



KEYSTONE XK IS DEAD NOW COMES THE TOUGH FIGHT OVER COMPENSATION

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Keystone-XL is dead. Everyone knows that. Nothing can force the Biden administration to issue the construction permit. The fight is now over any compensation owed to TC Energy Corp. by the US government.

Even though endorsed by the Canadian government and even though Alberta invested \$1.5 billion in the venture, Keystone is a private sector project. Claims for compensation will be up to the company to advance, either in US courts or before a North American Free Trade Agreement panel. The company said it is considering its options.

In the meantime, Alberta Premier Jason Kenney has demanded Canada apply “sanctions” in retaliation for the project’s cancellation. Saskatchewan counterpart Scott Moe echoed this, saying “sanctions are always on the table” in dealing with the United States. Whatever the premiers might say, retaliation by Canada will never happen.

We’ve just come through a trade war with the Trump administration, where Canada had been on the receiving of Donald Trump’s unilateral tariffs on Canadian steel and aluminum, threatening to impose more on other Canadian imports. At the outset of what is seen to be a productive and respectful bilateral relationship, sabre rattling is not helpful. Recognizing Western Canada’s anger over Keystone, can it possibly be in Canada’s interest to resort to the same unilateralism that we condemned the Trump team for? If we did go that route, the US would simply respond in kind, a battle Canada could never win.

Leaving aside domestic Canadian politicking, there are points about sanctions that need clarification. Yes, international law allows countries to apply these in certain cases, such as when the United Nations Security Council orders them or when there have been human rights abuses abroad or other threats to international peace and security. Canada has applied such trade sanctions against Myanmar, Russia, Iran, North Korea, Syria and others.

In the international trade arena, we don’t speak of sanctions. The proper term is “countermeasures”, basically tariff surcharges aimed at restoring the economic balance where trade agreements have been breached. Thus in 2018, Canada applied tariff

surcharges as countermeasures on US steel and aluminum in response to Donald Trump's unilateral national security tariffs on Canadian imports, in breach of US obligations under the NAFTA (in force at the time) and under the WTO Agreement. But what are the breaches of international law in President Joe Biden's cancellation of the Keystone XL permit? Let's look at this.

The US is bound under NAFTA to guaranty Canadian investors and their investments both non-discriminatory treatment as well as "fair and equitable" treatment in accordance with international law norms. Even if these rules are subject to some important qualifications, including the right of the US to enact legitimate environmental protection measures, the cancellation of the KXL permit could be seen as both unfair and arbitrary, at least before TransCanada and Alberta were given the opportunity to make their case. But that requires adjudication by an independent NAFTA panel.

Both TC Energy and the Province have the right to have such a panel formed by filing an investor claim against the US government. While these are being phased out under NAFTA's replacement, the Canada-United States-Mexico Agreement, there is a three-year period during which NAFTA actions can still be brought. TC Energy had filed such a claim in 2016 after the Obama administration refused the permit, withdrawing its case in 2017 when Trump the reversed Obama government's decision. Biden's decision puts the situation back to where it was in 2016.

In a letter to the PM last week, Mr. Kenney says,

"At the very least, I call upon the government of Canada to press the U.S. Administration to compensate TC Energy, and the Government of Alberta, for billions of dollars of costs incurred in the construction of Keystone XL to date. . ."

"For the United States to retroactively cancel the permit, on the basis of which investment decisions were made, is a clear violation of the investor-protection provisions of the North American Free Trade Agreement."

Those arguments have some merit. But whether the Biden administration has violated NAFTA and whether and how much compensation may be required has to be adjudicated by a dispute settlement panel. And as noted above, and implicit in Mr. Kenney's letter, these panels can award compensation but have no authority to order the American government to issue the Keystone permit. Because these are private sector claims, moreover, it is doubtful that anything in the NAFTA would allow the Canadian government to retaliate against the US, whatever the panel's decision might be.

NAFTA investor cases are long and arduous. History shows that they can take five years or more to reach a final conclusion. An example is one involving the cancellation of a permit for a US company to build a quarry in Nova Scotia. The American investor filed its claim

in 2008. The final award – which gave the investor \$7 million versus \$400 million claimed – was not handed down until 2019.

Any NAFTA arbitration claim over Keystone will likewise take years of hard-fought litigation to get to a final decision. It can be expected that the virtually unlimited legal resources of the American government will be brought to bear in defending the case. Unlike others that have been relatively confined in scope, a Keystone claim goes to the very root of the climate change policies of the Biden administration. While that doesn't gainsay the merits of the investors' arguments in Keystone, these are factors that will have to be weighed by TC Energy's board of directors in deciding how to proceed.
