

Intelligence MEMOS



From: Lawrence Herman
To: Canadians Concerned about Trade
Date: January 29, 2021
Re: **COMPENSATION, NOT SANCTIONS, FOR KEYSTONE**

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

Even though it was endorsed by the Canadian government and even though Alberta invested up to \$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 NAFTA 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 the Trump trade war featuring unilateral tariffs on Canadian steel and aluminum, with threats to impose more on other Canadian imports. At the outset of what is seen to be a productive and respectful bilateral relationship with the new Biden administration, sabre rattling is unhelpful.

Recognizing Western Canada’s anger over Keystone, can it possibly be in Canada’s interest to resort to the same unilateralism for which we condemned the Trump team? 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 and Canada has done so when there have been human-rights abuses abroad or other threats to international peace and security.

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 Mr. Trump’s unilateral national security tariffs on Canadian imports, in breach of US obligations under NAFTA and under the WTO Agreement. What are the breaches of international law in the Biden Keystone permit cancellation?

The US is bound under NAFTA to guarantee 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 US right to enact legitimate environmental protection measures, the cancellation of the permit could be seen as both unfair and arbitrary. But that requires adjudication by an independent NAFTA panel.

Both TC Energy and the province have the right to have such a panel by filing an investor claim against the US government. While these are being phased out under NAFTA’s replacement, 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 Mr. Trump reversed the decision. Mr. Biden’s decision puts the situation back to where it was in 2016.

Arguments that the latest decision violates NAFTA have some merit. But that will need to be adjudicated by a dispute settlement panel. These panels can award compensation but have no authority to order the US government to restore the Keystone permit. Because these are private-sector claims, moreover, it is doubtful that anything in NAFTA would allow the Canadian government to retaliate against the United States, whatever the panel’s decision might be.

NAFTA investor cases are long and arduous. History shows they can take five years or more to reach a final conclusion. It took 11 years for a dispute over the cancellation of a permit for a US company to build a quarry in Nova Scotia to be resolved, and the award gave the investor \$7 million versus \$400 million claimed.

Any NAFTA arbitration claim over Keystone would likewise take years of hard-fought litigation. It can be expected that the almost unlimited legal resources of the US government would 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.

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A version of this memo first appeared in the [Globe and Mail](#).