Frustrated Chinese Investors in the OPC & OEPC v. Republic of Ecuador
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**Abstract.** Chinese Investor brought forty percent of property interest of an Ecuadorian Oil Participation Contract owned by a Canadian oil company. The interest was entitled by two American oil companies, who afterwards transferred to the Canadian. The Ecuadorian government rejected the transfer, and terminated the participation contract. The American investors disagreed, and claimed for compensation. The international investment tribunal in Washington D.C. issued award in favor of two American investors, but set aside the Chinese investor’s interests. It is concluded that Chinese investors are under the protection of the Ecuador-China Bilateral Investment Treaty (BIT) instead of the U.S.-Ecuador BIT. However, Chinese investors have no right to apply for ICSID arbitration but an ad hoc arbitration instead under Ecuador-China BIT.

**Introduction**

OPC&OEPC v. Republic of Ecuador (2006) is an international investment arbitration case brought by the two American companies, Occidental Petroleum Corporation (OPC) and Occidental Exploration and Production Company (OEPC), and the Respondent is the Republic of Ecuador. In 1999, the government of Ecuador, through the National Petroleum Corporation (PetroEcuador), signed a participation contract for the development of an oil field (hereafter “the Contract”) with the OPC. As the Claimants transferred 40% of the property to AEC (a Canadian company) without the approval of the Ministry, the Ecuadorian government officially announced the termination of the Contract in May 2006.

Subsequently, the Claimants submitted the case to the ICSID for a compensation of 3.37 billion of U.S. dollars. In October 2012, the Tribunal composed by Mr. L. Yves Fortier (President), Mr. David A.R. Williams (Claimant-appointment) and Professor Brigitte Stern (Co-Arbitrator) issued the final award with 1.77 billion of U.S. dollars in favor of the Claimants. Ecuador applied for the annulment of the award. On November 2, 2015, the ad hoc committee of the ICSID issued its decision of annulment on the ground that the arbitral tribunal manifestly exceeded its powers.

As the OPC only enjoyed a 60% interest, the Committee ordered the compensation amount to be dropped to 60% of $1.77 billion, namely $1.06 billion. The validity of the remaining contents of the original award is not affected by the partial revocation. The arbitration process lasted for more than nine years from July 2006 when the OPC applied for the ICSID arbitration, to November 2015 when the committee issued the annulment decision.

**Summary of the Decision**

The ad hoc committee partially annulled the award on the ground of manifest excess of powers [ICSID Convention Article 52 (1)(b)] to the extent that the tribunal assumed jurisdiction with regard to the investment beneficially owned by the Chinese investor Andes. The committee ruled that the compensation owed by the Ecuadorian government to the Claimants should be reduced from 100% to 60% of the value of Block 15.

The Committee’s reasoning was that AEC’ 40% economic interest is an investment different from the Claimants’ investment, which is owned later on by Chinese investors in name of Andres Company under the protection of the Ecuador-China BIT instead of the U.S.-Ecuador BIT. Such
investment is not protected by the latter treaty because it does not belong to U.S. companies or nationals anymore.

The annulment decision went through a few of issues, such as jurisdiction, principle of proportionality, negligence, Res Iudicata, valuation methodology and so forth. Ecuador submitted the arbitrability objection was based on the following arguments. First, the Ecuadorian Constitution attributes exclusive jurisdiction to the Ecuadorian government to make the decision of any dispute concerning “actos administrativos” including Caducidad Decree, which means that the dispute must be submitted to the Ecuadorian administrative tribunals rather than ICSID arbitration. However, this objection was denied by the Tribunal, since Respondent cannot invoke its domestic law for the purpose of avoiding ICSID jurisdiction. Secondly, Respondent also argues that OPC failed to establish a basis for its standing as an investor. The Tribunal dismissed Respondent’s arguments and confirmed its jurisdiction over OPC’s claims because by stating that OPC was the ultimate parent of OEPC. Thirdly, the Respondent argued that the claims of the Tribunal’s jurisdiction were premature, because Claimants had made no attempt to challenge the Caducidad Decree before the Ecuadorian administrative courts. The Tribunal dismissed this inadmissibility objection as there was no request to challenge the Caducidad Decree before the Ecuadorian Courts. Forth, the republic also submitted a negotiation objection arguing that Claimants had fail to respect six month waiting period for the submission of the dispute to arbitration which was included in the Treaty. The Tribunal dismissed the negotiation objection since OEPC used to seek negotiate with the Republic. But all seeking was refused by the respondent. According to the evidence attempts at reaching a negotiated settlement were indeed futile. Above all, Respondent’s four grounds for annulment were dismissed by the Committee.

Having dismissed Respondent’s requested that the Decision on Jurisdiction be annulled, the Committee turned to the grounds for partial annulment of the Award invoked by Ecuador. Ecuador claimed that the Tribunal wrongly assumed jurisdiction over Chinese investors’ investment, thus manifestly exceeding its power. Its decision to calculate the damages as 100% should be annulled. Claimants disagreed with respondent’s arguments because it claimed that the Tribunal did not manifestly exceed its powers by improperly exercising jurisdiction ratione materiae over the Chinese investment, because the Tribunal did not award Andes any damage. The Committee believed that but viewed from the angle of OEPC, OEPC’s damage seems to be limited to 60% of the value of the Block, because ownership over the remaining 40% had been transferred to Andres, a company which is not a party to the arbitration, and which is not protected by the US-Ecuador BIT. Moreover, the definition of Farmout Property leaves no room for doubt that what OEPC was transferring to AEC was the ownership of a 40% interest in the complete bundle of rights and obligations. For the remaining 40% OEPC was simply a nominee rather than beneficial owner. Then, the Committee used the case of Impregilo v. Pakistan, PSEG v. Turkey and Mihaly v. Sri Lanka to prove that unprotected parties cannot receive compensation, even if claimed on their behalf by protected investors.

**Conclusion**

The case is concerning the emerging global investor-China. The Chinese investor Andes here has been in operation in Ecuador since 2006. The company was set up with shareholder capital from state-run corporations of the People's Republic of China: China National Petroleum Corporation (CNPC), with a 55 per cent stockholding, and China Petrochemical Corporation (SINOPEC), with a 45 percent stake. An interesting point is the role of the Chinese investors in this case, which is not under protection of U.S.-Ecuador BIT. In other words, it could claim for investment protection under China-Ecuador BIT signed in the year of 1994. A new issue not covered by the case is how Chinese investors protect their own interests under China-Ecuador BIT 1994.

According to the Article 9 of the China-Ecuador treaty, all investment disputes shall be settled by the amicable negotiations; if failed within six months, each party has right to submit to the applicable court having jurisdiction; regarding to dispute of compensation amount, each party could submit to the ad hoc arbitration in case that the dispute was not submitted to the court. The parties
could make reference to the ICSID arbitration rules, and choose chief arbitrator with the assistance of the ICSID secretary general. Therefore, Chinese investors have no right to apply for ICSID arbitration but an ad hoc arbitration instead.

References

[1] Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador, Award, ICSID Case No ARB/06/11, IIC 561 (2012), Para 24, Final Award, at 20.


[3] Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador, Award, ICSID Case No ARB/06/11, IIC 561 (2012), Para 590, Final Award, at 135.


