

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. ISDS empowers multinational corporations to sue our governments before panels of three corporate lawyers. The corporate lawyers can award the corporations unlimited sums to be paid by America's taxpayers, including for the loss of expected future profits the corporations claim they would have earned if the domestic law was never enacted. The corporate lawyers' decisions are not subject to appeal and the amount they can order taxpayers to give corporations has no limit.

Occidental Petroleum v. Ecuador

Investor Win (awarded \$2.3 billion; reduced to \$1.4 billion after partial annulment)

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 [filed a request for annulment of the award](#), raising four different arguments regarding why the tribunal’s decision to grant jurisdiction over the case in the first instance — and thus the entire \$2.3 billion award — should be annulled. In 2015, [an annulment committee rejected all four of Ecuador’s arguments](#). However, based on the logic of the dissenting tribunalist that it was outrageous to order Ecuador to pay Oxy damages for the 40 percent share of the investment that it had sold away, the annulment committee partially annulled the award — reducing the damages that had been based on the 40 percent share that had been sold. The committee’s ruling means that the original award of \$2.3 billion (including compound interest) was reduced to \$1.4 billion — still an enormous amount for Ecuador to pay Oxy over a conflict that arose from Oxy selling unauthorized rights under a contract that explicitly stipulated that doing so could cause forfeiture of Oxy’s investment.

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