

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-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 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_e5f85c3d-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 Chile¹¹ and the Petro government in Colombia¹² 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/>.