**Headline:** Biden Should End the Fossil Fuel Industry’s Secret Weapon

**Teaser:** Using a little-known provision of trade agreements, oil and gas corporations are able to pit their profits against democracies and our climate. It’s time to end the practice.

By Sonali Kolhatkar

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**[Article Body:]**

There is an obscure mechanism by which fossil fuel companies maintain their global domination even as their products are destroying our futures. Most rank-and-file climate activists haven’t heard of it and most news media rarely discuss it in great detail. It is a tool that has its origins in colonialism and advantages corporate power over democracy. The technical term for such a tool is “[Investor-state dispute settlement](https://www.bu.edu/gdp/2022/12/12/faq-what-is-investor-state-dispute-settlement-and-what-does-it-mean-for-climate-action/)” or ISDS. And while it sounds boring and technical, it is crucial that we familiarize ourselves with it in order to dismantle it.

The [Global ISDS tracker](https://www.globalisdstracker.org/), a newly launched online database, describes these as “secretive corporate tribunals.” When nations enter into trade agreements with one another, they usually include a clause on using the benign-sounding ISDS to resolve corporate disputes with national regulators. In other words, if a corporation originating in one nation sees its profits threatened by regulations or nationalization in another nation, it can sue that second government.

When applied to curbing carbon emissions in order to save our planet’s ability to sustain life, one can see that such tribunals can be extremely problematic. Country A decides to transition away from the oil and gas industry toward green, renewable energy. However, an oil company based in Country B sues via an ISDS agreement to extract its lost profits. That’s precisely what is happening, to the tune of $327 billion, according to the [Global ISDS Tracker](https://www.globalisdstracker.org/). “[F]ossil fuel cases… can devastate public budgets or even bankrupt a country.”

For example, [Nigeria](https://www.desmog.com/2023/09/27/a-system-of-secret-arbitration-tribunals-is-undercutting-climate-action-worldwide/) is currently facing a massive set of damages determined by an ISDS tribunal to be paid to a UK-based company for a gas project to the tune of 30 percent of the entire nation’s foreign exchange reserves. And, foreign mining companies are demanding [$30 billion from the Republic of Congo](https://insideclimatenews.org/news/21102023/un-protests-isds-as-economic-colonialism/) using ISDS tribunals. That’s twice the amount of Congo’s gross domestic product (GDP).

Former UN climate envoy and former Irish President [Mary Robinson](https://www.theguardian.com/environment/article/2024/may/14/fossil-fuel-investment-treaties-lobbying-climate-mary-robinson-ban-ki-moon-ect), who said she was “outraged” when she found out about oil and gas companies using ISDS to extort nations, explained that “if countries do the *right* thing on climate, they have to compensate fossil fuel companies.”

Where did ISDSs come from and how are they remotely justifiable in an era when society broadly agrees on democracy as the best form of government? Former U.S. President Barack Obama’s administration [explained](https://obamawhitehouse.archives.gov/blog/2015/03/26/isds-important-questions-and-answers) in the context of the 2016 free trade agreement called the [Trans-Pacific Partnership](https://www.theguardian.com/business/2015/jan/20/barack-obama-trans-pacific-partnership-republicans), that “ISDS is specifically designed to protect American investors abroad from discrimination and denial of justice,” and that it is a “more peaceful, better way to resolve trade conflicts” compared to the “gunboat diplomacy” of earlier eras.

It is as if the United States’ only option has been to defend its corporations against other people’s democracies rather than allow private entities to fend for themselves. If only human beings were protected from “discrimination and denial of justice” to this extent!

According to a 2023 [report](https://documents.un.org/doc/undoc/gen/n23/205/29/pdf/n2320529.pdf?token=ZzrJeS5q4GqWGyGywQ&fe=true) by David Boyd, the UN’s special rapporteur on human rights and the environment, “[o]f the 12 largest ISDS awards to date, 11 involve cases brought by fossil fuel and mining investors.” The $95 billion they extracted from nations using ISDS “likely exceeds the total amount of damages awarded by all courts to victims of human rights violations in all States worldwide, ever,” wrote Boyd.

The Pulitzer Prize-winning media outlet [Inside Climate News](https://insideclimatenews.org/news/21102023/un-protests-isds-as-economic-colonialism/) prefers to call ISDS “economic colonialism,” especially given that “the majority of cases have been filed by corporations from the United States, Europe, and Canada against developing nations.” Colonialism is a fitting descriptor. Gus Van Harten explained in his 2020 book “The Trouble with Foreign Investor Protection,” that ISDS treaties “originate in the efforts of former colonial powers and international organizations, especially the World Bank, to constrain newly independent countries.” In other words, ISDS is a means by which to extend colonialism after the end of physical occupation.

Joseph Stiglitz, a Nobel prize-winning economist, prefers even harsher terminology. He called ISDS mechanisms “[litigation terrorism](https://www.reuters.com/article/idUSKCN1SZ04X/),” because they “instill fear of environmental regulations, climate regulations because you know that it’s going to be costly” for governments.

British commentators had [pressured](https://www.theguardian.com/commentisfree/2023/sep/13/fossil-fuel-companies-britain-international-charter-treaty) the UK government to exit from treaties such as the “Energy Charter Treaty” (ECT) that require ISDS tribunals. In February 2024, the UK announced it would [quit](https://www.theguardian.com/environment/2024/feb/22/uk-quits-treaty-that-lets-fossil-fuel-firms-sue-governments-over-climate-policies) the ECT, following in the footsteps of France, Germany, Spain, and the Netherlands. Most recently Members of the European Parliament also [backed a proposal](https://www.euronews.com/green/2024/04/09/meps-support-exit-from-treaty-allowing-big-oil-to-sue-governments-over-climate-action) to end its ECT membership. It was called a “historic” vote against a treaty seen as a “climate killer.”

It’s time for the U.S. to do the same. Last November, hundreds of climate justice and civil society groups [signed on to a letter](https://www.citizen.org/wp-content/uploads/exit-ISDS-organizational-letter.pdf) urging President Joe Biden to end ISDS mechanisms built into a trade agreement with nearly a dozen Latin American and Caribbean nations called Americas Partnership for Economic Prosperity. The signatories explained that ISDS was “a global governance regime that prioritizes corporate rights over those of governments, people, and the planet.”

This was followed by a similar [letter](https://www.warren.senate.gov/imo/media/doc/2023.11.01%20Letter%20from%20Warren,%20Whitehouse,%20Cohen%20to%20USTR,%20State.pdf) in December 2023 signed by more than 40 lawmakers from the Senate and House urging Biden to remove ISDS provisions from all trade agreements. The signatories, including Senators Elizabeth Warren and Sheldon Whitehouse, lauded Biden for his “powerful action when he shut down the Keystone XL pipeline project, preventing the construction of a tar sands oil pipeline,” and pointed out that “TC Energy (formerly known as TransCanada)—the company behind the now-defunct pipeline—has filed an ISDS claim for billions of dollars to be litigated not in an American court, but in a shady international tribunal.”

What good does it do Biden and the U.S. for him to be a climate champion if any steps he takes to undermine fossil fuel domination are countered by a powerful and secretive corporate weapon?

Momentum against ISDS provisions is growing. In April 2024, hundreds of academics in law and economics [also wrote to Biden](https://www.citizen.org/wp-content/uploads/2024-Professors-Letter.pdf) urging him to “eliminate ISDS liability from existing agreements,” and offering valuable expertise on how it can be done.

Biden had said in 2020 that he was against ISDS provisions—in spite of his role as Vice President to the pro-ISDS Obama. In a [letter](https://www.law360.com/articles/1295978/biden-comes-out-against-special-tribunals-for-corporations) to the United Steelworkers union, he said “I oppose the ability of private corporations to attack labor, health, and environmental policies through the investor-state dispute settlement (ISDS) process, and I oppose the inclusion of such provisions in future trade agreements.” But what about current trade agreements?

It’s troubling that multinational corporations from the U.S. launched the [highest number of ISDS cases](https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf) worldwide. The U.S. is currently the [top producer](https://www.eia.gov/todayinenergy/detail.php?id=61545) of crude oil in the world. U.S. oil and gas companies are reaping [extraordinarily high profits](https://www.nytimes.com/2024/02/02/business/oil-gas-companies-profits.html) while taking advantage of billions of dollars of public [subsidies](https://www.nytimes.com/2024/03/15/climate/tax-breaks-oil-gas-us.html) in the form of tax breaks. The least Biden can do to curb a deadly industry that is threatening our entire species is to take action against ISDS provisions in existing trade agreements.