Corporate Attacks: Climate Change
Case Study: Keystone XL Pipeline

Investor-State Dispute Settlement (ISDS) grants corporations shocking powers to attack the laws we rely on for a clean environment, financial stability, affordable medicines, safe food and decent jobs. ISDS empowers multinational corporations to sue our governments before panels of three corporate lawyers. The corporate lawyers can award the corporations unlimited sums to be paid by America's taxpayers, including for the loss of expected future profits the corporations claim they would have earned if the domestic law was never enacted. The corporate lawyers' decisions are not subject to appeal and the amount they can order taxpayers to give corporations has no limit.

TransCanada v. United States
Keystone XL crude oil pipeline
Case dismissed

In June 2016, the TransCanada Corporation launched an ISDS case under NAFTA demanding $15 billion in compensation because the corporation's bid to build a pipeline was rejected by the U.S. government. The $15 billion claim was five times more than the $3.1 billion that TransCanada said it already had invested in the pipeline project because the compensation demand included the future expected profits that TransCanada claims it would have earned had the pipeline been allowed.

The proposed 875-mile pipeline – called the Keystone XL – would transport to the U.S. Gulf Coast up to 830,000 barrels per day of highly-corrosive crude oil extracted from tar sands in Alberta, Canada. The pipeline would transport one of the dirtiest fossil fuels on the planet across more than a thousand rivers, streams, lakes and wetlands as it traverses six U.S. states.

Indigenous leaders, farmers, and ranchers in the path of the project stressed that a spill from the pipeline would threaten their lands and livelihoods. Their concerns were bolstered by environmental and health experts who provided evidence during the course of various federal and state reviews of the project about how tar sands oil development in Alberta, Canada already has devastated the land and water of Canadian First Nations communities, released toxic chemicals that poisoned and sickened these communities and threatened local species of fish and wildlife.

The pipeline also raises significant concerns with respect to its climate impacts. If the pipeline were completed, it would create new demand for intensified carbon-intensive tar sands extraction and processing as the purpose of the pipeline was to transport the tar-sands oil to U.S. Gulf Coast refineries for processing so finished product could be exported into the global market.

The November 2015 decision by the U.S. government not to approve the pipeline project came after tens of thousands of citizens in the states that would be affected and by environmental activists nationwide had worked for six years to demonstrate that the pipeline was not in the national interest and would pose serious health and environmental risks.

In January 2016, just two months after the U.S. government's decision to reject the pipeline, TransCanada filed notice of intent to start an ISDS case under NAFTA. It simultaneously filed a case in U.S. federal court, claiming that the decision to reject the pipeline was unconstitutional because only Congress, not the president, has authority to make such a decision.

In its ISDS notice of arbitration, TransCanada claimed the United States had violated four different investor rights provided by NAFTA. First, it claimed that the U.S. government violated the "minimum standard of treatment" standard, arguing that the U.S. government led TransCanada to develop "reasonable expectations" that the Obama administration would approve the pipeline, only to ultimately reject it. The company noted that, while in 2010 the U.S. State Department was "inclined" to approve the project, subsequently "politicians and environmental activists … continued to assert that the pipeline would have dire environmental consequences," which ultimately led the Obama administration to reject it for "symbolic reasons, not because of the merits."

TransCanada also alleged that disapproval of the project violated the NAFTA investor protection against "indirect expropriation," arguing that the pipeline "substantially deprived" the company of its investment in the project." TransCanada also claimed violations of NAFTA's "national treatment" standard, claiming that the United States treated the Canadian firm worse than it treated U.S. firms, and of NAFTA's "most-favored nation" standard, claiming that the United States treated the Canadian firm worse than other international pipeline companies. These latter claims were lodged despite the fact that no other company would be permitted to build the pipeline.

In his first week as president in January 2017, Donald Trump signed an executive order inviting TransCanada to submit a new application for approval of the pipeline's construction. ISDS rules would have permitted TransCanada to continue to pursue compensation via ISDS for lost revenue it claims was caused by the project's delay even after receiving a permit. However, on February 28, 2017, the company suspended its case for 30 days, which coincided precisely with the time period by which the U.S. State Department was to make a final decision on the new permit application.

During that 30 day period, on March 4, 2017, the White House clarified that a previous Trump executive order calling for pipelines to be constructed with American-made steel and pipe would not apply to the Keystone XL. Shortly thereafter, the State Department issued the permit. TransCanada then announced that it would discontinue its NAFTA ISDS case. Various news outlets reported that close observers suspected that the quick permit approval and the Buy American steel/pipe waiver that blessed TransCanada's use of foreign steel and piping were likely the "settlement" price extracted from the Trump administration by TransCanada for dropping its NAFTA claim.