

TransCanada's \$15 Billion Lawsuit Against U.S. on Keystone XL Presents Strong Case

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TransCanada, the Canadian company that had been planning to build and own its proposed Keystone XL Pipeline carrying Canada's tar-sands oil to Texas Gulf Coast refineries for export to Europe and elsewhere, released to the public, on Wednesday January 6th, two legal presentations against the United States, because U.S. President Barack Obama, through his Secretary of State John Kerry, on 6 November 2015, had said no to TransCanada's proposed oil pipeline.

TransCanada's basic legal argument contains many allegations, each one of which will be exceedingly difficult for the United States to defend successfully against; and all of which taken together provide TransCanada's stockholders a reasonably high likelihood of ultimately winning their penalty claim, even perhaps all of the \$15 billion that they are seeking against U.S. taxpayers for the American President's having violated rights of TransCanada stockholders to profit, under the 1994 NAFTA trade agreement between the U.S. and Canada. This case could be a harbinger of many more to come if President Obama's three mega trade deals become passed by Congress (TTIP, TPP, and TISA), each of which extends the same profitable potentials for corporations to sue the U.S. government.

First of all, [the penalty case](#) here will be brought outside the U.S. legal system, in an arbitration panel (much championed by the Obama Administration and by prior Administrations, including that of President Bill Clinton, who introduced this arbitration-system into his NAFTA trade agreement). This panel will consist probably of three arbitrators, none of whom needs to be a lawyer, in an Investor State Dispute Settlement proceeding under America's NAFTA trade agreement with Canada, rather than in any U.S. court, and it will not be reviewable in, nor appealable to, any U.S. court, including even the U.S. Supreme Court. In other words: the penalty part of TransCanada's case will exclude any type of democratic accountability — any way that the American people (who would be the persons that would be paying the fine via their taxes) can hold anyone accountable, at the ballot box or otherwise, for the loss, if a fine is imposed by the panel. The U.S. public would simply be forced to pay to the stockholders of the TransCanada Corporation whatever fine such a panel might determine. The American people elected Clinton, Obama, and the other Presidents, and the Congresses, which have subjected U.S. taxpayers to this system — called Investor State Dispute Settlement or ISDS — and future American leaders will have to deal with the consequences, whatever those may be.

The [court case](#) challenges whether the President's turn-down of the Keystone XL Pipeline proposal was Constitutional. It is formally unconnected with the penalty case; but, if the ultimate decision in it turns out to be in favor of Trans-Canada, then the company might be able to increase the penalty in the penalty case. Indeed, the penalty case closes with,

essentially, a warning, to this effect: “The Disputing Investors reserve the right to adjust the claimed damages during the course of the arbitration.” Obviously, if the President unConstitutionally blocked the Keystone XL, then that would be especially damning against the government.

Secondly, both legal presentations — the penalty case and [the court case](#) — cite chapter-and-verse of the statements by U.S. President Obama, and by his Secretaries of State Hillary Clinton and John Kerry, in which they had argued that the Keystone XL pipeline will present little or no environmental harm, and will be beneficial for the U.S. economy. Furthermore, the penalty case (in its footnote 61) cites and quotes from [Secretary of State Kerry’s 6 November 2015 press statement](#) which explained why the President was turning down the proposed pipeline.

This is the passage that’s cited: “It’s absolutely true that the perception of U.S. leadership on climate change, the perception of what this President and this Administration have been doing, and the resolve that they have been showing over the course of the last number of years has been enormously important to the U.S. posture internationally” However, the key statement there (which TransCanada oddly failed to quote, since it’s their strongest evidence) was: “The critical factor in my determination was this: moving forward with this project would significantly undermine our ability to continue leading the world in combatting climate change.” Kerry’s assertion there, that this — and not any of the issues that have legal bearing — was “the critical factor” in the decision, will add considerably to TransCanada’s chance of victory in the penalty case.

Thirdly, both actions cite a lengthy record of admissions by the Obama Administration that none of the issues that have legal bearing on the matter were pertinent in their decision. Here is how the penalty case summarizes this:

49. This, then, was the basis of the Administration’s reasoning: Keystone’s application should be denied so that the United States could show leadership on climate change by (i) appeasing those who held a view on the environmental impact of the Keystone XL Pipeline that the Administration itself concluded on six different occasions was wholly unsubstantiated; and (ii) making a “tough choice” to deny Keystone a Presidential Permit for the Keystone XL Pipeline, even though denying the permit would, based on the Administration’s own analysis, have no beneficial impact on the environment. In short, the decision elevated perceptions over reality, which is the hallmark of a decision tainted by politics.

Unfortunately, the following matters will have no bearing on the ultimate determination by either the arbitration panel in the penalty case, or the ruling by the U.S. District Court for the Southern District of Texas, Houston Division (which will be the first court to hear the Constitutional case):

[All of the Environmental Impact Statements that the State Department commissioned](#) to be done on the proposed pipeline, and especially the ones that were done under Secretary of State Hillary Clinton (a strong behind-the-scenes supporter of the Pipeline), were profoundly corrupt and were done by teams that included not a single climatologist but were instead wholly comprised of companies that were chosen by TransCanada itself, and that will potentially lose business if anything is reported that would be unfavorable to the U.S. government’s approval of Keystone XL. [In other words: they were](#)

[rigged.](#)

John Kerry was [only slightly less gung-ho for Keystone XL than Hillary Clinton was.](#)

Furthermore, Steve Horn, of the DeSmogBlog, headlined 5 February 2015, at Huffington Post, "[Digging Into TransCanada's Lobbying History,](#)" and he reported that: "In addition to the [\\$250,000 paid to Paul Elliott](#) — TransCanada's [infamous in-house lobbyist](#) and former Secretary of State Hillary Clinton's national deputy campaign manager during her 2008 run for president — three outside firms lobbied on TransCanada's behalf to promote KXL." One of those was Bryan Cave. And, "The two Bryan Cave lobbyists on the KXL file are [Brandon Pollak](#) and [David Russell](#). Pollak formerly served as Deputy National Director of Grassroots Fundraising for John Kerry's 2004 run for president. Kerry now serves as the head of the U.S. Department of State, the body assigned to make the final call on KXL." So, the deeper one dug, the more the smell came to resemble that of tar-sands sludge itself.

But even that is merely scratching the surface of what's wrong here. [If TransCanada wins its penalty case here, then all nations' environmental regulations will become effectively crippled, unless and until ISDS becomes internationally outlawed. But instead, Obama's top intended legacy as President is to seal the deals to extend ISDS globally](#) — and Hillary Clinton was a big supporter of that until she started to run for President in a Party that's overwhelmingly opposed to ISDS. It's the same as when she was a big champion of NAFTA until she started to run for President and said she hadn't supported it. She has the worst record on the environment of anyone except Republicans.

The likeliest reason why Obama turned down Keystone XL is that he wants Hillary Clinton to become President to finish everything that he started. If he had accepted XL, he would have lost all chance of that happening, unless one of the Republican contenders wins the Presidency.

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