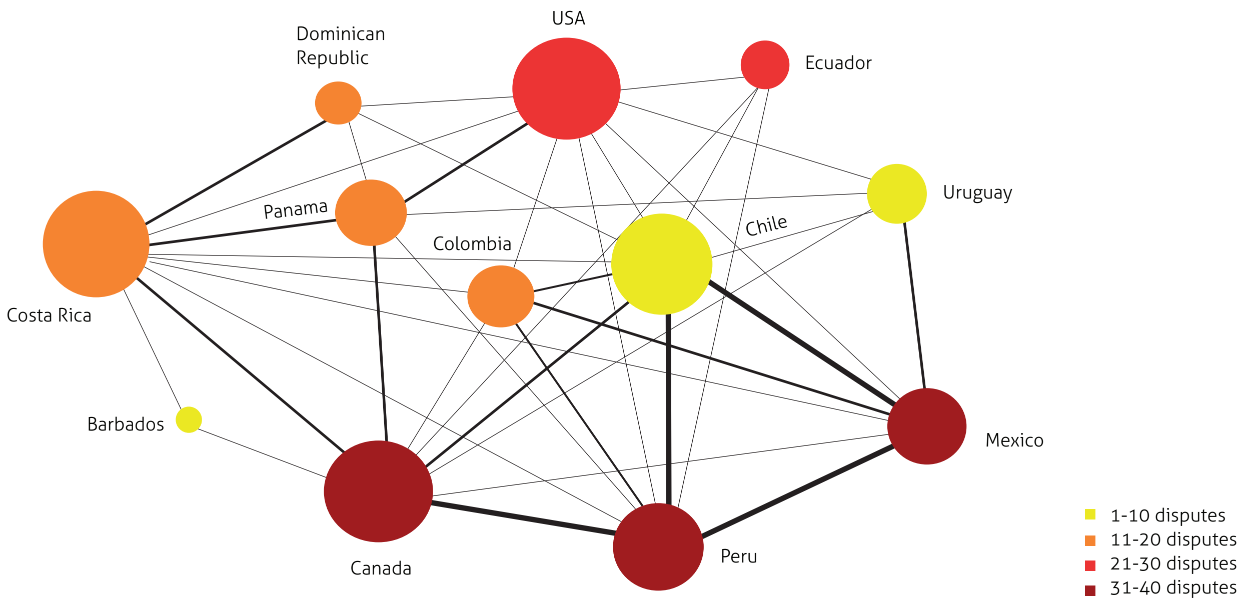
Decades of Failed Promises, Costly Awards, and Corporate Challenges to Public-Interest Policies

Starting in the early 1990s, countries in the Americas, and indeed in the rest of the world, went on an investment agreement signing spree. For most developing countries, the main reason for entering into these agreements was the assumption that doing so would allow them to attract foreign investment. Developed countries were very aggressive in advancing this position, but they were also guided by the expectation that investment agreements would depoliticize disputes with investors, and that they were essential to protecting their investors' interests abroad, especially in countries with weak legal systems. In the Americas, the U.S. push to include ISDS in the North American Free Trade Agreement (NAFTA) in 1994 was a key driver of both the adoption of investment agreements and the explosion of investor-state disputes, affecting not only developing countries but also developed ones, which did not contemplate that signing onto ISDS exposed their own democratic, public-interest policies to corporate attacks.[13]

In 1995 alone, countries in the Americas entered into 60 investment agreements, averaging five agreements per month.[14] As of 2023, countries in the hemisphere have signed 842 investment agreements.[15] Just among themselves, APEP countries have signed 47 BITs and FTAs with an ISDS clause, with 43 still in force (see Annex 1 for a list of the agreements).

13. Scott Sinclair, "The Rise and Demise of NAFTA Chapter 11," Canadian Centre for Policy Alternatives, April 2021, https://policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2021/04/The_Rise_and_Demise_of_NAFTA_Chapter_11.pdf.
14. "International Investment Agreements Navigator," United Nations UNCTAD Investment Policy Hub, accessed August 28, 2023, https://investment-policy.unctad.org/international-investment-agreements/advanced-search.
15. "International Investment Agreements Navigator."

Figure 1. Network of ISDS-Enforced Agreements Between APEP Countries



Source: APEP Countries ISDS Agreements Database. The network graph represents the existing ISDS-enforced FTAs and BITs among APEP countries. The node size depicts the number of ISDS-enforced agreements a country has with other APEP countries. Smaller nodes indicate fewer agreements. The lines connecting nodes show the agreements between APEP countries. Thicker lines indicate countries that have multiple agreements with ISDS with each other. For example, Canada and Peru have ISDS through two bilateral agreements (Canada-Peru BIT (2006) and Canada-Peru FTA (2008)) and in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

The experience of APEP countries with ISDS-enforced agreements leaves much to be desired. The system serves primarily the interests of powerful corporations and wealthy individuals (and their lawyers). Empowering multinational corporations to launch extrajudicial challenges of democratically enacted measures taken in the public interest has proven to be extremely problematic. And in the current state of affairs, it is likely to be one of the biggest obstacles to a green energy transition. APEP's vision of a Western Hemisphere where democracy, inclusive and sustainable investment, and shared prosperity prevail is simply incompatible with the ISDS regime.

1. Setting the Record Straight on ISDS: A Corporate-Driven Regime That Could Jeopardize the Transition to a Green Economy

ISDS is, deliberately, a one-sided dispute settlement system. By design, ISDS primarily creates obligations for one disputing party (governments that sign on to investment agreements), while conferring rights almost exclusively to the other disputing party (investors, corporations, and other corporate actors). Under this regime, only investors can initiate a dispute. Most agreements do not allow governments to raise counterclaims, much less use the system in any way to hold accountable corporations that have violated domestic laws while investing in the country. Likewise, third parties affected by a dispute are seldom, if ever, permitted to participate or raise a claim.

In addition, those charged with adjudicating disputes are regularly drawn from the ranks of highly paid corporate lawyers who cater to businesses and lack any depth of training in, and understanding of, the societies in which their decisions have the most impact.[17] This is in sharp contrast to career judges who preside over domestic disputes. In deciding a case, the substantive law these lawyers apply is not the domestic law of the country where the investment takes place, but the law of the investment agreement, as interpreted by the arbitrators. The law of the agreement is drafted in very vague, broad terms, giving significant latitude to the arbitrators to determine what they mean in a particular case. Their rulings are dispositive and subject neither to precedent nor any meaningful appeal. Furthermore, because the lawyers deciding these disputes typically act sequentially (sometimes even simultaneously) as arbitrator and as legal counsel for, or expert witness to, investors or states, they are prone to having conflicts of interest.[18]

A large number of agreements with ISDS do not require corporations to first direct their grievances through domestic courts or agencies or otherwise exhaust domestic legal remedies. Even less so does this regime consider that matters of domestic law, which could undermine public-interest policies or democratic decision-making processes, should be deferred to local courts. Last but not least, ISDS proceedings, and the negotiations leading up to settlements, are regularly secretive and kept from public view. This prevents citizens from having the information to hold governments accountable for any concessions offered, which thwarts citizens from questioning corporations that strong-arm governments into overturning democratic regulations adopted in the public interest.[19]

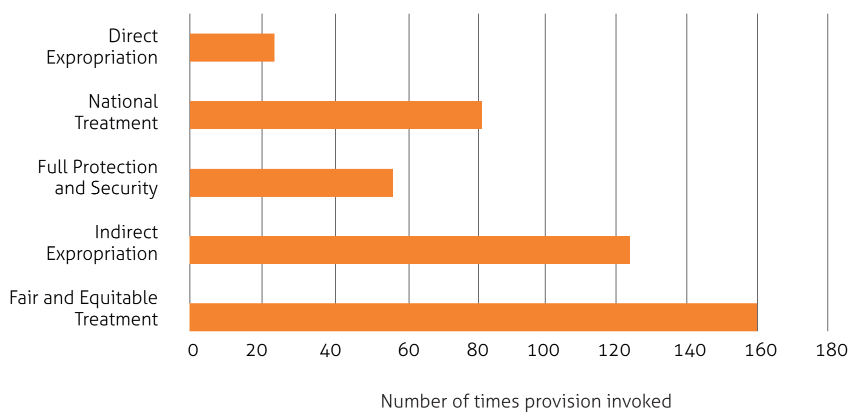
These lopsided qualities of ISDS are not a bug in the system. They are a feature of a dispute settlement regime that was designed to serve the interests of corporations. ISDS was created to give corporations sweeping substantive and procedural rights they would otherwise never have.[20] It has not only conferred on corporations the special privilege to skirt domestic judicial systems and directly file legal claims against national governments in international proceedings conducted behind closed doors for any action that they believe may have violated the broad and elastic substantive rights enforced by ISDS pacts. ISDS also allows corporations to seek compensation not only for any capital they actually invested, but also for future lost profits they hypothetically could have earned. This is in stark contrast to what is generally permissible under domestic takings law. It is not in vain that ISDS has been

17. In fact, arbitrators are typically disqualified from deciding disputes affecting the countries they belong to.
18. See Bernard Caillaud and Ariane Lambert-Mogiliansky, *Pro-Business Arbitration with* ISDS, Nos. 2022–28 (Agence Nationale de la Recherche Aug. 2022) (delineating how ISDS is prone to collusion to the benefit of corporations and their lawyers and at the expense of host states). See also Malcolm Langford et al., "The Revolving Door in International Investment Arbitration," *Journal of International Economic Law* 301 (Jun. 2017) (mapping the community of lawyers involved in ISDS and providing empirical support to concerns over "double hatting" — the practice of participating in different disputes in different roles/capacities).
19. Only a small number of states have signed or ratified the Mauritius Convention, a treaty requiring transparency in ISDS and that information about proceedings be made publicly available.
20. See Lise Johnson, Lisa E. Sachs, and Jeffrey D. Sachs, "Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law," Columbia Center on Sustainable Investment, May 2015, https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/22/ (explaining how investment agreements give greater rights when compared to U.S. domestic law); see also Lise Johnson and Oleksandr Volkov, "Investor-State Contracts, Host-State 'Commitments' and the Myth of Stability in International Law," Columbia Center on Sustainable Investment, May 2013, https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/173/ (arriving at the same conclusion by comparing ISDS awards with decisions by U.S. courts).

popularly referred to as corporate interests' private, global "super court."[21] Worse, it is not just any corporate interests that ISDS serves, but particularly those interests that are beholden to the most powerful, well-organized, and vested groups. Large multinational companies and ultra-wealthy individuals (and their lawyers) benefit most from ISDS, while smaller businesses and less-wealthy individuals rarely benefit at all.[22]

Moreover, it has become increasingly clear that this system not only serves the vested interests of the corporations it was originally intended to serve, but that it often does so at the expense of, or to the detriment of, the interests of all other stakeholders. Corporations rarely turn to ISDS to claim protection from the kind of outright expropriation or gross denial of justice that the system ostensibly was set up to check. Instead, corporations have been consistently successful in exploiting the vaguely worded provisions within investment agreements, such as fair and equitable treatment or indirect expropriation, to bring (or threaten to bring) claims against democratic measures taken in the public interest that they feel have harmed their business interests.[23]

Figure 2. Frequency of Claims by Provision Invoked Against APEP Countries



Source: ISDS Disputes Against APEP Countries Database[24]

21. See Chris Hamby, "Inside the Global 'Club' that Helps Executives Escape Their Crimes," *BuzzFeed News*, August 28, 2016, https://www.buzzfeednews.com/article/chrishamby/super-court; Eric Levitz, "A Private Super Court Is Helping Corporate Criminals Go Free," *New York Magazine Intelligencer*, August 29, 2016, https://nymag.com/intelligencer/2016/08/a-super-court-is-helping-corporate-criminals-go-free.html. See also "The Arbitration Game," *The Economist*, October 11, 2014, https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game (referring to ISDS as "secretive tribunal[s] of highly paid corporate lawyers").
22. See Gus Van Harten and Pavel Malysheuski, "Who Has Benefited Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants," in The Legitimacy of Investment Arbitration: Empirical Perspectives, ed. Daniel Behn, Ole Kristian Fauchald, and Malcolm Langford (Cambridge: Cambridge University Press, 2022), 394-423.
23. In addition to including guarantees against government takings and discriminatory treatment, agreements with ISDS often have vague and intrusive obligations imposed on countries, including fair and equitable treatment (FET), full protection and security (FPS), and protection against "indirect" expropriation. Because investment agreements purposefully leave substantial discretion for corporate-friendly arbitrators to interpret these provisions within them, corporations have been consistently successful in exploiting these obligations to claim compensation for the policy changes that affect their interests, even if they also apply generally to similar domestic businesses and investors.
24. The authors built a bespoke ISDS disputes dataset for this paper based on the information for the Latin American and Caribbean countries available at https://isdslac.georgetown.edu/. The authors added the information regarding disputes against Canada and the United States based on publicly available sources. The dataset can be made available per request.

Cases in which investors have resorted to ISDS to attack democratically enacted domestic measures that treat domestic and foreign investors alike abound, but notable examples affecting APEP countries include:

Assaults on COVID-19-Related Policies: In August 2021, Chile received the first COVID-19-related ISDS claim in the world. The claimants, two multinational airport operators, challenged Chile's pandemic measures, namely the government's decision to close borders to halt the spread of the disease during the pandemic's peak in 2020.[25] The companies argued that this decision caused them losses of USD 37 million, despite Chilean authorities' insistence that the measures taken were necessary "to protect its citizens and the overburdening of the health system.".[26] The ISDS claim arrived as Chile surpassed 1.6 million COVID-19 cases, with over 8.24% of its population affected.[27]

Shortly after, Chile was again on the receiving end of COVID-19-related ISDS claims, this time relating to a democratic law, passed in April 2021, allowing pension contributors to immediately withdraw up to 10% of premiums paid, as a way to provide relief from financial hardship experienced during the pandemic. Anticipating that this measure would negatively impact their business, three large multinational corporate providers of insurance, annuities, and retirement solutions (ON Global Holdings,[28] Consolidated Life Insurance,[29] and MetLife[30]) have recently threatened the government with ISDS claims.[31]

Attacks on Environmental Protection Measures: In December 2016, Eco Oro (formerly Greystar) initiated an ISDS case against Colombia following the Colombian Constitutional Court's decision to give full effect to a democratic law prohibiting mining operations in "páramo" ecosystems.[32] Páramos are rare high-altitude wetlands that serve as vital sources of fresh water, accounting for over 70% of Colombia's drinking water.[33] The law impacted a proposed gold mine that the Canadian corporation was developing, even though at the time of its passage, Eco Oro had not yet received all the permits required to begin extracting gold. The company won its ISDS case under the Colombia-Canada FTA despite the Colombian Constitutional Court having reviewed the case and deciding the mine would have violated Colombian law,[34] and despite an environmental exception provision included in the FTA that justified the measures adopted by the Colombian authorities to protect the páramo.[35]

25. *ADP International S.A. and Vinci Airports S.A.S. v. Republic of Chile*, ICSID Case No. ARB/21/40 (2021), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/40.
26. Bettina Müller, "Before the flood? The looming risk of corporations suing states for Covid-related measures," *Business & Human Rights Resource Centre*, September 8, 2022, https://www.business-humanrights.org/en/blog/before-the-flood-the-looming-risk-of-corporations-suing-states-for-covid-related-measures/.
27. "Coronavirus: Chile," Worldometer, last modified August 25, 2023, https://www.worldometers.info/coronavirus/country/chile/.
28. "Ohio envía aviso de arbitraje a Chile por adelanto de rentas vitalicias," *Ciar Global*, May 14, 2021, https://ciarglobal.com/ohio-envia-aviso-de-arbitraje-a-chile-por-adelanto-de-rentas-vitalicias/.
29. "Segundo aviso de arbitraje a Chile por retiro de rentas vitalicias," *Ciar Global*, June 16, 2021, https://ciarglobal.com/segundo-aviso-de-arbitraje-a-chile-por-retiro-de-rentas-vitalicias/.
30. "Metlife da pasos hacia el arbitraje con Chile por rentas vitalicias," *Ciar Global*, October 22, 2021, https://ciarglobal.com/metlife-da-pasos-hacia-el-arbitraje-con-chile-por-rentas-vitalicias/.
31. Müller, "Before the flood?"
32. *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41 (2016), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/16/41.
33. "Protection of Páramos: Delimitation and Its Controversies," Digital Environmental Justice Storytelling Project, accessed August 28, 2023, https://www.environmentaljusticecolombia.com/protectionofparamos1.
34. "Majority in Eco Oro v. Colombia," *Investment Treaty News.*
35. "Decision on Jurisdiction, Liability and Directions on Quantum," *Eco Oro Minerals Corp v. Republic of Colombia* (ICSID Case No. ARB/16/41), italaw, Paras. 826-837, https://www.italaw.com/sites/default/files/case-documents/italaw16212.pdf.

While a decision on damages is pending, Colombia could be ordered to pay as much as USD 700 million to the Canadian company.[36] Eco Oro's ISDS challenge incited new attacks against Colombian policies. In 2018, two other Canadian mining corporations (Red Eagle[37] and Galway Gold[38]) filed similar ISDS claims against Colombia. A final award on these two disputes is still pending.

While Canadian corporations have often used ISDS to attack other countries' laws, Canada has also been plagued by ISDS claims challenging its environmental measures. For example, over two decades ago, Ethyl, a U.S. corporation that invented the gasoline additive MMT, filed an ISDS claim under NAFTA's investment chapter against Canada's democratic decision to ban the suspected import and interprovincial transport of MMT.[39] MMT contains manganese, a known human neurotoxin. MMT is not used in most countries and is banned by the U.S. Environmental Protection Agency in reformulated gasoline. Canada adopted the legislation because it considered MMT to be a dangerous substance for public health and for its interference with cars' emission-control systems. After it lost a jurisdictional ruling, the Canadian government agreed to settle the case by reversing the ban, posting advertising announcing MMT was safe, and paying the corporation CAD 13 million in damages for the period the ban had been in place, as well as arbitration costs and all legal fees.[40] Today, MMT is still used in Canada despite its environmental and health effects. Canada has also lost or settled ISDS attacks on mining, fracking, and forestry regulation; offshore oil concession policies; and more.[41]

Challenges to National Security Actions Related to 5G Technology: Huawei, a Chinese tech corporation, has been turning to ISDS to challenge democratically enacted measures governing how countries adopt and put into operation the fifth-generation technology standard for broadband cellular networks (known as "5G"), including with a view to address public concerns relating to the use of both private and national security information. The Chinese multinational has already launched an ICSID case against Sweden,[42] and has threatened the Czech Republic,[43] Romania,[44] and the United Kingdom[45] over measures affecting its participation in the rollout of 5G networks. Furthermore, it has been reported that Canada may soon be put on notice over similar measures, along with Australia and New Zealand.[46]

36. "*Eco Oro v. Colombia*," United Nations UNCTAD Investment Policy Hub, accessed August 28, 2023, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/756/eco-oro-v-colombia.
37. *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12 (2018), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/18/12.
38. *Galway Gold Inc. v. Republic of Colombia*, ICSID Case No. ARB/18/13 (2018), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/18/13.
39. *Ethyl Corporation v. The Government of Canada*, UNCITRAL ad-hoc arbitration (1996), https://www.italaw.com/cases/409.
40. John Urquhart, "Canada Lifts Ban on Ethyl's Additive; U.S. Firm to Terminate Its Legal Fight," *The Wall Street Journal*, July 21, 1998, https://www.wsj.com/articles/SB900953820837355500.
41. "Table of Foreign Investor-State Cases and Claims Under NAFTA and Other U.S. 'Trade' Deals," Public Citizen, last modified January 2021, https://www.citizen.org/wp-content/uploads/2021.01.08-Investor-State-Chart-Jan-2021.pdf.
42. *Huawei Technologies Co., Ltd. v. Kingdom of Sweden*, ICSID Case No. ARB/22/2 (2022), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/22/2.
43. Jakub Zelenka and Lukáš Prchal, "Když nezrušíte varování, budeme se soudit, hrozí v dopisech Huawei. Odpoví na ně kyberúřad, rozhodla vláda," *Deník* N, February 7, 2019, https://denikn.cz/68998/kdyz-nezrusite-varovani-budeme-se-soudit-hrozi-huawei-dopisy-projedna-vlada/?ref=tit.
44. Lisa Bohmer, "China's Huawei lodges ICSID arbitration against Sweden over 5G ban," *Investment Arbitration Reporter*, January 24, 2022, https://iareporter.com/articles/chinas-huawei-lodges-icsid-arbitration-against-sweden-over-5g-ban/.
45. Lisa Bohmer, "Uncovered: Huawei puts the United Kingdom on notice of treaty dispute," *Investment Arbitration Reporter*, June 7, 2023, https://iareporter.com/articles/uncovered-huawei-puts-the-united-kingdom-on-notice-of-treaty-dispute/.
46. Jarrod Hepburn and Luke Eric Peterson, "Analysis: As Huawei invokes investment treaty protections in relation to 5G network security controversy, what scope is there for claims under Chinese treaties with Czech Republic, Canada, Australia and New Zealand?," *Investment Arbitration Reporter*, February 11, 2019, https://www.iareporter.com/articles/analysis-as-huawei-invokes-investment-treaty-protections-in-relation-to-5g-network-security-controversy-what-scope-is-there-for-claims-under-chinese-treaties-with-czech-republic-canada-australia-a/.

Corporate attacks on these and other democratic measures enacted in the public interest clash with APEP's stated ambitions to promote sustainable economic growth and hemispheric resilience, and run deeply counter to its objective of advancing a regional vision of democracy, development, and shared prosperity.

BOX 1: The ISDS Threat to the Transition Toward a Green Economy

One of APEP's stated goals is for countries to undertake collective efforts to address the climate crisis. Indeed, climate change is the defining issue of our time, with average temperatures increasing yearly since the 1980s and accelerating, threatening livelihoods and fueling environmental degradation, natural disasters, weather extremes, and food and water insecurity, resulting in economic hardship, social conflict, and migration. Experts agree that global efforts to combat climate change require a transition to renewable energy effectuated in part through measures taken to reduce reliance on fossil fuels, such as coal, oil, and gas. Many of these measures will affect corporations that have invested in fossil fuel industries. ISDS is poised to become a principal vehicle through which these corporations will seek recourse for measures taken to phase out fossil fuels. While these companies have profited heavily for decades while contributing to the climate crisis, thanks to ISDS they have a means to extract compensation from taxpayers for the shift away from carbon-based fuels that is needed to save the planet.

Fossil fuel corporations and their shareholders are already among the most prolific users of ISDS and have been, by and large, the beneficiaries of the largest awards to date.[47] Scholars have estimated that global measures to combat climate change could generate upward of USD 340 billion in ISDS claims from fossil fuel corporations alone.[48] The Intergovernmental Panel on Climate Change has acknowledged that through ISDS, governments could be deterred from taking measures that affect fossil fuel corporations or face pressure to compensate them with taxpayer funds needed for other critical uses.[49] This could make it considerably more difficult and more costly for the world, and APEP countries in particular, to implement the green energy future needed to forestall a climate catastrophe.

47. Lea Di Salvatore, "Investor-State Disputes in the Fossil Fuel Industry," *International Institute for Sustainable Development*, December 31, 2021, https://www.iisd.org/publications/report/investor-state-disputes-fossil-fuel-industry.
48. See Kyla Tienhaara et al., "Investor-State Disputes Threaten the Global Green Energy Transition," *Science* 376, (May 2022): 701, https://www.science.org/doi/10.1126/science.abo4637.
49. Priyadarshi R. Shukla et al., "Climate Change 2022: Mitigation of Climate Change. Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change," *Intergovernmental Panel on Climate Change*, April 2022, https://www.ipcc.ch/report/sixth-assessment-report-working-group-3/.

The Keystone XL Pipeline Case

In 2016, TC Energy (then TransCanada), a major North American energy infrastructure operator, filed a USD 15 billion ISDS claim against the United States for the Obama administration's decision to deny the corporation a permit to build a pipeline (called Keystone XL).[50] The pipeline would have transported up to 830,000 barrels of highly corrosive crude oil per day from Alberta, Canada, across more than a thousand U.S. rivers, streams, lakes, and wetlands, to the Gulf Coast. The ISDS claim, amounting to USD 15 billion, was five times more than TC Energy's actual investment in the pipeline project because it included not only the initial investment but also the anticipated future profits that the corporation claimed it would have earned. The project was met with fierce resistance from the Indigenous communities, farmers, and ranchers who lived or worked in or near the path of the pipeline, as well as from environmental and health experts and organizations. It gained international notoriety as a battleground over climate justice. In issuing the permit denial on behalf of President Obama in late 2015, then-Secretary of State John Kerry stated that "moving forward with this project would significantly undermine [the United States'] ability to continue leading the world in combating climate change."[51]

In January 2017, newly elected President Trump announced that the project would move forward and settled the initial ISDS case. The State Department issued a new permit and Trump waived certain made-in-America steel rules for the pipeline. In his first day in office, however, President Biden again revoked the permit, calling the pipeline inconsistent with the administration's "climate imperatives."[52] The economic feasibility of the pipeline was already in question and shortly after Biden's decision, TC Energy abandoned the project. In June of 2021, the company revived its ISDS claim, again seeking USD 15 billion in compensation from the United States.[53] This is the largest amount claimed yet over measures taken to combat the climate crisis and reduce reliance on fossil fuels in the region. In the context of the green energy transition, however, Canada has been the most frequently afflicted APEP country. Investors have sued Canada for instituting a ban on gas fracking[54] and for its decision to phase out coal.[55] It is only a matter of time before other APEP countries are impacted the same way.

50. *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63 (2016), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/63.
51. "Remarks by Secretary John Kerry on Keystone XL Pipeline Permit Determination," U.S. Department of State, last modified November 6, 2015, https://2009-2017.state.gov/secretary/remarks/2015/11/249249.htm.
52. "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," White House Briefing Room, last modified January 20, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/.
53. *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63 (2021), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/63.
54. *Lone Pine Resources Inc. v. Canada*, ICSID Case No. UNCT/15/2 (2013), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=UNCT/15/2.
55. *Westmoreland Mining Holdings*, LLC v. Canada, ICSID Case No. UNCT/20/3 (2019), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=UNCT/20/3; *Westmoreland Coal Company v. Canada*, ICSID Case No. UNCT/23/2 (2023), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=UNCT/23/2.

2. Taking Stock of ISDS: A Costly, Ineffective System of Failed Promises

Many countries signed agreements with investment protections and ISDS mechanisms under the assumption that these privileges would promote foreign investment flows. However, several econometric studies have found no conclusive evidence that investment agreements, of which ISDS is typically a prominent feature, increase foreign direct investment in host countries.[56] Instead of attracting more investment, ISDS's legacy has been an avalanche of disputes against signatory countries. To date, countries in the Americas have been on the receiving end of at least 401 ISDS claims that seek a staggering sum of over USD 1.58 trillion in compensation.[57] More than 105 of these claims are still pending, with the demanded compensation reaching over USD 80 billion. So far, governments in the Americas have been ordered or have agreed to pay foreign investors a total of over USD 29.2 billion in awards and settlements.[58]

A. APEP Countries' Costs Due to Investor-State Disputes

By 2022, corporations had launched a total of 1,257 (publicly known) investor-state disputes under BITs and FTAs worldwide.[59] Of that total, 231 disputes (18%) have been against APEP countries. The table below summarizes some of the publicly available information about these cases.

Table 1. Total Number of Cases, Costs in Awards and Settlements, Pending Disputes, and Amounts Claimed for APEP Countries

APEP country	Total number of ISDS cases	Total cost in awards and settlements (USD)	Total number of pending ISDS cases	Total known amount claimed in pending ISDS cases (USD)
Barbados	1	Not applicable	0	Not applicable
Canada	32	180,713,201	5	1,198,318,051
Chile	7	15,800,000	2	200,000,000
Colombia	20	19,100,000	13	19,283,000,000
Costa Rica	13	4,400,000	2	Data not available
Dominican Republic	11	53,000,000	5	630,100,000
Ecuador	29	2,162,857,000	7	166,090,000
Mexico	40	289,840,000	11	5,248,000,000
Panama	18	48,000,000	6	2,310,000,000
Peru	32	52,180,000	16	2,740,000,000
United States	23	Data not available	5	15,120,950,000
Uruguay	5	Not applicable	1	Data not available
Total	**231**	**2,742,790,201**	**73**	**46,898,458,051**

Source: ISDS Disputes Against APEP Countries Database

56. Josef C. Brada, Zdenek Drabek, and Ichiro Iwasaki, "Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis," *Journal of Economic Surveys* 35, no. 1 (February 2021): 9-10, https://doi.org/10.1111/joes.12392; Joachim Pohl, "Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence," OECD Working Papers on International Investment 2018, no. 1 (2018): 14-36, 37-39, https://doi.org/10.1787/18151957.
57. This includes only claims where a notice of arbitration has been filed and only claims brought under a BIT or FTA. In some cases, the amount claimed by the investor is not publicly available. The data covering Latin American and Caribbean countries includes claims filed through December 31, 2022. For the United States and Canada, the figure includes cases filed before May 2023.
58. ISDS Disputes Against APEP Countries Database.
59. "Investment Dispute Settlement Navigator," United Nations UNCTAD Investment Policy Hub, accessed August 28, 2023, https://investmentpolicy.unctad.org/investment-dispute-settlement.

As shown in *Table 1*, corporations have been granted a total compensation of USD 2.7 billion from APEP countries through ISDS awards and settlements. What is even more concerning is the fact that APEP governments are facing 73 pending disputes, with an aggregate claimed sum of USD 46.9 billion. To put this in perspective, this figure exceeds Ecuador's entire national health budget for 2021 by nearly 17 times;[60] surpasses more than half of Colombia's current national budget;[61] and accounts for about **13% of the entire budget authorized by the U.S. Congress through the 2022 Inflation Reduction Act for climate action and clean energy investments and subsidies to be distributed over the next decade.**[62]

BOX 2: Regulatory Chill in APEP Countries and How ISDS Has Negative Spillovers Across the Globe

A further cost of ISDS (or even the threat of ISDS) is "regulatory chill," which refers to the situation in which a country refrains from adopting legitimate policies — or carrying out legitimate policy changes — due to existing or anticipated ISDS challenges by investors. Several studies show how ISDS negatively affects a country's regulatory powers.[63] ISDS is so corporate-driven and unpredictable, and the awards arising from a dispute so costly, that yielding to demands from corporations is often viewed as the most prudent choice by a government.[64] The costs arising from regulatory chill may not always be strictly pecuniary, but they always represent a cost to the host country. This cost is often borne by the citizens of the country, who are deprived of policies that would have been enacted in the public interest.

In Canada, for example, a study based on 51 confidential interviews with former and current environmental and trade policy officials from the province of Ontario revealed the existence of regulatory chill caused by ISDS claims, especially regarding environmental protection measures.[65] The study concluded that the province of Ontario "changed its decision-making to account for trade concerns including ISDS."[66] Some interviewees concluded that ISDS creates undesirable obstacles for environmental decision-making, while others described specific situations in which ISDS concerns led to policy changes.[67]

60. Ecuador's national public health budget for 2021 was equivalent to USD 2.8 billion. See "Presupuesto General del Estado Prorrogado," Ministerio de Economía y Finanzas, 2021, https://www.finanzas.gob.ec/wp-content/uploads/downloads/2021/09/INFORME-TECNICO-PRESUPUESTO-PROR-ROGADO_VFINAL.pdf.
61. The Colombian Congress approved a USD 85.5 billion budget for 2023. See Carlos Vargas, "Colombia Congress Approves 2023 Budget Bill, increasing funding for social programs," *Reuters*, October 19, 2022, https://www.reuters.com/world/americas/colombia-congress-approves-2023-budget-bill-increasing-funding-social-programs-2022-10-19/.
62. The historic investment in clean energy approved by the U.S. Congress in 2022 adds up to USD 370 billion. See "Building a Clean Energy Economy: A Guidebook to the Inflation Reduction Act's Investments in Clean Energy and Climate Action," The White House, January 2023, Version 2, https://www.whitehouse.gov/wp-content/uploads/2022/12/Inflation-Reduction-Act-Guidebook.pdf.
63. Anna Sands, "Regulatory Chill and Domestic Law: Mining in the Santurbán Páramo," *World Trade Review 22*, no. 1 (2023): 55-72, https://doi.org/10.1017/S1474745622000386; Kyla Tienhaara, "Regulatory Chill and the Threat of Arbitration: A View from Political Science," *Evolution in Investment Treaty Law and Arbitration*, (2010), https://ssrn.com/abstract=2065706; Tarald Laudal Berge and Axel Berger, "Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Capacity," January 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3522366; Christine Côté, "A Chilling Effect? The Impact of International Investment Agreements on National Regulatory Autonomy in the Areas of Health, Safety and the Environment" (Ph.D. thesis, London School of Economics, 2014).
64. Chris Hamby, "The Secret Threat that Makes Corporations More Powerful Than Countries," *BuzzFeed News*, August 30, 2016, https://www.buzzfeednews.com/article/chrishamby/the-billion-dollar-ultimatum.
65. Gus Van Harten and Dayna Nadine Scott, "Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada," *Osgoode Hall Law School: Legal Studies Research Paper Series* 12, no. 6 (2016), https://dx.doi.org/10.2139/ssrn.2700238.
66. Van Harten and Scott, "Investment Treaties," 2.
67. Van Harten and Scott, "Investment Treaties."

The COVID-19 Highway Tolls Case

In April 2020, at the outset of the COVID-19 outbreak, the Peruvian Congress passed a law suspending the payment of tolls on highways to ease the financial burden imposed by the pandemic on Peruvian citizens. However, it was reported that due to threats from foreign corporations with toll concessions and the risk that Peru might face ISDS claims, the government challenged the law before the Peruvian Constitutional Court in August 2020.[68] In its filing, Peru's Ministry of Economy alluded to the risk of ISDS claims it faced with the passage of the highway toll suspension law. In particular, it was noted how costly the proceedings would be and the high likelihood that the country would lose in such claims.[69] The Constitutional Court declared the law unconstitutional. As a result, Peruvian citizens were not relieved of paying highway tolls during the pandemic. [70]

The Phillip Morris Tobacco Plain-Packaging Case

Regulatory chill is not a phenomenon that is contained within national borders. Perceived risks from events occurring outside of a country's jurisdiction can also have the effect of regulatory chill. One prominent example involves the cigarette plain-packaging measures adopted by Australia and Uruguay. Both countries had adopted measures to protect their consumers' health, requiring tobacco packages to have a uniform presentation and prohibiting any branding, logos, or other promotional elements. Australia was challenged at the WTO,[71] and both countries were brought before ISDS tribunals by Philip Morris, a company that claimed that these plain-packaging measures infringed on its rights as an investor and amounted to an expropriation.[72] While neither country succumbed to the threats and both were successful in their respective cases, the aggressive litigation strategy used by Philip Morris had spillover effects in other countries that, when these cases were filed, envisioned adopting similar measures. Singapore and New Zealand, for example, delayed the adoption of cigarette plain-packaging policies until the WTO and ISDS disputes against Australia and Uruguay[73] were finalized. The Singaporean government feared the risk of being put in the same situation as Australia and Uruguay. Similarly, it was reported that New Zealand decided to pause the adoption of stricter cigarette packaging measures the moment these disputes emerged.[74]

68. Gabriel O'Hara Salini, "Gobierno Presenta Demanda de Inconstitucionalidad Contra Ley de Suspensión de Cobro de Peajes," *Gestión*, March 6, 2020, https://gestion.pe/economia/gobierno-presenta-demanda-de-inconstitucionalidad-contra-ley-de-suspension-de-cobro-de-peajes-noticia/.
69. O'Hara Salini, "Gobierno Presenta Demanda."
70. Müller, "Before the flood?"
71. Australia – Certain measures concerning Trademarks, Geographical indications and other plain packaging requirements applicable to tobacco products (DS435, DS441, DS458, DS467)
72. *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12 (2012).
73. Dafina Atanasova, "IIAs in Singapore and the rule of law promise," *Investment Treaty News*, October 7, 2022, https://www.iisd.org/itn/en/2022/10/07/iias-in-singapore-and-the-rule-of-law-promise-dafina-atanasova/.
74. "How Some International Treaties Threaten the Environment," *The Economist*, October 5, 2020, https://www.economist.com/finance-and-economics/2020/10/05/how-some-international-treaties-threaten-the-environment; "Philip Morris vs. Uruguay: Big Tobacco vs. anti-smoking legislation," Stop Investor-State Dispute Settlement, last modified April 2021, https://www.isds.bilaterals.org/?philip-morris-vs-uruguay-big.

In addition to compensating corporations, governments must pay the costs of their own representation. They are also typically responsible for half of the arbitration fees and frequently bear the burden of covering the disputing corporations' legal costs. A 2021 study examined over 400 ISDS cases conducted under various arbitration rules and over 70 ICSID annulment procedures. It revealed that arbitrators have considerable discretion in determining and allocating costs among the parties involved, as there is often a lack of detailed guidance in the applicable arbitration rules.[75] The study examined two types of costs in ISDS: party (legal) costs and arbitration fees.[76] According to the study, the party costs incurred by countries in an ISDS case are on average USD 4.7 million (USD 2.6 million being the median legal costs).[77] The mean arbitration fees are approximately USD 0.95 million (USD 0.74 million being the median arbitration costs).[78] Disturbingly, the study also found that successful countries recover at least some costs in 53% of cases, while successful corporations recover at least some costs in 62% of cases.[79] In other words, even if countries are not found liable on the merits of the case, they are less likely to recover some costs incurred during the arbitration process. Conversely, when corporations prevail, tribunals are more likely to order countries to cover a portion of corporations' arbitration costs, in addition to the compensation awarded.

Following the issuance of the arbitral tribunal's award, the investor may seek recognition of the award by presenting it before the national court of another country. Once the award is recognized and incorporated into a valid judgment by that court, the investor can proceed with the enforcement process. This process empowers the investor to seize government assets in order to collect the compensation awarded by the arbitral tribunal. Enforcement proceedings can be time-consuming, potentially stretching over a considerable duration, and exposing respondent countries to the risk of protracted legal disputes and potentially prolonged financial implications within the national courts of other countries. Several APEP countries have encountered the challenges posed by such prolonged and costly enforcement procedures. For instance, investors continue to pursue enforcement of the awards against Ecuador before U.S. courts that resulted from arbitrations initiated over a decade ago.[80]

B. The Fiscal Risk of ISDS

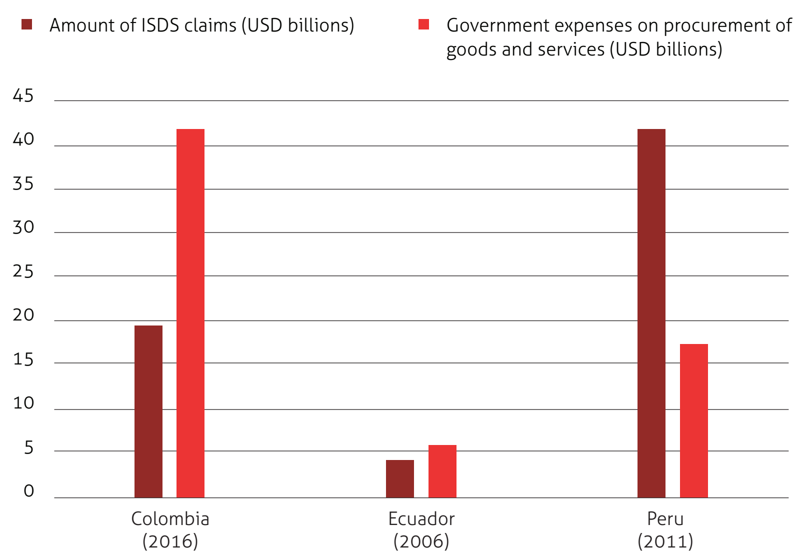
ISDS claims represent a contingent liability, i.e., an indeterminate future liability, on countries' balance sheets. From the moment investors submit their notice of intent, the government is alerted about the possibility of a new ISDS dispute. Investors will likely file a claim before an arbitral tribunal if the dispute is not amicably resolved through consultations or negotiations during the cooling-off period

75. Matthew Hodgson, Yarik Kryvoi, and Daniel Hrcka, "2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration," Allen & Overy and *British Institute of International and Comparative Law*, June 2021: 4-12, https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf.
76. Hodgson, Kryvoi, and Hrcka, "Costs, Damages and Duration," 6.
77. Hodgson, Kryvoi, and Hrcka, "Costs, Damages and Duration," 4.
78. Hodgson, Kryvoi, and Hrcka, "Costs, Damages and Duration," 12.
79. Hodgson, Kryvoi, and Hrcka, "Costs, Damages and Duration," 5.
80. In March 2023, Judge Cobb from the District Court for the District of Columbia allowed Pereco to move forward with the enforcement of the award issued by the arbitral tribunal in 2019. The investor filed the arbitration in 2008.

(three to 12 months). The amount claimed by investors is usually much higher than the amount ultimately awarded by tribunals. However, until a final award has been issued, the government knows only the amount claimed by the investor. Since the average duration of an ISDS dispute is approximately four and a half years, respondent countries must consider the potential risk of having to pay an award in all their budget decisions.

Allocating separate funds for ISDS claims is not easy. For most APEP countries, these claims pose a significant fiscal risk and a burden on their budgets. *Figure 3* provides data on some of the hardest-hit APEP countries: Colombia, Ecuador, and Peru. It compares the value amount in ISDS claims brought against these countries in the year with the highest value with the respective governments' spending on goods and services in the same year. Government spending is a good indicator of the fiscal capacity of a country and shows the tradeoffs that a country faces when confronted with large ISDS claims.

Figure 3. Amount of ISDS Claims and Government Spending on Goods and Services for Most Affected Countries in Year with Largest Amount Demanded (USD Billions)



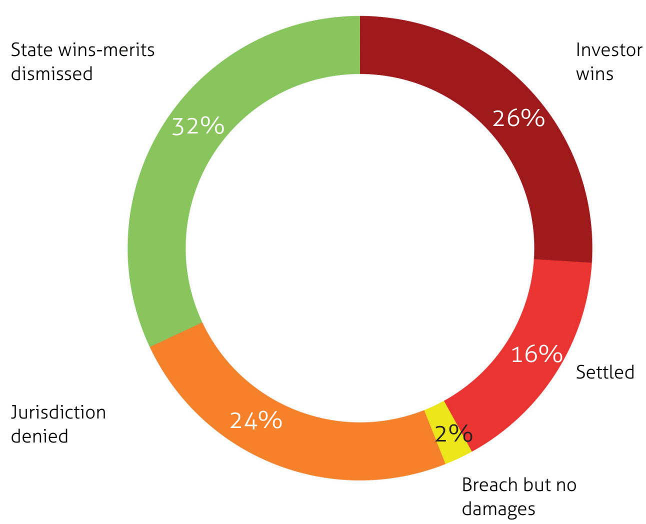
Source: World Bank Data and APEP ISDS Database

For instance, Colombia received its first ISDS claim in 2016. Three additional corporations lodged claims against Colombia in the same year. The total value of compensation demanded by the corporations in these four cases was more than USD 19 billion. That figure was nearly half of the Colombian government's spending on goods and services in 2016. In the case of Ecuador, the value of the claims filed against it in 2006 represented more than 80% of the government's spending on goods and services in the same year. Without knowing exactly how long an ISDS proceeding might take, countries may find it extremely difficult to determine the amount they should provision for each dispute and for which year, and opt for reducing government expenditure in other areas, such as procurement of medical and school supplies.

C. APEP Countries' Record Facing ISDS Claims

The strain on APEP countries from ISDS is significant, and the odds are not in their favor when investors lodge claims. In all, APEP countries have only prevailed on the merits in less than one-third of the ISDS cases they have faced. As depicted in *Figure 4*, in their cases against APEP countries, corporations have either won ISDS disputes or obtained settlements in 42% of the proceedings that have reached an outcome. In addition, in 2% of the cases, arbitrators have determined that the challenged country has breached its obligations, even if the investor did not prove damages had occurred. Importantly, nearly a quarter of all ISDS cases have finished with a tribunal decision rejecting the claim due to jurisdictional issues. This means that the investor started an ISDS proceeding without even meeting the minimum requirements to access this regime. Common jurisdictional deficiencies include investors failing to demonstrate their compliance with nationality requirements in order to access ISDS, corporations filing claims beyond the time limits imposed by the relevant agreement, or instances in which the claimants could not prove that they had covered investments in the country whose policies they were challenging.

Figure 4. ISDS Dispute Outcomes for APEP Countries



Source: ISDS Disputes Against APEP Countries Database

BOX 3: The United States' Experience With ISDS

Defenders of ISDS often point to the U.S. record on ISDS, given that the country has not lost a single dispute. However, the United States is neither impervious to corporate strong-arming arising from ISDS, nor has it been immune from its costs.

The Loewen Case

The first ISDS proceeding against the United States was filed by a Canadian funeral business under NAFTA's investment chapter, following a final ruling by the Supreme Court of the state of Mississippi against it.[81] The corporation attacked the Mississippi jury verdict and the state's civil procedure rules as violating national treatment, fair and equitable treatment, and expropriation rules. The tribunal decided it had jurisdiction to review a jury decision in a private contract dispute, and "criticized the Mississippi proceedings in the strongest terms," but narrowly dismissed Loewen's claim on procedural grounds after Loewen reorganized the corporation under U.S. bankruptcy laws. As a U.S. corporation, Loewen no longer qualified as a "foreign investor." One of the arbitrators, former U.S. judge and congressman Abnver Mikva said after the case that he recognized that if the tribunal had ruled against the United States it could derail ISDS and NAFTA, and thus he pushed for the procedural dismissal.[82]

The Softwood Lumber Cases

In 2006, the United States and Canada signed the Softwood Lumber Agreement (SLA). The SLA is one of many chapters in a protracted North American trade dispute that involves numerous cases before WTO and NAFTA state-state tribunals. The U.S. government claimed that Canada subsidized softwood lumber with below-market stumpage fees on government lands, replanting support, and transportation subsidies. The Canadian government disputed this and insisted that the U.S. government lift various tariff penalties that amounted to billions against Canadian imports, which it also said violated WTO procedural rules. Eventually, under the SLA, the United States agreed to revoke countervailing and antidumping orders issued against Canadian softwood lumber. An aspect of the SLA that is often overlooked is that the U.S. government also agreed to the restitution of approximately USD 4 billion in custom duties paid by importers of Canadian lumber.[83] A significant portion of this money went to three Canadian firms that had launched ISDS cases against the U.S. government over the tariffs. The payment has the appearance, if not the formal label, of an ISDS settlement, as the firms agreed to drop their ISDS claims as part of the SLA, which added up to USD 500 million.

Between 2002 and 2004, the three Canadian softwood lumber producers filed ISDS claims under NAFTA against the United States over

81. *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 (1998), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB(AF)/98/3.
82. Chris Hamby, "How a Mississippi Funeral Home Showdown Freaked Out the White House," *BuzzFeed News*, September 1, 2016, https://www.buzzfeednews.com/article/chrishamby/homegrown-disaster; Dirk Pulkowski, "The Final Award in *Loewen v. United States*," in *The Reasons Requirement in International Investment Arbitration*, ed. Guillermo Aguilar Alvarez and W. Michael Reisman (Brill Nijhoff, June 2008), 291.
83. Katie Hoover and Ian F. Fergusson, "The 2006 U.S.-Canada Softwood Lumber Trade Agreement (SLA): In Brief," Congressional Research Service, May 18, 2017, https://sgp.fas.org/crs/misc/R44851.pdf.

alleged violations of corporate-friendly provisions, including minimum standard of treatment, national treatment, and indirect expropriation.[84] In their notices of arbitration, Canfor Corporation, Tembec Inc., and Terminal Forest Products Ltd. claimed that they imported most of the Canadian lumber through their U.S.-based subsidiaries, meaning, in effect, that the subsidiaries were responsible for the payment of any antidumping and countervailing duties levied by the U.S. government.[85] After protracted negotiations, the three Canadian corporations with active ISDS claims against the United States were among the signatories of a "Termination of Litigation Agreement," included as Annex 2A of the SLA. Under this agreement, the Canadian lumber producers committed to withdraw their ISDS claims in exchange for the reimbursement of countervailing and antidumping duties paid.[86] For all intents and purposes, this outcome was equivalent to a settlement of the claims lodged by Canadian producers through ISDS, and with a considerable settlement payoff: USD 4 billion in returned duties. Although all importers, and not just the U.S. subsidiaries of the three Canadian corporations, benefited from the reimbursement, at least USD 500 million (equivalent to the demanded compensation of Canfor, Tembec, and Terminal Forest) were potentially related to the ISDS claims.

Even in many of the cases that the U.S. government "won," it was ordered to pay millions in arbitration fees and spent millions in legal costs. As mentioned before, the average cost of an ISDS case ranges in the millions and tribunals' discretion in allocating costs typically means that governments are less likely to recover their arbitration costs, even when a case is dismissed. Compensation and settlement costs are not the only financial costs of ISDS.

84 "*Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America*, UNCITRAL," italaw, accessed August 28, 2023, https://www.italaw.com/cases/200.

85. "Notice of Arbitration and Statement of Claim," *Canfor Corporation v. the Government of the United States of America*, UNCITRAL (2002), italaw, https://www.italaw.com/sites/default/files/case-documents/italaw8677.pdf; "Notice of Arbitration and Statement of Arbitration Claim," *Tembec Inc., Tembec Investments Inc., Tembec Industries Inc. v. the United States of America*, UNCITRAL (2003), italaw, https://www.italaw.com/sites/default/files/case-documents/italaw8696.pdf; "Notice of Arbitration," *Terminal Forest Products Ltd. v. the Government of the United States of America*, UNCITRAL (2004), https://www.italaw.com/sites/default/files/case-documents/italaw8694.pdf.

86. "Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America," USTR, September 12, 2006, https://ustr.gov/sites/default/files/uploads/factsheets/Trade%20Topics/enforcement/softwood%20lumber/2006%20U.S.-Canada%20Softwood%20Lumber%20Agreement.pdf.

3. Turning the Page on ISDS: A Problematic Regime That Countries Are Increasingly Leaving Behind

Countries facing investor-state disputes have often opted to back down on their public-interest policies rather than pay the exorbitant legal and arbitration fees involved and face the risk of being condemned to pay staggering ISDS awards. Realizing how problematic this is, many countries have embarked on a retreat from the regime. The APEP country that has gotten the farthest in that process is Ecuador. The Ecuadorian government began to denounce its investment agreements in 2008, the same year in which a new Constitution was introduced prohibiting Ecuador from "entering into international treaties or instruments in which the Ecuadorian State cedes sovereign jurisdiction to international arbitration."[87] In 2009, it also withdrew from the ICSID Convention. Subsequently, in 2013, after being involved in 24 ISDS cases and being ordered to pay over USD 1 billion to the corporate oil giant Occidental, Ecuador created the Commission for the Comprehensive Citizen Audit of Reciprocal Investment Agreements and the International Investment Arbitration System (known for its acronym in Spanish, CAITISA).[88] In 2017, CAITISA released its final report, calling out the system for its corporate bias and failure to recognize the importance of environmental protection policies. It recommended that Ecuador withdraw from ISDS and complete the termination of its investment agreements. That same year, Ecuador initiated the unilateral termination of its agreements with ISDS that had not been previously denounced.[89] However, these BITs continue to apply today due to clauses included in these agreements that extend their applicability for a specified period of time after their unilateral termination, typically ranging from five to 20 years.

The United States, Canada, and Mexico have also effectuated their own ISDS exit in the context of the United States-Mexico-Canada Agreement (USMCA). As of July 1, 2023, the ISDS mechanism between the United States and Canada has come to an end. The United States and Mexico replaced NAFTA's ISDS regime with a modified mechanism that requires investors to go to national courts and exhaust domestic remedies before resorting to ISDS. Under the new arrangement, claims are limited to cases of direct expropriation and discrimination. This effectively eliminates the most expansive and flexible ISDS corporate rights. However, five U.S. oil companies, which hold certain concession contracts with the Mexican Hydrocarbons Authority, retain their full substantive rights. These rights are enforceable through the modified system until such time when Mexico ends ISDS with other countries whose firms hold similar contracts.

Many other countries have taken steps to withdraw from ISDS. In the Americas, for example, Bolivia has followed a direction similar to Ecuador's. It was the first country to withdraw from the ICSID Convention,

87. Constitution of the Republic of Ecuador (2008), Article 422.
88. See CAITISA – *Arbitraje Internacional En Materia de Inversiones*, https://caitisa.org/.
89. Note that in September 2021, after the conservative businessman and banker Guillermo Lasso took office, Ecuador rejoined the ICSID Convention. Because the Ecuadorian Constitutional Court refused to rule on the matter of the (constitutional) legality of the accession, the Lasso government seized the opportunity and re-ratified the Convention without the approval of the National Assembly, Ecuador's national legislative body. Since then, the country has signed a trade agreement with Costa Rica that includes ISDS. However, the Constitutional Court was tasked with ruling on the (constitutional) legality of this agreement, and, in July 2023, determined that Ecuador could not ratify the agreement unless it laid aside the provisions on ISDS, which were held to be contrary to Article 422 of the Constitution.

in 2007. Shortly after, in 2009, a new Constitution prohibited Bolivia from entering into agreements with ISDS in the oil and gas sector.[90] That same year, the government initiated the denunciation of its investment agreements. By 2014, Bolivia had completed the termination of its agreements with ISDS, except for the investment agreement with Ecuador, which was terminated in 2018. Venezuela withdrew from the ICSID Convention in 2012. Brazil has never ratified any of its agreements with ISDS. More recently, Honduras also announced that it was considering withdrawing from the ICSID Convention and denouncing its agreements with ISDS.

Elsewhere, the list of countries retreating from ISDS is long. Outside of the Americas, South Africa took the lead in 2010 with the denunciation of its investment agreements, followed by Indonesia in 2014. India replaced many of its existing BITs with a new model in 2016 and withdrew from others. In 2011, Australia announced that it would no longer enter into agreements with ISDS, and has more recently pledged to purge ISDS from all its agreements already in force. In 2017, New Zealand also indicated that it would no longer negotiate agreements with ISDS. As a result, in 2018, the government agreed to the conclusion of the Comprehensive and Progressive Agreement for a Trans-Pacific Partnership, but opted out of ISDS.

EU Member States have also agreed to roll back ISDS among themselves, following a ruling by the European Court of Justice invalidating an ISDS award rendered against Slovakia. This confirmed both legal scholars' and the European Commission's warnings that ISDS was incompatible with, and by implication undesirable under, EU law.[91] As noted in the box below, European nations have also decided to exit the ISDS-enforced Energy Charter Treaty.

Finally, Pakistan, a country that inaugurated the ISDS system, having entered into the first investment agreement ever, with Germany in 1959, recently announced that it would denounce 23 of its agreements with ISDS, not ratify 16 that have already been concluded, and, like India, seek to mitigate the effects of those agreements in which the initial term has not yet expired.

This exodus from ISDS has not gone unnoticed. Many members of the investment arbitration community have acknowledged some of the system's flaws and generally support proposals for moderate reform, such as those advanced within the United Nations Commission on International Trade Law (UNCITRAL).[92] These proposals, however, do not address the most inherent, substantive problems nor the corporate bias of ISDS. Instead, they propose a modest reform to a system that is, in so many ways, contrary to the principles animating APEP.

APEP was launched with a view to advance the needs and interests of working people, drive middle-out growth for economies in the Americas, recover from the impact of the pandemic, and develop new tools for the challenges afflicting countries in the region today and in the decades to come. ISDS runs

90. Political Constitution of the State of Bolivia (2009), Article 366.
91. *Slovak Republic v. Achmea BV*, Case C-284/16 (2016), https://curia.europa.eu/juris/document/document.jsf?docid=199968&doclang=EN.
92. United Nations Commission on International Trade Law, https://uncitral.un.org/en/working_groups/3/investor-state.

completely counter to these ambitions. It is a system that has been serving mostly the interests of large and powerful corporations; it has been used to attack measures taken by countries to provide relief from the pandemic; and not only has it been used against environmental policies, but it will soon become an obstacle to the transition to a greener economy necessary to combat climate change. Only through a deepened hemispheric economic cooperation that eliminates ISDS can APEP truly deliver on its goals.

BOX 4: The Green Energy Transition Prevails: European Countries' Withdrawal From the Energy Charter Treaty

Following a number of costly awards affecting policies designed to protect the environment and advance a green energy transition, and fearful that corporations would continue to use ISDS to undermine ambitious climate action, many European countries have begun to withdraw from the Energy Charter Treaty (ECT). The ECT is the agreement with ISDS that corporations most frequently turn to initiate investor-state disputes globally. For years, pressure from civil society has been mounting against the ECT, particularly for its incompatibility with both European Union law and the EU's 2050 carbon neutrality objective, and more broadly, with the 2015 Paris Agreement commitments. As a result of the growing environmental concerns with the ECT and beating other countries to the punch, Italy announced in 2014 that it was pulling out of the ECT. The withdrawal came into effect in 2016.

In 2018, in response to growing criticism, a process to modernize the ECT was launched, culminating in a set of reform proposals by June 2022. Since late 2020, however, a group of 282 members of national parliaments and of the European Parliament had already asked ECT negotiators to either fundamentally limit or scrap ISDS or urged governments to withdraw from the agreement altogether. Also in June 2022, the European Parliament issued a resolution calling on EU countries to remove ISDS from their investment agreements. The ECT's reform proposals did not bring about a fundamental revamp or termination of ISDS, and hence, around the time of the 27th United Nations Climate Change Conference (COP 27) and before an official vote on the proposals took place, a large number of ECT contracting parties that are also EU Member States announced their intention to withdraw from the ECT. As of today, the list of withdrawing countries, in addition to Italy, includes Austria, Belgium, Denmark, France, Germany, Luxembourg, the Netherlands, Poland, Portugal, Slovenia, and Spain. More countries are expected to follow suit, given that the European Parliament has already summoned the European Commission to initiate a coordinated exit from the ECT.

II. An ISDS-Free Americas:

International Legal Strategies to Exit ISDS

Countries around the world have launched ISDS exit strategies at the national, bilateral, and multilateral levels. However, the national processes have been less effective in reducing liability to ISDS claims and the risk of challenges to public-interest policies, with the denunciation of BITs taking effect 10 to 15 years after the fact. In the meantime, governments and other stakeholders remain bound by an outdated regime that is widely recognized as ill-suited for contemporary investment policy objectives and conflicting with other critical social, economic, and environmental policy goals, leading to increasingly concerning consequences.

Bilateral and multilateral exit strategies are more effective since they have the potential to facilitate the alignment of thousands of existing BITs and FTAs with investment chapters (including ISDS) with evolving challenges and opportunities in the investment field. Thus, to free themselves from the ongoing liability and policy constraints of existing investment agreements, the U.S. government and its APEP partners can consider three pragmatic options in the near term:

1. Termination of BITs with an agreement to neutralize sunset clauses.
2. Amendment to remove the investment chapter, or the ISDS provisions only, from FTAs, with an agreement to neutralize sunset clauses, where applicable.
3. Withdrawal of consent to ISDS arbitration from BITs and FTAs.

As a general rule in public international law, contracting countries are the "masters of their treaties."[93] As such, they are free to define the content of their international agreements; terminate or withdraw from them unilaterally; or terminate, modify, or amend them by mutual consent. These are legitimate and rational options for governments aiming to address the excessive costs and risks associated with the current regime.[94] These options can be taken while ongoing discussions and negotiations of new procedural mechanisms continue in other fora, like UNCITRAL's Working Group III.[95]

93. Here we are using the international law notion of the term "treaty," which is an international agreement between two or more countries.
94. Brooke Güven and Lise Johnson, "Draft Treaty Language: Withdrawal of Consent to Arbitrate and Termination of International Investment Agreements," submission to UNCITRAL Working Group III on ISDS Reform, July 15, 2019, https://ccsi.columbia.edu/sites/default/files/content/docs/publications/UNCITRAL-submission-Withdrawal-of-Consent-and-Termination.pdf.
95 See "Working Group III: Investor-State Dispute Settlement Reform," United Nations Commission on International Trade Law, accessed August 28, 2023, https://uncitral.un.org/en/working_groups/3/investor-state.

1. Policy Option One: Termination of BITs With an Agreement to Neutralize Sunset Clauses

In the case of BITs, governments can terminate them in conformity with the BITs' termination provisions or with the consent of all parties.[96] Article 54 of the Vienna Convention on the Law of Treaties (VCLT) makes clear that if governments agree to terminate an agreement, they may do so at any time.

In addition to terminating BITs by mutual consent, all BITs among APEP partners contain provisions allowing for, and specifying the conditions of, unilateral withdrawal from the BIT. Many require a period of advance notice before withdrawal becomes effective, as well as specifying consequences for existing and future investments after termination. While the specific wording of such provisions varies by BIT, there are three main models of termination clauses:[97]

1. Under BITs with a **tacit renewal termination clause**, the BIT is in force for a specified term. At the end of that term, the BIT is automatically renewed for an additional term unless one of the parties terminates it within the specified timeframe. Termination requires prior written notification by the terminating party. At least three BITs in force among APEP partners fall under this model.[98]

2. Under BITs with a **fixed term termination clause,** the BIT enters into force for an agreed period of time that is set out in the BIT. After the expiry of that term, either party can terminate it at any time. Termination requires advance written notice prior to taking effect. This is usually a period of one year.[99] Most BITs among APEP partners, including all U.S. BITs, fall under this model.[100]

3. Under BITs with an **open termination clause**, the clause contains no restrictions as to when termination can occur. However, like the other models, termination under this model requires advance notice prior to taking effect. All of Canada's existing BITs with other APEP partners and two BITs among Latin American countries (Colombia–Peru BIT (2007) and Chile–Uruguay BIT (2010)) fall under this model.[101]

96. Vienna Convention on the Law of Treaties, May 23, 1969, UN Doc. A/Conf.39/27 / 1155 UNTS 331 / 8 ILM 679, Article 54.
97. Nathalie Bernasconi-Osterwalder et al., "Terminating a Bilateral Investment Treaty," *International Institute for Sustainable Development*, March 2020, https://www.iisd.org/system/files/publications/terminating-treaty-best-practices-en.pdf.
98. These include the Chile-Dominican Republic BIT (2000), the Mexico-Uruguay BIT (1999), and the Dominican Republic-Panama BIT (2003). As an example, in the Dominican Republic-Panama BIT (2003), Article XIII provides:
   1. ...
   2. [This Agreement] will remain in force for an initial period of ten (10) years and will be automatically renewed for periods of equal duration, unless the Agreement has been terminated.
   3. After ten (10) years, each Contracting Party may terminate this Agreement by means of prior written notification, made at least six (6) months prior to its termination. In the event of denunciation, the provisions of Article 1 to Article XII of this Agreement will continue to apply to investments made before the date of denunciation, for an additional period of ten (10) years.

99. Bernasconi-Osterwalder et al., "Terminating a Bilateral Investment Treaty," 2.
100. For example, Article 22 in the U.S.-Uruguay BIT (2005) uses this type of termination clause:
   1. This Treaty shall enter into force thirty days after the date of exchange instruments of ratification. It shall remain in force for a period of ten years and shall continue in force thereafter unless terminated in accordance with paragraph 2.
   2. A Party may terminate this Treaty at the end of the initial ten-year period or at any time thereafter by giving one year's written notice to the other Party.
   3. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.

101. For example, Article XVIII of the Barbados-Canada BIT (1996) provides:
   1. ...
   2. This Agreement shall remain in force unless either Contracting Party notifies the other Contracting Party in writing of its intention to terminate it. The termination of this Agreement shall become effective one year after notice of termination has been received by the other Contracting Party. In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, the provisions of Articles I to XVII inclusive of this Agreement shall remain in force for a period of fifteen years

Further, the BITs in force among all APEP countries include **"sunset" or "survival" clauses**. These clauses extend certain legal protections for a specified period of time after the BIT's termination, typically ranging from five to 20 years. These legal effects are applicable to investments made in the host country prior to the termination of the BIT. For example, the Ecuador-U.S. BIT (1993), which was terminated in 2018, provides U.S. investors who invested in Ecuador prior to 2018 access to ISDS until 2028 due to the sunset clause.

Implementing the Termination of BITs

Governments have three options when it comes to terminating their existing BITs:

1. Governments can adopt a **multilateral instrument to terminate multiple BITs** at once. This instrument could take the form of an opt-in agreement. This is the approach taken by the EU Member States for the termination of their intra-EU BITs.[102] The advantage of a multilateral instrument is that it does not require individual bilateral terminations or negotiations. It might also lessen the pressure on terminating governments, allowing them to coordinate and more clearly and loudly express that their actions are not directed against international investors but against expansive protections and ISDS in BITs, and are taken in accordance with, and with continued respect for, international law.

2. Governments may instead agree to **bilaterally terminate each of their BITs** by mutual consent. This can be done at any time, according to Article 54 of the VCLT. For example, the Czech Republic terminated its BITs in this way with Denmark, Italy, Malta, and Slovenia between 2009 and 2010 through a mutual agreement reached via an exchange of notes (known as a *note verbale*). This exchange was recognized as an official agreement to terminate their respective BITs.[103]

   The U.S. government and its APEP partners may choose to issue a declaration with model language to terminate all BITs in force on an agreement-by-agreement basis. In this way, APEP could also work as a model for countries outside of this group to exit BITs and ISDS altogether.

3. Some governments may opt for the unilateral termination of their BITs according to the terms of the particular BIT, as has already been done by certain countries. Ecuador, for instance, unilaterally terminated several of its BITs in 2017 and 2018 after they were in force for the specified term required by the termination clause. These included Ecuador's BITs with Canada, Chile, Peru, and the United States.

Since the BITs in force among APEP countries under the fixed term termination model are all past the initial specified term, parties to these BITs can unilaterally terminate them at any time with advance notice. The same is true for BITs under the open term termination model. Of the three BITs that fall under the tacit renewal termination model, the Dominican Republic-Panama BIT (2003) is up for renewal in 2026. In this case, either party to the BIT may unilaterally terminate it

102. See the text of "Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union," *Official Journal of the European Union* 169, no. 1 (May 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A0529(01).
103. Tania Voon and Andrew D. Mitchell, "Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law," ICSID *Review-Foreign Investment Law Journal* 31, no. 2 (February 2016): 413, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2735974.

by means of a prior written notification, made at least six months prior to its termination. The other two BITs — the Chile-Dominican Republic BIT (2000) and the Mexico-Uruguay BIT (1999) — may be unilaterally terminated before their renewal in 2032.

Although BITs provide signatories the ability to unilaterally terminate them, they do not include the ability to unilaterally neutralize the effect of the sunset clause. As a result, both signatories to these BITs must agree to neutralize the clause, or else the terminating party will remain subject to ISDS claims for a number of years after its unilateral termination of the BIT. This is the position that Ecuador finds itself in with respect to the BITs it terminated unilaterally.

In the case of mutual termination — either bilaterally among signatories or by way of a multilateral instrument — the sunset clause may be neutralized by explicit consent of the parties.[104] The VCLT affirms that signatories may, by agreement, amend an international agreement (VCLT Article 39), including an amendment to remove the sunset clause or to neutralize the sunset clause. The VCLT also affirms that signatories may, by agreement, completely terminate an international agreement (VCLT Article 54(b)), which would also terminate the sunset clause.[105] This finds support in recent practice.[106]

In addition, Article 70(1) of the VCLT refers to party autonomy as regards the determination of the consequences of termination by stating that:

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
   (a) releases the parties from any obligation further to perform the treaty;
   (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.[107]

According to this Article, the usual consequence of terminating an international agreement (i.e., to release "the parties from any obligation further to perform the treaty") can be altered if "the treaty otherwise provides or the parties otherwise agree." Therefore, in the case of a mutually agreed termination of a BIT that includes a sunset clause applicable to such termination, the parties' release "from any further obligation to perform the treaty" would be modified (postponed according to the content of the clause). However, this outcome can change when the parties agree to terminate a BIT with the intention of terminating all of its effects, including the sunset clause, whether or not previously agreed upon. The question then arises as to whether it is the pre-agreed sunset clause or the subsequent agreement to terminate the entire BIT that should take precedence.[108]

In general treaty law, as included in the VCLT, the latter solution is favored. Article 54 of the VCLT provides:

104. Christina Binder, "A Treaty Law Perspective on Intra-EU BITs," *The Journal of World Investment & Trade 17*, no. 6 (November 2016): 964-983, https://doi.org/10.1163/22119000-12340024.
105. Valerio Letizia, "The EU Termination Agreement and Sunset Clauses: No 'Survivors' on the (Intra-EU) Battlefield?" Kluwer Arbitration Blog, last modified June 22, 2022, https://arbitrationblog.kluwerarbitration.com/2022/06/22/the-eu-termination-agreement-and-sunset-clauses-no-survivors-on-the-intra-eu-battlefield/.
106. *UP and C.D Holding Internationale v. Hungary* Award, ICSID Case No. ARB/13/35, October 9, 2018, para 265, https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/13/35.
107. VCLT, Article 70(1), "Consequences of the termination of a treaty." Indeed, states also have the option to shorten or amend the sunset clause when terminating the relevant BIT.
108. August Reinisch and Sara Mansour Fallah, "Post-Termination Responsibility of States?—The Impact of Amendment/Modification, Suspension and Termination of Investment Treaties on (Vested) Rights of Investors," ICSID *Review - Foreign Investment Law Journal 37*, no. 1-2 (Winter/Spring 2022): 101-113, https://doi.org/10.1093/icsidreview/siab023.

> The termination of a treaty or the withdrawal of a party may take place:
> (a) in conformity with the provisions of the treaty; or
> (b) at any time by consent of all the parties after consultation with the other contracting States.

This Article offers the parties a choice either to follow the pre-agreed method of termination (as provided by the termination clause in the BIT) or reach a subsequent agreement. The wording of this provision does not suggest that if a BIT contains provisions regarding its termination, subsequent mutual termination would be prohibited.[109]

To avoid this dilemma and completely eliminate the effects of a sunset clause, parties to a BIT must include a specific and explicit provision stating that the sunset clause — and any rights and obligations conferred by it — no longer applies.[110] This can be done in one of two ways. Some countries, like the Czech Republic, adopted a two-step approach by first amending the BITs to remove the sunset clause, and then terminating those BITs.[111] This approach recognizes the freedom of contracting parties to amend international agreements, and by doing so, such clauses can be removed before initiating the termination process. Alternatively, countries can agree to end the sunset clause at the same time as they agree to terminate a BIT. For example, when EU Member States concluded the agreement to terminate all intra-EU BITs, Article 2 of their termination agreement provided that "[f]or greater certainty, Sunset Clauses [...] are terminated [...] and shall not produce legal effects."[112]

When a BIT is mutually terminated and the sunset clause is extinguished, the investment obligations of the signatories toward foreign investors under that BIT cease to exist. Thus, terminating BITs would definitively reduce the exposure of APEP countries to claims or liabilities, providing an opportunity for a fresh start. These countries can then develop and implement policies that take into account evidence on attracting and governing investments in a manner that aligns with their climate, environmental, and energy transition objectives, as well as their broader national development goals.[113]

109. Reinisch and Mansour Fallah, "Post-Termination Responsibility."
110. Tania Voon, Andrew D. Mitchell, and James Munro, "Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights," *ICSID Review - Foreign Investment Law Journal* 29, no. 2 (April 2014): 451-467, https://doi.org/10.1093/icsidreview/sit051.
111. The Czech Republic adopted a sophisticated two-step approach by first amending the BITs with several EU Member States by eliminating the sunset clause and subsequently terminating the amended BITs. However, it remains debatable whether there is any significant distinction between this approach and the simultaneous termination outlined in the termination agreement among EU Member States. See Luke Eric Peterson, "Czech Republic Terminates Investment Treaties in Such a Way As to Cast Doubt on Residual Legal Protection for Existing Investments," *Investment Arbitration Reporter*, February 1, 2011, https://www.iareporter.com/articles/czech-republic-terminates-investment-treaties-in-such-a-way-as-to-cast-doubt-on-residual-legal-protection-for-existing-investments/.
112. "Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union," *Official Journal of the European Union* 169, no. 1 (May 2020): Article 2, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A0529(01).
113. Lise Johnson, Lisa Sachs, and Nathan Lobel, "Aligning International Investment Agreements with the Sustainable Development Goals," *Columbia Journal of Transnational Law* 58, no. 1 (November 2019): 58, https://www.jtl.columbia.edu/journal-articles/aligning-international-investment-agreements-with-the-sustainable-development-goals.

2. Policy Option Two: Amendment to Remove the Investment Chapter From FTAs and Agreement to Neutralize Sunset Clauses, Where Applicable

A large proportion of the ISDS-enforced agreements among APEP countries take the form of FTAs that include a chapter on investment. These investment chapters offer investor protections similar, or even identical, to those found in BITs, including access to ISDS. Due to the extensive coverage of an FTA compared to a BIT, terminating FTAs for the purpose of mitigating ISDS risks may be impractical or undesirable. However, it is possible to remove the investment chapter from an FTA through an amendment (by way of Articles 39-40 of the VCLT or the provisions of the FTA), provided there is mutual consent among the parties involved.

Amendment provisions in FTAs are straightforward. For example, Article 34.3 of the USMCA[114] provides:

1. The Parties may agree, in writing, to amend this Agreement.
2. An amendment shall enter into force 60 days after the date on which the last Party has provided written notice to the other Parties of the approval of the amendment in accordance with its applicable legal procedures, or such other date as the Parties may agree.

Once the parties agree to remove the investment chapter, a formal agreement is drafted to reflect the proposed changes.

In the case of a plurilateral FTA in which not all parties are APEP countries (e.g., the Dominican Republic-Central America FTA, or CAFTA-DR), Article 41 of the VCLT holds that such an agreement may be modified in relation to a group of parties only (in their reciprocal relations), while remaining in effect with respect to parties outside that group.[115] This is done by way of an *inter se* agreement concluded between those parties only, and intended to modify the agreement between themselves alone.[116]

114. USMCA (2020), https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.
115. VCLT, Article 41, "Agreements to modify multilateral treaties between certain of the parties only."
116. Clémentine Baldon and Nikos Braoudakis, "Summary Analysis: Arguments Relating to the Desirability and Feasibility of a Coordinated EU Withdrawal from the ECT and Neutralisation of the Sunset Clause," Veblen Institute for Economic Reforms, December 2022, https://www.veblen-institute.org/IMG/pdf/veblen_summary_note_arguments_re__ect_sunset_clause_13122022.pdf.

BOX 5: Amendment to Remove Only the ISDS Provisions

It is also possible for the U.S. government and its APEP partners to only remove the ISDS provisions from their FTAs (or BITs) through an amendment. In this case, APEP countries would still remain bound by the substantive investor obligations set forth in those FTAs (and BITs). Those obligations could remain subject to state-state dispute settlement mechanisms, meaning that governments — not individual foreign corporations or investors — would decide what the investor protections require, whether they have been violated, and whether it is in the national interest to seek redress. Depending on the substantive obligations left in the investment chapter of an FTA, state-state dispute settlement would be less likely to result in exorbitant and frivolous claims, in challenges of legitimate policy measures, and in outcomes that are contrary to public policy.[117] An amendment to remove ISDS from these agreements may therefore strike a useful balance between change and stability, continuing to provide investment protections and state-state dispute settlement, but tackling the issue of ISDS while reforms are ongoing.

One possible complication to implementing the removal of ISDS provisions from FTAs (or from BITs) arises from most-favored-nation (MFN) clauses, which may be invoked during a dispute in order to import ISDS provisions from another BIT or FTA. Fortunately, MFN clauses in agreements that follow the U.S. model are bulletproofed against this strategy, because they have an exhaustive list of matters to which the clause applies, and this list excludes the dispute settlement mechanism.[118] However, in order to prevent such unintended consequences for other types of agreements, countries should amend the MFN clause of their BITs and FTAs by restricting its scope to a limited number of matters, or by providing that it specifically does not apply to dispute settlement mechanisms or to procedural protections more generally. For example, the Colombia-Switzerland BIT bars the application of the MFN provision to dispute settlement mechanisms by stating:

> For greater certainty, it is further understood that the most favourable treatment … does not encompass mechanisms for the settlement of investment disputes provided for in other international agreements related to investments concluded by the Party concerned.[119]

117. See discussion in Anthea Roberts, "State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority," *Harvard Journal of International Law* 55, no. 1 (Winter 2014): 25-26, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2315078; also see Nathalie Bernasconi-Osterwalder, "State–State Dispute Settlement in Investment Treaties," IISD Best Practices Series (October 2014), https://www.iisd.org/system/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf.

118. For example, the MFN provision in the Dominican Republic-Central America FTA (CAFTA-DR) states:
Article 10.4: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Even for those treaties that provide more open-ended language, the importation of procedural rights through the MFN clause is controversial. See Suzy H. Nikièma, "The Most-Favoured-Nation Clause in Investment Treaties," IISD *Best Practices Series* (February 2017): 13-17, https://www.iisd.org/system/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf.

119. Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, Protocol, Ad article 4, paragraph 2.

The Comprehensive Economic and Trade Agreement (CETA) similarly provides more clarity. In that agreement, Canada and the European Union specify that the MFN provision of the agreement does not permit importation of procedural or substantive standards. The CETA makes clear that, by the mere act of giving investors from one country the ability to benefit from certain procedural or substantive protections under one international investment agreement, the government does not give those investors "treatment" capable of being more or less favorable than what is provided under another international investment agreement. Article X.7(4) of the CETA states:

> *For greater certainty*, the "treatment" referred to in Paragraph 1 and 2 does not include investor-to-state dispute settlement procedures provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this article, absent measures adopted by a Party pursuant to such obligations.[120]

The most salient example of the amendment option to remove ISDS is the renegotiated investment chapter in the USMCA. The USMCA, which entered into force on July 1, 2020, revised and modernized NAFTA with new provisions, including an amendment to the investment rules. Particularly, ISDS provisions were removed via an amendment between the United States and Canada (and Mexico and Canada, although these countries continue to be subject to ISDS claims on a bilateral basis through the Comprehensive and Progressive Agreement for Trans-Pacific Partnership). Additionally, the ISDS provisions were drastically amended for the United States and Mexico. These two countries scaled back foreign investors' protections and limited the ability of potential claimants to access ISDS by requiring them to first exhaust domestic remedies available to resolve their dispute (with a few exceptions).[121]

120. CETA, Article X.7(4) (emphasis added).

121. Nathalie Bernasconi-Osterwalder, "USMCA Curbs How Much Investors Can Sue Countries—Sort of," *International Institute for Sustainable Development*, October 2, 2018, https://www.iisd.org/articles/usmca-investors; Scott Sinclair, "The Rise and Demise of NAFTA Chapter 11," *Canadian Center for Policy Alternatives*, April 2021, https://policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2021/04/The_Rise_and_Demise_of_NAFTA_Chapter_11.pdf.

Implementing the Removal of the Investment Chapter from FTAs

An amendment to remove the investment chapter from an FTA may involve bilateral negotiations or multilateral consultations among the contracting parties, depending on the FTA. Because an amendment requires an agreement between the parties to the FTA, it cannot be implemented unilaterally. It can, however, be formalized either on an agreement-by-agreement (bilateral) basis, or by way of a multilateral instrument, similar to the discussion above regarding the termination of BITs.

Most FTAs do not include a sunset clause. However, among the APEP partners, there are at least three agreements that do contain such a clause. These agreements are the Additional Protocol to the Framework Agreement of the Pacific Alliance (2014),[122] the Mexico-Panama FTA (2014),[123] and the CARICOM-Dominican Republic FTA (1998).[124] The sunset clause in these FTAs apply only to their investment chapters and is triggered only after the unilateral termination of the entire agreement. Even so, in order to effectively exit ISDS and terminate investment protections within these FTAs, the sunset clauses should be amended or neutralized by consent to render them inapplicable. The amendment or neutralization of the sunset clause can be carried out either before or simultaneously with the amendment to remove the investment chapter from the FTA. By addressing and modifying the sunset clauses in these specific FTAs, the parties can ensure that the provisions related to ISDS and investment protections no longer apply.

3. Policy Option Three: Withdrawal of Consent to ISDS Arbitration From BITs and FTAs

All BITs and FTAs with ISDS include a clause by which the contracting parties to the agreement provide consent to ISDS arbitration. Therefore, a third option available to the U.S. government and its APEP partners is to conjointly withdraw consent to ISDS from those BITs and FTAs. This would end the foreign investor challenges in ISDS tribunals that are now possible under existing agreements. This would enable countries to focus on developing new approaches to investment policy and dispute settlement that better meet their policy goals. Similar to the removal of ISDS provisions described above in Box 5, APEP countries would still remain bound by the substantive investor obligations set forth in those BITs and FTAs, which could be subject to state-state dispute settlement mechanisms.

122. The Additional Protocol to the Framework Agreement of the Pacific Alliance (2014), Article 19.6, states:
   1. None of the Parties may denounce this Additional Protocol without having denounced the Framework Agreement of the Pacific Alliance.
   2. The denunciation of the Framework Agreement of the Pacific Alliance will imply the denunciation of this Additional Protocol in accordance with the provisions of Article 16 of said Agreement.
   3. Without prejudice to the provisions of paragraphs 1 and 2, Chapter 10 (Investment) will remain in force for a period of five years from the denunciation of this Additional Protocol, with respect to investments made at least one year before from the date of said complaint.

123. The Mexico-Panama FTA (2014), Article 20.6, states:
   1. Any Party may denounce this Agreement. The denunciation will take effect 180 days after it is communicated in writing to the other Party, unless the Parties agree otherwise.
   2. Notwithstanding the provisions of paragraph 1, the investment provisions shall continue in force for a period of 10 years from the termination of this Agreement, with respect to investments made only during its validity.

124. The CARICOM-Dominican Republic FTA (1998), Article XVIII, states:
   1. Any Party may at any time withdraw from this Agreement by giving written notice of termination to the other Party. Termination shall take effect six (6) months after such notice is received by the other Party. The rights acquired and the obligations assumed under this Agreement shall cease on the effective date of termination, except as provided in paragraphs 2 and 3 of this Article.
   2. ...
   3. The provisions of the Agreement on the Reciprocal Promotion and Protection of Investments (Annex III) shall continue to apply to investments established or acquired prior to the date of termination, for a period of ten years from the date of termination, except in so far as those provisions extend to the establishment of covered investments.

Implementing the Withdrawal of Consent to ISDS Arbitration From BITs and FTAs

The new APEP-driven instrument could also be used by all contracting parties to withdraw their consent to ISDS in their existing BITs and FTAs through an amendment of these agreements.[125] This could be implemented by countries on an agreement-by-agreement (bilateral) basis.

Alternatively, APEP countries could sign onto a jointly crafted multilateral agreement, which would offer a simpler and more systematic approach to addressing and managing concerns regarding their consent to ISDS arbitration in all of their BITs and FTAs. This approach would consolidate these concerns into a single instrument. This instrument, which may be in the form of an opt-in agreement, could provide legal and political support for such a decision, and could apply to all underlying BITs and FTAs concluded by the countries that opt in, all BITs and FTAs specifically identified, or all BITs and FTAs except those specifically identified.

It is also possible for a government to unilaterally withdraw consent to ISDS arbitration from any or all of its BITs and FTAs at any time. However, the effectiveness of this unilateral move is unclear and subject to ISDS risks. Namely, if a country unilaterally withdraws consent to ISDS, there is a risk that investors would continue to bring ISDS cases, challenging the legality of the county's unilateral decision to withdraw consent to arbitrate,[126] and that ISDS arbitrators could potentially affirm jurisdiction over such a claim and find in the investors' favor, thus ignoring the country's action. Similarly, the non-withdrawing party may contend that its counterparty's withdrawal of consent to ISDS violates its obligations under the BIT or FTA. Thus, while this is a potential option, it is not without risk, given the possibility of controversial decisions by ISDS tribunals. Indeed, if this is the only option available to some countries, it is imperative that the non-withdrawing party provide a commitment to waive objections to their counterparty's withdrawal of consent to ISDS arbitration.

4. Multilateral Instrument to Effectuate Policy Options One, Two, and Three

The policy changes discussed above can be effectuated by an all-encompassing multilateral instrument that would take effect with respect to mutually agreeing countries. This could be part of APEP, or the APEP negotiating rounds could be used to develop a separate legal instrument for this purpose. Such a multilateral instrument, which would include an agreement to neutralize the sunset clause of each affected agreement, would allow each participating country to indicate which of the three options outlined above — termination of a BIT, amendment to remove the investment chapter from an FTA, amendment to remove only the ISDS provisions from an FTA (or BIT), or withdrawal of consent to ISDS arbitration from a BIT or FTA — would apply to each of its existing agreements. If there is a match between parties of the same agreement, that option takes effect for that particular BIT or FTA. In this way, countries can effectuate whatever changes they agree to for each of their agreements.

125. VCLT, Articles 39-41.

126. Some treaties, however, appear to prevent investors from challenging withdrawals of consent. In Section B of the investment chapter (Chapter 11) of the North American Free Trade Agreement, for instance, the state parties provide their consent to arbitration. Section B, which is the section that provides for ISDS, further specifies that covered investors are only able to bring ISDS claims for breaches of Section A (setting forth Chapter 11's substantive obligations). Thus, NAFTA does not seem to allow investor claims relating to consent or other obligations set forth in Section B.

As an example, if the United States government chooses to terminate its BIT with Uruguay, and Uruguay also chooses that option with respect to that particular BIT, there is a match and therefore, that BIT is terminated. In the context of a plurilateral FTA, like the CAFTA-DR, if APEP countries (e.g., Costa Rica, the Dominican Republic, and the United States) all choose to amend and remove the ISDS provisions in that FTA, that would function as an *inter se* agreement between those three countries, without impacting the other parties to the CAFTA-DR.

Working such a multilateral instrument into the APEP framework would enable an efficient way to deal with all relevant BITs and FTAs among APEP countries through a consensual process. In such an opt-in multilateral instrument, each country would:

1. Specify the BITs it seeks to terminate according to their respective terms, and the BITs it wishes to terminate with immediate effect;[127]
   - For those BITs being terminated, indicate its intention to waive any notice periods or other conditions for termination by its counterparties;[128]
2. Specify the FTAs it seeks to amend in order to remove the entire investment chapter or, alternatively, just the ISDS provisions;
   - For those FTAs in which the ISDS provisions have been removed, indicate the preferred dispute settlement mechanism available for foreign investor grievances;
   - For those FTAs in which only the ISDS provisions have been removed, amend the MFN provision of the FTA by limiting its scope to certain matters only, or by explicitly excluding procedural matters from its scope, like ISDS;
3. Specify the BITs and FTAs it seeks to withdraw consent to arbitrate;
4. Indicate that it aims to amend underlying BITs and FTAs by excising the sunset clause from those underlying identified or non-excluded agreements, which can operate as an amendment when its counterparties similarly indicate their intention to excise the sunset clause; [129] and
5. Set forth certain affirmations, including commitments to continue to provide foreign investors and investments the treatment required by customary international law and other relevant legal instruments.

127. While some treaties, such as certain human rights treaties, may not permit a right of withdrawal, investment treaties do not appear to be of such a type. See discussion in Laurence R. Helfer, "Terminating Treaties," in *The Oxford Guide to Treaties*, ed. Duncan Hollis (Oxford University Press, 2013), 634, 637-40.
128. For more on unilateral denunciation and withdrawal, see Helfer, "Terminating Treaties."
129. VCLT, Articles 30, 40, 41.

III. Turning the Tide:

How the United States Can Unite with Its Neighbors on a Hemispheric ISDS Exit

For decades, the United States was among the main promoters of ISDS and greatly expanded its scope of coverage worldwide by adding ISDS to FTAs, starting with NAFTA in 1994. Evidence of the U.S. zeal for promoting these deals is that it has agreements with ISDS provisions with nine of its 11 APEP partners — all except for Barbados and Canada. (The USMCA terminated ISDS between the United States and Canada on July 1, 2023.)

Given this context, President Biden's unequivocal repudiation of ISDS could have been surprising. In May 2020, then-candidate Biden answered a questionnaire from one of the largest U.S. industrial unions, the United Steelworkers. Biden said, "I don't believe that corporations should get special tribunals that are not available to other organizations. I oppose the ability of private corporations to attack labor, health, and environmental policies through the Investor-State Dispute Settlement (ISDS) process, and I oppose the inclusion of such provisions in future trade agreements."[130]

Fifteen years earlier, it would have been almost unimaginable to have a leading U.S. presidential candidate publicly denounce ISDS. However, the turn against ISDS in the United States has been years in the making, and President Biden's position enjoys support across the U.S. political spectrum.

1. Widespread Criticism of ISDS in the United States

In 2020, when President Biden announced opposition to ISDS, he was not an outlier promoting a radical idea. As the record[131] of outrageous ISDS rulings expanded,[132] the United States faced investor challenges[133] that infuriated members of Congress and state[134] and local officials. Public awareness also grew as U.S. corporations used ISDS to attack Canadian and Mexican environmental

130. "Biden for President United Steelworkers Questionnaire," USW Voices, May 17, 2020, https://www.uswvoices.org/endorsed-candidates/biden/BidenUSWQuestionnaire.pdf.
131. Anthony Depalma, "Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say," *New York Times*, March 11, 2001, https://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html.
132. "Case Studies: Investor-State Attacks on Public Interest Policies," Public Citizen, last modified March 6, 2015, https://www.citizen.org/wp-content/uploads/egregious-investor-state-attacks-case-studies_4-1.pdf.
133. "New Study Analyzes Seven Years of Corporate Investor Challenges to Democratic Governance and State Sovereignty Under NAFTA," Public Citizen, last modified September 4, 2001, https://www.citizen.org/news/new-study-analyzes-seven-years-of-corporate-investor-challenges-to-democratic-governance-and-state-sovereignty-under-nafta/; "TransCanada Demands $15 Billion in NAFTA Investor-State Tribunal for XL Pipeline Rejection," Public Citizen, last modified January 6, 2016, https://www.citizen.org/wp-content/uploads/nafta-isds-keystonexl-statement.pdf.
134. "Trade Pacts' 'Investor-State' Systems: Private Corporate Tribunals Used to Attack Countries' Courts," Public Citizen, last modified September 26, 2012, https://www.citizen.org/wp-content/uploads/loewen-case-brief-final.pdf.

and health policies, two popular California environmental policies, and even a state's Supreme Court decision. As a result, more scrutiny was focused on the obscure process that many people were unaware was embedded in a dozen U.S. trade agreements.

Opposition to ISDS within the United States solidified during the Obama administration, which was pushing for a massive expansion of ISDS through the Trans-Pacific Partnership (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP).[135] The two agreements would have expanded ISDS dramatically, empowering tens of thousands of new foreign corporations in the United States to challenge U.S. policies and demand taxpayer compensation, while also enabling U.S. corporations to advance ISDS challenges against numerous additional countries.[136] Public and policymaker opposition to ISDS played a role in the Obama administration's inability to secure congressional approval of TPP in the year following its signing in 2015. Similarly, the TTIP was sunk by ISDS opposition in Germany, a country that had previously been a major ISDS proponent, but changed its stance when confronted with two multibillion dollar claims filed by Swedish energy company Vattenfall, one over improved environmental standards for coal-fired electric generation and another related to the phase-out of nuclear power.[137] Notably, even though the Fukushima nuclear plant disaster galvanized German public opinion against nuclear energy, the government had to pay approximately USD 1.7 billion to the Swedish energy corporation to settle the second case.[138] The amount the German government paid Vattenfall in the second (coal-fired electricity) case has not been disclosed, but the firm demanded USD 1.4 billion.[139]

Even before the TPP and TTIP debates, associations of U.S. local and state government officials had voiced their opposition to ISDS as they witnessed escalating numbers of attacks on policies and actions at home and abroad.[140] For instance, in 2002, the U.S. National Association of Attorneys General issued a policy on ISDS calling on Congress to "ensure that in any new legislation providing for international trade agreements foreign investors shall receive no greater rights to financial compensation than those afforded to our citizens."[141] As the TPP and TTIP debates crested, such organizations were increasingly

135. On February 26, 2015, Senator Elizabeth Warren gave a floor speech denouncing the issues of including ISDS in the TPP, which triggered a response in the form of a personal attack on Sen. Warren from then-President Obama in an attempt to defend the deal. Speech available at: https://www.youtube.com/watch?v=xzfxv2XQoPg; Ali Breland, "Obama slams Warren on trade comments," *Politico*, May 9, 2015, https://www.politico.com/story/2015/05/obama-slams-elizabeth-warren-on-trade-117778.

136. "Tens of Thousands of U.S. Firms Would Obtain New Powers to Launch Investor-State Attacks against European Policies via CETA and TTIP," Public Citizen, last modified December 9, 2014, https://www.citizen.org/article/tens-of-thousands-of-u-s-firms-would-obtain-new-powers-to-launch-investor-state-attacks-against-european-policies-via-ceta-and-ttip/.

137. Shawn Donnan and Stefan Wagstyl, "Transatlantic Trade Talks Hit German Snag," *Financial Times*, March 14, 2014, http://www.ft.com/cms/s/0/cc5c4860-ab9d-11e3-90af-00144feab7de.html; Vera Weghmann and David Hall, "The Unsustainable Political Economy of Investor-State Dispute Settlement Mechanisms," *International Review of Administrative Sciences 87*, no. 3 (2021): 480-496, 488-490, https://journals.sagepub.com/doi/pdf/10.1177/00208523211007898.

138. Lisa Bohmer, "[Updated] Vattenfall Asks for Discontinuance of ICSID Arbitration Against Germany, After Settlement Enters Into Force," *Investment Arbitration Reporter*, November 2, 2021, https://www.iareporter.com/articles/vattenfall-asks-for-discontinuance-of-icsid-arbitration-against-germany-after-settlement-enters-into-force/.

139. "*Vattenfall v. Germany (I)*," United Nations UNCTAD Investment Policy Hub, accessed August 28, 2023, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/329/vattenfall-v-germany-i-.

140. "Selected Statements and Actions Against Investor-State Dispute Settlement (ISDS)," Public Citizen, last modified October 19, 2016, https://www.citizen.org/wp-content/uploads/selected_statements_and_actions_against_isds_1.pdf.

141. "Resolution: In Support of State Sovereignty and Regulatory Authority," National Association of Attorneys General, last modified March 2002, https://www.citizen.org/wp-content/uploads/national-association-of-attorneys-general-resolution-2002.pdf.

vocal. The U.S. National Conference of State Legislatures (NCSL), representing the mainly Republican-controlled U.S. state legislative bodies, stated in 2016, "NCSL will not support Bilateral Investment Treaties (BITs) or Free Trade Agreements (FTAs) with investment chapters that provide greater substantive or procedural rights to foreign companies than U.S. companies enjoy under the U.S. Constitution. Specifically, NCSL will not support any BIT or FTA that provides for investor/state dispute resolution."[142] The National Association of Counties included in its 2016-2017 policy priorities its opposition to "the adjudication of disputes arising out of trade agreements in a manner that preempts local government authority, circumvents domestic judicial processes, and grants greater rights to foreign investors than those guaranteed to U.S. citizens by federal, state, and local law."[143]

When the Trump administration launched the renegotiation of NAFTA, removing ISDS was part of the agenda. Eliminating this regime from NAFTA was a priority demand from Democratic lawmakers, who had fairly unanimously and consistently opposed ISDS for some time.[144] It was also a priority demand of organized labor (including the AFL-CIO),[145] major environmental groups (including the Sierra Club),[146] hundreds of law and economics professors,[147] faith groups,[148] small businesses,[149] 100 health organizations (including Doctors Without Borders and Oxfam),[150] and more than 1,000 U.S. civil society groups.[151]

During a congressional hearing on his plan to renegotiate NAFTA, then-U.S. Trade Representative Robert Lighthizer explained Republican opposition to ISDS, which did not differ greatly from what at that point was widespread Democratic congressional opposition:

> We are skeptical about ISDS for a variety of reasons which I would like to go into if I have a second to do it. Number one, on the U.S. side there are questions of sovereignty. Why should a foreign national be able to come in and not only have the rights of Americans in the American court system but have more rights than Americans have in the American court system?
>
> (...)

142. "Policies for the Jurisdiction of the Labor and Economic Development Committee," National Conference of State Legislatures, accessed August 28, 2023, https://www.ncsl.org/in-dc/standing-committees/labor-and-economic-development/policies-for-the-jurisdiction-of-the-labor-and-economic-development-committee.
143. "The American County Platform and Resolutions, 2016-17," National Association of Counties, last modified July 25, 2016, https://www.naco.org/sites/default/files/documents/2016-2017%20American%20County%20Platform.pdf.
144. "Selected Statements and Actions Against ISDS," Public Citizen.
145. "Civil Society Speaks Out on NAFTA Renegotiation," Citizens Trade Campaign, last modified May 18, 2017, https://www.citizenstrade.org/ctc/blog/2017/05/18/civil-society-speaks-nafta-renegotiation/.
146. "Replacing NAFTA: Eight Essential Changes to an Environmentally Destructive Deal," Public Citizen, last modified April 2017, https://www.citizen.org/wp-content/uploads/nafta-enviro-redlines-final.pdf.
147. "Hundreds of Academics Urge Trump to Remove Controversial Investor-State Dispute Settlement from NAFTA," Public Citizen, last modified October 25, 2017, https://www.citizen.org/wp-content/uploads/press-release-public-citizen-ccsi-isds-professor-letter-oct-2017.pdf.
148. "NAFTA: Interfaith Statement on Trade and Access to Medicines," Jubilee USA Network, last modified May 18, 2018, https://www.jubileeusa.org/nafta_and_international_public_health_an_interfaith_call_for_access_to_medicines.
149. "Small Business Leaders to Trump: End Advantage for Multinationals Over U.S. Small Businesses in NAFTA," American Sustainable Business Council, last modified July 12, 2017, https://www.citizen.org/wp-content/uploads/small_business_letter.pdf.
150. "Over 100 Organizations Concerned with Health Sign Open Letter to Canadian, Mexican and U.S. Ministers of Health and Trade Urging That the NAFTA Renegotiation Not Undermine Access to Affordable Medicines," Doctors Without Borders, last modified January 24, 2018, https://www.doctorswithoutborders.org/sites/default/files/2018-06/nafta_a2m_letter_jan_24_2018.pdf.
151. "1,000+ Civil Society Groups Outline Shared NAFTA Renegotiation Demands," Citizens Trade Campaign, last modified March 21, 2018, https://www.citizenstrade.org/ctc/blog/2018/03/21/1000-civil-society-groups-outline-shared-nafta-renegotiation-demands/.

> On the outgoing side, there are many people who believe that in some circumstances, and I can discuss the varieties, that in some circumstances it's more of an outsourcing issue. So what is it? It's a situation where somebody says, "I want to move a plant from Texas and I want to put it in Mexico; and when I go down there, I don't want to take the political risk that AMLO is going to win in Mexico and change my bargain. So I want the U.S. government essentially to buy political risk insurance for me.[152]

The outcome of this widespread criticism was the USMCA, which phased out the original NAFTA ISDS provisions (Chapter 11-B).

These developments set the context for Biden's 2020 campaign position. They also show the degree to which ISDS had become discredited across the political spectrum in the United States.

2. Means to Formalize a Coordinated ISDS Exit: U.S. Legal System Considerations

While broad opposition to ISDS in the United States provides some confidence that there will be no new U.S.-led agreements with ISDS, the United States and its APEP partners still need to take action to mitigate their considerable ISDS risks under the existing stock of agreements and treaties with ISDS. Given that the APEP process involves many countries with which the United States has agreements with ISDS, and that it will involve regular meetings among top-level officials and their negotiating teams, this process provides an auspicious venue to deploy a regionally coordinated ISDS exit. Such an exit could be executed through various legal means under international law (as discussed in the previous section), but will also depend on considerations regarding U.S. law, as discussed here.

Six out of the nine U.S. agreements with APEP countries that include ISDS provisions are FTAs, namely, CAFTA-DR, the U.S.-Chile FTA, the U.S.-Colombia FTA, USMCA, the U.S.-Panama FTA, and the U.S.-Peru FTA. The remaining three are BITs that the United States adopted with Ecuador, Panama, and Uruguay. While Ecuador unilaterally terminated its BIT with the United States in 2018, the treaty's sunset clause enables investors to continue to use ISDS until 2028.

The legal vehicles identified in the preceding section would have to be adopted in each country in a way that complies with the requirements of that country's domestic legal system. This is necessary so that they can have a binding effect and truly eliminate the risk of intra-APEP ISDS claims. Consequently, U.S. policymakers need to consider the U.S. legal framework applicable to international trade and investment policymaking.

Under the U.S. Constitution, Congress and the executive branch each have distinctive roles with respect to the negotiation and adoption of trade agreements.[153] Under Article I, Section 8, Congress has exclusive authority over the regulation of commerce with foreign nations and over tariffs. Article II, Section 2, establishes the president's powers to make treaties, provided that the Senate grants its consent by a two-thirds majority.

152. "Brady-Lighthizer ISDS Exchange," International Economic Law and Policy Blog, last modified March 21, 2018, https://worldtradelaw.typepad.com/ielpblog/2018/03/brady-lighthizer-isds-exchange.html.

Kathleen Claussen, "Separation of Trade Law Powers," Yale Journal of International Law 43, no. 2 (June 2018), https://ssrn.com/abstract=3200105.

Over the years, the U.S. Congress has devised various arrangements to coordinate the roles of the legislative and executive branches concerning trade agreements.[154] Initially, trade deals were treated as treaties requiring Senate approval, as well as separate House and Senate approval of any changes to tariff rates. With the Reciprocal Tariff Act of 1934 (RTA), Congress first delegated to the executive branch multi-year authority to reduce tariffs within set bands. After the executive branch exceeded its authority and negotiated non-tariff rules related to subsidies during a General Agreement on Tariffs and Trade round, Congress refused to approve the agreement. President Richard Nixon sought to exploit the situation and proposed a new trade authority that allowed the president to unilaterally proclaim changes to laws to conform to trade pacts. Congress, however, rejected that idea. Nixon then proposed the Fast Track trade authority, which was first authorized in 1974. This mechanism granted the president extensive trade authority for multi-year blocks, leaving Congress with the sole task of approving or disapproving signed deals. The legislation to implement these deals was drafted by the executive without undergoing congressional "markup" amendment procedures. Over time, Fast Track was broadened to encompass negotiations and expedited approval of agreements related to the service sector, intellectual property, investment, and other regulations beyond traditional trade matters. In 2002, this process was rebranded and emerged as the Trade Promotion Authority (TPA).[155]

Under Fast Track, U.S. trade agreements are regarded as congressional-executive agreements. These agreements are negotiated by the executive branch, ostensibly guided by objectives established by Congress. The executive is authorized to sign and enter into these deals, while Congress has the narrow role of a post-facto yes or no vote, requiring a simple majority in both the House of Representatives and the Senate. Amendments are disallowed, and the scope of debate is limited. While this process is currently not in effect, it was employed to negotiate and adopt the six FTAs with Latin American countries covered by the APEP process.

The precise contours and implications of Congress's constitutional trade authority have been subject to ongoing debate.[156] The U.S. Congress has rightfully criticized attempts by the executive branch to negotiate and conclude international agreements on trade-related matters without securing congressional final approval. Recent examples include "skinny" trade agreements, like the 2018 agreement with Japan that covered specific topics, such as digital trade, as well as the Biden administration's agreement with the same country, which focused on trade concerning critical minerals (presented as a "free trade agreement" for purposes of the Inflation Reduction Act Electric Vehicle tax credits).[157] Previously, both Democratic

153. Kathleen Claussen, "Separation of Trade Law Powers," *Yale Journal of International Law* 43, no. 2 (June 2018), https://ssrn.com/abstract=3200105.
154. Lori Wallach, *The Rise and Fall of Fast Track Authority* (Public Citizen's Global Trade Watch, 2013). There are five distinct coordination regimes, the first of which was used for the first 100 years after the nation's founding.
155. Wallach, *The Rise and Fall of Fast Track Authority*.
156. Kathleen Claussen and Timothy Meyer, "The President's (and USTR's) Trade Agreement Authority: From Fisheries to IPEF," *Lawfare Media*, July 18, 2022, https://www.lawfareblog.com/presidents-and-ustrs-trade-agreement-authority-fisheries-ipef.
157. "Agreement between the Government of the United States of America and the Government of Japan on Strengthening Critical Minerals Supply Chains," March 28, 2023, https://ustr.gov/sites/default/files/2023-03/US%20Japan%20Critical%20Minerals%20Agreement%202023%2003%2028.pdf.

and Republican administrations have entered into various new WTO agreements without congressional approval.[158] The Biden administration's expressed intention to implement the trade component of an Indo-Pacific Economic Framework (IPEF) without obtaining congressional approval has sparked bipartisan concern among members of Congress.[159]

The Biden administration, continuing a contention made by prior administrations, claims that its authority to enter into certain trade agreements without congressional approval emanates from the organic statute that established the Office of the U.S. Trade Representative (USTR).[160] According to this statute, the USTR is granted the "lead responsibility for the conduct of, and shall be the chief representative of the United States for, international trade negotiations." The USTR contends that with this statute, Congress has implicitly delegated the authority not only to negotiate, but also to enter into and implement trade agreements.

Constitutional scholars have raised objections to this interpretation, highlighting the historical practice of Congress explicitly granting trade agreement authority to the executive branch — and removing it — over the past 89 years, since Congress first broadly delegated its constitutional trade authority through the Reciprocal Tariffs Act of 1934.[161] Since then, Democratic and Republican presidents alike have sought congressional endorsement to enter into significant bilateral, plurilateral, or multilateral trade agreements. This consent has been obtained through various means, such as extending the RTA authority, utilizing the Fast Track process established in the early 1970s, or through regular floor votes, as seen with congressional approval of the U.S.-Jordan FTA.

Setting aside the discussion surrounding the scope of USTR's trade agreement negotiating authority, past administrations have primarily justified executive agreements that do not undergo ex post congressional approval by pointing to Congress's previous actions, which indicate either express or implied authorization. It is rare for agreements to be implemented solely on the basis of the president's constitutional powers.[162] Thus, the central issue when evaluating the legality of executive international lawmaking pertaining to commercial matters centers on whether Congress has delegated authority concerning the specific subject matter or scope of any particular agreement.

158. For instance, in April 2023, U.S. Trade Representative Katherine Tai signed the United States' instrument of acceptance of the World Trade Organization (WTO) Agreement on Fisheries Subsidies, announcing that no congressional approval was required to enter into this deal. See "Ambassador Tai Signs U.S. Instrument of Acceptance of WTO Agreement on Fisheries Subsidies Alongside WTO Director General Ngozi Okonjo-Iweala," Office of the United States Trade Representative, April 11, 2023, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/april/ambassador-tai-signs-us-instrument-acceptance-wto-agreement-fisheries-subsidies-alongside-wto.

159. Steven Overly, "How USTR, Commerce justify their trade authority," Politico, June 2, 2023, https://subscriber.politicopro.com/newsletter/2023/06/how-ustr-commerce-justify-their-trade-authority-00099838.

160. 19 U.S.C. § 2171, originally part of the Trade Act of 1974; Margaret Spiegelman, "Tai, Raimondo defend engagement with Congress on IPEF; Wyden unmoved," Inside U.S. Trade, June 1, 2023, https://insidetrade.com/daily-news/tai-raimondo-defend-engagement-congress-ipef-wyden-unmoved.

161. Claussen and Meyer, "Trade Agreement Authority." Before the Reciprocal Tariffs Act of 1934, there were instances of narrow congressional delegation of trade authority. For instance, through the McKinley Tariff Act of 1890, Congress gave the president delegated authority to raise tariffs on five commodities for which Congress had cut tariff levels if other countries did not reciprocally cut tariffs. See Kathleen Claussen, "Trade Administration," Virginia Law Review Vol. 107: 845, (March 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3602190.

162. Harold Hongju Koh, "Triptych's End: A Better Framework To Evaluate 21st Century International Lawmaking," *The Yale Law Journal Forum*, (January 2017): 340, https://www.yalelawjournal.org/pdf/KohMacroedFinal_b7ccaqrm.pdf.

Box 6: Legal Mechanisms for U.S. Policymakers to Formalize a Coordinated ISDS Exit

Option 1: Negotiation and Adoption of a Regional Treaty or Congressional-Executive Agreement to Remove ISDS From Existing Agreements

Given that adopting a multilateral or regional instrument to remove ISDS from existing agreements would be unprecedented in the U.S. context, it could be desirable to formalize such an agreement as a treaty or a congressional-executive agreement subject to legislative approval.

Without question, congressionally approved international agreements, such as FTAs and BITs, can be terminated or amended if Congress and the executive branch follow the same procedural steps used for their initial adoption. An example of this is the case of NAFTA and USMCA. Since USMCA's modifications to NAFTA, which the new pact effectively replaced, were adopted through a congressional-executive agreement formally identical to NAFTA, no question could arise as to the legitimacy or constitutionality of USMCA. Therefore, a multilateral or regional instrument that terminates treaties or withdraws consent to ISDS in existing agreements would be legally valid if adopted in the United States as a treaty or a congressional-executive agreement.

This option would replicate the EU approach, given that the 2020 EU "Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union" was subject to ratification, approval, or acceptance procedures.[163]

However, as discussed below, Congress provided presidents broad discretion through TPA's negotiating objectives and in trade-pact implementing legislation concerning ISDS relative to the otherwise specific authorizations and instructions on other aspects of trade agreements. Additionally, the Supreme Court has refused to validate challenges against the president's authority to unilaterally terminate treaties entered into through Senate approval. Thus, a congressionally approved instrument is not the only route to terminate BITs or otherwise withdraw consent to ISDS in intra-APEP BITs and FTAs. Indeed, because ISDS is included in both congressional-executive agreements and treaties, a decision about the type of vote that would be employed could become a heated political tangle even though legally the two instruments are considered to be interchangeable.[164]

Option 2: Negotiation and Adoption of a Regional Executive Agreement to Remove ISDS From Existing Agreements

There are several compelling reasons why adopting an executive agreement that effectively eliminates intra-APEP ISDS would

163. Article 16, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22020A0529%2801%29.
164. Oona Hathaway, "Treaties' End: The Past, Present, and Future of International Lawmaking in the United States," *The Yale Law Journal* 117, no. 7 (2008): 1236, 1244-48, https://doi.org/10.2307/20454683; Louis Henkin, *Foreign Affairs and the United States Constitution 2nd ed.* (Clarendon Press), 217; Myres S. McDougal and Asher Lans, "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: II," *The Yale Law Journal*, (1945); "Treaties and Other International Agreements: The Role of the United States Senate," Committee on Foreign Relations, U.S. Senate, 2001: 173, https://www.congress.gov/106/cprt/SPRT66922/CPRT-106SPRT66922.pdf.

be a better approach. First, given that the ISDS clauses are embedded in both BITs approved by Senate treaty votes and congressionally approved FTAs, the political debates about what form a congressional vote should take and the practical problems of scheduling what might need to be a series of votes could greatly delay, if not derail, an ISDS exit that has bipartisan support. Second, this approach reflects the reality that Congress did not *mandate* the negotiation of ISDS mechanisms in trade deals when granting TPA to the executive branch. Notably, NAFTA's Implementation Act does not mention ISDS at all. And the only reference to ISDS in Congress's FTA subsequent implementing legislation is permissive in nature, granting authorization to the president to engage in ISDS arbitration for the resolution of certain types of specific claims, but by no means requiring it. Indeed, as explained below, the limited reference to ISDS in the implementing legislation of each FTA between the United States and an APEP country is notably different from most other implementing bill terms, which explicitly require the executive branch to do or not do specific actions to implement FTA provisions. The provision that mentions ISDS does not impose a mandatory obligation on the executive branch to engage in the process much less specify obligations for any U.S. agency to implement those terms. In addition, the executive branch possesses broad powers to altogether terminate treaties, such as BITs, without Congress's vote, as described below.

While achieving a regional executive agreement among all APEP countries could be challenging, there is the possibility of achieving the same outcome through bilateral arrangements. Interested countries could use the proximity of their officials participating in the APEP process and negotiating rounds to reach bilateral arrangements leading to the removal of ISDS from their respective BITs and FTAs.

If the United States and only some other APEP countries choose to act, such arrangements could take the form of an exchange of diplomatic letters to terminate BITs and neutralize the respective sunset clauses or protocols to amend the FTAs to remove their investment chapters. For the United States, these instruments would have the nature of executive agreements. Such an approach is consistent with international law and provides a solid defense against any potential investor challenge.

One such scenario could involve the United States proposing a non-binding APEP declaration that contains model language to be adopted by countries wishing to remove ISDS from existing BITs and FTAs. APEP could work as a clearinghouse for these undertakings.

There is a strong legal basis for either of these approaches. Yet, in considering whether an international commitment among APEP countries to exit ISDS should take the form of an ex post congressionally approved agreement or an executive agreement, U.S. policymakers must assess several factors.

Professor Koh's framework is useful for tackling this very question. He posits that any action related to the executive branch's international lawmaking capacity should be analyzed by taking into account three factors: "(i) whether the agreement entails new, legally binding obligations; (ii) the degree of congressional approval for the executive lawmaking; and (iii) the constitutional allocation of institutional authority over the subject matter area at issue."[165] Applying this approach to the current question, the executive branch could enter into an agreement that does not entail new obligations and that can be traced back to Congress's preauthorization or permissibility, even if it falls under a subject matter of plenary congressional authority, such as foreign commerce issues.

Concerning investment chapters in FTAs, the preceding section provided two options to eliminate ISDS: (i) amending FTAs to remove either their investment chapter entirely or solely the ISDS provisions or (ii) amending FTAs to withdraw consent to ISDS arbitration. The standard amendments clause in U.S. FTAs provides that parties may agree on amending any portion of the agreement and that an amendment constitutes an integral part of the agreement as long as it is approved in accordance with the legal requirements of each party.[166] Thus, the relevant question for the U.S. context is whether adopting an instrument that carries out those amendments would be legally viable through an executive action under the parameters of the U.S. legal system.

Neither approach would require modifying U.S. law, nor would it constrain domestic policy space with respect to future congressional action since the United States would not be adopting new legally binding international obligations. Additionally, there would be no concerns about such an instrument's effects on state laws or its risks for the nation as a whole. This is because the proposed agreement would recuperate policy space conceded through investment agreements for Congress, local and state governments, the judicial branch, and executive authorities.

However, the various exit methods need distinct considerations. If a chapter of an agreement approved by Congress is to be eliminated, it would likely necessitate congressional approval. On the other hand, withdrawing consent to ISDS arbitration could be accomplished using an executive agreement, without requiring an ex post vote from Congress. This is due to the discretionary power granted to the president by Congress on this question in the legislation providing trade promotion authority, as well as in the relevant implementing acts, as explained in the next paragraphs.

165. Koh, "Triptych's End," 344.
166. For instance, Article 23.2 of the U.S-Colombia FTA provides: "1. *The Parties may agree on any amendment to this Agreement. 2. When so agreed, and approved in accordance with the legal requirements of each Party, an amendment shall constitute an integral part of this Agreement and shall enter into force on such date as the Parties may agree.*"

As mentioned before, Congress granted Fast Track authority to the executive branch to negotiate the six FTAs with Latin American countries covered by the APEP process. Indeed, the U.S.-Chile FTA, CAFTA-DR, and the U.S.-Peru FTA were negotiated and approved under the Trade Act of 2002's TPA. The executive branch also counted with trade promotion authority as well when it negotiated and adopted the U.S.-Colombia FTA, U.S.-Panama FTA, and USMCA. Within the negotiating objectives set by Congress in all of the relevant TPA bills, there is a subparagraph devoted to "Foreign Investment." Here, Congress mandated that the executive branch negotiate standards of protection for U.S. investors while ensuring that foreign investors would not gain greater substantive rights as compared to U.S. investors in the United States. It is noteworthy that when it comes to dispute settlement, the Trade Act of 2002 only mandates "providing meaningful procedures for resolving investment disputes."[167] Thus, Congress did not instruct the president to include ISDS in FTAs to be negotiated under this trade promotion authority. Its mandate was to include "meaningful" dispute settlement procedures — a requirement that would easily be fulfilled by state-state dispute settlement, which can be used to enforce investment obligations. Furthermore, when the legislation refers to ISDS, it does so in a manner seeking to establish limits on this type of dispute settlement system, for instance, by "seeking to improve mechanisms used to resolve disputes between an investor and a government through— (i) mechanisms to eliminate frivolous claims and to deter the filing of frivolous claims (...)." [168] This language assumes the existence of ISDS mechanisms, but by no means requires their inclusion.

Perhaps more importantly, in contrast to fundamental elements of trade policy like the implementation of the rules of origin, the unilateral termination of trade preferences, or the imposition of certain safeguards, when Congress granted approval for relevant FTAs and authorized the president to engage in ISDS, it did so in a permissive manner. This permissiveness provided the executive branch with broad discretion to determine whether and how to exercise this authority. Nearly every implementation act associated with FTAs concluded with APEP countries includes language authorizing ISDS arbitration for specific types of claims. For instance, consider the United States-Peru Trade Promotion Agreement Implementation Act, which states:

> SEC. 106. ARBITRATION OF CLAIMS.
>
> The United States is authorized to resolve any claim against the United States covered by article 10.16.1(a)(i)(C) or article 10.16.1(b)(i)(C) of the Agreement, pursuant to the Investor-State Dispute Settlement procedures set forth in section B of chapter 10 of the Agreement.

The provisions mentioned in the excerpt above are related to ISDS claims based on an alleged breach of an investment agreement. This is the only reference to ISDS in the implementing legislation that traditionally

167. Section 2102(b)(3)(F) of the Trade Act of 2002. The Trade Promotion Authority legislation that covers the U.S.-Colombia FTA, U.S.-Panama FTA, and USMCA contains the exact same language.
168. Section 2102(b)(3)(G) of the Trade Act of 2002. The Trade Promotion Authority legislation that covers the U.S.-Colombia FTA, U.S.-Panama FTA, and USMCA contains the exact same language.

follows the conclusion of an FTA by the United States. The statements of administrative action accompanying trade-agreement implementing legislation — which are also approved by Congress — clarify that the investment agreements refer to "certain types of government contracts," and section 106 of the implementing law merely clarifies that the United States consents to the arbitration of such disputes. Moreover, the statements of administrative action repeatedly clarify that the executive branch does not need authorization from Congress to engage in ISDS arbitration. For instance, the U.S.-Peru FTA Statement of Administrative Action sets forth: "No statutory authorization is required for the United States to engage in binding arbitration for other claims covered by Article 10.16."[169]

Congress did not *instruct* the president to resolve ISDS claims arising from FTA investment chapters. Rather, Congress authorized the executive branch to engage in such dispute resolution when claims arose from a government contract. It acknowledged that for other types of claims, the president would not require authorization to engage in ISDS arbitration. This means, by implication, that the president also has the discretion to not engage in ISDS arbitration.

Conversely, as illustrated in the table below, concerning the rules that ascertain the origin of goods covered by an FTA, for instance, Congress distinctly directs the executive branch to adopt regulations to comply with certain FTA provisions. FTA implementing legislation also traditionally requires presidents to terminate the designation of the new FTA partner as a beneficiary of any relevant trade preferences program. The table includes these and other examples of mandatory language in FTA implementation legislation that demonstrate, in contrast, the permissive nature of the ISDS-related provisions.

169. "The United States-Peru Trade Promotion Agreement Implementation Act," Office of the United States Trade Representative, June 25, 2007, https://ustr.gov/archive/assets/Trade_Agreements/Bilateral/Peru_TPA/PTPA_Implementing_Legislation_Supporting_Documentation/asset_upload_file194_15341.pdf.

Table 2. Examples of Mandatory Implementation Language From the United States-Peru Trade Promotion Agreement Implementation Act

Subject	Provision	Implementation language (emphasis added)
Termination of generalized system of preferences status	Section 201(a)(2)	Notwithstanding section 502(a)(1) of the Trade Act of 1974 (19 U.S.C. 2462(a)(1)), the President **shall**, on the date on which the Agreement enters into force, terminate the designation of Peru as a beneficiary developing country for purposes of title V of the Trade Act of 1974 (19 U.S.C. 2461 et seq.).
Agricultural safeguards	Section 202(b)	In addition to any duty proclaimed under subsection (a) or (b) of section 201, the Secretary of the Treasury **shall** assess a duty, in the amount determined under paragraph (2), on a safeguard good imported into the United States in a calendar year if the Secretary determines that, prior to such importation, the total volume of that safeguard good that is imported into the United States in that calendar year exceeds 130 percent of the volume that is provided for that safeguard good in the corresponding year in the applicable table contained in Appendix I of the General Notes to the Schedule of the United States to Annex 2.3 of the Agreement.
Regulations to implement commitments on rules of origin and customs user fees	Section 209	The Secretary of the Treasury **shall** prescribe such regulations as may be necessary to carry out— (1) subsections (a) through (n) of section 203; (2) the amendment made by section 204; and (3) any proclamation issued under section 203(o).
Safeguard measures	Section 311(b)	Upon the filing of a petition under subsection (a), the Commission, unless subsection (d) applies, **shall** promptly initiate an investigation to determine whether, as a result of the reduction or elimination of a duty provided for under the Agreement, a Peruvian article is being imported into the United States in such increased quantities, in absolute terms or relative to domestic production, and under such conditions that imports of the Peruvian article constitute a substantial cause of serious injury or threat thereof to the domestic industry producing an article that is like, or directly competitive with, the imported article.

The differences in the language used in the implementation legislation for core trade matters, such as those mentioned above, and the terms related to ISDS arbitration show the intent of Congress to provide the executive branch discretion to not engage in particular ISDS claims or, more broadly, to withdraw consent to ISDS arbitration. Congress's choice to provide presidents with discretion on ISDS and the important difference between establishing new international legal obligations versus reducing such obligations provide a basis for using an executive agreement to withdraw consent to ISDS provisions in a congressional-executive agreement.

Between 2017 and 2018, the United States and Korea initiated the internal amendment processes of the U.S.-Korea FTA (KORUS). Among the changes incorporated into KORUS, through a protocol of amendment that entered into force in 2019 without a U.S. congressional vote, were new limits to the

ISDS mechanism.[170] Evaluating the legality of adopting all the changes to KORUS without congressional approval exceeds the scope of this paper. However, the ISDS changes appear to be justifiable, considering they were focused on curbing liability to ISDS claims in a way consistent with the broad discretion granted by Congress to the president concerning investor-state arbitration in the agreement's implementing legislation.

With respect to BIT termination, while the power to enter into investment treaties by the executive branch is clearly conditioned upon receiving consent from the Senate, the president has broad powers to terminate such treaties, including those covering foreign investment. The Supreme Court has dismissed challenges against executive determinations to terminate treaties. For instance, President Jimmy Carter terminated the Mutual Defense Treaty between the United States and Taiwan in 1980, six months after announcing that the United States would withdraw from that treaty. Some senators objected to President Carter's actions, but the Supreme Court rebuffed their challenge in Goldwater v. Carter (1979).[171] Thereafter, other presidents have terminated treaties without facing domestic challenges. For example, President George W. Bush terminated the Anti-Ballistic Missile Treaty with the Soviet Union in 2002, and President Donald Trump withdrew from the Intermediate-Range Nuclear Forces Treaty in 2019. More broadly, several legal scholars argue that the president has general powers to terminate treaties so long as a majority in Congress does not take action to oppose the termination of a specific treaty.[172]

In conclusion, it is both desirable and legally feasible for the United States to leverage the APEP process to negotiate an international agreement to terminate BITs and to withdraw the consent to ISDS provided in FTAs or BITs, by adopting it as an executive agreement under U.S. law. Considering the president's authority to terminate treaties, Congress's intent to grant broad authority to the president when it comes to ISDS involvement, and the fact that such an agreement would not create any new obligations for the United States — much less require changes to existing U.S. law or limit policy space for congressional or executive branch actions — there is a clear U.S. domestic legal pathway to adopting a regionally coordinated exit from agreements that include ISDS through the APEP process.

170. Simon Lester, Inu Manak, and Kyounghwa Kim, "Trump's First Trade Deal: The Slightly Revised Korea-U.S. Free Trade Agreement," CATO *Institute Free Trade Bulletin*, June 13, 2019, https://www.cato.org/free-trade-bulletin/trumps-first-trade-deal-slightly-revised-korea-us-free-trade-agreement.
171. Goldwater v. Carter, 444 U.S. 996 (1979).
172. Louis Henkin, Foreign Affairs and the United States Constitution 217 (2d ed. 1996); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 339, Reporters' Note 1 (1987).

IV. Conclusion

The APEP countries' experience with ISDS is an ongoing and costly process. This group of democratic nations includes some of the countries in the Americas that have faced the most ISDS challenges, such as Canada, Colombia, Ecuador, Mexico, and Peru. This includes numerous challenges related to these governments' actions to address the major challenges that APEP seeks to address, from the climate crisis to COVID-19 recovery to extreme economic inequality. APEP countries have been ordered or agreed to pay foreign investors over USD 29.2 billion in awards and settlements. The total value of the pending claims the APEP nations face is more than USD 46.9 billion, which is particularly concerning given countries' dire need of funds to implement climate action and mitigation measures and to promote the transition to low-carbon energy.

The realization that ISDS is a serious obstacle for ambitious climate action has motivated the recent wave of countries adopting ISDS exit strategies. And, even before policymakers acknowledged the threat ISDS poses to climate policy, myriad countries had decided to drastically reduce their ISDS liability. Through USMCA, the United States and Canada ended ISDS between them. South Africa terminated all of its BITs in 2010. India and Indonesia did the same. The European Union Member States terminated their intra-EU BITs. Also, the European Commission recently announced the EU's organized exit from the ISDS-enforced Energy Charter Treaty, after Italy, Germany, France, the Netherlands, and scores of other countries that had previously championed ISDS exited.

The APEP initiative presents a unique opportunity for participating countries to achieve tangible policy gains for their populations. Removing ISDS as an obstacle to this progress is vital. This can be accomplished by terminating BITs, amending FTAs to remove investment chapters and ISDS provisions, or withdrawing consent to arbitration from BITs and FTAs. These actions can be undertaken either as part of the formal agenda adopted by all APEP signatories or as a parallel process that takes advantage of the gatherings of relevant government officials. Taking such actions would provide governments the necessary policy space to properly align their investment policy with their domestic policies and priorities. Removing ISDS will also protect APEP countries and their taxpayers from exposure to costly ISDS cases and awards while they tackle the pressing challenges of climate change, economic inequality, and ongoing public health crises. U.S. leadership in harnessing the APEP process to deliver an ISDS exit would be a sign of true partnership, and indeed would represent the U.S. helping to fix a problem it created when it pushed numerous countries in the Americas to enter ISDS pacts.

The termination of special rights and protections afforded to foreign investors, including a coordinated removal of ISDS from the 43 agreements now in force among APEP nations, is not a stance against investment, investors, foreigners, globalization, or international law. Instead, it reflects a conscientious effort to govern investment in a responsible and equitable manner. The objective is for governments to ensure that their investment policies, including any investment agreements, are supportive of regional economic cooperation and broader sustainable development objectives.

A regionally coordinated exit from agreements that include ISDS through the APEP process would be a remarkable win-win for the Biden administration. Turning the page on decades of failed international economic policies would unleash benefits for people across the continent.

Annex 1: List of ISDS-enforced Agreements Between APEP Countries

Title	Parties	Type of Agreement	Status	Date of Signature	Date of Entry Into Force	Date of Terminaton
Additional Protocol to the Framework Agreement of the Pacific Alliance	Chile; Colombia; Mexico; Peru	FTA	In force	10 February 2014	1 May 2016	N/A
Agreement between the United States of America, Mexico, and Canada (USMCA)	Canada; Mexico; USA	FTA	In force	30 November 2018	1 July 2020	N/A
Barbados-Canada Bilateral Investment Treaty	Barbados; Canada	BIT	In force	29 May 1996	17 January 1997	N/A
Canada-Ecuador Bilateral Investment Treaty	Canada; Costa Rica	BIT	In force	18 March 1998	29 September 1999	N/A
Canada-Ecuador Bilateral Investment Treaty	Canada; Ecuador	BIT	Terminated	29 April 1996	6 June 1997	19 May 2018 (15-year sunset clause)
Canada-Panama Bilateral Investment Treaty	Canada; Panama	BIT	In force	12 September 1996	13 February 1998	N/A
Canada-Panama Free Trade Agreement	Canada; Panama	FTA	In force	14 May 2010	1 April 2013	N/A
Canada-Peru Bilateral Investment Treaty	Canada; Peru	BIT	In force	14 November 2006	20 June 2007	N/A
Canada-Uruguay Bilateral Investment Treaty	Canada; Uruguay	BIT	In force	29 October 1997	2 June 1999	N/A
Chile-Canada Free Trade Agreement	Canada; Chile	FTA	In force	5 December 1996	5 July 1997	N/A
Chile-Costa Rica Bilateral Investment Treaty	Chile; Costa Rica	BIT	In force	11 July 1996	23 June 2000	N/A
Chile-Dominican Republic Bilateral Investment Treaty	Chile; Dominican Republic	BIT	In force	28 November 2000	8 May 2002	N/A
Chile-Ecuador Bilateral Investment Treaty	Chile; Ecuador	BIT	Terminated	27 October 1993	21 February 1996	19 May 2018 (10-year sunset clause)
Chile-Uruguay Bilateral Investment Treaty	Chile; Uruguay	BIT	Terminated	25 March 2010	18 March 2012	N/A
Colombia-Peru Bilateral Investment Treaty	Colombia; Peru	FTA	In force	22 November 2006	15 May 2012	N/A

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)	Australia; Brunei Darussalam; Canada; Chile; Japan; Malaysia; Mexico; New Zealand; Peru; Singapore; Viet Nam	FTA	In force	8 March 2018	30 December 2018	N/A
Dominican Republic-Panama Bilateral Investment Treaty	Dominican Republic; Panama	BIT	In force	6 February 2003	17 September 2006	N/A
Ecuador-Peru Bilateral Investment Treaty	Ecuador; Peru	BIT	Terminated	7 April 1999	9 December 1999	19 November 2017 (10-year sunset clause)
Ecuador-United States of America Bilateral Investment Treaty	Ecuador; USA	BIT	Terminated	27 August 1993	5 November 1997	18 May 2018 (10-year sunset clause)
Free Trade Agreement between Canada and Colombia	Canada; Colombia	FTA	In force	21 November 2008	15 August 2011	N/A
Free Trade Agreement between Canada and Peru	Canada; Peru	FTA	In force	29 May 2008	1 August 2009	N/A
Free Trade Agreement between Central America and Panama	CACM (Central American Common Market); Panama	FTA	In force	6 March 2002	11 April 2003	N/A
Free Trade Agreement between Central America and the Dominican Republic	CACM (Central American Common Market); Dominican Republic	FTA	In force	28 November 1998	3 September 2002	N/A
Free Trade Agreement between Central America, the Dominican Republic and the United States of America (DR-CAFTA)	Costa Rica; Dominican Republic; El Salvador; Guatemala; Honduras; Nicaragua; USA	FTA	In force	5 August 2004	1 March 2006	N/A
Free Trade Agreement between Chile and Colombia	Chile; Colombia	FTA	In force	27 November 2006	8 May 2009	N/A
Free Trade Agreement between Chile and Peru	Chile; Peru	FTA	In force	22 August 2006	1 March 2009	N/A
Free Trade Agreement between Costa Rica and Peru	Costa Rica; Peru	FTA	In force	21 May 2011	1 June 2013	N/A
Free Trade Agreement between Mexico and Central America	Free Trade Agreement between Mexico and Central America	FTA	In force	22 November 2011	1 July 2013	N/A

Free Trade Agreement between Mexico and Peru	Mexico; Peru	FTA	In force	6 April 2011	1 February 2012	N/A
Free Trade Agreement between Panama and Peru	Panama; Peru	FTA	In force	25 May 2011	1 May 2012	N/A
Free Trade Agreement between the Caribbean Community (CARICOM) and Costa Rica	CARICOM (Caribbean Community); Costa Rica	FTA	In force	9 March 2004	15 November 2005	N/A
Free Trade Agreement between Canada and Costa Rica	Canada; Costa Rica	FTA	In force	23 April 2001	1 November 2002	N/A
Free Trade Agreement between Chile and the United States of America	Chile; USA	FTA	In force	6 June 2003	1 January 2004	N/A
Free Trade Agreement between Mexico and Uruguay	Mexico; Uruguay	FTA	In force	15 November 2003	15 July 2004	N/A
Free Trade Agreement between Chile and Mexico	Chile; Mexico	FTA	In force	17 April 1998	1 August 1999	N/A
Free Trade Agreement between Colombia and Costa Rica	Colombia; Costa Rica	FTA	In force	22 May 2013	1 August 2016	N/A
Free Trade Agreement between Colombia, Venezuela, and Mexico	Colombia; Mexico	FTA	In force	13 June 1994	1 January 1995	N/A
Free Trade Agreement between Korea and Central America	Costa Rica; El Salvador; Honduras; Korea; Nicaragua; Panama	FTA	In force	21 February 2018	1 November 2019	N/A
Free Trade Agreement between Mexico and Panama	Mexico; Panama	FTA	In force	3 April 2014	1 July 2015	N/A
Trade Promotion Agreement between the United States and Panama	Panama; USA	FTA	In force	28 June 2007	31 October 2012	N/A
Trade Promotion Agreement between the United States of America and Peru	Peru; USA	FTA	In force	12 April 2006	1 February 2009	N/A
Mexico-Uruguay Bilateral Investment Treaty	Mexico; Uruguay	BIT	In force	30 June 1999	1 July 2002	N/A
Panama-United States of America Bilateral Investment Treaty	Panama; USA	BIT	In force	27 October 1982	30 May 1991	N/A
Panama-Uruguay Bilateral Investment Treaty	Panama; Uruguay	BIT	In force	18 February 1998	14 April 2002	N/A
United States of America-Uruguay Bilateral Investment Treaty	USA; Uruguay	BIT	In force	4 November 2005	31 October 2006	N/A

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