



2016

# Emerging Issues: Transcanada v. Obama Administration – 15 Billion for Cancellation of Keystone XL Pipeline Project

Aviana Cooper

University of Baltimore, [aviana.cooper@ubalt.edu](mailto:aviana.cooper@ubalt.edu)

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ubjil>

 Part of the [Energy and Utilities Law Commons](#), [Environmental Law Commons](#), and the [International Law Commons](#)

---

## Recommended Citation

Cooper, Aviana (2016) "Emerging Issues: Transcanada v. Obama Administration – 15 Billion for Cancellation of Keystone XL Pipeline Project," *University of Baltimore Journal of International Law*: Vol. 4 : Iss. 2 , Article 6.  
Available at: <http://scholarworks.law.ubalt.edu/ubjil/vol4/iss2/6>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Journal of International Law by an authorized editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact [snolan@ubalt.edu](mailto:snolan@ubalt.edu).

## TransCanada v. Obama Administration – 15 Billion for Cancellation of Keystone XL Pipeline Project

**By Aviana Cooper\***

TransCanada Keystone Pipeline, LP and TC Oil Pipeline Operations Inc., subsidiaries of TransCanada Corporation (“TransCanada”), lost their seven-year bid with the United States (U.S.) Government for a permit to complete the \$5.4 billion oil pipeline connecting Canada and the U.S.<sup>1</sup> On November 6, 2015, President Obama announced that Secretary of State, John Kerry, through powers under Executive Order 13337, had denied the application for a border crossing permit, prohibiting construction of the Keystone XL Pipeline Project.<sup>2</sup> Following this denial, on January 6, 2016, TransCanada filed a complaint to the District Court of Texas against members of the Obama Administration, requesting a declaration expressing that this decision was unlawful and for an injunction barring future Executive branches to give it effect.<sup>3</sup> In conjunction with the declaratory request, TransCanada also filed a Notice of Intent to initiate a claim under Chapter 11 of the North American Free Trade Agreement (NAFTA) alleging that the Administration breached their duties and the reasons given for the denial were “arbitrary and unjustified” and are asking for \$15 billion in damages.<sup>4</sup>

---

\*Aviana Cooper is a rising 3L at the University of Baltimore School of Law, with a focus on health law and civil advocacy. Aviana graduated with a BA in Biology, minoring in Chemistry and Psychology, from the University of Miami in 2010.

1. Complaint at 11, *TransCanada Keystone Pipeline, LP & TC Oil Pipeline Operations Inc. v. John F. Kerry, Secretary of the Department of State; et al.* (Jan. 6, 2016) (No. 4:16-cv-00036) [hereinafter *Complaint*].
2. *Id.* at 17.
3. *Id.* at 17.
4. *TransCanada Commences Legal Actions Following Keystone XL Denial*, TRANSCANADA (Jan. 6, 2016), <http://www.transcanada.com/news-releases-article.html?id=2014960> [hereinafter *TransCanada Commences Legal Actions*].

### Supposed Benefits of the Keystone XL Project

The Keystone XL pipeline was to be a “1,179 mile . . . crude oil pipeline”<sup>5</sup> extending from Canada, across the borders of the U.S. to Steele City, Nebraska “where it would connect with existing pipelines to refineries on the Gulf Coast.”<sup>6</sup> The pipeline was to “carry up to 830,000 barrels (nearly 35 million gallons) of oil per day.”<sup>7</sup> TransCanada indicated that this project would create up to 9,000 construction jobs including work for contracted companies to supply concrete, fuel, and other materials required for the creation of the pipeline.<sup>8</sup>

Along with jobs, it was believed that the pipeline would have allowed American and Canadian oil manufacturer’s access to larger oil refining markets located in the Midwest and along the Gulf Coast.<sup>9</sup> This project would have had the same origin and destination as a presently operational pipeline, however, would have taken a more direct route from Canada to Nebraska.<sup>10</sup> Moreover, it was believed that the pipeline would decrease the need to import oil from countries in the Middle East, allowing lower oil prices for consumers overall.<sup>11</sup>

### U.S. Issues with Keystone Project

On January 29, 2015, the Senate, followed by the House on February 11, 2015,<sup>12</sup> voted to pass the Keystone Pipeline Approval Act. President Obama, however, urged by the Environmental Protection Agency (EPA), vetoed the bill<sup>13</sup> on the basis that the pipeline “would undercut the country’s leadership on climate change,”<sup>14</sup> and it

- 
5. *About The Project A proposed oil pipeline from Alberta to Nebraska*, TRANSCANADA (visited Jan. 14, 2016), <http://keystone-xl.com/about/the-keystone-xl-oil-pipeline-project/>. [Hereinafter *About the Project*].
  6. Brooks Jackson, *Pipeline Primer The Keystone XL Project: We examine the facts about jobs, spills, climate change and gasoline prices*, FACTCHECK.ORG (Mar. 10, 2014), <http://www.factcheck.org/2014/03/pipeline-primer/>.
  7. *Id.*
  8. *Id.*
  9. *About the Project*, *supra* note 5.
  10. *Keystone XL Project: Why is it so disputed?*, BBC (Nov. 6, 2015), <http://www.bbc.com/news/world-us-canada-30103078> [hereinafter *Keystone XL Project*].
  11. *Id.*
  12. Complaint, *supra* note 1, at 16.
  13. *Keystone XL Project*, *supra* note 10.

would not be a benefit to the creation of permanent American jobs.<sup>15</sup> Expounding upon the fact that once the project was complete, the jobs would no longer be necessary and thousands of Americans, once again, would be looking for employment.

Based on research conducted by the State Department and the EPA, environmentalists and many U.S. citizens were in great disagreement with the continuance of this project. In 2011, the State Department initially stated that the project would *not* have “significant adverse impacts on the environment,” however, later that year came back and reissued a statement stating that TransCanada would need to find alternative routes because “the . . . region[s] [are] a fragile ecosystem.”<sup>16</sup> Environmentalists argue that because the area of development in Canada is so underdeveloped, in order to retract the oil it would require more energy than normal, releasing more fossil fuels into the atmosphere, thereby contributing to the ever growing issue of global warming.<sup>17</sup> According to research conducted by the Congressional Research Service,<sup>18</sup> over the “life cycle” of fuel being brought from the sand to the pipe, the burning of a “gallon of fuel from the Canadian oil [would result] in 14 percent to 20 percent more greenhouse gas emissions, on average than burning a gallon of currently available fuel.”<sup>19</sup>

### Claims alleged in Complaint against U.S. in District Court

TransCanada filed a complaint against Secretary of State, John Kerry, Attorney General, Loretta Lynch, Secretary of the Department of Homeland Security, Jeh Charles Johnson, and Secretary of the Department of Interior, Sally Jewell.<sup>20</sup> TransCanada alleges that the

- 
14. Ian Austin, *TransCanada Seeks \$15 Billion From U.S. Over Keystone XL Pipeline*, N.Y. TIMES (Jan. 6, 2016), [http://www.nytimes.com/2016/01/07/business/international/transcanada-to-sue-us-for-blocking-keystone-xl-pipeline.html?\\_r=2](http://www.nytimes.com/2016/01/07/business/international/transcanada-to-sue-us-for-blocking-keystone-xl-pipeline.html?_r=2).
  15. *Keystone XL Project*, *supra* note 10.
  16. *Id.*
  17. *Id.*
  18. *Congressional Research Service Careers*, LIBRARY OF CONGRESS, <https://www.loc.gov/crsinfo/> (last visited April 1, 2016) (“The Congressional Research Service works exclusively for the United States Congress, providing policy and legal analysis to committees and Members of both the House and Senate”).
  19. Jackson, *supra* note 6.
  20. Complaint, *supra* note 1, at 1.

Constitution does not grant the President of the United States the authority to prohibit the development of the pipeline.<sup>21</sup> In TransCanada's complaint, they are seeking a declaration from the court expressing: (1) the U.S. was without legal authority to prohibit TransCanada from development; (2) that the decision made is "without lawful effect"; (3) there was no lawful basis for the decision made; and (4) enjoining the U.S. from taking any action to enforce their decision prohibiting the construction of the pipeline.<sup>22</sup>

### Was there a breach of NAFTA?

Along with the recently filed suit against members of the Obama Administration, TransCanada has filed a "Notice of Intent to initiate a claim under Chapter 11 of the North American Free Trade Agreement."<sup>23</sup> This claim is in response to the U.S. denying the Presidential Permit for the Keystone XL Pipeline, alleging that the basis for the "denial was arbitrary and unjustified."<sup>24</sup>

The North American Free Trade Agreement ("NAFTA") is a trade agreement that entered into force on January 1, 1994, that "sets the rules of trade and investment between Canada, the [U.S.], and Mexico."<sup>25</sup> NAFTA has "eliminated most tariff and non-tariff barriers to free trade and investment"<sup>26</sup> and establishes "clear rules for commercial activity."<sup>27</sup> Under NAFTA, each state is: (1) to work to eliminate duties on goods crossing borders within North America, opening up the market between the countries; (2) to treat foreign investors as a domestic investor; (3) provide adequate protection for intellectual property rights to businesses, foreign and domestic; (4) provide access to government procurement at the federal level; and (5) ensure easier access to business professionals so they can travel in and out of each country.<sup>28</sup>

---

21. Complaint, *supra* note 1, at 4.

22. *Id.*

23. *TransCanada Commences Legal Actions*, *supra* note 4.

24. *Id.*

25. *North American Free Trade Agreement*, NAFTANOW.ORG [http://www.naftanow.org/faq\\_en.asp](http://www.naftanow.org/faq_en.asp) (last visited Jan. 15, 2016) [hereinafter NAFTANOW].

26. *Id.*

27. *Id.*

28. *Id.*

Within NAFTA, Chapter 11 provides a “mechanism for the settlement of investment disputes that assures both equal treatment among investors of the parties to the agreement.”<sup>29</sup> Article 1118 highly suggests that both parties attempt to settle the claim through negotiation.<sup>30</sup> However, if that option does not settle the issue, Article 1119, requires the disputing party deliver written notice of intent to submit a claim to arbitration “at least 90 days” prior to the claim being submitted. The claim should express: (1) the provisions of the agreement believed to have been breached; (2) the issues and factual basis for the claim; and (3) the relief sought.<sup>31</sup> Chapter 11 provides the option for recourse in one of the following tribunals: (1) the World Bank’s International Centre for the Settlement of Investment Disputes (ICSID), (2) ICSID’s Additional Facility Rules, and (3) the rules of the United Nations Commission for International Trade Law (UNCITRAL rules).<sup>32</sup> Alternatively, the Parties may decide to choose remedies available at a domestic court, in which those rulings will be enforceable.<sup>33</sup>

Because TransCanada, in 2008, had received a permit with no complications for a similar project, the company was not expecting a denial for the 2016 project.<sup>34</sup> Indicated in the Notice of Intent by TransCanada, “[e]nvironmental activists . . . turned opposition to the Keystone XL Pipeline into a litmus test for politicians – including U.S. President Barack Obama – to prove their environmental credentials. . . The activists’ strategy succeeded.”<sup>35</sup> Further, TransCanada expressed, that the U.S. denied their permit “even though the Administration had concluded on six occasions that the pipeline would not have a significant impact on climate change.”<sup>36</sup> Thereby saying that

---

29. North American Free Trade Agreement, Ch. 11: Sec. B (1994) [hereinafter NAFTA].

30. NAFTA, *supra* note 29, at art. 1118.

31. NAFTA, *supra* note 29, at art. 1119.

32. NAFTA, *supra* note 29, at art. 1120.

33. NAFTA, *supra* note 29, at art. 1135(2)(c).

34. Claudia Cattaneo, *TransCanada Corp launches US\$15-billion lawsuit against U.S. government for rejecting Keystone XL*, VANCOUVER SUN (Jan. 7, 2016), <http://www.vancouversun.com/TransCanada+Corp+launches+billion+lawsuit+against+government+rejecting+Keystone/11634634/story.html>.

35. Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the North American Free Trade Agreement at 1, TransCanada Corp. & TransCanada PipeLines Ltd. v. United States (Jan. 6, 2016) [hereinafter Notice of Intent].

36. *Id.*

this denial done by members of the Administration was not done based on fact or law, but simply to appease those who opposed the project, *i.e.* a political ploy. Therefore, TransCanada believes, that because of these political reasons, the U.S. has violated their obligations under NAFTA.<sup>37</sup>

### **Any Legal Merit against the U.S.?**

As previously stated, along with the complaint filed in District Court, TransCanada has filed an Intent to File under Chapter 11 of NAFTA alleging that the U.S. has violated the agreement under NAFTA by denying their application.<sup>38</sup> Therefore, there are two main questions that must be addressed: (1) was the President wrongful in his assertion of power to control foreign commerce by issuing the Executive Order 13337, giving the power of denial to Secretary of State John Kerry; and (2) does TransCanada have legal grounds to assert a breach under NAFTA *and* receive \$15 billion in damages for the breach of the agreement?

### **Was the President Wrongful in His Assertion of Power by Issuing Executive Order 13337?**

No. Under the U.S. Constitution, the President has the power to implement, enforce laws, and issue executive orders without the approval of Congress.<sup>39</sup> Within Article II of the Constitution, the President is also provided the power to veto any bill that comes across his desk from Congress, however Congress has the power to override a veto with a two-thirds vote against the President's decision.<sup>40</sup> The power to issue Executive Orders also stems from the Constitution and do not require congressional approval. Therefore, President Obama was within his rights to issue an Executive Order providing John Kerry the power to block the pipeline. Just as prior presidents had the power to grant the Presidential permit, they also have the power to deny said permit.

---

37. *Id.*

38. *See supra* pp. 4-5.

39. U.S. CONST. art. II.

40. *Id.*

**Does TransCanada have legal grounds to assert a breach under NAFTA and receive \$15 billion in damages for the breach of the agreement?**

The answer is unclear. In the Intent to File, TransCanada alleges that the U.S. has violated their obligations by denying Canadian investors with “national treatment (Article 1102), most-favored-nation treatment (Article 1103), treatment in accordance with international law (Article 1105), and protection against uncompensated expropriations (Article 1110).”<sup>41</sup> The issue is whether or not TransCanada’s reliance on an approval of the permit was reasonable in that they should have begun construction even though they had not yet received an answer on their application. As stated under NAFTA, states who have ratified are obligated to treat foreign corporations/business/investors as they would domestic investors.<sup>42</sup> Here, TransCanada began operations with the belief that they would receive the ‘greenlight’ on their permit as before.<sup>43</sup> Although TransCanada should not have begun operations before receiving an answer, they do have a rather strong argument claiming that they detrimentally relied on the consent of the permit from the U.S. because there had been no indication from U.S. officials that their application would be denied. As indicated in the letter of intent, after two years following the submission of the application, then Secretary of State, Hillary Clinton stated to the company that they were ‘inclined’ to approve the application.<sup>44</sup>

Nevertheless, all NAFTA partners signed a parallel agreement entitled the North American Agreement on Environmental Cooperation (NAAEC), in which all states have committed to take steps to protect the environment by enforcing environmental laws.<sup>45</sup> As per this agreement, a “[p]arty’s failure to meet this environmental obligation is subject to the same type of dispute resolution mechanism that is included in the NAFTA.”<sup>46</sup> Therefore, even if the U.S. is found to have violated its obligations under NAFTA, it can be argued that because there is also an obligation to enforce their environmental laws,

---

41. Notice of Intent, *supra* note 35.

42. NAFTA NOW, *supra* note 25.

43. Notice of Intent, *supra* note 35.

44. *Id.*

45. NAFTA NOW, *supra* note 25.

46. *Id.*

in order to oblige by NAAEC, the U.S. had no choice but to deny the permit to fulfill their commitment to lowering greenhouse gas emissions.

**Conclusion**

In conclusion, although TransCanada has many meritorious claims in both the Chapter 11 filing as well as the complaint filed, it is believed that neither will turn in favor of TransCanada. As it is unfortunate that the corporation has relied on past actions of the U.S. Government to their detriment, both entities understood that the project could not be done until approval had been given.