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TransCanada Sues U.S. Government for Rejecting Keystone Pipelines

By: James Coleman

Last Wednesday, TransCanada filed a complaint against the United States in a federal district court in Houston alleging that the President's rejection of the Keystone XL pipeline was invalid and unconstitutional because it was not authorized by Congress. If successful, this claim would allow construction of the pipeline.

On the same day, TransCanada filed a notice of intent to submit a claim to arbitration under the North American Free Trade Agreement (NAFTA). Even if successful, this claim would not allow construction of the pipeline, but could entitle TransCanada to money damages from the United States. The company is asking for $15 billion in damages.

Like most private lawsuits against the government, these lawsuits face long odds, but both raise important and novel legal issues that will be difficult to decide. TransCanada's constitutional claim could change the way that the United States approves international oil pipelines. And TransCanada's NAFTA claim could endanger the United States' long winning-streak in NAFTA arbitrations.

TransCanada's Constitutional Claim

The most unexpected part of TransCanada's legal salvo was the lawsuit that it filed asking a U.S. district court to rule that President Obama's rejection of the Keystone XL pipeline was unconstitutional. TransCanada notes that Congress has never passed a statute that gives the President authority to reject international oil pipelines and says that, without such a law, the President had no authority for his unilateral rejection of the pipeline.

Congress has never provided a legal framework for regulating oil pipelines that cross the United States' international borders. By contrast, there are laws that establish a process for the President to decide on international natural gas pipelines and electricity transmission.

In the absence of Congressional authorization, President Lyndon Baines Johnson simply issued an executive order in 1968, Executive Order 11423, that established a process for issuing permits to proposed oil pipelines that "would serve the national interest." Then in 2004, President George W. Bush issued a new unilateral order, Executive Order 13337 that expedited review of border crossings. Both executive orders delegate decisions on these cross-border permits to the U.S. Secretary of State.

On November 6, 2015, the current Secretary of State, John Kerry rejected the Keystone XL pipeline after seven years of review. The official U.S. Record of Decision stuck by the State Department's controversial previous conclusion that the pipeline would improve U.S. energy security, benefit the economy, and would be unlikely to increase greenhouse gas emissions in Canada. (It also suggested that the pipeline might even decrease greenhouse gas emissions in the United States by moving oil transport from railroads to pipelines, making oil transport more

efficient.) But the U.S. concluded that the pipeline was ultimately not in the national interest because it could undercut the nation's leadership in climate talks because the pipeline was "perceived as enabling further [greenhouse gas] emissions globally."

TransCanada's key argument is that, in the absence of any law, the President does not have unilateral authority to reject an international oil pipeline based on this kind of consideration. Although Presidents have claimed power to decide whether a pipeline is in the national interest since President Johnson in 1968, TransCanada argues that this power has never been fully tested because the President has never rejected an international pipeline.

This creates something of a puzzle: if Congress has never passed a law governing international oil pipelines and the President does not have authority to reject an oil pipeline, then who may, in fact, regulate pipeline border crossings?

One possible answer is that international oil pipelines are primarily regulated by the states, just like domestic oil pipelines. The U.S., unlike Canada, primarily relies on state-by-state regulation for interstate oil pipelines. That is, if no law has been enacted governing international oil pipelines, then the only laws that govern them are the same ones that govern domestic oil pipelines.

President Obama's administration will raise several counterarguments. First, it will argue that the President has inherent and unilateral constitutional authority to control the nation's borders, so he must have some kind of ability to control international border crossings. Second, if Congress has not established any criteria for the President to use in this decision, then he is free to create his own criteria. Third, President Johnson established this process almost fifty years ago and it has been frequently used to *approve* pipelines so Congress has, with the passage of time, acquiesced to this process. Fourth, federal district courts have upheld the President's unilateral decision to approve international pipelines.*

TransCanada will respond that, whatever power the President has, it does not allow him to reject a pipeline based solely on international perceptions that are inconsistent with his own government's environmental analysis. TransCanada's complaint also argues that, far from acquiescing in the President's unilateral authority to reject international pipelines, recent Congresses have repeatedly sought to constrain the President's authority, citing Congress's frequent attempts to approve the Keystone XL pipeline. Finally, TransCanada will point to federal court decisions and executive branch opinions from nearly a century ago, which concluded that in the absence of Congressional authorization the President had, at most, limited authority to control border-crossing facilities. Though old, these opinions may remain relevant in the unusual situation where, as with oil pipelines, Congress has not established a process for permitting border crossings.

The continuing saga of the Keystone XL drama overlaid with a tangle of old and new precedents and conflicting constitutional powers will make TransCanada's U.S. lawsuit a case to watch. If a Republican is elected President this coming November, then the issue will likely be moot because the Republican contenders say they would reverse President Obama's decision on the pipeline. But if not, then the U.S. courts will have to resolve the thorny issues raised by TransCanada.

TransCanada's NAFTA Claim

TransCanada's other action, its notice of intent to submit a claim to NAFTA arbitration, alleges that the U.S. discriminated against Keystone XL's Canadian investors, violating its obligations to afford them national and most-favored-nation treatment under Article 1102 and Article 1103 of NAFTA. TransCanada also argues that by delaying a decision on the pipeline for seven years, and then denying it, the U.S. government destroyed the value of its investment, expropriating its property in violation of NAFTA Articles 1110 and 1105.

NAFTA claims are decided by three independent arbitrators. These arbitrators are not bound by the decisions of the arbitrators that decided previous claims. Thus, it is very difficult to predict whether a NAFTA claim will be successful.

If past cases are any indication, a Canadian company like TransCanada begins at a serious disadvantage. The United States has never lost a NAFTA decision to a foreign investor. And arbitrators have sometimes gone to great lengths to avoid a finding of discrimination. In one case, *Glamis Gold Ltd. v United States*, Award (NAFTA Arb Trib 2009), California passed a law that, it admitted, used "narrowly crafted language intended to prevent approval of a specific mining project" owned by Canadian investors (at ¶167). But the NAFTA panel for that case held that the law was not discriminatory because, in theory, that narrowly crafted language could apply in the future if another company proposed a similar project.

On the other hand, the extraordinary facts of the Keystone XL review process could end the United States' NAFTA winning streak. First, throughout the seven-year review, President Obama repeatedly responded to complaints from pipeline supporters by admonishing them to remember "this is Canadian oil, this isn't U.S. oil." And the President's administration was, at the same time, moving to expedite domestic oil pipelines. Second, after repeatedly delaying the decision on Keystone XL and repeated environmental impact studies, the U.S. denied the permit on the basis of a perception that was not supported by the seven years of analysis it had done. It will be difficult to explain why it took seven years to analyze the pipeline if, in the end, the government chose to ignore that analysis.

Finally, TransCanada's lawsuits may operate in tandem because one relevant set of laws that Congress has passed concerning international energy trade is the set of laws approving and implementing NAFTA. In U.S. court TransCanada will argue that even if Congress has not prescribed a specific process for international oil pipelines, it has, at least ruled out any discriminatory or arbitrary treatment of international investors in those pipelines. One of the chief challenges for U.S. lawyers will be to explain why the federal government should impose a uniquely lengthy and unpredictable process on Canadian oil pipelines while expediting domestic oil pipelines.

Regardless of the outcome, TransCanada's Keystone XL challenges set the stage for potential blockbuster decisions that will have a lasting impact on energy, constitutional, and trade law.

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*Disclosure: Before my academic career, I worked in private practice and represented TransCanada in two of these earlier cases.

This post originally appeared on James Coleman's blog Energy Law Prof. You can see more legal documents & analysis related to the Keystone XL pipeline and other North American oil pipelines at Oil Transport Tracker.