IN THE MATTER OF AN ARBITRATION
UNDER THE CANADA-UNITED STATES-MEXICO AGREEMENT ("CUSMA") AND THE NORTH AMERICAN FREE TRADE AGREEMENT ("NAFTA")

ALBERTA PETROLEUM MARKETING COMMISSION, Disputing Investor v. THE GOVERNMENT OF THE UNITED STATES OF AMERICA, Respondent	)

NOTICE OF INTENT TO SUBMIT A CLAIM TO ARBITRATION

9 February 2022

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Washington, D.C. 20004

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Counsel for the Alberta Petroleum Marketing Commission (APMC)

I. INTRODUCTION

1. Pursuant to Annex 14-C of the Canada–United States–Mexico Agreement ("**CUSMA**"), a/k/a United States–Mexico–Canada Agreement ("**USMCA**") and Article 1119 of the North American Free Trade Agreement ("**NAFTA**"), the Alberta Petroleum Marketing Commission ("**APMC**" or "**Investor**"), a Provincial Corporation of the Government of Alberta ("**Alberta**"), hereby notifies the Government of the United States of America ("**United States**," "**U.S.**," "**U.S. Government**" or "**USG**") of its intent to pursue a NAFTA legacy claim under the CUSMA in respect of President Biden's 20 January 2021 revocation of the Presidential Permit for the construction and operation of the Keystone XL ("**KXL**") pipeline (the "**Revocation**")[1] and the attendant loss of its related investment contrary to the United States' obligations under CUSMA, NAFTA, and international law.

2. With the encouragement and support of the United States, substantial resources were invested by Canadian investors in the KXL pipeline, including over CAD$ 1 billion by APMC. Not only did the USG's decision to revoke the KXL pipeline's Presidential Permit cause the loss of these investments, it has also resulted in the loss of thousands of jobs, caused systemic harm to the American, Canadian and Albertan economies, and diminished the highly integrated North American energy system upon which future North American prosperity will continue to rely.

3. The KXL pipeline was planned and designed to deliver over 830,000 barrels of crude oil per day from Hardisty, Alberta to refineries on the U.S. Gulf Coast. Replacing the

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[1] Administration of Joseph R. Biden, Jr, 2021, Executive Order Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis, E.O. 13990, 86 Fed. Reg. 7037, sec. 6 (20 January 2021), https://www.federalregister.gov/documents/2021/01/25/2021-01765/protecting-public-health-and-the-environment-and-restoring-science-to-tackle-the-climate-crisis.

transportation of this much capacity to the U.S. market that remains reliant on Canadian oil will necessarily involve much less environmentally sensitive means of transport (such as by rail, tanker, or truck). The only other alternative is to ramp up imports of foreign oil from outside North America, further undermining U.S. energy independence, national security and adding environmental risk. With recent increases in oil demand and prices in the United States, the USG has demonstrated its reliance on foreign oil over Canadian oil (such as would have been delivered through the KXL pipeline) with its call for increased production and supply from the Organization of the Petroleum Exporting Countries ("**OPEC**"). President Biden's recent efforts to release oil from the Strategic Reserve and encourage other countries to do the same shows the continued need for reliable, continental energy infrastructure, such as the KXL pipeline.

4. This NAFTA claim is the unfortunate result of numerous factors to be elaborated in the forthcoming arbitration, but the simplest explanation is that it arises from a breakdown in the Canada-U.S. relationship driven by interests of a political rather than principled character. It was brought about by the new U.S. Administration's (the "**Biden Administration**") unwillingness to constructively engage with Canada and Alberta, much less to demonstrate the leadership required to address the pressing concerns of climate change. Instead of cooperating together to achieve shared continental energy policy objectives, including an acknowledgement of the United States' continued need for oil imports throughout the long transition to a lower carbon world, the USG's arbitrary and discriminatory approach has forced the parties into an adversarial process that is plainly anathema to their common interests.

5. This claim is about how APMC (and Alberta) and the KXL pipeline have been targeted by the Biden Administration, while not addressing the broad action needed to address climate change. The Revocation of the KXL Presidential Permit is in fact directly at odds with the

Biden Plan for Clean Energy, which does not include any general or specific prohibition on already permitted oil infrastructure, such as the KXL pipeline.

6. Such arbitrary, discriminatory, and expropriatory conduct is fundamentally at odds with the United States' obligations under the NAFTA to Canada, Alberta, and the APMC's investment in KXL. President Biden's Revocation of the KXL Presidential Permit was also patently inconsistent with the facts as established by the United States' own officials under both of the Obama and Trump Administrations, which objectively confirmed how the KXL pipeline would not have contributed to a net increase in greenhouse gas ("**GHG**") emissions or would otherwise have had any significant impact on climate change attributable to the United States.

7. That the 20 January 2021 Revocation of the KXL Presidential Permit may have successfully served short-term political expediency, by providing the appearance of governmental action, is obvious. Equally obvious, however, is the fact that this measure was adopted in a manner contrary to the rule of international law. Virtually the first act of the new Administration was to make the KXL pipeline impossible to complete. It is thus manifest that the new Administration, with President Biden being inaugurated the very morning of the Permit Revocation, provided no formal notice or opportunity to engage in meaningful consultation to either Alberta, APMC or TransCanada Keystone Pipeline, L.P. ("**TransCanada LP**"), the permit holder in which APMC had so heavily invested. The Revocation cannot be understood as anything other than a rash and arbitrary measure adopted for a political purpose and unmoored from fundamental concepts of due process.

8. After the investors in the KXL pipeline had been invited in 2017 by the USG to make their investment in the KXL pipeline, the people of Alberta were reasonably entitled under NAFTA investment protections to expect that their investment in KXL through APMC would be

treated in a fair and equitable manner by any subsequent administrations beyond 2021. They were also entitled to expect that, if the KXL Permit was to be revoked, APMC would be fully and fairly compensated for the loss of its previously approved investment engendered by such revocation. None of this has occurred and APMC has been forced to file this Notice of Intent to submit a NAFTA legacy claim under the CUSMA.

9. The Presidential Permit authorizing the construction required to complete the KXL pipeline was initially granted on 23 March 2017, and then confirmed on 29 March 2019. One year later, the people of Alberta committed to investing US$ 5.3 billion in KXL through APMC, reasonably expecting that no subsequent administrations would contemplate undermining foreign investment in such an important transnational project. This is especially so given how the permitted construction had already commenced in earnest. It was surprising to many that such an existing permit would be revoked, much less on President Biden's Inauguration Day and in a manner contrary to fundamental tenets of applicable international law. Alberta, through APMC, invested in the KXL pipeline, and thereby in the shared energy future of the United States and Canada, because it trusted in the strength and enduring comity of the Canada-U.S. relationship, fully expecting that any U.S. Administration would treat that relationship with the care and attention befitting one of its largest, closest and longstanding international partners.

10. The NAFTA and CUSMA were negotiated to assure U.S., Canadian, and Mexican investors that they would always be treated in a manner consistent with international norms, and reflected in the Parties' shared values and interests and longstanding national friendships. This case is an unfortunate failure by the USG to live up to those shared values and standards, working together to reach mutually beneficial solutions. In this case, it appears that political theatre won out over fundamental procedural fairness. It came at the cost of forsaking the transnational

cooperation that must occur if true success is to be achieved in addressing climate change. Representing the interests of all Albertans, APMC is commencing the process required to right these wrongs, starting with its filing of this Notice of Intent.

II. NAME AND ADDRESS OF THE DISPUTING INVESTOR

11. Pursuant to NAFTA Articles 1116 and 1119, this Notice of Intent is submitted by the disputing investor, the Alberta Petroleum Marketing Commission (previously defined as "**APMC**" or "**Investor**"), organized under the laws of Alberta and Canada:

Alberta Petroleum Marketing Commission ("APMC")
Centennial Place, West Tower
250 5 Street SW
Calgary, AB T2P 0R4
Canada

12. Pursuant to NAFTA Articles 1117 and 1119, this Notice of Intent is also submitted on behalf of the following enterprise organized under the laws of the United States, which is 100% owned and controlled by APMC:

2254746 Alberta Sub. Ltd.
1209 Orange St. Corporation Trust Centre,
Wilmington County of New Castle,
Delaware, 19801
USA

13. For purposes of the present Notice of Intent, the Investor is represented by:

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14. All communications with regard to this matter should be directed to counsel Crowell & Moring LLP.

III. APMC IS ENTITLED TO PURSUE A NAFTA LEGACY CLAIM UNDER CUSMA

15. Paragraphs 1 and 6 of Annex 14-C of the CUSMA provide, in relevant part, as follows:

> 1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:
> (a) Section A of Chapter 11 (Investment) of NAFTA 1994;
> (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and
> (c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994. 20, 21.
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> […]
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> 6. For the purposes of this Annex:
> (a) "legacy investment" means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement. . . .

16. Paragraph 1 of Annex 14-C conditions the CUSMA Parties' consent to legacy claims, using NAFTA Chapter 11, Part B, on the existence of a "legacy investment." Paragraph 6 of CUSMA Annex 14-C defines "legacy investment" as an "investment of an investor of another Party" using the terms "investment" and "investor" as defined by the NAFTA,[2] and as meaning "an investment of an investor of another Party in the territory of the Party established or acquired between 1 January 1994, and the date of termination of NAFTA, and in existence on the date of entry into force of this Agreement."

17. As described in the sections below, APMC established an "investment" in the United States as reflected in, and dictated by, an Investment Agreement and supporting agreements[3] it entered into with TransCanada Pipelines Limited[4] on 31 March 2020, *i.e.*, before 1 July 2020, when CUSMA entered into force between the Governments of Canada, Mexico, and the United States. APMC qualifies as "an investor of a Party" under NAFTA Article 1139, and is accordingly capable of pursuing a claim on its own behalf under NAFTA Article 1116 and/or on behalf of its investment(s) under NAFTA Article 1117.

IV. BREACH OF OBLIGATIONS

18. The Investor claims that the USG has acted inconsistently with its obligations under the CUSMA and Chapter 11 of NAFTA, with respect to the following provisions:

i. Article 1102: National Treatment
ii. Article 1103: Most Favoured Nation Treatment
iii. Article 1105: Minimum Standard of Treatment
iv. Article 1110: Expropriation and Compensation

19. The relevant text of each applicable NAFTA provisions is as follows:

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2 NAFTA Articles 201 and 1139, respectively.

3 A copy of the relevant supporting agreements will be provided in due course.

4 TransCanada Pipelines Limited is a company affiliate of TC Energy Corporation, and constituted in and organized under the laws of Canada.

Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

Article 1103: Most Favoured Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 1105: Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

Article 1110: Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
   a) for a public purpose;
   b) on a non-discriminatory basis;

c) in accordance with due process of law and Article 1105(1); and
d) on payment of compensation in accordance with paragraphs 2 through 6.

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. Compensation shall be paid without delay and be fully realizable.

V. FACTUAL AND LEGAL BASIS FOR THE CLAIM

A. The Investor

20. APMC is a Provincial Corporation in Alberta and a commercial arm of the Government of Alberta,[5] responsible for: (i) marketing the Crown's conventional oil royalty received in-kind and setting prices used in the valuation of the Crown royalty share of natural gas, natural gas liquids, and sulphur; (ii) adding value to Alberta's energy resources; and, (iii) expanding access to global energy markets.[6] As described below, APMC entered with TransCanada Pipelines Limited into an Investment Agreement and provided support for the construction of a pipeline between Canada and the United States, known as the Keystone XL Extension Pipeline Project.

B. The Investment in KXL

21. On 31 March 2020, APMC and TransCanada Pipelines Limited executed the Investment Agreement under which APMC agreed to provide up to US$ 5.3 billion of financial

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[5] APMC is a statutory corporation formed under the Alberta *Petroleum Marketing Act* ("**PMA**," *see* https://canlii.ca/t/531jw), and, subject to the PMA, has the rights, powers and privileges of a natural person. Subsection 8(2) of the PMA authorizes the APMC to bring an action or other legal proceeding.

[6] *See* APMC, Responsibilities, https://apmc.alberta.ca/AU/Pages/default.aspx (last visited 25 January 2022).

support for the KXL pipeline construction project in the United States and Canada. This show of commitment by Alberta and APMC, and their integral involvement in the project, allowed the KXL pipeline to move forward. APMC also agreed to a number of additional credit and partnership agreements to facilitate, and carry out, its investment in the project. The investment structure described below is typical for a project and transaction of this nature and complexity located in the United States, and was designed to protect the interests of, and maximize the benefits to, APMC and Alberta.

22. APMC and TransCanada Pipelines Limited structured their investment through a special purpose vehicle (or "**SPV**") formed in Delaware, United States (**181531115 Limited Partnership** or "**US SPV LP**") that was responsible for administering all of the costs, revenues and management related to the KXL pipeline. Typically, a Delaware Limited Partnership refers to a business entity formed in the State of Delaware that consists of at least one general partner and at least one limited partner. APMC's investment in the US SPV LP included:

(i) **2254753 Alberta Ltd.**, an Alberta-based subsidiary 100% owned by APMC ("**APMC US Member**"), which acted as a member of the Delaware-based general partner (**181531115 LLC** or "**US SPV GP**"). US SPV LP's major decisions were made by US SPV GP, with certain decisions requiring the approval of a management committee, which included the APMC US Member; and

(ii) **2254746 Alberta Sub. Ltd.**, a Delaware-based company indirectly 100% owned by APMC (through **2254746 Alberta Ltd.**, an Alberta-based subsidiary 100% owned by APMC), was a limited partner of the US SPV LP.

23. The KXL expansion work was conducted by TransCanada Keystone Pipeline, L.P. (previously defined as "**TransCanada LP**"). TransCanada LP, *inter alia,* applied for, and obtained

on 23 March 2017, and subsequently confirmed on 29 March 2019, a Presidential Permit in the United States to construct and operate the KXL pipeline facilities at the international boundary between Canada and the United States. US SPV LP is a limited partner of the TransCanada LP, and US SPV GP is a member of the general partner of TransCanada LP.

24. Pursuant to the Investment Agreement, APMC agreed to provide financial support to the KXL pipeline in (i) an equity commitment in the US SPV LP and Canadian SPV LP of up to US$ 1.06 billion to be spent in 2020; (ii) a debt guarantee, including a committed revolving construction facility of up to US$ 3.8 billion; and (iii) a committed revolving letter of credit facility of up to US$ 300 million.

25. Accordingly, APMC established an "investment" in the territory of the United States as defined under NAFTA Article 1139, including: (i) U.S.-based enterprises, including 2254746 Alberta Sub. Ltd., formed in Delaware, which is wholly owned and controlled by APMC; (ii) equity securities in the US SPV LP owned pursuant to the Investment Agreement of 31 March 2020, as well as under related agreements establishing the US SPV LP and a credit agreement for KXL; (iii) an initial post-closing contribution under the Investment Agreement of US$ 48,245,855 on account of APMC's equity interest in the US SPV LP in early April 2020, and further cash contributions over the course of 2020; and, (iv) an interest in the US SPV LP that entitles APMC's subsidiaries to a share in the income and profits, as well as a share in its assets upon dissolution.

C. The USG's Unlawful and Otherwise Harmful Measures

1. Keystone XL Presidential Permit

26. After the USG initially denied KXL's application for a Presidential Permit in 2015, on 24 January 2017 then-President Trump issued a Presidential Memorandum inviting TransCanada LP to re-submit its application for a Presidential Permit for the construction and

operation of the KXL pipeline.[7] On 26 January 2017, TransCanada LP filed a new application with the State Department following President Trump's Memorandum.[8]

27. On 23 March 2017, the State Department issued a Record of Decision approving the new permit application and concluding, consistent with prior determinations under the Obama Administration, that the KXL project would be unlikely to lead to a significant net increase in GHG emissions.[9] On the same day, President Trump executed a presidential permit to build the Keystone XL pipeline.[10]

28. On 30 July 2018, the State Department made available a draft Environmental Impact Statement ("**EIS**") for the proposed KXL pipeline's Mainline Alternative Route ("**MAR**") for public review and comment.[11] A draft supplemental EIS was released two months later, on 24 September 2018. The analysis in the EIS concluded that "implementing the MAR would have no significant direct, indirect or cumulative effects on the quality of the natural or human environments" and overall that the project would not worsen GHG emissions.[12]

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[7] Administration of Donald J. Trump, 2017, Memorandum on Construction of the Keystone XL Pipeline (24 January 2017), https://www.govinfo.gov/content/pkg/DCPD-201700068/pdf/DCPD-201700068.pdf.

[8] TransCanada Keystone Pipeline, L.P., Application for Presidential Permit for Keystone XL Pipeline Project (26 January 2017), https://www.state.gov/wp-content/uploads/2019/02/Application-for-Presidential-Permit-for-Keystone-XL-Pipeline-Project.pdf.

[9] U.S. Dep't of State, Record of Decision and National Interest Determination: TransCanada Keystone Pipeline, L.P., Application for Presidential Permit, Keystone XL Pipeline (23 March 2017), https://2017-2021.state.gov/wp-content/uploads/2019/02/Record-of-Decision-and-National-Interest-Determination.pdf.

[10] Administration of Donald J. Trump, 2017, Remarks on the Keystone XL Pipeline Project (24 March 2017), https://www.govinfo.gov/content/pkg/DCPD-201700191/html/DCPD-201700191.htm.

[11] Notice of Availability of the Draft Environmental Assessment for the Proposed Keystone XL Pipeline Mainline Alternative Route in Nebraska, 83 Fed. Reg. 36,659 (30 July 2018), https://www.govinfo.gov/app/details/FR-2018-07-30/2018-16241.

[12] U.S. Dep't of State, Office of Env't Quality and Transboundary Issues, Bureau of Oceans and Int'l Env't And Scientific Affairs, Draft Supplemental Environmental Impact Statement – Keystone XL Mainline Alternative Route (24 September 2018), https://www.eenews.net/assets/2018/09/24/document_gw_01.pdf.

29. On 29 March 2019, President Trump executed a new Presidential Permit, "[a]uthorizing TransCanada […] LP, [t]o Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada" (previously defined as "**Presidential Permit**").[13] The new Presidential Permit superseded and revoked the 23 March 2017 permit.

30. On 22 January 2020, the U.S. Department of the Interior issued a Record of Decision allowing the Bureau of Land Management to offer a 30-year right-of-way to TransCanada LP for the construction and operation of the KXL pipeline across 44 miles of federally-managed lands in Montana.[14]

31. On 31 March 2020, on the same day APMC and TransCanada Pipelines Limited entered into the Investment Agreement, plans were announced to proceed with construction of the KXL pipeline extension.[15] The construction began at the border crossing in northern Montana on 5 April 2020.

32. With construction activities underway, by the end of 2020 APMC had invested equity in the KXL pipeline of approximately US$ 825 million, with approximately US$ 325 million in equity attributable to the KXL pipeline in Canada and approximately US$ 500 million in equity attributable to the KXL pipeline in the United States. The pipeline was scheduled to be completed and enter into service in early 2023.

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[13] Authorizing TransCanada Keystone Pipeline, L.P., To Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, 84 Fed. Reg. 13,101 (29 March 2019), https://www.federalregister.gov/documents/2019/04/03/2019-06654/authorizing-transcanada-keystone-pipeline-lp-to-construct-connect-operate-and-maintain-pipeline.

[14] Notice of Availability of the Record of Decision for the Keystone XL Pipeline, Montana, 85 Fed. Reg. 5,232 (29 January 2020), https://www.federalregister.gov/documents/2020/01/29/2020-01545/notice-of-availability-of-the-record-of-decision-for-the-keystone-xl-pipeline-montana.

[15] Press Release, TC Energy, TC Energy to Build Keystone XL Pipeline (31 March 2020), https://www.tcenergy.com/announcements/2020/2020-03-31tc-energy-to-build-keystone-xl-pipeline/.

2. Revocation of KXL Presidential Permit

33. On 20 January 2021, on the first day of his presidency, President Biden issued Executive Order 13990 on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, revoking the March 2019 Presidential Permit issued by President Trump:

> **Sec. 6**. *Revoking the March 2019 Permit for the Keystone XL Pipeline*.
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> […] In 2015, following an exhaustive review, the Department of State and the President determined that approving the proposed Keystone XL pipeline would not serve the U.S. national interest. That analysis, in addition to concluding that the significance of the proposed pipeline for our energy security and economy is limited, stressed that the United States must prioritize the development of a clean energy economy, which will in turn create good jobs. The analysis further concluded that approval of the proposed pipeline would undermine U.S. climate leadership by undercutting the credibility and influence of the United States in urging other countries to take ambitious climate action.
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> […] The United States must be in a position to exercise vigorous climate leadership in order to achieve a significant increase in global climate action and put the world on a sustainable climate pathway. Leaving the Keystone XL pipeline permit in place would not be consistent with my Administration's economic and climate imperatives.

34. On the same day of the Revocation, TransCanada Pipelines Limited announced that KXL's construction activities were suspended.[16] On 9 June 2021 TransCanada Pipelines Limited confirmed the termination of the KXL pipeline.[17] In its annual report published in June 2021, APMC confirmed the final costs are expected to be a net loss of approximately CAD$ 1.3 billion.[18]

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[16] Press Release, TC Energy, TC Energy disappointed with Expected Executive Action revoking Keystone XL Presidential Permit Unions (20 January 2021), https://www.keystonexl.com/project-updates/updates-feed/2021/tc-energy-disappointed-with-expected-executive-action-revoking-keystone-xl-presidential-permit/.

[17] Press Release, TC Energy, TC Energy confirms termination of Keystone XL Pipeline Project (9 June 2021), https://www.keystonexl.com/project-updates/updates-feed/2021/tc-energy-confirms-termination-of-keystone-xl-pipeline-project/.

[18] APMC, Annual Report (For the Fifteen Months ending March 31, 2021), (25 June, 2021), https://www.alberta.ca/assets/documents/energy-apmc-annual-report.pdf.

D. Legal Basis for the Claim

35. Through President Biden's targeted Revocation of the KXL Presidential Permit, the USG has denied the same best treatment that it is required to afford, and has afforded, to the investments of its own nationals, as set out in NAFTA Article 1102. On its face, there is no reasonable basis on which the USG can justify the manifestly less favourable treatment accorded to APMC's investment by the Revocation. For example, if the USG actually maintained a general policy of reducing oil imports into the United States, ostensibly to reduce GHG emissions in response to climate change, or of prohibiting already permitted oil infrastructure, the similarly-situated investments of U.S.-based investors would have seen the cross-border Presidential permits upon which they have relied and operated rescinded as well. That did not happen. Nor is that kind of destruction of existing permitted oil infrastructure contemplated in any manner by the Biden Administration's climate change plan. Indeed, numerous examples can be identified of the differential and better treatment currently being accorded to other investments owned and operated by U.S. investors in like circumstances to those of KXL.

36. Two such examples of more favorable treatment given by the USG in respect of Presidential permits granted to the U.S.-based subsidiaries of U.S. entities in like circumstances to KXL, and which have not been revoked, include but are not limited to:

(i) The Cochin Pipeline (authorizing 14.5 miles between Canada and the United States);[19] and

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[19] *See* Presidential Permit for Kinder Morgan Cochin LLC, a Delaware company (Renville County, ND facilities), 78 Fed. Reg. 73,582 (6 December 2013). Presidential Permit Authorizing Kinder Morgan Cochin, LLC To Connect, Operate, and Maintain Pipeline Facilities at The International Boundary Between The United States and Canada (6 December 2014), https://2009-2017.state.gov/e/enr/applicant/applicants/217905.htm. As stated in the Preamble, "I hereby grant permission, subject to the conditions herein set forth, to Kinder Morgan Cochin, LLC (hereinafter referred to as the "permittee"), a Delaware limited liability company, to connect, operate, and maintain pipeline facilities at the border of the United States and Canada. . . ." *See* Application of Kinder Morgan Cochin,

(ii) The Magellan Pipeline, (authorizing 600 feet between United States and Mexico).[20]

37. The measure according less favourable treatment to KXL, which was also adopted without any notice or any form of due process – and in a manner that was arbitrary and disproportionate to the alleged policy objective of addressing climate change – has also denied Alberta, APMC and KXL the benefit of fair and equitable treatment as required by NAFTA Article 1105. This is because the measure appears to have been adopted as a matter of political expediency, realized through an act of performative policymaking rather than as the manifestation of a reasoned and proportionate policy agenda. The real reason behind the arbitrary adoption of the measure is reflected in the fact that officials from two prior Administrations, who had previously been tasked with reviewing KXL Permit requests, consistently concluded that granting and maintaining a permit would not contribute detrimentally to climate change.

38. And again, neither APMC nor any of their investment enterprises were provided with any notice or opportunity to provide comment on the ostensible reasoning put forward by the Biden Administration in adopting this measure.

39. The USG's conduct constitutes an expropriation of the Investor's investment in the United States. Pursuant to NAFTA and international law, such an uncompensated taking is unlawful. This expropriation was not effected for any legitimate public purpose, was discriminatory, was not undertaken in accordance with due process of law, and was not

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LLC for New Presidential Permit to Reflect Name Change (14 November 2012), https://2009-2017.state.gov/e/enr/applicant/applicants/201951.htm.

[20] *See* Presidential Permit for Magellan Pipeline Company, L.P. (a Delaware company), 80 Fed. Reg. 45,697 (31 July 2015). Presidential Permit Authorizing Magellan Pipeline Company, L.P. To Operate and Maintain Existing Pipeline Facilities at The International Boundary Between the United States and Mexico (14 July 2015), https://2009-2017.state.gov/e/enr/applicant/applicants/251933.htm. As stated in the preamble: "I hereby grant permission, subject to the conditions herein set forth, to Magellan Pipeline Company, L.P. (hereinafter referred to as the "permittee"), organized **under the laws of the State of Delaware**, to connect, operate, and maintain existing pipeline facilities at the border of the United States and Mexico near El Paso, Texas, for the transport of liquid petroleum products between the United States and Mexico. . . ." (emphasis added).

accompanied by payment of compensation as required by NAFTA Article 1110. The Investor should be compensated for the losses following these breaches of the NAFTA.

VI. RELIEF SOUGHT AND DAMAGES CLAIMED

40. Without prejudice to its rights to amend, supplement or restate the relief to be requested in the arbitration, the Investor intends to request the arbitral tribunal to:

1) Declare that the Government of the United States of America has breached the terms of CUSMA and NAFTA;

2) Damages of not less than One billion three hundred million Canadian dollars (**CAD$ 1,300,000,000.00**) as compensation for the losses caused by, or arising out of, the U.S. Government's measures which have been held to have breached the terms of the CUSMA and NAFTA;

3) Award costs associated with any proceedings undertaken in connection with this Notice of Intent, including all professional fees and costs;

4) Award pre- and post- award interest at a rate to be fixed by the tribunal; and

5) Grant such other relief as counsel may advise and that the tribunal may deem appropriate.

Dated: 9 February 2022

Respectfully Submitted,

Crowell & Moring LLP

For and on behalf of the Disputing Investor
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