

2016

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Recommended Citation

Elise LeGros, *Report: TransCanada Seeks \$15 Billion from U.S. for Breach of NAFTA Obligations*, 22 LAW & BUS. REV. AM. 51 (2016)

<https://scholar.smu.edu/lbra/vol22/iss1/11>

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REPORT: TRANSCANADA SEEKS \$15 BILLION FROM U.S. FOR BREACH OF NAFTA OBLIGATIONS

*Elise LeGros**

ON November 6, 2015, the U.S. Department of State announced its decision to deny TransCanada Keystone Pipeline, LP's permit to build a pipeline from Canada to the United States for crude oil.¹ The investors of the project—TransCanada Corporation and TransCanada PipeLines Limited (collectively TransCanada)—responded by filing a Notice of Intent to Submit a Claim under Chapter 11 of the North American Free Trade Agreement (NAFTA),² claiming \$15 billion in damages.³ This report will summarize the NAFTA claim.

I. BACKGROUND

The proposed pipeline, Keystone XL Pipeline, would have spanned 1,179 miles and transported crude oil from Alberta, Canada through Montana, South Dakota, and Nebraska, to an existing pipeline network that feeds oil to Gulf Coast refineries.⁴ Because the Keystone XL Pipeline would have crossed an international border, TransCanada needed to obtain a “Presidential Permit” to complete the project.⁵ The president,

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1. Press Statement by Secretary of State John Kerry, U.S. Department of State, Keystone XL Pipeline Permit Determination (Nov. 6, 2015), <http://www.state.gov/secretary/remarks/2015/11/249249.htm>.

2. Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of the North American Free Trade Agreement, TransCanada Corp. v. United States (Jan. 6, 2016) <https://assets.documentcloud.org/documents/2676478/TransCanada-Notice-of-Intent-6-Jan-2016.pdf> [hereinafter *Notice of Intent*]. TransCanada Keystone Pipeline has also filed a lawsuit in the Southern District of Texas challenging President Obama's constitutional power to deny the permit. Complaint at ¶ 2, *TransCanada Keystone Pipeline v. Kerry*, No. 16-cv-36, complaint filed (S.D. Tex Jan. 6, 2016), available at http://www.eenews.net/assets/2016/01/07/document_daily_03.pdf.

3. Notice of Intent, *supra* note 2, ¶ 61.

4. David Marino & Rebecca Penty, *TransCanada Corp. Challenges Keystone XL Permit Denial*, BLOOMBERG BNA (Jan. 6, 2016), http://news.bna.com/itln/ITLNBW/split_display.adp?fedfid=81741334.

5. Department of State Record of Decision and National Interest Determination, TransCanada Keystone Pipeline, L.P. Application for Presidential Permit (Nov. 3, 2015), at 2, <http://keystonepipeline-xl.state.gov/documents/organization/249450.pdf> [hereinafter Department of State Record of Decision].

by Executive Order, delegated to the U.S. Secretary of State the authority to deny Presidential Permits for these types of petroleum pipelines that cross international borders when the project is not in the “national interest.”⁶ This was the basis for U.S. Secretary of State John Kerry’s denial of TransCanada’s Presidential Permit.⁷

TransCanada initially applied for a Presidential Permit to build the Keystone XL Pipeline in September 2008.⁸ The Keystone XL Pipeline would have “nearly double[d] U.S. imports of Canadian tar sands.”⁹ TransCanada worked with the U.S. State Department to develop a pipeline that would be approved,¹⁰ making fifty-seven changes to the project to improve its environmental safety.¹¹ What was at first an uncontroversial project, similar to other pipelines that had been approved by the U.S. State Department,¹² became “a political symbol amid broader clashes over energy, climate change and the economy.”¹³ According to Rice University historian Douglas G. Brinkley, “[o]nce the grass-roots movement on the Keystone pipeline mobilized, it changed what it meant to the president It went from a routine infrastructure project to the symbol of an era.”¹⁴ A rejection would symbolize the nation’s commitment to countering global warming and taking action on climate change.¹⁵

The U.S. State Department spent over three years conducting a review of TransCanada’s permit application and then announced that further review into alternative routes in Nebraska was necessary before it could make a final decision.¹⁶ In December 2011, Congress passed a bill that required the president to decide in sixty days whether to approve the application.¹⁷ The U.S. State Department subsequently denied the permit in January 2012, claiming sixty days was an insufficient time to determine whether the pipeline was in the national interest.¹⁸

TransCanada claims that because the denial was procedural in nature, it filed a new application for the Keystone XL Pipeline and continued to

6. Exec. Order No. 13337, 69 Fed. Reg. 25299 (Apr. 30, 2004).

7. Department of State Record of Decision, *supra* note 5, at 3.

8. Notice of Intent, *supra* note 2, ¶ 1.

9. Elana Schor, *Labor Uses Automated Calls to Tout Controversial Oil Pipeline* NY TIMES (Oct. 21, 2010), <http://www.nytimes.com/gwire/2010/10/21/21greenwire-labor-uses-automated-calls-to-tout-controversi-58386.html>.

10. Notice of Intent, *supra* note 2, ¶ 2.

11. *Id.*

12. *Id.*, ¶ 1.

13. Coral Davenport, *Citing Climate Change, Obama Rejects Construction of Keystone XL Pipeline* NY TIMES (Nov. 6, 2015), http://www.nytimes.com/2015/11/07/us/obama-expected-to-reject-construction-of-keystone-xl-oil-pipeline.html?ref=topics&_r=0.

14. *Id.*

15. *Id.*

16. Media Note by Office of the Spokesperson, U.S. Department of State, Denial of the Keystone XL Pipeline Application (Jan. 18, 2012), <http://www.state.gov/r/pa/prs/ps/2012/01/181473.htm>.

17. *Id.*

18. *Id.*

invest in the project.¹⁹ Keystone continued its construction of two Texas segments of the pipeline.²⁰ Because the segments did not cross international borders, TransCanada did not need a Presidential Permit to construct them.²¹ At a press conference in March 2012 concerning oil production in Cushing, Oklahoma, President Obama spoke positively about TransCanada's construction of the Keystone XL Pipeline's Gulf Coast Segment.²² The president emphasized the importance of producing oil and gas in the United States, and he further stated that he was going to make the Keystone XL Pipeline "project a priority" because it would enable the quick transport of oil from Cushing to the Gulf Coast.²³

Keystone XL Pipeline's second Presidential Permit was submitted in May 2012.²⁴ From April 2014 - January 2015, state litigation in Nebraska over the Nebraska Governor's approval of the pipeline route temporarily suspended federal administrative proceedings regarding the application.²⁵ On November 2, 2015, TransCanada requested that the State Department suspend federal proceedings a second time so state administrative proceedings in Nebraska concerning approval of the pipeline route could be completed; however, this request was denied.²⁶ On November 6, the State Department and White House announced the denial of the TransCanada's second Presidential Permit application.²⁷

Throughout the application process, the State Department issued multiple drafts and a final environmental impact statement that addressed the project's projected impact on the environment.²⁸ The State Department concluded the pipeline would not have a significant impact on the environment because this type of oil was already making its way onto the market through existing pipelines.²⁹ The Department of State's Final Supplemental Environmental Impact Statement (SEIS) concluded "that significant impacts to most resources are not expected along the proposed Project route."³⁰

Nonetheless, the project was rejected. Acknowledging that the rejection of a single pipeline would not significantly impact efforts to reduce greenhouse gas pollution,³¹ Secretary of State John Kerry noted the deci-

19. Notice of Intent, *supra* note 2, ¶ 30.

20. *Id.*

21. *Id.*

22. *Id.*, ¶ 31.

23. *Id.*

24. *Id.*, ¶ 33.

25. Notice of Intent, *supra* note 2, ¶ ¶ 37-38; *see also* Andrew Harris, *Keystone Pipeline Nebraska Path Argued at Top State Court*, BLOOMBERG, (Sept. 5, 2014) <http://www.bloomberg.com/news/articles/2014-09-05/keystone-pipeline-nebraska-path-argued-at-top-state-court>.

26. Notice of Intent, *supra* note 2, ¶ ¶ 40, 41.

27. *Id.*, ¶ 41.

28. *See id.*, ¶ ¶ 21, 23, 25.

29. Davenport, *supra* note 13.

30. U.S. Department of State, *Keystone XL Pipeline Project, Final Supplemental Environmental Impact Statement (SEIS)* (Jan. 2014), ch. 4.16, available at <http://keystonepipeline-xl.state.gov/documents/organization/221192.pdf>.

31. Davenport, *supra* note 13.

sion to reject the permit “could not be made solely on the numbers.”³² According to him, “[t]he United States needs to prioritize the development of renewable energy opportunities and continue to transition to the kind of jobs that better utilize our skilled manufacturing base.”³³

President Obama asserted that for years the pipeline had an “overinflated role in our political discourse.”³⁴ According to the President, “approving [the pipeline] would have undercut [America’s] global leadership” in fighting climate change.³⁵ The president further stated that “if we’re going to prevent large parts of this Earth from becoming not only inhospitable but uninhabitable in our lifetimes, we’re going to have to keep some fossil fuels in the ground rather than burn them and release more dangerous pollution into the sky.”³⁶

II. SECRETARY OF STATE JOHN KERRY’S REASONS FOR DENIAL OF PERMIT

Secretary of State John Kerry stated that the “critical factor” in his determination was “moving forward with [the] project would significantly undermine our ability to continue leading the world in combatting climate change.”³⁷ He emphasized the Keystone XL Pipeline would “facilitate the transportation to the United States of one of the dirtiest sources of fuel on the planet” and the United States instead should “prioritize the development of renewable energy opportunities” and clean energy.³⁸ Further, the State Department found the proposed project “has a negligible impact on our energy security,” “would not lead to lower gas prices for American consumers,” “long-term contribution to our economy would be marginal,” and “[t]he proposed project raises a range of concerns about the impact on local communities, water supplies, and cultural heritage sites.”³⁹

III. NAFTA CLAIM

In its Notice of Intent to Submit a Claim, TransCanada argued that the State Department’s delays in processing its two permit applications, and its ultimate denial of its second application, breached NAFTA Articles

32. Press Statement by Secretary of State John Kerry, *supra* note 1.

33. *Id.*

34. President Barack Obama, Statement by the President on the Keystone XL Pipeline (Nov. 6, 2015), <https://www.whitehouse.gov/the-press-office/2015/11/06/state-ment-president-keystone-xl-pipeline>.

35. *Id.*

36. *Id.*

37. Press Statement by Secretary of State John Kerry, *supra* note 1.

38. *Id.*

39. *Id.*

1102 (National Treatment),⁴⁰ 1103 (Most-Favored Nation Treatment),⁴¹ 1105 (Minimum Standard of Treatment)⁴² and 1110 (Expropriation and Compensation).⁴³ The investors seek fifteen billion dollars in damages arising from the United States' alleged breach of NAFTA obligations.⁴⁴

TransCanada claims that after seven years of "arbitrary and contrived" excuses for the delay, rejection of its permit "was symbolic, and based merely on the desire to make the U.S. appear strong on climate change even though the denial would have no significant impact on the environment."⁴⁵ As reported in one article, a trade analyst with the libertarian think tank Cato Institute believes that "TransCanada's claim that the project denial was arbitrary might be bolstered because the administration essentially blocked transport of Canadian sands crude via one pipeline, but not rail or other methods."⁴⁶ TransCanada further claims that throughout the delay, it "had no choice but to continue making capital expenditures, and investing in land easements, pipe, materials, equipment, etc., so that it would be in a position to start construction as soon as possible after the permit was granted."⁴⁷

Concerning the alleged violation of Articles 1105 and 1110, TransCanada claims that the reasons for the permit's denial could have been made

40. "Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. NORTH AMERICAN FREE TRADE AGREEMENT, art. 1102(1) U.S.-Can.-Mex., Dec. 8, 1993, 32 I.L.M. 289 (1993).

41. "Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." NORTH AMERICAN FREE TRADE AGREEMENT, art. 1103(1) U.S.-Can.-Mex., Dec. 8, 1993, 32 I.L.M. 289 (1993).

42. "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." NORTH AMERICAN FREE TRADE AGREEMENT, art. 1105(1) U.S.-Can.-Mex., Dec. 8, 1993, 32 I.L.M. 289 (1993).

43. "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6." NORTH AMERICAN FREE TRADE AGREEMENT, art. 1110(1) U.S.-Can.-Mex., Dec. 8, 1993, 32 I.L.M. 289 (1993). "Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value." *Id.*, art. 1110(2). Notice of Intent, *supra* note 2, ¶ 12.

44. *Id.*, ¶ 61.

45. *Id.*, ¶ 51 (emphasis removed).

46. Ayesha Rascoe, *TransCanada legal challenges over Keystone face long odds*, REUTERS (Jan. 7, 2016), <http://www.reuters.com/article/us-transcanada-keystone-lawsuit-idUSKBN0UL2NV20160108>

47. Notice of Intent, *supra* note 2, ¶ 54.

apparent immediately after the application was submitted, and the delay thus resulted in damage to investors and a breach of U.S. obligations under NAFTA.⁴⁸ TransCanada further claims Articles 1105 and 1110 were violated because the permit application was unjustifiably rejected—it was “not based on the merits of Keystone’s application, but rather on how the international community might react to an approval in light of its erroneous perception that the pipeline would result in higher GHG emissions.”⁴⁹

TransCanada also claims NAFTA Articles 1102 and 1103 were breached because the United States discriminated against Keystone.⁵⁰ TransCanada claims that until now, the State Department has never denied a Presidential Permit for a cross-border pipeline, and the United States utilized unprecedented factors in deciding to deny the permit, which resulted in the United States discriminating against the investors.⁵¹ It should be noted that there is no statute that establishes the criteria for the Secretary when reviewing an application for a Presidential Permit, and the Secretary has discretion to consider “factors he or she deems germane to the national interest.”⁵² Factors the Secretary has considered in the past include “foreign policy; energy security; environmental, cultural, and economic impacts; and compliance with applicable law and policy.”⁵³ Because there are no prescribed factors, it likely will be difficult for TransCanada to make its case that the United States violated NAFTA by considering its environmental leadership role in the international community.

U.S. Press Secretary Josh Earnest indicated on January 7, 2016 that the U.S. is confident it will prevail in the case.⁵⁴ He stated that the decision to deny the Keystone Pipeline was “entirely consistent with all of our international obligations, including our obligations under NAFTA.”⁵⁵ Earnest also noted that in investor-state disputes such as this one, the “United States has never lost a case.”⁵⁶

How the 2016 elections play out also might affect the NAFTA challenge. Presidential candidate Donald Trump tweeted in August 2015 that “[i]f I am elected President I will immediately approve the Keystone XL Pipeline.”⁵⁷ In February 2014, presidential candidate Ted Cruz also came

48. *Id.*, ¶ 55.

49. *Id.*, ¶ 59.

50. *Id.*, ¶ 60.

51. *Id.*, ¶ 60.

52. Department of State Record of Decision, *supra* note 5, at 3.

53. *Id.*

54. Press Briefing by Press Secretary Josh Earnest, The White House (Jan. 7, 2016), <https://www.whitehouse.gov/the-press-office/2016/01/07/press-briefing-press-secretary-josh-earnest-172016>.

55. *Id.*

56. *Id.*

57. Theodore Schleifer, *Donald Trump supports the Keystone Pipeline*, CNN (Aug. 18, 2015), <http://www.cnn.com/2015/08/18/politics/donald-trump-keystone-pipeline-support/>.

out in support of the Keystone XL Pipeline.⁵⁸ Presidential Candidate Hillary Clinton, on the other hand, opposes the Keystone XL Pipeline.⁵⁹ According to Clinton, the Pipeline is “a distraction from important work we have to do on climate change,” and interferes “with our ability to move forward with other issues.”⁶⁰

Given that oil prices recently fell to a low of twenty-six dollars a barrel on February 11, 2016,⁶¹ interest in “high-cost oil extraction” investments—such as in the Canadian sands where the Keystone XL Pipeline oil would have originated—may decrease across the entire political spectrum.⁶² Economists note that the Keystone XL Pipeline does not make economic sense unless prices are at least sixty dollars a barrel, given the costly ways of recovering oil from sand.⁶³

IV. CONCLUSION

For the past seven years, both parties used the Keystone XL Pipeline as an ideological platform. Republicans cited the pipeline’s benefits for the economy, such as its ability to create jobs and stimulate economic growth, while Democrats emphasized its potential effects on climate change.⁶⁴ The division was not always along party lines, as many Democrats in oil-producing states also supported the project.⁶⁵

Given the role the Keystone XL Pipeline has played, the investors will not be the only ones watching closely to see how the NAFTA claim plays out. If an arbitration panel rules in favor of TransCanada and imposes billions of dollars in damages on the United States, it will impose practical limits on the discretion afforded to the Secretary of State when determining whether a Presidential Permit is in the national interest. But, the arbitration panel may focus more on the procedural aspect of the determination, and what justified the time it took to ultimately reject the Pipeline, rather than on the Secretary of State’s factors in determining whether the Keystone XL Pipeline was in the national interest.

As the Rice historian noted to the New York Times, the Keystone XL

58. Erin Dooley, *Ted Cruz Makes Case for Keystone XL to ‘Birkenstock-Wearing Tree-Hugging Activists*, ABC NEWS (Feb. 11, 2014), <http://abcnews.go.com/blogs/politics/2014/02/ted-cruz-makes-case-for-keystone-xl-to-birkenstock-wearing-tree-hugging-activists/>.

59. Eric Bradner, Dan Merica & Brianna Keilar, *Hillary Clinton opposes Keystone XL pipeline*, CNN (Sept. 22, 2015), <http://www.cnn.com/2015/09/22/politics/hillary-clinton-opposes-keystone-xl-pipeline/>.

60. *Id.*

61. Charles Riley, *Oil crash taking stocks down*, CNN MONEY (Feb. 11, 2016), <http://money.cnn.com/2016/02/11/investing/oil-price-crash/>.

62. David Goldstein, *How low oil prices can be good for the environment*, GREEN BIZ (Jan. 18, 2016), <http://www.greenbiz.com/article/how-low-oil-prices-can-be-good-environment>.

63. David Talbot, *Low Oil Prices Mean Keystone Pipeline Makes No Sense* MIT TECH. REV. (Jan. 9, 2015), <http://www.technologyreview.com/news/533981/low-oil-prices-mean-keystone-pipeline-makes-no-sense/>.

64. Davenport, *supra* note 13.

65. *Id.*

Pipeline became a symbol of a broader dispute.⁶⁶ This dispute included the effects of fossil fuels on global warming and whether the economy and job creation should take precedence over the United States taking a leadership role in combatting climate change and discouraging the use of fossil fuels. President Obama's choice of the latter is reflected in his statements to the press when commenting on the State Department's rejection of the second Presidential Permit. The president stated,

[t]oday, the United States of America is leading on climate change with our investments in clean energy and energy efficiency . . . America is now a global leader when it comes to taking serious action to fight climate change. And frankly, approving this project would have undercut that global leadership. And that's the biggest risk we face – not acting.⁶⁷

66. *Id.*

67. President Barak Obama, *supra* note 34.