
C H A L L E N G I N G

corporate nationhood

F O R H U M A N I T Y ' S S A K E

Case No. 1 – The Keystone XL Pipeline

TransCanada Corporation v. the United States of America

EXECUTIVE SUMMARY. The TransCanada Corporation—proponent of the Keystone XL pipeline—is demanding \$15 billion from the United States government because, in their words, “the activist strategy worked” to derail the project. The activists in this case are the cross-border coalition of indigenous, environmental, rancher-farmer and climate advocates who organized the campaign to defeat the pipeline, and inspired unprecedented public participation. This coalition motivated a civic dialogue about the high cost of dirty energy, and convinced the White House to reject the Keystone XL pipeline. It was a historic victory celebrated by communities around the world, and helped fuel the success of international climate negotiations in Paris. The 8-year campaign to defeat the pipeline was a model of effective coalition building and advocacy in a representative democracy. Today TransCanada is using special rules tucked into the North American Free Trade Agreement to challenge the will of the people, and extract \$15 billion for unrealized profits from U.S. taxpayers.

Domestically, the outsized influence of corporations vis-a-vis “we the people” is of paramount concern to both the left and right. Internationally, a parallel power struggle is quietly playing out. In the 1990s, multinational corporations manufactured an international court system in which they are litigants, judge and jury; and are now engaged in a concerted legal campaign to wield this offshore judicial system as a weapon against the public interest. Until recently, the public had been entirely locked out of the process, and few people were aware these courts existed.

Voice 4 the People (V4P), a project of the Center for International Environmental Law ([CIEL](#)), is seeking funds to coordinate the efforts of existing citizen groups—the Center for Biological Diversity, Sierra Club, Friends of the Earth, etc.—to educate and mobilize their memberships, and provide legal representation to defend the public’s victory in defeating the Keystone XL pipeline. V4P challenges corporate nationhood *for humanity’s sake* to ensure that the people’s voice is clear wherever multinationals threaten public health, environmental and climate protections.



I. INTRODUCTION

Corporate nationhood is a little known threat to socio-economic justice and environmental sustainability. Chevron, Philip-Morris, Koch Industries and other multinational corporations have quietly constructed an international legal system in which they are literally as powerful as sovereign nations. Tucked into U.S. trade agreements, the Investor-to-State Dispute Settlement (ISDS) system expands *Citizens United* beyond corporate personhood, and opens the door to a more corrosive force—corporate nationhood. ISDS allows multinationals to challenge virtually any law, using “investment tribunals” where the judges are corporate lawyers and the people rarely have a voice.



ISDS IS CORROSIVE TO PEOPLE POWER

BY CONSTRAINING THE POLICY SPACE ON WHICH SOCIAL MOVEMENTS RELY TO ADVANCE THE PUBLIC INTEREST AND SHIFTING POWER TO MULTINATIONAL CORPORATIONS.

Voice for the People (V4P) will defend humanity’s right to mobilize for just and sustainable communities. V4P will build on the success of civil rights and similar movements through coordinated strategic legal engagement and grassroots organizing by:

- 1) Intervening on behalf of citizen groups by filing Friend of the Court, or amicus, briefs in cases like *TransCanada Corp. v U.S.A.* where public interest policies are challenged; and
- 2) Advocating for fundamental reforms to the ISDS system through grassroots organizing.

II. THE BIRTH OF CORPORATE NATIONHOOD

In crafting the North American Free Trade Agreement (NAFTA), the Reagan Administration designed a special chapter to limit government’s ability to regulate in the public interest and expand the influence of multinational corporations. As a central element of Reaganomics, NAFTA included radical rules that extended special legal rights to multinationals to challenge environmental and public health laws, energy policies, financial regulations and virtually any measure that undermines profits or reduces the value of an investment. NAFTA and subsequent “free trade” deals provide an avenue on which multinationals can circumvent national democratic processes and bypass domestic courts. The rules give multinationals status equal to sovereign countries, and allow them to sue governments in offshore trade courts for unlimited taxpayer dollars.

“THAT’S RIGHT! A COMPANY IS ABLE TO SUE A COUNTRY OVER A PUBLIC HEALTH MEASURE THROUGH AN INTERNATIONAL COURT. HOW THE F**K IS THAT POSSIBLE?”



Multinationals are currently using these rules with alarming success to challenge public interest and democratically supported initiatives around the world. A Canadian company is using a U.S. affiliate

**NEARLY HALF OF THE ISDS CASES
LAUNCHED IN 2014 TARGETED
CLIMATE-RELATED POLICIES IN THE
OIL, GAS AND ENERGY SECTORS.**

called Lone Pine Resources Inc. to sue Canada for \$250M over a successful campaign by climate activists to ban fracking under the St. Lawrence River. Peru is being sued by a U.S.-based Renco Group, owned by one of the nation's richest men for \$800M because the people of La Oroya organized to close a smelter after the company refused to clean up its pollution in

what is now one of the world's 10 most polluted sites. Vattenfall is suing Germany for \$4.6B because, in the immediate wake of the Fukushima Daiichi disaster, the German people demanded replacing nuclear energy with wind and solar. In Uruguay, Philip-Morris is suing for \$25M over a popularly supported—and tremendously effective—public health regulation of tobacco.

III. CASE IN POINT: THE KEYSTONE XL PIPELINE

The Keystone XL (KXL) case epitomizes the threat of corporate nationhood. The campaign to defeat the proposed KXL pipeline was a model of effective mobilization coordinated by a broad coalition of civil society groups in the U.S. and Canada. Millions of North Americans from across the political spectrum waged an 8-year campaign using time-tested strategies for social change—community education, mass mobilization and tactical legal engagement. On Nov. 6, 2015 President Obama announced that he would deny TransCanada Corporation (TransCanada) a permit to pipe tar sand crude oil through the U.S. to global markets. The world celebrated a major climate victory and the unprecedented demonstration of people power that made it possible. It was a quintessential example of how people exercise their rights in a representative democracy, and helped fuel success in reaching agreement on a global climate deal.

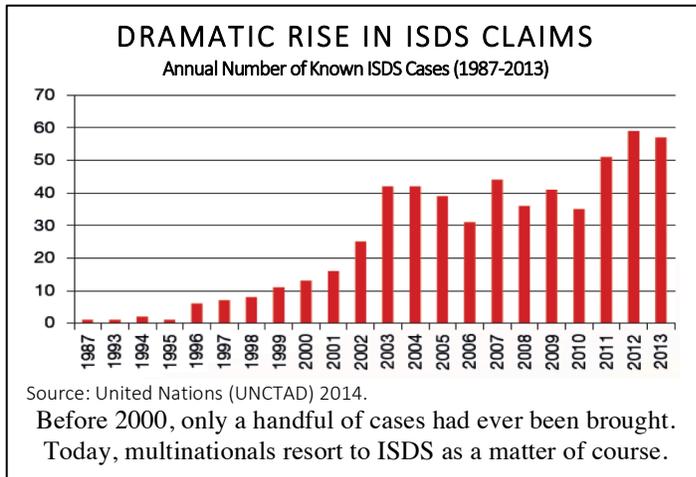


WE WON, RIGHT?
MORE AMERICANS PARTICIPATED IN DEFEATING KXL THAN ANY ENVIRONMENTAL CAMPAIGN IN U.S. HISTORY.

Despite having lost in the court of public opinion and the domestic political process, TransCanada is using an offshore ISDS court to challenge the will of the people. TransCanada claims that our hard fought victory violates special rights granted to it under NAFTA's Chapter 11, and is demanding \$15 billion for 'unrealized profits' from U.S. taxpayers.

IV. AN OFFSHORE JUDICIAL SYSTEM 'OF, BY AND FOR' THE MULTINATIONAL

The ISDS system is structurally biased in favor of corporate interests. First, multinationals actually choose two of the three judges that rule on their case. Second, the absence of meaningful conflict of interest rules means the judges are almost always corporate lawyers who are actively prosecuting similar claims in neighboring courtrooms. Third, there is no requirement that judges have



competence (*let alone expertise*) in public health, environmental or administrative law. The judges only need understand corporate investment law. Fourth, when weighing the public benefit of a challenged measure against impacts on corporate profit, judges openly rely on the underlying goal of the agreement—to increase investments—as a means to *de-value* public health or environmental protections. ISDS is being wielded in cases like *TransCanada v the United States of America* to prevent

governments from responding to emerging social issues like climate change without the risk of paying billions of dollars to multinationals.

IV. PROJECT GOALS & STRATEGIES

V4P is focused on protecting the people’s ability to advocate for and implement policies to address our most pressing social, economic and environmental challenges. V4P will accomplish this goal by employing strategies that have proven effective in advancing the public interest in other arenas:

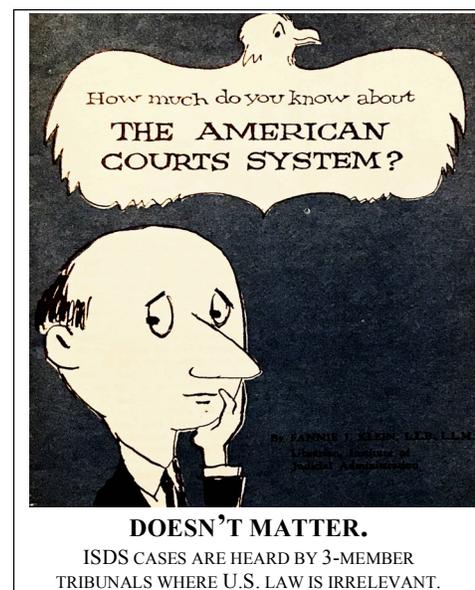
1) Strategic Legal Engagement

Numerous social movements have effectively used Friend of the Court, or amicus, briefs to shape the law and bend the arch of history toward justice. Amicus briefs give people and citizen organizations a voice by allowing groups to participate in cases with far-reaching social implications even though they are not formally parties to the legal action.

In 2016, V4P will coordinate the legal efforts of the Sierra Club, Center for International Environmental Law, Center for Biological Diversity, Greenpeace and Friends of the Earth to defeat TransCanada’s NAFTA claim and defend the ability of people around the world to organize and demand that their governments place the interests of people and the environment over corporate interest.

2) Education and Grassroots Organizing

A larger group of public interest organizations is seeking to use the KXL case as a tool for educating and mobilizing the public around ISDS more generally. V4P will organize and host at least 20 presentations around the Country with the Sierra Club, Greenpeace and Friends of the Earth. There is a confluence of three factors that make this a rare and opportune moment for education and mobilization around ISDS. First, hundreds of organizations and millions of individuals across North America participated in the campaign to defeat KXL. There may never have been such a large number of people with a personal stake in the outcome of an international investment case. Second, the prominence of the “trade debate” over the past two years has garnered attention from a broad





array of U.S. social movements that have not traditionally played a role—including public health groups, migrant advocates, labor unions, indigenous movements and LGBT organizations. Third, the global climate deal reached in Paris has given new momentum to developing lasting climate solutions.

V4P will focus on engaging with two communities: 1) those along the proposed pipeline route whose democratic participation and future are most directly challenged by TransCanada’s ISDS suit; and

2) those represented by House and Senate members whose committee positions and/or votes are essential to ISDS reform.

V. CONCLUSION

No one social movement is uniquely vulnerable to corporate nationhood. The purpose of ISDS is to allow multinationals to challenge laws they fail to quash in domestic processes. If multinationals actively oppose a proposed law or regulation in any national process and lose, it will very likely be the subject of an ISDS challenge. As such, it must be a broad coalition of public interest organizations that must coordinate a response. Failure to do so will ensure that multinationals continue to expand the legal interpretations of “investor protections” and foreclose

ACCORDING TO A 2014 REPORT
BY THE UNITED NATIONS, 7 OUT
OF 8 ISDS DECISIONS ACQUIECE
TO CORPORATE DEMANDS.

avenues for addressing our most pressing social issues. Climate solutions are especially susceptible to ISDS claims due to the complex of economic, social and political factors that must be balanced to build and implement these policies. There is an urgent need for innovation and experimentation in the field, and ISDS threatens to quash the willingness and ability of governments to take on this task.

Your support will ensure that a professional team is focused on this next, and hopefully last, phase of the campaign to defeat the KXL pipeline. Long term, V4P hopes to engage in a comprehensive program that will monitor and evaluate the public interest implications of individual ISDS cases, file amicus briefs as necessary, educate the public and media, engage policy makers, and protect the ability of communities around the world to advocate *for humanity’s sake*.

MAKE A TAX-DEDUCTIBLE DONATION

VOICE FOR THE PEOPLE IS A PROJECT HOSTED AT THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

Online at the CIEL Website [here](#).

— or —

Mail a check to the Center for International Environmental Law at 1350 Connecticut Ave. NW Suite 1100, Washington DC 20036, and be sure to note V4P on the check.