Corporate Attacks: Energy
Case Study: Oil Concession

Investor-State Dispute Settlement (ISDS) grants corporations shocking powers to attack the laws we rely on for a clean environment, financial stability, affordable medicines, safe food and decent jobs. The cases are decided by tribunals composed of three private attorneys, some of whom rotate between serving as "judges" and bringing cases against governments. The tribunalists are paid by the hour and are unaccountable to any court system or electorate. Under U.S. trade and investment pacts alone, corporations have already won more than $3.6 billion in taxpayer money, with $34 billion still pending.

Occidental Petroleum v. Ecuador
Investor Win (awarded $2.3 billion)

In 2006, Occidental Petroleum Corporation (Oxy) launched a claim against Ecuador under the U.S.-Ecuador BIT after the government terminated an oil concession due to the U.S. oil corporation's breach of the contract and Ecuadorian law. Oxy illegally sold 40 percent of its production rights to another firm without government approval, despite a provision in the concession contract stating that sale of Oxy's production rights without government pre-approval would terminate the contract. The contract explicitly enforced Ecuador's hydrocarbons law, which protects the government's prerogative to vet companies seeking to produce oil in its territory – a particular concern in the environmentally sensitive Amazon region where Oxy was operating. Oxy launched its BIT claim two days after the Ecuadorian government terminated the oil concession, claiming that the government's enforcement of the contract terms and hydrocarbons law violated its BIT commitments, including the obligation to provide the firm "fair and equitable treatment."

The tribunal acknowledged that Oxy had broken the law, that the response of the Ecuadorian government (forfeiture of the firm's investment) was lawful, and that Oxy should have expected that response. But the tribunal then concocted a new obligation for the government (one not specified by the BIT itself) to respond proportionally to Oxy's legal breach as part of the "fair and equitable treatment" requirement. Deeming themselves the arbiters of proportionality, the tribunal determined that Ecuador had violated the novel investor-state obligation.

The tribunal majority ordered Ecuador to pay Oxy $2.3 billion (including compound interest) – one of the largest investor-state awards to date. To calculate this penalty, the tribunal estimated the amount of future profits that Oxy would have received from full exploitation of the oil reserves it had forfeited due to its legal breach, including profits from not-yet-discovered reserves. Using logic that a dissenting tribunalist described as "egregious," the tribunal determined that the damages should be based on the entire value of Oxy's original contract even though the firm had sold a 40 percent share – because the sale violated Ecuadorian law and therefore could not be recognized. And the tribunal arbitrarily concluded that Ecuador was 75 percent responsible for the conflict and thus should pay 75 percent of the projected losses to Oxy, even though the conflict arose from Oxy selling unauthorized rights under a contract that explicitly stipulated that doing so could cause forfeiture of the investment. Ecuador has filed a request for annulment of the award, and a decision on annulment is pending.