

TransCanada an underdog, but has strong case against Washington

Pipeline company hits U.S. government with legal action and NAFTA claim

By Tracy Johnson & Kyle Bakx, [CBC News](#) Posted: Jan 07, 2016 5:00 AM ET Last Updated: Jan 07, 2016 8:13 AM ET

Slapping Washington with a multibillion-dollar lawsuit and a North American Free Trade Agreement claim takes a certain level of bravado, but considering the long, arduous and expensive path TransCanada has travelled with the proposed Keystone XL pipeline, it's easy to see why it has the guts to do it.

The Calgary-based pipeline company does not want to walk away from Keystone XL empty-handed after seven years of frustration, billions of dollars spent and thousands of pages of filings.

Instead, it's asking for \$15 billion US and permission to start construction on the cross-border pipeline.

- [Keystone XL rejection leads TransCanada to sue Obama administration](#)
- [TransCanada's legal action after U.S. rejection of Keystone XL pipeline spurs mixed reaction](#)

To that end, TransCanada has launched two separate legal challenges against the U.S. government.

The first is a NAFTA claim, which was not unexpected, as there have been musings by the pipeline company's CEO in recent years about taking such action.

The question was always whether it was more of a threat than a promise.

'What they spent has now become tantamount to expropriation.' – *Cyndee Todgham Cherniak, international trade lawyer*

Under NAFTA, governments have to treat foreign and domestic companies alike. Their regulations can't discriminate between the treatment of a foreign or domestic company.

It's called a Chapter 11 challenge, and TransCanada is the underdog right now, at least historically. To date, no company outside of America has been successful in a NAFTA Chapter 11 case against the U.S.

So, if you are keeping score: U.S. 100 per cent, Investors 0

But this could be the first victory for the other side.

The main argument by TransCanada is that it did not receive fair and equitable treatment throughout the review process for Keystone XL, which was ultimately rejected.

- [Eli Lilly files \\$500M NAFTA suit against Canada over drug patents](#)
- [NAFTA pesticide ban challenge settled without money](#)

"It basically says the U.S. has approved other pipelines, and so we are not being treated the same as these other guys who were approved," said Cyndee Todgham Cherniak, who practises international trade law, in an interview with CBC News.

The company spent a significant amount of money to purchase land and secure rights, while the approval process went on.

"What they spent has now become tantamount to expropriation," said Todgham Cherniak. "They are taking a significant financial hit."

While the Keystone XL process dragged on, other pipelines were constructed south of the border. Under NAFTA, every investor has to be treated the same, without discrimination.

"What TransCanada has raised in their notice, is that this file was highly politicized," said Lawrence Herman, an international trade lawyer with Herman & Associates in Toronto. "I think they've got a pretty strong case."

- [Keystone XL denial all about politics, says former ambassador](#)

The \$15 billion in damages in the NAFTA claim is a preliminary figure by TransCanada to recoup its investment and the lost future economic return for the project.

"They have the right to claim for compensation based on both sunk costs and future lost profits as a result of the decision," said Herman.

Direct challenge to Obama

TransCanada also filed a separate lawsuit, arguing that Obama exceeded his power by denying construction of Keystone XL.

The basis of the argument is that the U.S. Constitution gives Congress the power to regulate international commerce. The U.S. Congress passed a bipartisan bill nearly a year ago to approve Keystone XL.

The company isn't looking for any damages in this case; it essentially wants to overturn the denial of the permit and get started on construction of the pipeline.

- [Keystone XL: Why one pipeline answered for them all](#)
- [Keystone XL may be dead. The oilsands probably aren't](#)

The question of presidential power to approve or deny the pipeline hadn't been challenged by TransCanada until now, but the company suggests that the presidential permits in the past have focused solely on border-related and operational concerns, not on issues of dirty oil or climate change.

This challenge has some merit, according to Lawrence Smith, a partner with the law firm Bennett Jones. He is the firm's leading energy lawyer. Smith points out that he is not a U.S. constitutional lawyer, but that the executive decision seemed arbitrary.

"It is somewhat surprising that when it comes to pipelines, which we have many of crossing the border, that the president was able to insist on an almost ever-changing series of escalating requirements, substantive requirements that are not reflected in law."

A chill on U.S.-Canada relations?

Under the Chapter 11 provision in NAFTA, firms are allowed to sue another country without first getting the approval of their own country. So TransCanada was able to launch the lawsuit against the U.S. without approval from Ottawa. That may put a chill on the warming relationship between Prime Minister Justin Trudeau and Obama.

"TransCanada, by launching this case, is going to basically stop all dialogue between the two governments on pipelines and projects like this, and that's going to continue even after there's someone new in the White House," said Christopher Sands, a fellow with the Hudson Institute in Washington, D.C..

In March, the White House will hold a state dinner for Trudeau, the first for a Canadian prime minister in 19 years.

"With Trudeau and Obama getting along well, they had put the KXL pipeline issue on the side for a while," said Sands.

"They could talk about other things, like North American energy strategy, but now a lot of that is going to be held up with this case pending, and I think it's going to be frustrating to Washington, but also frustrating to Ottawa."

What now?

The road TransCanada is now travelling is just like the one behind it — long and expensive.

A NAFTA claim won't be settled quickly and won't be cheap.

"It will take several years, there is no question about that," said Herman. "These are long-term cases. They are going to have to have lots of patience and deep pockets."

What's interesting to note amid the legal action and trade claim is that Keystone XL still isn't dead.

TransCanada can still reapply for approval to construct the project in the future. It's an option the company said it is considering.