

Turning the Tide:

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

WHITE PAPER



AMERICAN
ECONOMIC
LIBERTIES
PROJECT

OCTOBER 2023

Daniel Rangel, Research Director, Rethink Trade

Lori Wallach, Director, Rethink Trade

Ladan Mehranvar, Senior Legal Researcher, Columbia Center on Sustainable Investment

Alvaro Santos, Faculty Director, Center for the Advancement of the Rule of Law in the Americas, Georgetown University Law Center

Mario Osorio, Senior Fellow, Center on Inclusive Trade and Development, Georgetown University Law Center

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.

Table of Contents

Executive Summary	1
I. The Americas' Experience With ISDS: Decades of Failed Promises, Costly Awards, and Corporate Challenges to Public-Interest Policies	7
1. Setting the Record Straight on ISDS: A Corporate-Driven Regime That Could Jeopardize the Transition to a Green Economy	8
2. Taking Stock of ISDS: A Costly, Ineffective System of Failed Promises	15
3. Turning the Page on ISDS: A Problematic Regime That Countries Are Increasingly Leaving Behind	23
II. An ISDS-Free Americas: International Legal Strategies to Exit ISDS	26
1. Policy Option One: Termination of BITs With an Agreement to Neutralize Sunset Clauses	27
2. Policy Option Two: Amendment to Remove the Investment Chapter From FTAs and Agreement to Neutralize Sunset Clauses, Where Applicable	31
3. Policy Option Three: Withdrawal of Consent to ISDS Arbitration From BITs and FTAs	34
4. Multilateral Instrument to Effectuate Policy Options One, Two, and Three	35
III. Turning the Tide: How the United States Can Unite with Its Neighbors on a Hemispheric ISDS Exit	37
1. Widespread Criticism of ISDS in the United States	37
2. Means to Formalize a Coordinated ISDS Exit: U.S. Legal System Considerations	40
IV. Conclusion	50
Annex 1: List of ISDS-enforced Agreements Between APEP Countries	52

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-**

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

ISDS Attacks on Climate, Other Critical

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-PRORROGA-DO_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

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

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

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-

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,

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,

17. In fact, arbitrators are typically disqualified from deciding disputes affecting the countries they belong to.

18. See Bernard Caillaud and Ariane Lambert-Mogiliansky,

21. See Chris Hamby, "Inside the Global 'Club' that Helps Executives Escape Their Crimes," *BuzzFeed News*, August 28, 2016, <https://www.buzzfeed-news.com/article/chrishamby/super-court>; Eric Levitz, "A Private Super Court Is Helping Corporate Criminals Go Free," *New York Magazine Intelligence*, 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
-

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.
-
-
-

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 Eagle³⁷ and Galway Gold³⁸) 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

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

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

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.

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

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

68. Gabriel O'Hara Salini, "Gobierno Presenta Demanda de Inconstitucionalidad Contra Ley de Suspensión de Cobro de Peajes,"

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

(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

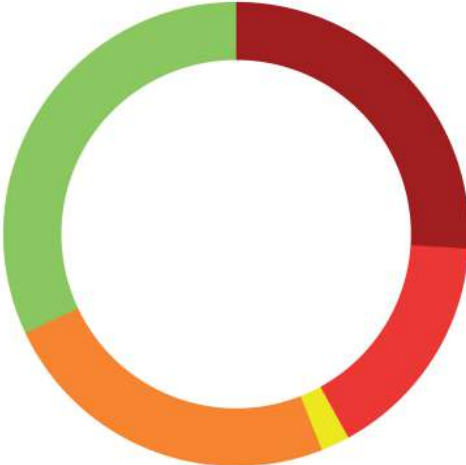
each dispute and for which year, and opt for reducing government expenditure in other areas, such as procurement of medical and school supplies.

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 Abner 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

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

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

85. "Notice of Arbitration and Statement of Claim," *Canfor Corporation v. the Government of the United States of America*, UNCITRAL (2002), itlaw, <https://www.itlaw.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*

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,

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

90. Political Constitution of the State of Bolivia (2009), Article 366.

91.

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

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.

options in the near term:3an 2 3.135.12e3 term:

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

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, _____

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

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:

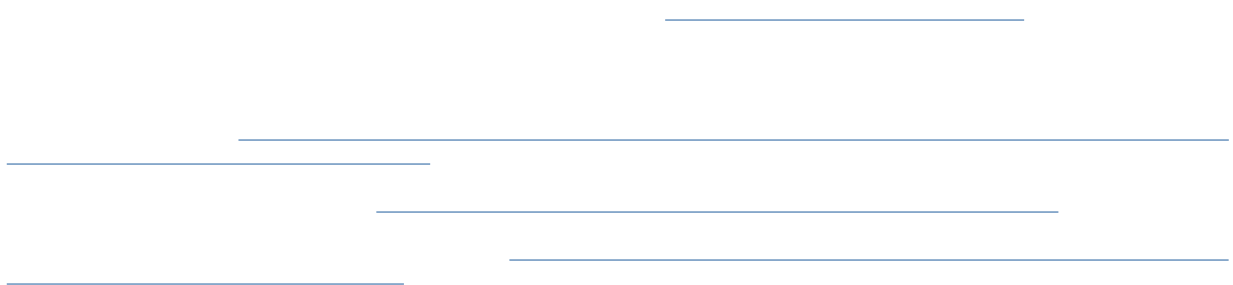
The termination of a treaty or the withdrawal of a party may take place:

- (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

109. Reinisch and Mansour Fallah, "Post-Termination Responsibility."



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 USMCA¹¹⁴ 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

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

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

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

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.

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

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

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

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-keystone-xl-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 the phase-out of nuclear power clear pzed German public opinion

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_ca-2017.pdf.
-
-
-

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

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

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

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

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

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.

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

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,

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

Subject

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
---	-------------------	---

Agricultural safeguards	Section 202(b)
-------------------------	----------------

Regulations to implement commitments on rules of origin and customs user fees	Section 209
---	-------------

Safeguard measures	Section 311(b)
--------------------	----------------

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

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

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
Additional Protocol to the Framework Agreement of the Pacific Alliance	Chile; Colombia; Mexico; Peru	FTA	In force	10 February 2014
Agreement between the United States of America, Mexico, and Canada (USMCA)	Canada; Mexico; USA	FTA	In force	30 November 2018
Barbados-Canada Bilateral Investment Treaty	Barbados; Canada	BIT	In force	29 May 1996
Canada-Ecuador Bilateral Investment Treaty	Canada; Costa Rica	BIT	In force	18 March 1998
Canada-Ecuador Bilateral Investment Treaty	Canada; Ecuador	BIT	Terminated	29 April 1996
Canada-Panama Bilateral Investment Treaty	Canada; Panama	BIT	In force	12 September 1996
Canada-Panama Free Trade Agreement	Canada; Panama	FTA	In force	14 Ma015TjETEMC /Span /Lang (en-US)/MCID 4708 BDC BT/TT
Canada-Peru Bilateral Investment Treaty	Canada; Peru	BIT	In force	
Canada-Uruguay Bilateral Investment Treaty	Canada; Uruguay	BIT	In force	
Chile-Canada Free Trade Agreement	Canada; Chile	FTA	In force	
Chile-Costa Rica Bilateral Investment Treaty	Chile; Costa Rica	BIT	In force	
Chile-Dominican Republic Bilateral Investment Treaty	Chile; Dominican Republic	BIT	In force	
Chile-Ecuador Bilateral Investment Treaty	Chile; Ecuador	BIT	Terminated	
Chile-Uruguay Bilateral Investment Treaty	Chile; Uruguay	BIT	Terminated	
Colombia-Peru Bilateral Investment Treaty	Colombia; Peru	FTA	In force	

Dominican Republic-Panama Bilateral Investment Treaty	Dominican Republic; Panama	BIT	In force	6 February 2003
Ecuador-Peru Bilateral Investment Treaty	Ecuador; Peru	BIT	Terminated	7 April 1999
Ecuador-United States of America Bilateral Investment Treaty	Ecuador; USA	BIT	Terminated	27 August 1993
Free Trade Agreement between Canada and Colombia	Canada; Colombia	FTA	In force	21 November 2008
Free Trade Agreement between Canada and Peru	Canada; Peru	FTA	In force	29 May 2008
Free Trade Agreement between Central America and Panama	CACM (Central American Common Market); Panama	FTA	In force	6 March 2002
Free Trade Agreement between Central America and the Dominican Republic	CACM (Central American Common Market); Dominican Republic	FTA	In force	28 November 1998
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
Free Trade Agreement between Chile and Colombia	Chile; Colombia	FTA	In force	27 November 2006
Free Trade Agreement between Chile and Peru	Chile; Peru	FTA	In force	22 August 2006
Free Trade Agreement between Costa Rica and Peru	Costa Rica; Peru	FTA	In force	21 May 2011
Free Trade Agreement between Mexico and Central America	Free Trade Agreement between Mexico and Central America	FTA	In force	22

Free Trade Agreement between Mexico and Peru	Mexico; Peru	FTA	In force	6 April 2011
Free Trade Agreement between Panama and Peru	Panama; Peru	FTA	In force	25 May 2011
Free Trade Agreement between the Caribbean Community (CARICOM) and Costa Rica	CARICOM (Caribbean Community); Costa Rica	FTA	In force	9 March 2004
Free Trade Agreement between Canada and Costa Rica	Canada; Costa Rica	FTA	In force	23 April 2001
Free Trade Agreement between Chile and the United States of America	Chile; USA	FTA	In force	6 June 2003
Free Trade Agreement between Mexico and Uruguay	Mexico; Uruguay	BT/FTA	In force	
Free Trade Agreement between Chile and Mexico	Chile; Mexico	FTA	In force	
Free Trade Agreement between Colombia and Costa Rica	Colombia; Costa Rica	FTA	In force	
Free Trade Agreement between Colombia, Venezuela, and Mexico	Colombia; Mexico	FTA	In force	
Free Trade Agreement between Korea and Central America	Costa Rica; El Salvador; Honduras; Korea; Nicaragua; Panama	FTA	In force	
Free Trade Agreement between Mexico and Panama	Mexico; Panama	FTA	In force	
Trade Promotion Agreement between the United States and Panama	Panama; USA	FTA	In force	
Trade Promotion Agreement between the United States of America and Peru	Peru; USA	FTA	In force	
Mexico-Uruguay Bilateral Investment Treaty	Mexico; Uruguay	BIT	In force	
Panama-United States of America Bilateral Investment Treaty	Panama; USA	BIT	In force	
Panama-Uruguay Bilateral Investment Treaty	Panama; Uruguay	BIT	In force	
United States of America-Uruguay Bilateral Investment Treaty	USA; Uruguay	BIT	In force	

CA RO
LA *

