

# Intelligence MEMOS



From: Jon Johnson  
To: Global Affairs Canada, TC Energy and the Biden Administration  
Date: January 28, 2021  
Re: **CANCELLATION OF THE KEYSTONE PERMIT – WHAT TO DO**

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It is no surprise that one of President Joe Biden's first acts was to cancel TC Energy's Keystone permit. So where does this leave us?

It is reported that TC Energy may initiate a NAFTA investor/state dispute settlement (ISDS) claim against the US government. The question then becomes: When did the events giving rise to the claim have to take place? Before CUSMA came into effect on July 1, 2020, was my conclusion when I explored the issue in a [Memo](#) last fall.

If this is correct, Biden's cancellation of the Keystone permit occurred too late to give rise to a claim. Others disagree, but TC Energy must answer this question before initiating an ISDS claim under the old NAFTA rules because it would have to waive its right to sue in a US court to do so.

What about a lawsuit? Unlike Canada's constitution, the US Fifth Amendment provides that no person (which includes a corporation) shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Press coverage has been skeptical as to TC Energy's chances for success in any such claim, but TC Energy should explore this possibility.

The Canadian government could request consultations with the US government under CUSMA Article 31, and if consultations do not result in a resolution, proceed to request the formation of a panel. However, what would the Canadian government achieve if it won? Unless the Biden administration reversed its position and renewed the permit, the only right that the Canadian government would gain is the right to suspend CUSMA benefits (such as tariff free trade) in some other sector. All that this would achieve is that some US businesses unrelated to the dispute would be hurt, as would be Canadian businesses with which they trade.

Alberta Premier Jason Kenney suggests unilateral action by Canada, such as occurred when Canada responded to the Trump administration's Section 232 tariffs on Canadian steel and aluminum. With the new Biden administration, both the Canadian and US governments have the opportunity to return to the rule of law in their trade relations. Unilateral action by Canada would undermine this objective.

The Biden administration has made much of the need to repair relations with close US allies such as Canada. TC Energy is a highly reputable Canadian company that provides a necessary service by building pipelines to transport petroleum products around the US using the safest means possible. The US need for these products is not going away anytime soon.

The Biden administration's action on Keystone damages US-Canada relations, particularly when one considers the history of the dispute. TC Energy commenced its efforts for Keystone approval in 2008. Approval seemed uncontentious in the early Obama years. However, the Obama administration's position hardened and in 2015, seven years after the initial application, and after considerable investment by TC Energy, the permit was refused.

TC Energy commenced a NAFTA claim against the US, but the Trump administration took over from the Obama administration and issued several approvals for the project. TC energy dropped its NAFTA claim and proceeded to invest more money in Keystone. However, the Trump administration has now been replaced by the Biden administration that in its first day in office reversed the Trump administration's approval.

TC Energy, through no fault of its own, has been the victim of massive shifts in policy by successive US governments. The Biden administration should take into account the difficulties that its Keystone decision is causing for Canada and its petroleum producing provinces in its other policies, such as by supporting Canada on issues important to Canada or, at least, refraining from decisions that adversely affect Canadian interests.

*Jon Johnson is a former advisor to the Canadian government during NAFTA negotiations and is a Senior Fellow at the C.D. Howe Institute.*

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